Three Opinions

Stephen B. Burbank

University of Pennsylvania Law School, sburbank@law.upenn.edu

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EDITOR’S NOTE

What follows is the written product of the “Conference on Jurisdiction, Justice, and Choice of Law for the Twenty-First Century,” hosted by the New England School of Law, on October 28-29, 1994.

Prior to the Conference, five fact patterns raising complex jurisdiction and choice of law issues were presented to various academic experts. These academic experts then attended the Conference in October, where they communicated their particular point of view both orally and in print. Four of the five fact patterns were presented to these panelists who in turn, acting as members of the judiciary, rendered judicial opinions. The fifth fact pattern was presented to elicit commentary rather than judicial opinion. These written opinions and commentary are published within.

In an effort to promote a freer flow of communication and interaction among the panelists, the Conference portion of this book replaces the traditionally rigid law review citation with the more relaxed practitioner’s form of citation. To aid the reader, the panelists’ names are capitalized when reference to their Conference contribution is made.

The New England Law Review is grateful to the following panelists for their written contributions:
Professor Robert G. Bone (Boston University School of Law); Professor Patrick J. Borchers (Albany School of Law); Professor Robert D. Brussack (University of Georgia School of Law); Professor Stephen D. Burbank (University of Pennsylvania School of Law); Professor Stan Cox (New England School of Law); Professor Thomas C. Fischer (New England School of Law); Professor Larry Kramer (New York University School of Law); Professor Harold G. Maier (Vanderbilt University Law School); Professor Linda S. Mullenix (University of Texas School of Law); Professor Martin H. Redish (Northwestern University School of Law); Professor Linda J. Silberman (New York University School of Law); Professor Joseph William Singer (Harvard University Law School); Professor Michael P. Scharf (New England School of Law); Professor Michael E. Solimine (University of Cincinnati College of Law); Professor Allan R. Stein (Rutgers, the State University of New Jersey School of Law, Camden); and Professor Russell J. Weintraub (University of Texas School of Law).

Special thanks to Professor Stan Cox, New England School of Law, for initiating and pursuing the concept of this Conference on conflicts. In addition, this Conference would not have been possible without the financial support of the New England School of Law.
Case One: Choice of Forum Clauses

INTRODUCTION*

This selective overview and response to the panelists’ opinions disproportionately focuses on the *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), half of the problem confronting our “Court,” and filters some of the panelists’ approaches taken to solve it through my own lens of dissatisfaction regarding current *Erie* doctrine. I see in the opinions that follow, not only lack of consensus about what *Erie* requires, but varying degrees of comfort with the current state of *Erie* doctrine. Some of our panelists (Professors MULLENIX and WEINTRAUB) find the *Erie* issue relatively straightforward, believing that the purpose of the forum selection clause is clearly substantive, that no federal statute stands in the way, and that therefore state law must apply. Most of the others (Professors BURBANK, REDISH, SILBERMAN, and SOLIMINE) see the *Erie* issue here as more muddied by the approach the Court has taken in *Hanna v. Plumer*, 380 U.S. 460 (1965), and subsequent cases, but still capable of being resolved in favor of applying state law. Some of our panelists (Professors BURBANK and SILBERMAN) seem critical of the way the Court in *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), handled the *Erie* problem before it, but find room enough between the facts before us and *Stewart* to reach a different result. I share that dissatisfaction with *Stewart* and believe that eventually the tension inherent in that decision, prefigured by *Hanna*, should be better resolved in favor of state interests. Two of our panelists, however, (Professors BORCHERS and STEIN)\(^1\) would resolve any tension in favor of federal interests, Professor BORCHERS preferring not to have any *Erie* doctrine at all, and Professor STEIN extending the *Stewart* rationale to embrace at least all diversity forum selection situations

* Stanley E. Cox: Assistant Professor of Law, New England School of Law.

1. The panelists are to be congratulated that their discussions of the hypothetical provoked Professor STEIN’s thoughtful written response included in this section of opinions. Professor STEIN was not an original participant on this panel at the conference, having graciously volunteered, instead, to moderate the personal jurisdiction discussion and to introduce the written product from that discussion.
involving domestic parties selecting a domestic forum. In their conclusions, but more so in the widely divergent methods they use to reach these conclusions, our panelists confirm that basic disagreement still exists about what *Erie* means and should require.

At one end of the spectrum, Professor MULLETIX, categorizing forum selection clauses as raising issues solely of substantive state contract law, finds it obvious that Georgia state law should control. She finds it equally obvious and compelling, both on policy and *Erie* precedent grounds, that only the Supreme Court of Georgia law should be followed on this issue, even though other Georgia appellate courts currently are reinterpreting and reformulating Georgia law on party autonomy. Until and unless the Supreme Court of Georgia makes clear that Georgia has abandoned its prior precedents which indicate nonenforcement of forum selection clauses, all federal courts hearing diversity cases removed in Georgia must refuse to enforce forum selection clauses.

Driving Professor MULLETIX’s interpretation of *Erie* is an emphasis that *Erie* is a constitutional dictate; federal courts sitting in diversity have no room to fashion substantive law differently from their state trial court counterparts. Professor MULLETIX is distrustful, and with good reason, of what happens whenever a federal court is given room to “discover” law different from what the state’s highest appellate court has made. By preventing federal courts from applying law differently than has the Supreme Court of Georgia, Professor MULLETIX believes she promotes the twin aims of *Erie*: inequitable administration of the laws, and forum shopping.

I believe Professor MULLETIX, however, in her desire to rein in other panelists’ “free wheeling balancing test[s],” and keep federal courts in line, promotes too rigid a rule and therefore an arguably anomalous result. In the instant case, accepting *arguedo* Professor MULLETIX’s point that forum selection clauses are issues purely of state contract law (even for underlying tort suits, and even when the result is determining what court will have jurisdiction to adjudicate), the state law here is unclear, at least regarding the viability of the Supreme Court of Georgia precedent. Under my reading of *Erie* and its progeny, a federal trial court judge should be wearing the same substantive law

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2. Similarly, Professor WEINTRAUB finds “it inconceivable that on a matter so significantly related to state views of freedom of contract, state law should not control.” WEINTRAUB, infra, at 554.

3. MULLETIX, infra, at 541. Similar concerns are voiced by Professor BURBANK. See BURBANK, infra, at 536.
“hat” as its state trial court counterpart. A state trial court judge, faced with intermediate level appellate decisions on party autonomy, would not be free to ignore them.

If these intermediate appellate opinions have become the de facto Georgia law regarding forum selection clauses, federal courts that cling to a sub silentio-overruled or discarded Supreme Court of Georgia precedent will promote exactly the sort of forum shopping and interference with state policy formulation that Erie discourages, as Professor REDISH notes. Only the federal courts will refuse, automatically, to enforce such clauses. Thus, the Supreme Court of Georgia may be invited to hear a lower appellate case, not because it needs to clarify confusion among its lower appellate courts, but rather to send a message sideways to the federal court about misinterpretation of state policy.

Certification of the state law issues, if the federal judge is unsure of the reach of the lower appellate decisions, would seem a more certain way to confirm the Georgia judiciary’s change in policy. This is true, despite the real risks, which Professor MULLENIX notes, of such “advisory” answers failing to develop Georgia policy in the same way as controversies litigated ab initio through the Georgia court system. Professor MULLENIX’s faith that relying only on not-overruled Supreme Court of Georgia precedent will in the long run produce more unambiguous state policy, and leave individual federal litigants in the short run without the benefits of de facto Georgia law. If faithfulness to substan-

4. Professor REDISH reads Erie and its progeny as authorizing the federal trial judge to assume the role of the state supreme court when the trial judge perceives state law to be in flux. See REDISH, infra, at 545.

5. Exploring the adequacy and propriety of certification procedures to ascertain and/or formulate state law is a worthy project for another day. For example, why should a certification statute be enacted such that the federal trial court is able to bypass normal Georgia appellate review? Why should the statute not instead permit the state supreme court to “remand” to lower state appellate courts for first formulation of law in truly unsettled areas? Or alternatively, why should the statute not give federal diversity litigants a “right” to demand that Georgia appellate courts of first resort review any decisions of state law which they think are erroneously rendered by the federal district judge? Exploring how actual or hypothetical certification procedures modify the normal Erie practice, that it is the federal court’s duty to ascertain state law, would give additional insight into Erie doctrine. Professor MULLENIX’s skepticism about the values of the certification process seem, generally, to speak to a belief that the federal courts systemically or as a matter of federalism are better off with already settled rather than to-be-formulated determinations of state law. Yet, if these courts are really exercising the same substantive authority as their state counterparts, there must be some freedom to formulate living law.
tive state law principles in the individual case is part of the goal of *Erie* and its progeny, the federal trial court, on our hypothetical facts, cannot avoid trying to determine the actual state of Georgia law about the validity of forum selection clauses.6

Professor BORCHERS is at an opposite extreme, both as regards the compulsions of *Erie* and the evils of forum shopping. He asserts that there is a significant federal interest in resolving the validity of forum selection clauses as a matter of federal law, and accordingly would rule under *Erie*’s balancing test that the validity of such clauses is governed by federal law in federal diversity suits. In reality, Professor BORCHERS is stalking bigger game. He wishes to overrule *Erie*, and therefore, in the meantime, ignores it to the greatest extent possible. His argument that the real choice is between interstate or intrastate forum shopping, and that we should err on the side of discouraging interstate forum shopping, applies in all *Erie* situations and effectively eliminates the *Erie* doctrine.

As a necessary result, intrastate forum shopping is an accepted and acceptable course of conduct under Professor BORCHERS’s rulings. The goal is to make federal non-preemptive common law the best possible, let the chips fall where they may. Professor MULLENIX, on the other hand, is decidedly troubled by situations where federal law on similar facts leads to opposite results. Her solution to the forum shopping abuses inherent in Court decisions such as *Stewart* and *Ferens v. John Deere*,7 is to encourage Congress to pass preemptive federal statutory law governing forum selection clauses.

Federal statutory *substantive* law certainly eliminates inconsistencies (and also any *Erie* problems), but at the expense of any ability of states

6. Granted, this gives federal courts ability to manipulate under the guise of interpreting state law, which is presumably why Professor MULLENIX resists this approach. I do not read Professor MULLENIX, however, as insisting that there can never be lack of certainty about state law content, and thus inherent potential for some inconsistency; she simply seems to wish to cut back on this potential wherever possible. I would tolerate more potential for inconsistency as being inherent in concepts of dual sovereignty, and search for new appellate devices to bring consistency when the federal system exercises state power.

7. 494 U.S. 516 (1990) (ruling that transfer pursuant to U.S.C. § 1404 could be initiated by plaintiffs who brought half a suit in Mississippi, and thereby, pursuant to *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), were able to litigate in federal court in Pennsylvania a suit that could not have been initiated in Pennsylvania state courts); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) (ruling that U.S.C. § 1404(a) was widely enough drafted to make the presence of forum selection clauses nearly determinative, thereby swallowing *Erie* federalism concerns).
to deal with what might at heart be state law issues. To eliminate forum shopping entirely, federal law must be entirely preemptive and thereby eliminate all state sovereignty regarding the issue addressed. But do we, using Professor MULLENIX’s characterization of this case, really want a preemptive federal statutory law of contracts? The reality of overlapping state court legislative jurisdiction is a normal part of conflicts inquiries, but, despite occasional efforts (such as current Republican attempts at federal tort “reform”), such lack of substantive uniformity usually is not thought to require that all inconsistencies in state law be eliminated by passing a preemptive federal statute.

The real question is whether federal procedural rules should be allowed to evade state substantive law, and the real problem may be that Erie doctrine has become so significantly eroded via mechanical application of Hanna’s congressional authorization presumptions, that Professor BORCHERS is describing the de facto result in many Erie situations—federal courts go their own way without regard to the underlying substantive issues in the suit. For those troubled by the inconsistency between federal and state results because of federal procedural statutes being read too expansively, a less drastic solution than either federalizing all state law or preventing federal courts from exercising state law-formulating powers, would be to prevent federal courts from trivializing all Erie inquiries. This means reconsidering and perhaps reversing prior Court decisions which have let the federal courts move too far from what state courts would do on similar facts.

Professor SILBERMAN, at least partially, advocates such an approach when she emphasizes that “if § 1404 had been invoked and I were in a position to do so, I would urge the Supreme Court to reconsider the path it chose in Stewart.” SILBERMAN, infra, at 550. Working within the fact pattern of the hypothetical, she emphasizes how a more balanced Erie inquiry would proceed. For Professor SILBERMAN, it makes sense to consider the litigation as a whole rather than the forum selection clause in isolation. Recognizing that “choice of law and choice of forum clauses must be viewed together to reflect Georgia’s regulatory policies against limiting liability in tort cases of this type,” she concludes the issue before the panel is one reflecting important substantive state policies and one which therefore must be governed by state law. SILBERMAN, infra, at 551.

Professor STEIN, on the other hand, seems to divorce the substan-

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8. Rather than continue to pay lip service to Erie, under Professor BORCHERS’s approach, the courts should simply abandon it.
tive concerns underlying this litigation from the question of where suit will proceed. His conclusion is that a defendant’s motion to dismiss is not the proper vehicle for enforcement of forum selection clauses, but that instead § 1404(a) should be the exclusive vehicle for enforcing such clauses in diversity suits involving domestic parties seeking domestic fora. Accordingly, on our hypothetical facts specifying exclusively a state forum, defendant Ski Vacations, in Professor STEIN’s view, has the chance to move under § 1404(a) for transfer, and might thereby force the litigation to proceed in Vermont federal district court. This result—possible frustration of important Georgia policies—is, as he admits, “an odd conclusion for someone who has argued in the face of black-letter law that state law should exert a greater influence on federal court access than is generally acknowledged.” STEIN, infra, at 570.

Believing that the Stewart Court reached the right result, although agreeing that the Court should have offered more convincing logic for its decision, Professor STEIN seems willing also to accept that Hanna properly authorizes Congress to determine jurisdiction, or to use his term, court access, via rules of procedure. He thus leaves it to others (perhaps myself in a future foolhardy work) to argue that there are inherent problems in Congress legislating away Erie’s federalism commands without providing any preemptive substantive law.

Having accepted Stewart and Hanna as controlling, Professor STEIN’s task is to apply them to forum selection clauses which designate forums outside the federal system. He correctly notes that Stewart creates a conundrum, on our facts, for the federal court which would otherwise desire to honor Georgia policy of not enforcing such clauses. If the federal court denies defendant’s motion to dismiss, because this would seem the right result under Georgia law and because Stewart does not directly govern motions to dismiss, that same court is likely to be faced with a follow-up § 1404(a) motion for transfer. Under Professor STEIN’s reading of Stewart, that motion could result in transfer to Vermont.9 It would be better from the beginning, in Professor STEIN’s

9. Professor STEIN emphasizes that transfer is not compelled, and suggests that the Stewart case on remand properly applied Stewart criteria in finding no obligation to transfer. See STEIN, infra, at 557, I am not so sure. Given at least two Justices’ emphasis in Stewart that forum selection clauses should almost always be enforced, and that there is no meaningful difference between the standards that should govern inquiries under admiralty versus diversity, see Stewart, 487 U.S. at 33 (Kennedy, J., concurring); and given the Court’s unhesitating expansion of clause enforcement in Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991), I am doubtful that a majority of the current Court would see the same difference in standards between § 1404(a) and other federal jurisdiction dismissals or transfers which Professor STEIN
view, to acknowledge that the enforceability of forum selection clauses in diversity cases designating domestic fora is always a matter of federal law, governed by the rationales which should have been put forth more clearly by the Court in Stewart but are implied from that decision.

Professor STEIN offers as justifications for always proceeding under § 1404 that this: 1) allows for more flexibility to varied circumstances than the mechanical knee-jerk enforcement exhibited in Carnival Cruise Lines, Inc. v. Shute; 2) emphasizes that courts are not ousted of jurisdiction by private agreements, but rather enforce or choose not to enforce such agreements by way of exercising their jurisdiction; and 3) provides for procedural consolidation of these issues and promotion of a single federal standard. Although he concedes that forum non conveniens dismissal provides alternatively good conceptual fit for addressing a defendant’s motion to enforce a forum selection clause, Professor STEIN considers this approach foreclosed by the general understanding that § 1404 preempts traditional forum non analysis.

I find it difficult to critique Professor STEIN’s approach, since I do not so readily accept that decisions such as Stewart, or Hanna, have taken us down the proper Erie path. In arguing that § 1404 best emphasizes the horizontal nature of a covenant to sue in a particular place, it further seems to me Professor STEIN predisposes towards his answer in the way he sets up this question. Section 1404 being solely an intrasystem statute, can address only what he labels horizontal concerns. What remains unexplained, because foreclosed by Stewart, is why motions to enforce forum selection clauses should not take more account of what the underlying suit is about and why giving effect to a forum selection clause will not frustrate the state’s law which got the diversity plaintiffs to the courthouse in the first place. Similarly, only because courts have assumed that § 1404 eliminates more traditional forum non conveniens doctrine does it make sense to argue, as Professor STEIN does, that a conditional forum non conveniens dismissal might be appropriate for a vertical situation, but not for a horizontal situation.

advocates. I address alleged lack of Vermont connection to this litigation.


11. On the hypothetical facts before this panel, such a vertical situation would occur under Professor STEIN’s analysis when a defendant’s § 1404 motion to transfer is granted, and the case is transferred to Vermont. In federal district court in Vermont, the defendant would then be free to renew a motion to dismiss and, § 1404 being then inapplicable, the federal district court would not be prevented from applying more traditional forum non conveniens analysis.

12. The horizontal situation would occur if the defendant moved to dismiss in
Professor SILBERMAN's approach to the hypothetical seems to me more satisfying. Drawing to our attention one district judge's attempts to wrestle with Erie's concerns in light of Stewart's increased pressure to grant transfer, Professor SILBERMAN emphasizes that it is the underlying Georgia policy regarding choice of law and choice of forum clauses, considered together, which should determine where our hypothetical case will be adjudicated. See SILBERMAN, infra, at 549. In the case she cites, when a New York judge received, via § 1404(a) transfer, a case originally filed in Puerto Rico Superior Court, the New York judge neither reflexively applied Puerto Rico's choice of law rules, nor considered himself automatically free to decide the case as would a New York tribunal. Instead, the transferee court tried to ascertain how a Puerto Rico court would have viewed the entirety of the litigation, were it still proceeding in Puerto Rico courts. Professor STEIN, on the other hand, apparently would allow a federal judge on our facts to rule as a matter of federal law, see STEIN, infra at 557, whether the litigation ultimately will proceed in Vermont state court. Professor SILBERMAN rules instead that the Georgia state policies regarding choice of law, in combination with policies about choice of forum, mean that this litigation should not only remain in federal district court in Georgia, but also remain subject to Georgia choice of law rules.

Professor STEIN may be right that the complicated analysis he offers is required under Stewart and current forum non conveniens doctrine, and he may also be correctly solving the dilemmas created by these doctrines, although as Professor SILBERMAN notes, at least one federal judge has found a different way to navigate between Stewart and Erie. My inclination is to take such signs of necessary, but counter-intuitive complication, as symptoms that something is wrong with current doctrine. Professor STEIN is right to remind us, however, of the

Georgia federal district court, on the basis of the forum selection clause. Under Professor STEIN's analysis, § 1404 would preempt traditional forum non conveniens doctrine if transfer could be made to a district where the selection clause pointed. Professor STEIN reads the stipulation of state court forum in our hypothetical facts as not determinative of how a federal court should use the clause for deciding whether to transfer. Accordingly, no dismissal, even a dismissal conditional on suit being reinstated in Vermont state court, can occur in Georgia federal court.

From the litigants' perspective, however, these procedural movements surely seem like a waste of time and resources, and exaltation of technicalities over substance. If the real issue is whether the case will be litigated in Vermont state court or not at all, and even assuming that this issue is one which should be governed by federal law, it is at least counter-intuitive that only a Vermont federal court can make that determination.
post-Stewart procedural reality that § 1404 motions almost always will be coupled with motions to dismiss, and that accordingly the defendant has an opportunity to get this litigation out of the Georgia federal court on our hypothetical facts, despite any strong Georgia state policies to the contrary.

Contrary to Professor STEIN, Professors REDISH, BURBANK, and SOLIMINE reason, under their versions of Erie analysis, that Stewart does not foreclose finding forum selection clauses like the one involved in our hypothetical to be potentially governed by state law. Professor REDISH, acknowledging that his position is significantly undercut by Hanna, nevertheless concludes that it would be appropriate to apply to the case facts a balancing test derived from Byrd v. Blue Ridge Elec. Coop., 356 U.S. 525 (1958). Such a test emphasizes “the systemic concerns of federalism that are necessarily implicated by any Erie choice.” REDISH, infra, at 547. Since this approach requires comparing the importance each system attach to resolving the issue under its own law, and since Georgia law seems in flux, Professor REDISH would remand to the district court to determine in the first instance both what Georgia law is, and what policies underlie that law. He provides, however, some guidance in discerning these state policies. For example, if the district court determined clauses would not be enforced under Georgia law, Professor REDISH would view this as a substantive policy decision to protect citizens from adhesion contracts and to provide them a forum for vindicating their rights. He would defer to such state substantive concerns under his reading of Erie.

Professor SOLIMINE reasons that regardless of which Erie methodology is applied, the validity of the forum selection clause will be governed by state law. First, he argues that if federal law is assumed to support more enforcement of such clauses, the intrastate forum shopping counseled against by Hanna should not be here encouraged. Alternatively, under a Byrd balancing approach, he contends it would be difficult to find on our facts a federal procedural interest which would override the state’s presumed regulatory interest in policing bargains. Finally, Professor SOLIMINE notes that the presence of a choice of law clause in our facts cannot circumvent the Erie inquiry, emphasizing that the Erie choice of whether state or federal law should govern “is a structural issue not amenable . . . to advance determination by the parties.” SOLIMINE, infra, at 573.

Professor BURBANK concludes that validity of forum selection clauses like the one at issue should be evaluated under state law, deriving support for his position by comparing to the lack of federal regulation of personal jurisdiction for diversity jurisdiction. Professor
BURBANK emphasizes attempting to find federal policy reasons, in the absence of more direct congressional intent, for uniform rules of court access for diversity suits. Whereas Congress has specifically limited access through amount in controversy, and has modified access (once obtained) through venue and reallocation of business status, it has chosen not to limit or expand general access beyond what state personal jurisdiction law would permit. Professor BURBANK interprets this silence as evidence of no strong federal desire for uniform access rules, and accordingly leaves the issue of validity of our forum selection clause to Georgia law by default.

Professor BURBANK thus impliedly rejects Professor STEIN’s approach of reading a general federal procedural statute, like § 1404, as incorporating within it broader policy concerns about court access. Without explicitly criticizing Stewart, although noting that the case curiously “grounded decision in [§ 1404] without reference to the law governing validity,” Professor BURBANK’s approach under Erie is not to read such decisions expansively. Only where Congress has unequivocally spoken, or a clearly rational policy justification for federal uniformity can be discerned, does federal law preempt; otherwise, state law governs.

I think Professors BURBANK and SILBERMAN correctly draw attention to tension inherent in current Erie practice. I would argue for reversing the current trend of federalizing jurisdiction issues under cover of procedural statutes. But until the Court itself changes directions, the approaches of our panelists in trying to distinguish Stewart (or in the case of Professor STEIN embracing it) seem ways a circuit court of appeals could address these issues. Since those federal appellate robes are the garb our panelists were asked to wear for purposes of this first

13. Assuming I am reading Professor BURBANK’s argument correctly, there is inherent within it an assumption about congressional ability to expand personal jurisdiction for diversity suits which I would challenge. Under my theory of jurisdiction, see, e.g., COX, infra, at 642, courts never have more jurisdictional reach than they have legitimacy to apply their own law. Since, under Erie, in diversity jurisdiction situations, federal courts must apply state substantive law rather than federal substantive law, it would be anomalous if federal courts could hear state-law based suits which could not be heard in the state system. To explore in any meaningful detail the implications of this theory for federal statutes which attempt to authorize larger jurisdictional reach is beyond the scope of this introductory essay.

14. Professor BURBANK criticizes the result in Hanna as the Court succumbing to the temptation “to hear federal statutes or Federal Rules speaking when they appear to be silent, or at least to hear enough noise nearby to silence state law.” BURBANK, infra, at 537.
"adjudication," their "opinions" make interesting reading as to how lower courts might be able to navigate through or around current Erie doctrine in efforts to uphold state or plaintiff rights.

Summing up the decision on the Erie issue, under rationales or variations on rationales recounted above, a majority of our "Court" rules that Georgia law controls whether the forum selection clause indicating suit in Vermont is valid (Professors BURBANK, MULLENIX, SILBERMAN, SOLIMINE and WEINTRAUB). On the second issue—whether the clause should be enforced, and the case dismissed—a four vote plurality finds that the clause should not be enforced (Professors BORCHERS, MULLENIX, SILBERMAN and WEINTRAUB), with two more "judges" remanding for further inquiry as to the content of state law on this issue (Professors BURBANK and REDISH).

Either to buttress their conclusion about the invalidity of the clause, or, in Professor BORCHERS's case, as necessary part of his decision (since he believes the clause is governed by federal standards), three of the plurality judges attempt to distinguish Carnival Cruise Lines on the merits, and argue that our clause would not survive even that decision, were that admiralty decision controlling on our facts. Like Professor BORCHERS, I also consider Carnival Cruise Lines "a miserable decision that I would cheerfully overrule," BORCHERS, infra, at 534, but I find the panelists' efforts to distinguish it on the merits unpersuasive, and it is only that aspect of the second issue "opinions" upon which I wish briefly to comment before concluding this introduction.

Professors BORCHERS, SILBERMAN, and WEINTRAUB all claim, for example, that underlying Carnival Cruise Lines is approval for consolidating litigation in one forum so as not to subject the cruise ship to multiple suits in diverse fora arising out of a single incident. This sort of situation, however, was not factually before the Carnival Cruise Lines Court. A single plaintiff slipped aboard a single ship and attempted to recover for this discrete injury. Moreover, in situations of mass catastrophe involving those drawn together from disparate areas, it is not immediately apparent that a shared location more factually connected with the events giving rise to the catastrophe can never be found. The Carnival Cruise Lines Court, however, was content to endorse consolidation on defendant's designated playing field, without regard to

\[15\] "Judge" REDISH remands for further consideration, "Judge" BORCHERS rules that federal law applies, and "Judge" STEIN, while overruling defendant's motion to dismiss, apparently would affirm grant of a motion to transfer brought pursuant to \$ 1404, if that situation came before him after reversal and remand.
what other possibilities might be available.

The real rationale underlying Carnival Cruise Lines, as Professor SOLIMINE correctly notes, is economic. And although I do not endorse that rationale, I think Professor SOLIMINE correctly emphasizes that the rationale cannot be avoided by pointing to contrary facts or policies in our hypothetical. Just as a cruise line operator wishes to keep competitive (or increase profits) by discouraging dispersed litigation in every forum from which it solicits customers, Ski Vacations wishes, with limited liability, to solicit customers from around the country to its scattered resorts. Professors WEINTRAUB and BORCHERS also argue that Plaintiff’s physical disability (being a quadriplegic as a result of this accident) prevents her from conducting meaningful trial in Vermont. My guess is the seriousness of the injury would make it worth a contingency fee attorney’s while to try the suit wherever recovery could be had. As Professor SOLIMINE points out, the logistical litigation difficulties of the hypothetical case are surmountable. The real unfairness in forcing Plaintiff to Vermont is the substantively unfavorable law when the Vermont choice of law clause is applied, especially since both the state of residence (which was also where solicitation for the trip occurred) and the state of the injury (Colorado) have law more favorable to Plaintiff.

I sympathize with Professor WEINTRAUB’s antipathy to assisting Vermont in becoming “the Delaware of ski resorts by winning the race to the bottom . . . .” WEINTRAUB, infra, at 556. But it stretches the facts too far, as Professor SOLIMINE emphasizes, to claim or imply that Vermont has no significant interest in this litigation. Professor SOLIMINE properly notes that although Defendant Ski Vacations’s principal place of business is in New York, the company operates ski resorts in upstate New York and Vermont. Even if there were no such connections, the company legitimately might choose a Vermont forum precisely because of that state’s presumed expertise in litigating incidents of this sort. The real personal due process issues are notice and lack of meaningful consent, and on those issues, as Professor SOLIMINE again points out, the Carnival Cruise Lines facts are every bit as egregious as those before our panel.

Given this identity to Carnival Cruise Lines, the question is whether that admiralty decision’s logic applies to this case. Accordingly, we are back at our starting point of addressing the Erie issue of whose law should be fashioned or used to determine the validity of the clause.
**FACTS**

Ski Vacations is a New York corporation which operates ski resorts primarily in upstate New York and Vermont, and has recently opened a small facility in Colorado. Plaintiff, an Atlanta, Georgia resident, responded to a local newspaper ad promoting inexpensive Colorado ski vacations. An Atlanta agency had placed the ad, responding to Ski Vacations’s form mailings advertising special package deals and good commissions as part of its start up campaign. Plaintiff booked, paid a deposit on a package trip, and received a confirmation letter from Ski Vacations’s Colorado office containing information about the resort. Included in the information was a notice entitled “Conditions of Contract.” Condition 3 indicated that any and all disputes arising out of Ski Vacations’s provision of services or goods, including any tort claims, must be brought in Vermont state court and are to be governed by Vermont law.

Plaintiff went on the Colorado ski trip, paying the balance due upon arrival and signing a “Conditions of Contract” form identical to the one received in the mail. While on the slopes, Plaintiff was injured and is now a quadriplegic. Emergency treatment was rendered in Colorado. Soon after, Plaintiff returned to Georgia and continues to reside there. Plaintiff brought negligence and strict liability claims in Georgia state court against Ski Vacations for allegedly allowing the use of inappropriate equipment and to ski on an inappropriate and poorly designed slope. Assume significant differences between Georgia, Colorado, and Vermont law on one or more important substantive law issues; also assume Vermont law is most favorable to defendant Ski Vacations on each of these issues. Assume choice of forum clauses which oust Georgia of jurisdiction were not traditionally honored under Georgia law as against public policy. Recent mid-level cases, however, have approved forum clauses, indicating some confusion or uncertainty about the current state of Georgia law on this issue. Assume that Georgia normally enforces contract choice of law clauses unless against public policy, but has not squarely ruled whether choice of law can be pre-negotiated for tort actions via contract terms. Assume Georgia is a vested rights jurisdiction that does not apply renvoi.

Defendant Ski Vacations removed Plaintiff’s suit to federal court on the basis of diversity and, citing the forum selection clause, moved to dismiss for lack of personal jurisdiction and/or improper venue. Assume the federal district court sitting in Atlanta granted this motion, holding that the issue was governed by federal law and that *Stewart Org., Inc.*

As the federal Appeals Court sitting en banc in 11th Circuit, how should we rule on this appeal?

Please address the following two issues:

1) By what law, state or federal, should we determine the validity of the forum selection clause?

2) Regardless of whether we apply federal or state law, should we honor the forum selection clause on the stated facts?

Those who decide that the issue is properly governed by state law should assume that there is enough room in Georgia precedents to allow a ruling either way on these facts.

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BORCHERS, J.*: (reversing and remanding)

This case presents two different issues relating to party autonomy. First, in diversity cases, does state law or “federal” common law1 govern the enforceability of choice-of-forum clauses? Second, should the choice-of-forum clause be honored in this case?

I.

It seems odd that the fundamental question whether federal common

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* Patrick J. Borchers: Professor of Law and Associate Dean, Albany Law School of Union University.

1. I place “federal” in scare quotes here because the reference is not to preemptive federal law that would govern both in state and federal court by virtue of the Supremacy Clause. See Louise Weinberg, The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law, 83 Nw. U. L. Rev. 860 (1989). Rather, “federal” common law here is a shorthand way of referring to general, judge-made rules articulated by federal courts that do not purport to displace state rules as they might apply in state court. This kind of common law differs from the preemptive sort of judge-made rule, such as the rule articulated in Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). For purposes of this opinion, when I use the term “federal common law” or some variant, I have in mind the non-preemptive kind.
law or state law governs the enforcement of an agreement so ordinary as a forum selection agreement remains shrouded in mystery. The unfortunate state of the matter, however, is that the Supreme Court positively delights in refusing to lay down intelligible rules, or even principles, in this area of the law.


Rather than answering that question, however, the Supreme Court asked and answered one of its own. The *Stewart* Court decided that the federal venue transfer statute, 28 U.S.C. § 1404 (1988), was broad enough to incorporate the existence of a forum selection clause as a factor in the analysis. Deciding that the federal venue statute covered the subject removed the state/federal choice from the realm of the seriously debatable, because the only circumstance in which a federal statute does not trump state law is if Congress lacks affirmative authority to pass it. *Stewart* said, sensibly enough, that congressional authority to pass a venue statute was “not subject to serious question,” *Stewart*, 487 U.S. at 32 (citing *Hanna*, 380 U.S. 460), and thus federal law applies if transfer under § 1404 is the mechanism for enforcing the forum-selection clause.

*Stewart*, of course, raises more questions than it answers. But the most important one for our purposes is: What law governs enforcement of forum selection clauses if § 1404 is not in the picture? In our case, of course, § 1404 is not available, because the forum selected here is a Vermont state court. The concurring Justices in *Stewart* hinted that federal common law should govern, but the dissent (which was forced to reach the “relatively unguided” *Erie* question by virtue of its narrower construction of § 1404) thought that state law must be supreme. *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring); *id.* at 33 (Scalia, J., dissenting). With this obscure guidance, it is not surprising that lower federal courts have divided sharply on the question. See Northwestern
Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 374 (7th Cir. 1990) (federal law); Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 512 (9th Cir. 1988) (federal law); Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848 (8th Cir. 1986) (state law). In fact, our circuit has managed to find itself on both sides of the question, because the en banc opinion for the court in Stewart, reviewed by the Supreme Court, took the position that the matter was governed by federal common law, but a three-judge panel later held that state law governs. See Alexander Proudfoot Co. World Headquarters v. Thayer, 877 F.2d 912 (11th Cir. 1989).

The most sensible answer to the question is that the federal common law rule favoring enforcement should apply. The asserted goal of the Erie line of cases construing the Rules of Decision Act is to prevent “forum shopping” and “inequitable administration” of law. Hanna, 380 U.S. at 468. But in this context, forum shopping cannot be avoided. Rather, the choice is between interstate and intrastate forum shopping. If federal courts sitting in diversity are required to follow state law on this subject, this will make the choice between state and federal court in any given state less significant. But it will up the ante significantly as to the state in which the plaintiff chooses to file (whether in federal or state court) because that choice will determine the enforceability of the forum selection clauses. As long as the states continue to differ on the enforceability of these clauses (and there are a dozen or so that refuse to enforce them under any circumstances, see Patrick J. Borchers, Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform, 67 Wash. L. Rev. 55, 57 n.7 (1992)) parties wanting to avoid the effect of such clauses will shop for fora that will ignore them.

The choice, then, is not between avoiding and promoting forum shopping, it is between promoting interstate or intrastate forum shopping. The lesser of the evils, it seems to me, is intrastate forum shopping. Intrastate forum shopping is a less serious threat to fairness because it does not discriminate against civil defendants. If a diversity

2. The record indicates that the contract also included a choice-of-law clause selecting Vermont state law. The majority rule appears to be that choice-of-law clauses do not govern the validity of companion choice-of-forum clauses. See, e.g., AVC Nederland B.V. v. Atrium Inv. Partnership, 740 F.2d 148 (2d Cir. 1984); L.A. Pipeline Contr. Co. v. Texas E. Prod. Pipeline Co., 699 F. Supp. 185, 186-87 (S.D. Ind. 1988); Bense v. Interstate Battery Sys. of Am., 683 F.2d 718 (2d Cir. 1982). Absent some clear indication to the contrary, therefore, I would hold that the choice-of-law clause excludes the choice-of-forum clause from its ambit.
plaintiff prefers federal court, it can file there; if a diversity defendant prefers federal court, it can remove the case as long as it is sued outside its home state. See 28 U.S.C. § 1441 (1988). The only antidotes available to defendants for interstate forum shopping are the far less certain devices of personal jurisdiction and forum non conveniens dismissals. Application of general standards in diversity cases also benefits both parties by making the enforcement of these clauses more predictable. Subjecting these clauses to the vagaries of local law only complicates any calculus of their commercial value and enhances the possibility of surprising results. Thus, even assuming the essential validity and persuasive value of the Erie line of cases, the result should be that general principles, not local law, apply.

A deeper question is whether the Erie-and-Klaxon line of cases makes any sense. Historical research has shown that the essential purpose of section 34 of the Judiciary Act of 1789—which came to be known as the “Rules of Decision Act” and was the foundation for Erie—was to codify the then-commonly-accepted notion that there was a “general” law applicable to general subjects, and local law governed only “local” subjects. Wilfred Ritz, Rewriting the History of the Judiciary Act of 1789 (1990); see also Patrick J. Borchers, The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon, 72 Tex. L. Rev. 79 (1993). The reference in that statute to “the laws of the several states” was surely a reference to the legal principles held in common—that is, held “severally”—by the states, and legislative activity contemporaneous with the Judiciary Act’s passage shows unmistakably that the First Congress thought that local state laws would not apply in diversity cases.

The essential insight of the First Congress—which was eventually lost to our modern legal tradition—is that diversity cases, by bringing together parties from disparate legal systems, are handled most sensibly and fairly, in many instances, by application of uniform rules. Conflicts rules are just the sort of subject for which uniform treatment across all federal courts makes sense. The cost of honoring state law is unfairness and the promotion of interstate forum shopping, and that cost is too high.

Accordingly, the enforcement of the forum selection clause should be governed by federal common law, not local Georgia law.

II.

The second issue is whether this clause merits enforcement under federal common law. It does not.

The Supreme Court’s decision in The Bremen v. Zapata Off-Shore
Co., 407 U.S. 1 (1972) set into motion a trend in the United States towards enforcement of exclusive forum selection clauses. But *Bremen* did not give an unqualified endorsement to these clauses. Instead, the Court held only that reasonable clauses merit enforcement, see *id.* at 15, and pointed to the strong bargaining position of both parties and the actual negotiation over the clause as evidence that the agreement in that case merited enforcement.

It is tempting to say, therefore, that the clause in this case fails the *Bremen* reasonableness test because of the disparity of bargaining power, the lack of actual negotiation, and the severe hardship to Plaintiff in litigating away from home. The problem with this approach is the Supreme Court’s decision in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). *Carnival Cruise Lines* held that a similar clause appearing on the back of a cruise ship ticket was enforceable notwithstanding the disparity in bargaining power, the lack of actual negotiation, and the hardship to the plaintiff in litigating outside her home state. Worse yet, *Carnival Cruise Lines* appears to create a rule of nearly *per se* enforcement of such clauses if they appear in form contracts produced by large enterprises and choose as a forum the place where one of the parties has some significant connection. This clause is, of course, the product of mass production by a large enterprise and the place it chooses as a forum—Vermont—is one with which the defendant has a substantial connection.

with reading the contract, and assume further that Plaintiff understood the significance of the clause, Plaintiff still cannot ascertain the cost and the defendant's benefit. Consumers are in a position to compare price, length of stay, and the other customary amenities of a ski vacation. But a consumer cannot—without obtaining legal advice—discount the value of the vacation by the probability of incurring the cost of an expensive lawsuit far from home. For this reason, the major international conventions on jurisdiction, such as the Brussels Convention, deny effect to agreements of this sort where one party is at an acute disadvantage as in insurance, consumer, and employment contracts.

Even taking Carnival Cruise Lines at face value, however, there are some significant differences between this case and that one. First, in Carnival Cruise Lines, although the lower court opinion, see Shute v. Carnival Cruise Lines, Inc., 897 F.2d 377 (9th Cir. 1988), found that the plaintiff was unable to journey from Washington to Florida for trial, the Supreme Court refused to defer to that finding. The Carnival Cruise Lines opinion, therefore, treated as unproven the allegation that the clause would be unfair to the plaintiff because of extreme hardship in attending trial. In our case, however, it is undisputed that Plaintiff is a permanent quadriplegic and that the burden on Plaintiff by enforcing the clause would be severe. Bremen makes clear that a heavy burden of this kind can, in appropriate circumstances, justify excusing a party from the obligations of such a clause.

Second, the Carnival Cruise Lines Court understood the plaintiffs' counsel to have conceded the issue of "notice" of the clause. Id. at 590. No such concession has been made here. Other courts have, in the wake of Carnival Cruise Lines, found preprinted form contracts to be insufficient notice of the clause. Cf. Carnival Cruise Lines, Inc. v. Superior Court, 286 Cal. Rptr. 323 (1991) (remand to trial court to determine whether printing of clause on the back of a ticket provides "notice"). Here, the defendant took no special steps to apprise Plaintiff of the clause's existence. The Supreme Court's opinion in Carnival Cruise Lines is distinguishable for this reason as well.

For these reasons, I would refuse to enforce the clause. This requires me to reach the question of whether the defendant is subject to personal jurisdiction in Georgia. For the reasons stated in my discussion of the Brake-O case, I would hold, as did the Ninth Circuit in Carnival Cruise Lines, that the defendant is subject to personal jurisdiction. Carnival Cruise Lines, 897 F.2d at 377.

I would reverse and remand for further proceedings.
BURBANK, J.*: (reversing and remanding)

In granting the defendant’s motion to dismiss, the district court determined that federal law governed the enforceability of the forum selection clause and relied on the Supreme Court’s decisions in Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988), and Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991), for a federal policy in favor of enforcement. It is a curious fact about these cases that the first grounded decision in 28 U.S.C. § 1404 (1988) without reference to the law governing validity, while the second grounded decision in federal law, without reference to § 1404. In any event, neither of the Supreme Court decisions relied on by the district court for the content of federal law tells us whether federal law applies.

The district court did not make clear on which of the two grounds advanced by the defendant, lack of personal jurisdiction or improper venue, it based the order of dismissal. Notwithstanding a suggestion to the contrary in Stewart, see 487 U.S. at 28 n.8, we do not think it matters. Indeed, defendant’s objection might as easily have been lack of subject matter jurisdiction.

Rules regulating personal jurisdiction and venue take account, however cruelly, of the interests of both plaintiffs and defendants. In that sense, each set of rules confers rights on prospective plaintiffs as well as prospective defendants. Rights that, if the law permits, can be traded in advance (as well as traded or lost after litigation has been commenced). Similarly, although parties are not permitted to confer subject matter jurisdiction on the federal courts, it has been clear since The Bremen v. Zapata Off-Shore Oil Co., 407 U.S. 1 (1972), that, in certain circumstances, they have the power to trade the right to such access as the rules of subject matter jurisdiction afford. Our first task is to determine whether the district court was correct in deciding that federal law determines whether Plaintiff effectively traded the right to sue the defendant in state or federal court in Georgia.

The resolution of the problem of lawmaking power in this diversity case is not as easy as some of my colleagues apparently believe. Certainly, invocation of neither Erie R.R. v. Tompkins, 304 U.S. 64 (1938), nor state contract law would resolve it. Just as federal lawmaking power exists to prescribe rules of subject matter jurisdiction, personal juris-

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* Stephen B. Burbank: Robert G. Fuller, Jr., Professor of Law, University of Pennsylvania.
diction and venue for the federal courts, so it exists to prescribe the circumstances in which those rules can be varied by private agreement. This power exists for cases that find their way into the federal courts only because the requirements of the diversity statute are met, whether directly or through removal. The questions we must answer are whether the power was exercised in prospective law made before the district entered its order, if so, whether it was exercised by a duly authorized federal lawmaker, and if not, whether in entering the order of dismissal on the basis of federal law, the district court was such a lawmaker.

When federal law speaks on a subject, conflicting state law must yield if the federal law is valid. At least since Hanna v. Plumer, 380 U.S. 460 (1965), the validity of pertinent federal law contained in legislation or the Federal Rules has been hard to dispute and easy to confirm. Hanna did little, however, to ease the task of those who seek to displace state law with judge-made federal law in diversity actions, and the Court’s subsequent decision in Walker v. Armco Steel Corp., 446 U.S. 740 (1980), confirmed just how difficult that task is.

With the source of the applicable law turning on what may seem to be the fortuity of federal lawmaker arrangements, it is an understandable temptation to hear federal statutes or Federal Rules speaking when they appear to be silent, or at least to hear enough noise nearby to silence state law. The Supreme Court succumbed to a similar temptation in Hanna itself,¹ and it has taken that approach twice in recent years, extending the domain of a Federal Rule in Burlington Northern R.R. Co. v. Woods, 480 U.S. 1 (1987), see Ralph U. Whitten, Erie and the Federal Rules: A Review and Reappraisal After Burlington Northern Railroad v. Woods, 21 Creighton L. Rev. 1 (1988), and of a federal statute in Stewart.

No such opportunity is available to us. Under the terms of the forum selection clause at issue here, transfer to another federal court, under either 28 U.S.C. § 1404 or § 1406, is not in the cards. If Con-

¹. The court of appeals’ gloss confirms what a fair reading of the [state] statute [involved in Hanna] suggests, namely that the statutory provisions in question were the functional equivalent of a tolling rule. The Supreme Court’s attempt to bifurcate the statute into limitations provisions and notice provisions was artificial, which may explain why Justice Harlan deemed Ragan impossible to distinguish and was moved to express his disagreement with the result in that case.

gress had taken responsibility for, rather than displaced part of, the doctrine of forum non conveniens, the Court's approach in Stewart might be open. But federal forum non conveniens doctrine is judge-made law, and it provides a mantle of validity no larger than federal judge-made law concerning forum selection clauses.

In the absence of a pertinent federal statute or Federal Rule, we are compelled to make the inquiry suggested by Hanna's dictum, see Hanna, 380 U.S. at 466-69, the vitality of which was confirmed in Walker. See Walker, 446 U.S. at 744-47, 752-53. There can be no doubt that differences in the rules applied by federal and state courts to assess the validity of forum selection clauses could materially affect the character or result of litigation. Upholding such a clause, and dismissing a lawsuit filed in derogation of it, might bring a second effort within the bar of a statute of limitations. Moreover, such clauses owe their existence to the knowledge that the location of litigation can materially affect its character, as in expense, and its result, as through the operation of a choice of law clause (which it is often the primary purpose of a choice of forum clause to fructify).

Similarly, there can be no doubt that differences between federal and state law on this matter could lead to forum-shopping. The perception of difference evidently did so in this case. There are strong indications in Walker that that is the end of the matter, that if either of the "twin aims of Erie," Hanna, 380 U.S. at 468, would be frustrated by the application of federal judge-made law instead of state law, the latter must govern. See Walker, 446 U.S. at 753. We believe that it is useful, however, also to consider whether application of federal common law on the issue of the validity of the forum selection clause—assuming always that it is consequentially different from state law—would lead to "inequitable administration of the laws," Hanna, 380 U.S. at 468, and thus frustrate the other of Erie's "twin aims."

In concluding on this aspect of the analysis that there was "simply no reason why" federal common law should displace state law in Walker, 446 U.S. at 753, the Court might be thought to have suggested that good reasons could justify such displacement, perhaps even if differences would lead to forum-shopping. If so, there would be some room for the consideration of federal policies other than the policies imputed by the Court to Erie, although not for the free-form balancing of federal and state policies that some lower federal courts and scholars, as well as some of my colleagues, have imputed to Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958). See Stephen B. Burbank, Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach, 71 Cornell L. Rev. 733, 787-91 (1986).
We should consider, therefore, whether some federal policy would be served by the application of uniform federal judge-made rules with respect to the validity of forum selection clauses in diversity cases. For this purpose, our search for relevant policies must be confined to existing federal law that might be affected by the content of the law on the issue in question. Although we have concluded that no existing federal statute or Federal Rule is pertinent on the forum selection clause issue—in the sense that, as interpreted, it provides the legal standards for resolution of the issue—federal law speaks in more than one voice, and sometimes it may simply call for other federal lawmakers to fashion the rules. The Rules of Decision Act says as much. See 28 U.S.C. § 1652 (1988); Burbank, *Interjurisdictional Preclusion*, supra, at 759, 762, 790-91.

The effect of the enforcement of the forum selection clause in this case would be to deprive Plaintiff of state and federal forums otherwise proper as a matter of subject matter jurisdiction and, we assume, as a matter of personal jurisdiction. Although the protections, benefits, or rights afforded by the rules governing both matters may be waived, it would be entirely rational to require that uniform federal law prescribe the circumstances of an effective waiver of a federal forum. That is not, however, a policy fairly derived from the diversity statute, the removal statute, or any other federal statute or Federal Rule of which we are aware. We thus need not consider how, if it existed, such a policy should be weighed against the policies imputed to the diversity statute in *Erie* and its progeny.

Perhaps the best gauge of Congress’s level of concern with access to the federal courts by diverse parties who satisfy the amount in controversy requirement (itself an index of Congress’s level of concern) is the extent to which it has chosen to regulate personal jurisdiction.

Rules of personal jurisdiction and venue may be redundant, see Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court Access Doctrine*, 133 U. Pa. L. Rev. 781 (1985), but in recent years at least, the relevant federal rules are not very much alike when viewed from the perspective of expressed federal interest. Legislation regulates the venue options of prospective federal court plaintiffs (and protections of prospective defendants) in considerable, and often puzzling, detail, and legislation also regulates the reallocation of business among the federal courts. See, e.g., 28 U.S.C. §§ 1391, 1404 (1988). There is very little federal legislation that speaks, directly or indirectly, to the question of personal jurisdiction, and whatever the ambitions of those responsible for the Federal Rules of Civil Procedure, they have been kept pretty
well under control by the Rules Enabling Acts. See Stephen B. Burbank, The Reluctant Partner: Making Procedural Law for International Civil Litigation, 57 Law & Contemp. Probs. 103, 146 & n.347 (1994). As a result, in most cases brought in or removed to federal court, particularly cases founded in diversity, the question of personal jurisdiction depends on the fortuity of state law.

Congress's refusal generally to enact federal standards of amenability, leaving regulation to delegated lawmakers whose powers in the area are—and are recognized to be—severely limited, see Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97 (1987), renders it impossible for us to impute to the diversity statute or the removal statute a policy in favor of uniform federal law on a cognate matter of access. To be sure, we would displace any element of state law found to be hostile to or inconsistent with those statutes, other federal statutes, or the Federal Rules. But until and unless that need arises, state law governs the issue of the validity of the forum selection clause.

We are told that Georgia law is in flux, but we do not deem it appropriate to have the first word on the subject in this case. The Supreme Court has decided that appellate review of district court decisions concerning the content of state law should be plenary. Salve Regina College v. Russell, 499 U.S. 225 (1991). That standard of review does not require us to dispense with the considered views of the learned district judge. Our inclination to have the benefit of those views is strengthened by the possibility that Georgia law may call for factual determinations on matters as to which, some of my colleagues' sympathetic assertions notwithstanding, the present record is only suggestive, as for instance the impact of enforcement of the clause on Plaintiff's ability to maintain a lawsuit. We only mention here a few considerations that may be relevant to the difficult task that confronts the district judge on remand:

1. The choices confronting Georgia lawmakers are not confined to the polar extremes represented by the traditional Georgia rule on the one hand and the federal rule as implemented in Carnival Cruise Lines on the other. In predicting how the Supreme Court of Georgia will deal with this issue in the future, the district court may wish to consider not only recent decisions of the lower Georgia courts regarding forum selection clauses, but Georgia law on the enforceability of arbitration clauses and, indeed, that state's jurisprudence as a whole relating to consumer contracts.²

² Waiting for the Supreme Court of Georgia to reevaluate its position on this
2. To the extent that practical access to the forum designated in the contract is relevant under Georgia law, as it is under federal law, the district court may wish to consider how Plaintiff financed this lawsuit and whether the same or similar arrangements are, or are likely to be, available in Vermont.

3. It is not clear whether Plaintiff also challenges the choice of law clause. The district court need formally consider such a challenge only if it finds the choice of forum clause invalid. In any event, we have no occasion to address it.

Reversed and Remanded.

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MULLENIX, J.*: (reversing and remanding)

I.

I concur with my colleagues that this federal diversity action requires that the Erie doctrine supply the rule of decision governing enforceability of the forum selection clause. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Unlike my colleagues, however, I do not believe this case presents as incredibly complicated an Erie question as they seem determined to make it. Hence, I do not believe the facts present a “relatively unguided Erie choice” derived from dicta in *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). Nor do I believe that this case authorizes us to conduct an ad hoc free-wheeling balancing test under *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), invoking such jargon-laden concepts as a “litigant-oriented approach” determined by “system-oriented standards.”

This case simply asks whether the Georgia federal court, in its diversity jurisdiction, should apply underlying Georgia state substantive contract principles. If ever there was a “pure” Erie question, this is it. The facts do not involve a direct conflict between a Federal Rule of Civil Procedure and a contrasting state procedural rule exactly on point.

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as in *Hanna*. Moreover, the fact that this case arises in the court’s removal jurisdiction does not convert this case into a *Hanna* problem. *Cf.* *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). Nor do the facts implicate a tension between a federal constitutional provision and a competing weak state policy, as in *Byrd*. Nor do these facts entail a state rule (statute of limitations) that exists in the absence of a parallel federal rule, as in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). Apparently, my colleagues feel free to roam over fifty years of *Erie* jurisprudence, selectively plucking standards, rules, principles, and academic exegesis, with little regard to the actual *Erie* problem in this case.

II.

Similarly, I believe that my colleagues have turned the problem of ascertaining applicable state law into a more complicated exercise than is necessary. The Supreme Court of Georgia has held that forum selection clauses are unenforceable. However archaic this ruling may be, it is controlling authority until the Georgia legislature or the Supreme Court of Georgia decides otherwise. For this Court to now hold differently would be to announce a rule of law that the federal court thinks Georgia should adopt. *See McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 669 (3d Cir. 1980) (Higginbotham, J., dissenting).

Moreover, we are not dealing with a case where the state’s highest court has not spoken on the legal issue, which would permit the federal court to look more broadly to state intermediate appellate decisions or other sources to determine applicable law. *See Salve Regina College v. Russell*, 499 U.S. 225 (1991); *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967). While it is interesting that some Georgia intermediate decisions have adopted the federal approach to forum selection clauses, these lower court decisions cannot provide the basis for this federal court independently to conclude that Georgia has changed its law.

Even where there is evidence that developing state doctrine casts doubt over established precedent, we should be wary of permitting federal judges broad-ranging authority to second-guess what a state legislature or state high court might do if the substantive law issue were newly raised in either forum. Such license inevitably will subvert the twin aims of *Erie* and reintroduce the very problems that *Erie* was intended to eliminate (inequitable administration of the laws and the evil of forum-shopping). If federal judges in diversity cases may disregard existing state supreme court precedent and consider all available data to determine applicable law, then lawyers seeking to evade unfavorable state law (such as the unenforceability of forum selection clauses) have
CASE ONE

Spring, 1995] 543

a great inducement to maneuver their cases into federal court, hoping that federal judges will apply some other perceived “better” law. Such a result embodies the jurisprudential doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), as well as the forum shopping opportunity of *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928), both soundly repudiated in *Erie*.

Finally, my colleagues’ proposals to remand this case to ascertain Georgia law or alternatively to certify the question to the Supreme Court of Georgia are intuitively attractive, although it seems better to ask the state court to speak on this question rather than a federal judge. See Ga. Sup. Ct. R. 37. While the state certification process exists in Georgia and many other jurisdictions, this approach is less than ideal. The certification process will cause the Supreme Court of Georgia to issue essentially an advisory opinion on the enforceability of forum selection clauses, in the absence of an actual case or controversy. The federal court might achieve a better result if it simply applied existing Georgia law and refused to enforce the forum selection clause, allowing this litigation to proceed as a federal diversity suit. Not only would this determination be faithful to the *Erie* doctrine, but it also would encourage future litigants to directly challenge Georgia’s existing law in state court. If Georgia truly desires to change its approach to the enforceability of forum selection clauses, such change either should come from legislative action or the Supreme Court of Georgia’s considered re-evaluation of its prior rulings in the context of actual litigation.

III.

Finally, I write to express concern with the consequences of this Court invalidating the forum selection clause under state law pursuant to the *Erie* doctrine.

The Supreme Court has now spoken at least three times on the issue of the enforceability of forum selection clauses and, taken together, these cases manifest a strongly stated federal policy favoring enforceability, subject to usual contract principles. See *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988); and *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). As a federal diversity action, then, this case arises in a procedural posture not present in the three leading Supreme Court precedents. The easy *Erie* solution is to apply existing Georgia law, reverse the federal dismissal based on *Carnival Cruise Lines*, and remand for further federal court proceedings.

This *Erie* solution, however, leaves federal court litigants with an array of logically consistent rules but globally incoherent doctrine. Thus,
we will now have one set of enforceability rules for cases in the federal court's admiralty jurisdiction, *Bremen*, 407 U.S at 8-19; another set of enforceability rules for diversity-based cases (following disparate state laws under the *Erie* doctrine); a third set of governing principles for state cases removed and transferred within the federal system, *Stewart*, 487 at 28-32; and possibly yet another undetermined set of standards for federal question cases. Further, it is not inconceivable that federal courts could develop different enforceability principles for federal cases grounded in some other jurisdictional basis, such as a Congressional charter provision. See, e.g., *American Nat'l Red Cross v. S.G.*, 112 S. Ct. 2465 (1992).

My colleagues are undisturbed by this phenomenon, characterizing these disparate rules, principles, standards, and results as the "normal dislocations" of federalism. But it seems to me that this dismissive attitude trivializes some very real problems.

The enforceability of forum selection clauses ought not to turn on fortuitous fact circumstances or contrived procedural choices. Hence, it makes very little sense to me that Mrs. Shute's case should come out differently depending on where she had the bad luck to slip and fall—whether at sea off the coast of Mexico or on the gangplank in Los Angeles. If Mrs. Shute had been a Georgia resident and had she fallen on the gangplank in Los Angeles, then a diversity removal in Georgia might have compelled the Supreme Court to decide *Carnival Cruise Lines* entirely differently. And, if Mrs. Shute from Washington state knocked over a Georgia resident in the same gangplank accident and both sued Carnival Cruise Lines in their home states, then on diversity removal Mrs. Shute probably would be bound by the forum selection clause, while the Georgia resident would not. To make matters even worse, these results would be different if the forum selection clause permitted transfer to another federal court, in which instance *Stewart* would apply to permit the federal court to apply federal *Bremen* standards.

Other anomalies abound among the developing federal rules relating to the enforceability of forum selection clauses. If in *Stewart* the contract had specified only a state court as a permissible forum (precluding a federal transfer pursuant to 28 U.S.C. § 1404 (1988)), then presumably *Stewart* would have been decided differently because Alabama does not recognize the enforceability of forum selection clauses. This is precisely the question the Supreme Court deflected in *Stewart*, instead relying on the *Hanna*-branch of the *Erie* doctrine to apply federal standards. At least one lesson derived from the Court's *Stewart* holding is that a contractual limitation to a state forum may enhance the ability to
defeat a forum selection clause, while inclusion of a federal forum should enhance the ability to have the provision enforced under *Bremen* principles.

Precisely these distinctions inevitably will cause transactional and litigating attorneys to conform their conduct to the most adventitious litigation opportunity available. Hence, all prospective defendants are well-advised to draft documents with contractual forum selection clauses that include a federal forum. This simple provision will always assure application of *Stewart* and *Bremen*. On the contrary, all prospective plaintiffs, if possible, should sue in those states that do not recognize the enforceability of forum selection clauses.

Finally, these various rules encourage forum shopping for a more favorable court as well as more favorable law. My colleagues, apparently agreeing with Justice Scalia (*see* *Ferens v. John Deere*, 494 U.S. 516 (1990)), are not offended by such strategies. But it seems to me that such a cavalier approach to blatant manipulative behavior reintroduces precisely the kinds of systemic abuse that the *Erie* decision was intended to eliminate. We should be offended by the result in *Ferens*, not applauding clever lawyering. Unless the federal courts have repudiated the rationales underlying the *Erie* doctrine, these concerns ought to be as compelling today as they were in 1938. If not, then the *Erie* doctrine and its progeny amount to nothing more or less than a highly manipulable set of rules.

IV.

Although the *Erie* doctrine compels the result in this case, the conclusion is an unhappy one. Because of the burgeoning doctrinal disarray in this area, if there is a national consensus favoring enforcement of forum selection clauses, then perhaps Congress could better resolve this problem.

*Reversed and remanded.*

* * *

REDISH, J.*: (remanding)

In reviewing the decision of the court below, we are required to resolve two distinct issues: (1) in this diversity case, should the federal court apply its own law on the validity of the forum selection clause or

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* Martin H. Redish: Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University School of Law.
instead apply the relevant law of the state of Georgia, and (2) assuming that this Court concludes that federal law controls the issue of forum selection clause validity, the content of that federal standard. It is my opinion that the first question cannot be answered without initially ascertaining the content of Georgia law on the issue of forum selection clause validity—apparently a difficult task that requires either careful examination and analysis of the applicable state court precedents by the district court or perhaps resort to certification to the state's highest court for clarification of the issue, if such a procedure is available under Georgia law. For this reason, the case must be remanded for consideration of these issues by the district court. Even if this Court were to conclude that federal law controls the question before us, according to controlling Supreme Court precedent, the case must in any event be remanded to the district court in order to enable that court to make factual findings concerning the level of inconvenience and unfairness that would result to Plaintiff as a result of enforcement of the clause.

I. DETERMINING WHOSE LAW CONTROLS

At the outset, it should be made clear that the case of Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991), in no way controls determination of the relevance of state law under the present circumstances. That case invoked the federal courts' admiralty jurisdiction, a jurisdiction in which—rightly or wrongly—federal common law controls even the most substantive question. Hence, it is not surprising that the Court in Carnival Cruise Lines proceeded on the assumption that federal law controlled. However, when a case falls within our diversity jurisdiction, the dictates of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and its progeny—a doctrine with no applicability to our admiralty jurisdiction—control our decision.

Resolution of the issue as to which system's law controls in this case, then, necessarily implicates the Erie doctrine, a doctrine as confused as it is venerable. It is clear, under both Erie itself and subsequent decisions, that it is unconstitutional—as beyond Congress's power under Article I of the Constitution—to employ the diversity jurisdiction in order to vest in the federal judiciary the power to fashion common law principles that supplant applicable state law that is purely substantive—i.e., law that in no way regulates the fairness or accuracy of the truthfinding process. Hanna v. Plumer, 380 U.S. 460 (1965). That is clearly not the case for a forum selection clause, which at least to a certain extent affects matters of process or procedure. For questions that are in some sense procedural, the issue is ultimately a matter of congressional choice. When no more specific federal statute is applicable,
i.e., 28 U.S.C. § 1404(a) (1988), the longstanding Rules of Decision Act, 28 U.S.C. §1652 (1982), controls. Although the Act’s text may not easily lend itself to many of the possible interpretive modes that have been suggested over the years, each of these potential standards finds some level of support in Supreme Court doctrine. Indeed, one can find reasonable support in one or more Supreme Court decisions—decisions that have never been formally overruled—for the following, seemingly mutually exclusive standards: (1) a systemic balancing process, that weighs the federal forum’s interest in applying its own common law principles against the state’s interest in having its law applied; (2) an “outcome determination” test, that applies state law when use of a different federal standard would result in a possible alteration in the case’s outcome; and (3) a “modified outcome determination” test, which dictates the use of state law when use of a distinct federal standard would likely influence a reasonable plaintiff’s strategic choice between state and federal fora.

If a court were to employ either of the latter two standards, the Erie issue would be a relatively easy one: any meaningful difference between state and federal law on the question of enforcement of the forum selection clause would necessarily dictate directly opposite results concerning the validity of the plaintiff’s selection of forum; under: one standard the clause would be valid and under the other standard it would be invalid. Whatever state law turns out to be, then, any departure from that rule by the federal court would undoubtedly influence a plaintiff’s choice of forum. Under one view of the Erie doctrine, this difference is of primary concern because it gives rise to the assumed evil of forum shopping on the part of the plaintiff.

According to another version of the values underlying the Erie doctrine (what can be properly described as the “systemic balancing” model, derived largely from the Supreme Court’s decision in Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958)) the dangers of forum shopping have been grossly overstated, and (at least in the procedural context) are actually relatively trivial. Much more important, under this theory of the values underlying Erie, are the systemic concerns of federalism that are necessarily implicated by any Erie choice.

I must candidly acknowledge that the weight of Supreme Court precedent appears to be on the side of the more litigant-oriented approach to the Erie question. Both the Court’s dictum in Hanna and its subsequent decision in Walker v. Armco Steel Corp., 446 U.S. 740 (1980), reflect this fact. Nevertheless, it should be noted that the Court’s decision in Byrd has never actually been overruled, and lower courts have for many years continued to invoke its system-oriented
standards. Hence, I conclude that the *Erie* issue in this case should be resolved by resort to a systemic balancing analysis, because such an approach properly grounds the *Erie* doctrine in concerns of federalism. Such an analysis cannot be conducted, however, absent a full understanding of both the current status of Georgia law on the issue at hand and the policies which that law is intended to foster.

As we understand it, the current state of Georgia law is in flux. While state supreme court precedent, which has yet to be overruled, refuses to enforce forum selection clauses, apparently more recent mid-level state decisions have indicated a willingness to enforce such clauses. In ascertaining applicable state law, it is appropriate for a federal court to assume the role of the state supreme court, rather than that of a state trial court. If the federal court were to assume the role of a state trial court it would be bound to enforce existing state supreme court precedent, even though the state supreme court itself might well choose to overrule that precedent were it given the opportunity. A state trial court decision, of course, may be appealed ultimately to the state supreme court, while a decision of a federal district court may not. Thus, if a federal court were to act as a state trial court without the possibility of review in the state’s highest court, a new type of forum shopping for substantive law on the part of plaintiffs could be created.

I do not believe we are competent at this point to ascertain state law on the forum selection clause issue. Instead, we need the benefit of a careful review of that question by an experienced district judge. In addition to ascertaining the current state of Georgia law, I would direct the district court to ascertain the policies underlying that law. If the state would, in fact, enforce forum selection clauses, uncertainty exists as to the state’s underlying policy goal. On the one hand, the state may do so in order to fulfill the values of individual self-determination that provide the basis for the freedom of contract in the first place. Under these circumstances, I believe that the state’s interest would extend beyond the four walls of the courtroom, constituting an important state substantive policy choice which could be seriously undermined by a contrary federal common law rule. I would therefore enforce state law. On the other hand, the state might choose to enforce forum selection clauses simply out of a “housekeeping” concern for docket control: enforcement of such clauses has the beneficial procedural effect of reducing the state’s already crowded judicial dockets. If this is, in fact, the state’s policy choice, it would in no way be undermined by a contrary rule in federal court. The state’s asserted interest, in other words, would not extend beyond the four walls of its courtroom, and the federal court should be deemed free to determine for itself the validity of
forum selection clauses.

If it were to be determined that under state law the clause would not be enforced, the state’s policy goal appears clear. The state would be attempting both to protect its citizens from what amount to contracts of adhesion and to assure a fair and convenient forum in which its citizens may effectively vindicate their rights. If so, I believe that a federal court would be required to enforce that important substantive policy choice. The interests of federalism dictate such a result.

II. DETERMINING FEDERAL LAW

If it is ultimately decided that federal law controls the validity of forum selection clauses, I believe a hearing must be held in the district court in order to determine whether enforcement would effectively deprive the plaintiff of a forum. This is the lesson of the Supreme Court’s decision in Carnival Cruise Lines. There, the Court rejected the court of appeals’s finding that plaintiffs lacked a forum, because no such finding had been made in the trial court. Thus, the Supreme Court in that case effectively held that such factual determinations must be made at the trial court level. While there appears to be a strong chance that such a finding could be made in this case given plaintiff’s obviously precarious position, we must leave that question, in the first instance, to the district court.

Case remanded, for proceedings consistent with this opinion.

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SILBERMAN, J.: (reversing)
The judgment below is reversed.

The present case presents a welcome opportunity to both clarify and revisit the jurisprudence of party autonomy with respect to jurisdiction and choice of law.

I.

On the issue of whether state or federal law controls the validity of the forum selection clause in this diversity action, we are presented with a classic *Erie* problem. An inquiry into the nature and purpose of forum selection clauses was avoided by the Supreme Court in *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), because the Court found that

* Linda J. Silberman: Professor of Law, New York University School of Law; B.A. University of Michigan, 1965; J.D. University of Michigan, 1968.
28 U.S.C. § 1404 (1988), a federal statute with an avowedly procedural purpose, controlled in the face of a direct collision with state law. *Stewart*, 487 U.S. at 32. However, Justice Scalia, dissenting in *Stewart*, criticized the majority for its assumption that § 1404 in any way spoke to the weight to be given to a forum selection clause. *Id.* at 33-41 (Scalia, J., dissenting).

No transfer motion has been made in this action, and thus *Stewart* does not control. Indeed, if § 1404 had been invoked and I were in a position to do so, I would urge the Supreme Court to reconsider the path it chose in *Stewart*.

Whether state standards control the validity of forum-selection clauses depend in part on the state’s reasons for upholding or invalidating such clauses. As Justice Harlan so astutely observed in his concurring opinion in *Hanna v. Plumer*, 380 U.S. 460 (1965): “if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation . . . *Erie* and the Constitution require that the state rule prevail, even in the face of a conflicting federal rule.” *Id.* at 475 (Harlan, J., concurring).

An initial inquiry is to determine what lies behind Georgia’s policy of disregarding forum selection clauses. If the Georgia rule is merely an attempt to control its own courts’ jurisdiction, then it would appear to fall into the category of housekeeping or procedural rules that should have no application in a federal court. If, on the other hand, the invalidation of forum selection clauses reflects Georgia’s protection of resident consumers in order to allow them to bring suit at home and to ease the costs of litigation, those seem to be the kind of protective rules that should be honored by a federal court. Indeed, it is precisely those kinds of policies that led Judge Friendly in the *Arrowsmith v. United Press Int’l*, 320 F.2d 219 (2d Cir. 1963), to conclude that state and not federal standards should control amenability to suit in diversity litigation. *Id.* at 231.

Further support for the choice of state rather than federal law can be

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1. Plaintiff sued in state court in her home state of Georgia; Defendant removed to federal court and then moved to dismiss on the basis of the forum selection clause. Presumably, no transfer motion was made in connection with the forum selection clause because the chosen forum is the Vermont *state* court.

2. It should be noted that some states might make precisely the opposite policy choice in order to further quite different state policies. See, e.g., N.Y. Gen. Oblig. Law § 5-1402 (McKinney 1989) (permitting choice of New York forum when non-resident defendant agrees in contract to submit to jurisdiction in New York, chooses New York law to govern, and the obligation arises out of a transaction covering at least one million dollars).
found in other values reflected in the *Erie* line of cases. In order to avoid the forum selection clause, Plaintiff sues in Georgia state court to take advantage of Georgia policy, which ostensibly invalidates the forum selection clause and allows Plaintiff to sue in Georgia. If the federal court is free to apply a different federal standard, the result will be the type of state-federal forum-shopping that *Erie* was designed to avoid. Of course, merely having suit in Georgia as opposed to suit in Vermont may not be the type of outcome difference with which *Erie* was concerned. But choice of forum differences are exacerbated by differing choice of law approaches followed in different fora. That is evident in the present case, where a choice of law clause in the contract selecting Vermont law may be critical to the decisive substantive issues in the case. Certainly, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), would require the federal court to follow the state’s choice of law approach on that question. The choice of law and choice of forum clauses must be viewed together to reflect Georgia’s regulatory policies against limiting liability in tort cases of this type. When viewed in this context, there can be little question that *Erie* requires the federal court sitting in diversity to honor the state policies. Needless to say, if Congress should decide, as a matter of its interstate commerce power, to regulate nationwide ski resorts or to establish federal standards to govern choice of forum and choice of law clauses in ski-vacation contracts, federal law would trump. But the federal standard would then be the applicable standard in both the state and federal courts.

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3. In prior writing I have suggested that courts treat the law governing forum selection clauses in *international* cases as a matter of federal common law. In this context, parochial values of individual states should give way to the need for a uniform federal standard in transnational litigation. That standard would then apply in both state and federal courts. See Linda Silberman, *Development in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 Tex. Int'l L.J. 501, 528-29 (1994); see also, Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness (Hague Academy General Course on Private International Law)*, 245 Recueil des Cours 255-91 (1994-I) (urging a uniform federal standard for enforcement of forum selection clauses in international commercial cases). Note that such an approach goes further than either *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), or *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), both of which are admiralty cases, and do not necessarily speak to situations where the claims in federal court are based on state law or when international commercial contract cases are brought in state court.

4. See, e.g., the Supreme Court’s recent decision in *Allied-Bruce Terminix v. Dobson*, 115 S. Ct. 834 (1995), applying the Federal Arbitration Act to enforce an arbitration clause in a termite bond—enforceable under the Federal Act—but unen-
er, in the absence of congressional action to that effect (or a rejuvenation of federal common law in this area), the Georgia standard with respect to forum selection clauses must control.

II.

On the issue of the validity of this particular forum-selection clause, enforcement is unlikely under either a state or federal standard. Recent decisions, such as The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), which have furthered the cause of party autonomy and upheld various types of forum-selection clauses, are distinguishable as involving international commercial matters. Of course, Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991), does offer the possibility that forum-selection clauses will be enforced even as against an unwitting consumer. However, in Carnival Cruise Lines, the Court noted the cruise line’s special interest in limiting the fora where a single mishap could subject the cruise line to litigation in several different fora. Id. at 593. The forum-selection clause as a consolidation device may have been given particular force in that context. But multi-party litigation raising common claims is less likely with respect to litigation against Ski Vacations. Individual plaintiffs with claims against Ski Vacations are more likely to present different grievances against the potential defendant.

The Restatement (Second) of Conflicts provides that the parties’ agreement as to the place of the action will be given effect unless it is unfair or unreasonable. Restatement (Second) of the Conflicts of Laws § 80 (1971). There seems little justification for the selection of Vermont as the forum. The choice of Vermont seems to be a blatant attempt to have Vermont law applied (although it is not clear on just what particular issue). Because Vermont has almost no connection to the parties and the transaction, the choice of Vermont law does not seem to meet the standards for upholding a choice of law clause. See Restatement (Second) of the Conflicts of Laws § 187 (1971). Again, looked at together, the choice of forum and choice of law clauses appear to violate the fundamental policy of Georgia and should not be enforced.5

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5. Note the thoughtful attempt by one district judge to implement the policies of
WEINTRAUB, J.*: (reversing)

Reversed. The forum selection clause and the choice-of-law clause are unenforceable. State law governs these issues, but there is no reason to think that, on these facts, Georgia and federal law would produce different results. The law of Colorado applies in accordance with Georgia's choice-of-law rules. The motion to dismiss for lack of personal jurisdiction is denied.

I. ERIE

A split of authority has arisen between the circuits as to whether the enforceability of a forum selection clause is determined in diversity cases by state or federal law. See, e.g., Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509 (9th Cir. 1988) (federal); General Eng’g Corp. v. Martin Marietta Alumina, 783 F.2d 352 (3d Cir. 1986) (state). In Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988), the Supreme Court did not resolve this issue because the defendant had moved to

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transfer under 28 U.S.C. § 1404(a) (1988). This, the Court held, caused the issue to be governed by federal § 1404(a) standards under which the forum selection clause was but one factor to be considered. Here, because the chosen forum is a Vermont state court, the defendant, instead of moving for a § 1404(a) transfer to another federal court, moves for dismissal for improper venue. Thus, the 

Erie fat is back in the fire. 


In resolving the Erie problem, the purpose of the state rule is often the key. If the state rule has a purpose that relates only to the state as forum—such as a rule that favors dismissal in order to clear crowded dockets—the rule might well be regarded as inapplicable in another forum, even in a federal court sitting in the state. The Georgia rule, now perhaps being displaced, refusing to dismiss a suit brought in violation of a forum-selection clause, can have no such forum-related purpose. We find it inconceivable that on a matter so significantly related to state views of freedom of contract, state law should not control.

We distinguish those cases in which circuit courts have applied a federal view of forum non conveniens to dismiss actions, even though the federal courts were sitting in states that abjure or restrict that doctrine. See, e.g., Sibaja v. Dow Chem. Co., 757 F.2d 1215 (11th Cir.), cert. denied, 474 U.S. 948 (1985). The “public” interest aspect of forum non conveniens can plausibly be argued to trigger the inherent power of a federal court to control its docket and refuse to expend its scarce resources on a matter that could more conveniently be tried elsewhere. There is no such factor present here. This case can as conveniently, nay, more conveniently, be tried here as in Vermont. This is true not only with regard to the private convenience considerations of the parties, but also with regard to the public factors affecting efficient use of judicial resources.

Because Georgia law controls, it might well be prudent, as Judges BURBANK and REDISH suggest, to remand this case to the district judge to receive the benefit of her expertise on that state’s law. Alternatively, we might certify the question to the Supreme Court of Georgia. See Ga. Code Ann. § 15-2-9 (Michie 1994); Ga. S. Ct. R. 37. Plaintiff, however, is gravely injured and every effort should be made to accelerate the determination of Plaintiff’s cause. Remand or certification for determination of Georgia law would in all likelihood be a waste of time. There is no reason to think that federal and state standards for enforcing forum-selection clauses would produce different results in this case. First, Georgia seems headed toward joining the mainstream on this issue. Second, even if the Supreme Court of Georgia would reject the direction assayed by its lower courts, this is a case in which the strong
federal presumption in favor of forum selection is rebutted. Whatever
the Georgia rule, there is no likelihood that it would enforce a forum-
selection clause that the federal rule would reject. Thus, certification to
the Supreme Court of Georgia may not be possible because we could
not represent that state law is “determinative” of the cause, as is re-
quired by the Georgia statute and rule.

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), stated that
a forum-selection clause should be enforced unless enforcement would
“be so manifestly and gravely inconvenient . . . that it will . . . effec-
tively [deprive the plaintiff] of a meaningful day in court,” id. at 19; or
the clause was affected “by fraud, undue influence, or overweening
bargaining power,” id. at 12; or “enforcement would contravene a
strong public policy of the forum,” id. at 15. Each of these reasons for
non-enforcement is present here. Plaintiff’s disability erects, if not physi-
cal, then economic, barriers that prevent Plaintiff from going to Ver-
mont; the clause is in an unbargained consumer contract; and enforce-
ment would shock the conscience.

economic theory apparently gleaned from the back of a bubble gum
wrapper, enforced the clause buried in the bedside reading for insomnia-
cs on the cruise ticket. An outraged Congress promptly abrogated
Carnival Cruise Lines by amending the Vessel Owner’s Liability Act,
46 U.S.C. App. § 183(c), to insert the boldface word in the subsection
outlawing any ticket provision “purporting to lessen . . . the right of
any claimant to a trial by any court of competent jurisdiction.” Act of
Stat.) 5039, 5068. The cruise industry thereupon mobilized its lobbyists

Be that as it may, Carnival Cruise Lines is distinguishable, even
aside from the circumstance that it was an admiralty matter and this is
not. A forum-selection clause on a cruise ticket might be designed to
protect the shipping company from the draconian prospect of hundreds
of lawsuits in many forums arising out of the same mass disaster. There
is much less likelihood that a skier’s claim will be one of many based
on the same event. Furthermore, Justice Blackmun notes that “the Dis-
trict Court made no finding regarding the physical and financial impedi-
ments to the Shutes’ pursuing their case in Florida.” Carnival Cruise
Lines, 499 U.S. at 594. Here, the finding of plaintiff’s heart-wrenching
disability is manifest. Justice Blackmun also states: “Any suggestions of
such a bad-faith motive [to discourage consumers from pursuing legiti-
mate claims] is belied by two facts: petitioner has its principal place of
business in Florida, and many of its cruises depart from and return to Florida ports.” *Id.* at 595. Here, defendant’s principal place of business is in New York. The selection of a Vermont forum and Vermont law is patently designed not only to discourage a suit such as the one before us, but also to make the suit infeasible. If Vermont wishes to be the Delaware of ski resorts by winning the race to the bottom, it is with singular pleasure that we frustrate that ambition.

Eighteen members of the European Union and the European Free Trade Association value forum selection clauses. Article 17 of their Convention on Jurisdiction and Enforcement of Judgments (Official J.E.C. 189, v. 33, July 28, 1990, pp. 1-34, reprinted 29 I.L.M. 1413 [E.U. “Brussels” Convention]; 28 I.L.M. 620 [E.F.T.A. “Lugano” Convention][hereinafter E.U.-E.F.T.A.]) provides wide scope for the parties to an agreement to select an exclusive forum for litigation of disputes that may arise between them. Our brethren abroad have more sense, however, than to extend this freedom to consumer contracts. Section 4 of that same Convention (arts. 13-15) protects the consumer of goods or services from bargaining away her right to sue at home when “in the State of the consumer’s domicile the conclusion of the contract was preceded by a specific invitation addressed to [her] or by advertising.” E.U.-E.F.T.A., *supra*, art. 13(3)(a). The result in *Carnival Cruise Lines* might survive the Convention for the Convention’s consumer provisions do “not apply to contracts of transport.” E.U.-E.F.T.A., *supra*, art. 13 ¶ 3. Of course, the contract in *Carnival Cruise Lines* could be found not to be one of transport, but of a different service. I am not sure what. Perhaps the privilege of stuffing yourself with all the mediocre food you can eat. In any event, the wise provisions of our European cousins strengthen our conclusion that this forum-selection clause should not be enforced.

II. CHOICE OF LAW

For the same reasons, neither we nor the Georgia courts will enforce the choice-of-law clause in the “Conditions of Contract.” Restatement (Second) of the Conflicts of Laws § 187 cmt. b (1971), provides that “the forum will scrutinize such contracts (as are contained on tickets) with care and will refuse to apply any choice-of-law provisions they may contain if to do so would result in substantial injustice to the adherent.” *Id.* That comment applies here.

III. JURISDICTION

We also dismiss defendant’s 12(b)(2) motion to dismiss for lack of
personal jurisdiction. The same E.U. and E.F.T.A. Convention provisions protecting the consumer from adhesion forum-selection clauses, confer jurisdiction over the other party at the consumer’s domicile. The Atlanta travel agency was the defendant’s agent for the purpose of establishing at the consumer’s home the contacts (concluding the contract and advertising) that, under the Convention, permit the consumer to sue the other party there. E.U.-E.F.T.A., supra, arts. 13(3)(a), 14 ¶ 1. Surely jurisdiction that our European cousins regard as proper and civilized cannot violate due process, or our Constitution is on its head.

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STEIN, J.*: (concurring)

I would deny defendant’s motion to dismiss for lack of personal jurisdiction because the forum selection clause, even if enforceable, does not divest this Court of jurisdiction. Accordingly, a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(3) is not an appropriate mechanism to enforce the clause. Use of this procedure is analytically incoherent and unnecessarily confuses the source of law governing the enforceability of forum selection clauses in federal court.

Plaintiff’s contention that state, rather than federal, law governs the present motion is predicated on the distinction between the procedural posture of this case and that of Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988). Stewart resolved definitively that the enforceability of a forum selection clause asserted as grounds to transfer pursuant to 28 U.S.C. § 1404(a) (1988) is governed by federal law. To find a live Erie issue in the wake of Stewart, plaintiff relies on the fact that defendant has attempted to enforce the forum selection clause through a motion to dismiss for lack of personal jurisdiction. In this posture, § 1404(a) seems to exert no influence, and the court must grapple with the “relatively unguided” choice between state and federal common law.1 The other members of this Court apparently accept Plaintiff’s jurisdictional characterization and therefore assume that defendant’s motion to

* Allan R. Stein: Professor of Law, Rutgers School of Law-Camden. I would like to thank Steve Burbank, Perry Dane, Roger Dennis, Michael Dorf, Richard Hyland, Larry Kramer, Earl Maltz, Dennis Patterson and Linda Silberman for their helpful suggestions.

1. Hanna v. Plumer, 380 U.S. 460, 471 (1965). The “relatively unguided Erie choice” refers to the choice between federal and state procedural law when the application of federal law is not specifically authorized by federal legislation. Id.
dismiss for lack of jurisdiction is the appropriate procedural mechanism to enforce the forum selection clause. That assumption confuses, I contend, rather than clarifies, the choice of law.

In this case, the parties have entered into an agreement that all disputes between them will be resolved in the state courts of Vermont. Plaintiff was allegedly injured at defendant’s ski facility in Colorado and, in violation of the agreement, has filed suit in the state courts of Georgia. Defendant removed to federal court, and then moved to dismiss for lack of personal jurisdiction and venue. The law of Georgia traditionally held that forum selection clauses were unenforceable (although there is some indication that the law may be changing). Thus, the key issue for the rest of the court is whether the federal courts may extend the federal common law position developed in the admiralty context and dismiss in favor of the Vermont state forum notwithstanding Georgia law to the contrary.

I have previously argued that state law has a central role to play in court-access questions not governed by federal statute. See Allan R. Stein, *Erie and Court Access*, 100 Yale L.J. 1936 (1991). I do not want to replay those arguments here. Instead, I conclude that this is not, in fact, an “unguided” *Erie* choice. I would hold that the federal transfer statute (28 U.S.C. § 1404(a)) provides the exclusive mechanism for interstate venue adjustments. If such a motion were granted, and that defendant still wanted to get into the Vermont state court, it should take that up with the Vermont federal court.

My reasons for this conclusion are complicated and require an understanding of the various ways that the parties might seek to enforce the forum selection clause, and the interrelationship between those enforcement mechanisms.

One way or another, it is likely that the motion under consideration will not be dispositive of the parties’ rights under the forum selection clause. If the Court disregards state law and enforces the forum selection clause through dismissal per defendant’s Rule 12 motion, Plaintiff is free to refile in Georgia state court. As a jurisdictional dismissal, that disposition is without prejudice to refiling in a different jurisdiction, namely the Georgia state courts. At that point, having been educated


3. Federal Rule of Civil Procedure 41(b) provides that dismissals for lack of jurisdiction are not adjudications upon the merits. Such dispositions are, accordingly, without prejudice to refiling. *Costello v. United States*, 365 U.S. 265 (1961) (case dismissed on jurisdictional basis does not create *res judicata* bar to subsequent suit).
by the first go-around, plaintiff would undoubtedly attempt to join a non-diverse defendant to defeat removal.

Alternatively, if the majority of this Court are correct in asserting that state law may govern outside of 28 U.S.C. § 1404 (as I believe they are), the Court will probably deny the motion to dismiss. At that point, defendant would undoubtedly move to transfer to federal court in Vermont pursuant to § 1404 rather than litigate in federal court in Georgia.4 Given the holding of Stewart, the Court would be hard-pressed not to give the forum selection clause at least some consideration in deciding the transfer motion notwithstanding Georgia law.5

Thus, permitting a litigant to enforce a forum selection clause through a jurisdictional dismissal will not, as a practical matter, resolve the rights of the parties under that clause and will only encourage further preliminary maneuvering. But even if enforcement of the forum selection clause through a jurisdictional dismissal did settle the question, I do not believe that it would be appropriate.

In my view, the forum selection clause in question in fact creates two separate covenants raising distinct choice-of-law questions: a “horizontal covenant”—the agreement to litigate in Vermont; and a “vertical covenant”—the waiver of the right to file in or remove to federal court there. Neither, I suggest, generates a jurisdictional defect. Accordingly, a

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4. Besides moving the case to a federal rather than state forum, the principal tactical difference between a § 1404(a) transfer and a 12(b)(2) dismissal is that a transfer will not affect the substantive law applied to the case. Under Van Dusen v. Barrack, 376 U.S. 612 (1964), the transferee court must apply the same law that would have been applied by the transferor court. Obviously if the case were dismissed and refiled in Vermont, plaintiff would have no assurance that Vermont would apply the same law as Georgia.

5. There is, of course, no guarantee that the court will choose to transfer pursuant to § 1404(a). First, the court may be concerned that since the contract did not call for litigation in federal court at all, transfer to a federal court would not be giving effect to the contract. As discussed below, I do not believe that concern is well founded. Moreover, if there were no other significant connections with Vermont, transfer may be denied notwithstanding the forum selection clause, as occurred in Stewart following remand. See Stewart Org., Inc. v. Ricoh Corp., 696 F. Supp. 583, 588-89 (N.D. Ala. 1988). Given the fact that plaintiff’s claim arose in Colorado, and bore little relation to Vermont, the transfer motion could well be denied on this basis.
motion to dismiss pursuant to Rule 12 is an inappropriate mechanism to enforce the agreement.

Once it is recognized that the forum selection clause does not create a jurisdictional problem, the range of appropriate enforcement mechanisms under federal practice narrows considerably. The procedural mechanism selected will have a direct impact on the law applicable to the motion.

The horizontal covenant, I argue, should be enforced domestically through the procedural mechanism best suited for that purpose, namely § 1404(a). Pursuant to Stewart, federal law will control the enforceability of that part of the forum selection clause.

While there is some division of authority on the question, had the contract simply said that the parties agree to litigate in Vermont, without specifying a state forum, many courts would now treat enforcement of that provision as within the exclusive domain of § 1404(a). 7

Prior to Stewart, a myriad of mechanisms were commonly employed, including motions under Federal Rules of Civil Procedure 12(b)(1) (subject-matter jurisdiction dismissal), 12(b)(2) (personal juris-

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6. International choice of forum clauses raise different problems since the alternative forum is outside the reach of § 1404, which authorizes transfer to United States district courts only. Thus, § 1404 could not be used to even partially enforce international forum selection clauses.

diction dismissal), 12(b)(3) (improper venue dismissal), and 28 U.S.C. § 1406 (transfer for improper venue). The use of these devices is dependent on the defendant’s ability to characterize the problem generated by the breach of the forum selection clause as “jurisdictional.” That is to say, unless the forum selection clause actually divests a court of its statutory authority to adjudicate the dispute, the use of these devices is questionable.

Stewart strongly implies that such a jurisdictional characterization is, in fact, inappropriate. In Stewart, defendant moved to transfer the case out of Alabama to New York, the venue stipulated in the forum selection clause, pursuant to § 1404(a), or in the alternative, to dismiss or transfer pursuant to § 1406. The domains of the two provisions appear to be mutually exclusive. Section 1404 is available to transfer cases from courts that have proper jurisdiction and venue, while § 1406 provides for transfer or dismissal from “a district in which is filed a case laying venue in the wrong division or district.” Id. While the Supreme Court did not address the matter directly, the Court did note that “[t]he parties do not dispute that the District Court properly denied the motion to dismiss for improper venue . . . because respondent apparently does business in the Northern District of Alabama.” Stewart, 487 U.S. at 28 n.8. In other words, the forum selection clause did not render defective an otherwise appropriate venue. That statement should logically preclude all motions predicated on the theory that the original court lacks jurisdiction or venue by virtue of the forum selection clause. Accord, David H. Taylor, The Forum Selection Clause: A Tale of Two Concepts, 66 Temple L. Rev. 785, 830 (1993).

Moreover, the Supreme Court’s attitude toward the forum selection clause in Stewart was completely at odds with the view that the parties had contractually stripped the Alabama court of authority. The central holding of the opinion is that the forum selection clause is but one of numerous factors that a court must consider in deciding whether a transfer is “in the interest of justice.”

8. See Note, Viva Zapata! Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases, 66 N.Y.U. L. Rev. 422, 445-447 (1991) and cases cited therein. The Note persuasively argues that none of the current enforcement mechanisms is appropriate and suggests legislation to provide a motion specifically to enforce forum selection clauses.

9. Accord, Federal Practice & Procedure, supra, at 264, (citing Liaw Su Teng v. Skaarup Shipping Corp., 743 F.2d 1140, 1147 (5th Cir. 1984)).

10. Id. See generally, David E. Steinberg, The Motion to Transfer and the Interests of Justice, 66 Notre Dame L. Rev. 443 (1990).
Section 1404(a) directs a district court to take account of factors other than those that bear solely on the parties’ private ordering of their affairs. The district court also must weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of “in the interest of justice.” It is conceivable in a particular case, for example, that because of these factors a district court acting under § 1404(a) would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause, whereas the coordinate state rule might dictate the opposite result. . . . The forum-selection clause, which represents the parties’ agreement as to the most proper forum, should receive neither dispositive consideration (as respondent might have it) nor no consideration (as Alabama law might have it), but rather the consideration for which Congress provided in § 1404(a). *Stewart,* 487 U.S. at 30-31 (citations omitted).

*Stewart* thus makes clear that while the statutory venue and jurisdiction provisions may be supplemented by private ordering,11 such private ordering does not strip the court of the statutory authority that it otherwise possesses. The forum selection clause simply renders the stipulated forum a potentially preferable venue. While a court may choose to honor a forum selection clause, it is not because the court is without jurisdiction to adjudicate.12 Indeed, if the stipulated forum lacks other affiliation with the litigation, the courts will deny enforcement of the clause and retain jurisdiction. Thus, the whole structure of § 1404 and practice thereunder makes clear that the parties do not contractually divest the transferee court of jurisdiction.13 Logically then, a

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11. Jurisdiction by consent is one of the most time-honored bases for personal jurisdiction. It is recognized in *Pennoyer* as an exception to its holding that a state only may exert jurisdiction over persons or property present within its borders. *Pennoyer v. Neff,* 95 U.S. 714, 735 (1878). Volitional affiliation with a forum now forms the core of modern “purposeful availment” doctrine in the law of personal jurisdiction. See generally, Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction,* 65 Tex. L. Rev. 689 (1987).

12. Cf. *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1212 n.7 (3d Cir. 1991) (enforceability of forum selection clauses under *Bremen* is “predicated on the notion that while the federal court has subject jurisdiction, it should decline to exercise it”); *Wm. A. Mueller & Co. v. Swedish Am. Line, Ltd,* 224 F.2d 806, 808 (2d Cir. 1955) (while reasonable forum selection clauses may be enforceable, “the parties by agreement cannot oust a court of jurisdiction otherwise obtaining: notwithstanding the agreement, the court has jurisdiction”).

13. This is also why any motion to remand from Georgia federal to Georgia state court should be denied; the Georgia federal court does have jurisdiction. It may choose to use that jurisdiction to enforce the forum selection clause, and remanding to the Georgia state court would not be an appropriate enforcement. The clause does not render the Georgia state court a preferable forum.
case transferable pursuant to § 1404(a) ought not be amenable to a jurisdictional or venue dismissal.

However, as perceptively noted by Professor David Taylor, the Supreme Court’s decision in *Carnival Cruise Lines* did muddy the procedural waters. See Taylor, *supra*, at 842-49. In that case, the defendant was apparently permitted to enforce a forum selection clause pursuant to 28 U.S.C. § 1406 even though the forum selection clause in question could have been satisfied by transfer to a Florida federal court pursuant to § 1404(a). Section 1406 is only available where the transferor court lacks venue or jurisdiction, see generally, 15 Charles A. Wright, et al., *Federal Practice & Procedure* 263-64 (1986), thus suggesting that the forum selection clause generated such a defect. The procedural posture of the case, however, suggests that the case, in this regard, may be an anomaly, and should not be read as a repudiation of Stewart’s characterization of forum selection clauses as non-jurisdictional.

Defendant in *Carnival Cruise Lines* moved to dismiss for lack of personal jurisdiction because it lacked contacts with Washington, or in the alternative to transfer to Florida pursuant to § 1406. The district court dismissed for lack of personal jurisdiction over the defendant in Washington. The court of appeals reversed the jurisdictional ruling, and further rejected enforcement of the forum selection clause, an issue not addressed by the district court. The court of appeals found the clause unenforceable under the under the *Bremen* standard of reasonableness controlling in Admiralty. Without discussing the procedural mechanism employed by defendant, the Supreme Court concluded that the clause was enforceable under the *Bremen* standards and reversed. However, its reversal simply undid the court of appeals’s own reversal, thus leaving intact the district courts original jurisdictional dismissal. See, Taylor, *supra*, at 848.

As the Supreme Court never considered the personal jurisdiction issue, its intent could not have been to resolve the case on that basis. However, no court in *Carnival Cruise Lines*, in fact, ordered that the case be transferred. See Patrick J. Borchers, *Forum Selection Agreements In the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 Wash. L. Rev. 55, 74-75. (1992); Taylor, *supra*, at 847-49. The most reasonable reading of *Carnival Cruise Lines* then, is that the Court never addressed whether forum selection clauses generate jurisdictional defects sufficient to justify enforcement outside of § 1404.14

14. Accord Haskel, 862 F. Supp. at 914 ("Carnival Cruise left open the question
Accordingly, it is relatively clear that § 1404 should provide the exclusive mechanism to move a case from one federal court to another where the first court has appropriate statutory jurisdiction and venue. Can it be then, that the specification of a state forum in the forum-selection clause changes all of this? If a contract specifying litigation in Federal Court B does not divest Federal Court A of jurisdiction, a state forum selection clause can be no more debilitating. While one may question whether § 1404 may be employed to transfer a case to a federal court when the forum selection clause calls for a state forum, the intra-federal cases ought to foreclose any jurisdictional dismissal based on a forum selection clause.

Some courts have held that if the clause does not technically divest the court of jurisdiction, then at least it is enforceable via a motion to dismiss on the merits pursuant to Rule 12(b)(6). Such a characterization, I believe, is even less persuasive than the jurisdictional one. While the filing of a complaint in Georgia may well have been in breach of contract, it did not render the underlying complaint unredeemable. Indeed, a 12(b)(6) dismissal that did not otherwise stipulate would be treated as a judgment on the merits pursuant to Rule 41(b), an indefensible consequence. Of course, the court could choose to stipulate that the dismissal was without prejudice. But that would represent an acknowledgment that the court was searching for the appropriate way to enforce the clause, and that 12(b)(6) does not quite fit. Taylor, supra, at 798; accord, Note, Viva Zapata! Toward a Rational System of Forum Selection Clause Enforcement in Diversity Cases, 66 N.Y.U. L. Rev. 422, 445-447 (1991).

There is one plausible enforcement mechanism other than § 1404(a) that might be employed: the common law doctrine of *forum non conveniens*. That device is used by federal courts to dismiss claims more appropriately brought in a foreign country. Since § 1404(a) is generally thought to preempt *forum non conveniens* practice where the alternative forum is in the United States, there are virtually no federal cases that

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15. See, e.g., Lambert v. Kysar, 983 F.2d 1110, 1113 n.2 (1st Cir. 1993) (motion to dismiss on basis of forum selection clause must be brought under 12(b)(6) rather than 12(b)(3)); Crescent Int'l., Inc. v. Avatar Communities, Inc., 857 F.2d 943 (3d Cir. 1988).

use *forum non conveniens* domestically. Conceptually, however, *forum non conveniens* fits better than the other devices. *Forum non conveniens* is predicated on the existence of jurisdiction and venue in the original forum; like § 1404, it is specifically designed to mediate between competing jurisdictional claims. Moreover, since the alternative forum in the case of a state forum selection clause is not in the federal system, the preemptive impact of § 1404 is not necessary.

Nevertheless, I would argue that *forum non conveniens* ought not be employed in this context. First of all, invocation of a doctrine that is generally considered preempted by federal statute can only introduce confusion into an already devilishly complex area. The uniformity achieved by consolidating enforcement into a single procedural mechanism would seem to be well worth whatever marginal infringement it imposes on state regulatory prerogatives. Remember that any state rule against enforcement of forum selection clauses will be defeated if the case is subsequently transferred pursuant to § 1404 in any event.

The primary impact of procedural consolidation will be to subject all forum selection clauses to a single federal standard independent of where the claim is filed and of how defendant frames the motion. This is a particularly compelling benefit. Not only does enforcement outside of § 1404(a) encourage the kind of forum shopping for state law evident here, but it facilitates the development of inconsistent federal law. Currently, different federal standards are applied to forum selection clauses depending on whether or not enforcement is sought under § 1404(a). In *Stewart*, the courts ultimately declined to enforce a bargained-for clause between two commercial parties because the stipulated forum lacked significant connection with the litigants. Yet in *Carnival Cruise Lines*, the Court enforced a boiler-plate clause against a consumer. As noted by several commentators, any inconsistencies in the approach to forum selection clauses evident in *Stewart* as compared to *Carnival Cruise Lines* are exacerbated by the procedural distinctions between the two cases: because *Carnival Cruise Lines* arose in the § 1406 context, the Court did not focus on the full range of factors relevant to a § 1404(a) transfer. See Borchers, *supra*, at 75; Taylor, *supra*, at 845-47. Procedural consolidation will lead to greater substantive uniformity.

More significantly, if one accepts my characterization of the forum selection clause as creating two separate covenants, the horizontal com-
ponent ought to be preempted by § 1404 since that covenant can be fully enforced by transfer. Note that in asserting that the contract is comprised of two separate covenants I am not making a claim about the intent of the parties, or the severability of those covenants under contract law. Rather, I am making an observation about the enforceability of two different aspects of the contract in federal court. Moving the case from one part of the country to another has different implications for the federal courts than divesting the federal courts of jurisdiction altogether. Distinguishing those two aspects clarifies the source of governing law and simplifies enforcement. The federal courts have a mechanism to move cases horizontally. The fact that further proceedings will be necessary to give full effect to the contract, i.e., a remand (of sorts) from the transferee court, is not sufficient justification to abandon that mechanism.

Why not use § 1404(a)? One possible objection may be that since the clause does not stipulate a Vermont federal forum, transfer would not be an appropriate enforcement of the clause. There are two powerful responses of concern. First, as demonstrated by Stewart, the issue in a § 1404 transfer is whether it is in the “interest of justice” to transfer, not per se whether to enforce the contract. As between a Georgia and Vermont federal forum, it may be preferable to litigate in the state the parties anticipated litigating in, even if the case does not end up in the precise court agreed to in the contract. It would be at least as compelling as transferring to a contractually-stipulated federal forum in Vermont.

Moreover, the case still may find its way into the Vermont state courts. If the courts follow my approach of bifurcating the enforcement of the contract, transfer to Vermont federal court is not inconsistent with enforcing the precise terms of the contract; it is simply the first step.

While enforceability of the vertical covenant is not currently before this Court, it is appropriate to examine that issue now in order to determine the propriety of bifurcating enforcement of the clause.

Assuming the case would be transferred to the Vermont federal court, that court will then have to decide whether to enforce the vertical covenant and send the case to the Vermont state court. The order at that point could not technically be a “remand” since there is no docket in Vermont, and the court would not be remanding or returning the case to the court from which it was removed.17 However, the court

17. Section 1447 authorizes a remand “to the State court from which it was re-
could still enforce the vertical covenant by entering a conditional *forum non conveniens* dismissal.\(^{18}\) Since no federal statute covers this vertical transfer of authority, there is no preemption problem, as there might have been had the same motion been granted by the Georgia federal court. Moreover, by isolating the vertical component, the choice-of-law governing the vertical covenant is clarified.\(^{19}\)

moved.” Thus, a court may not, under the statute, remand a case to a court from which it was not removed. See *Bradgate Assocs. v. Fellows, Read & Assocs.*, 999 F.2d 745, 750 (3d Cir. 1993) (court may not remand portion of case filed originally in federal court).

18. This device is typically employed in international *forum non* dismissals. The case is dismissed on the condition that defendant makes himself amenable to suit in the alternative forum. See, e.g., *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 809 F.2d 195, 203 (2d Cir. 1987) (upholding conditions placed on *forum non conveniens* dismissal that defendant submit to personal jurisdiction in India and waive any personal jurisdiction objection). In this case, the problem is not defendant’s amenability, but rather Plaintiff’s willingness to pursue the claim in Vermont rather than in a Georgia state court. Thus, the court could threaten to reassert jurisdiction if Plaintiff reinitiated the claim anywhere other than in the Vermont courts. Alternatively, the defendant could initiate a declaratory judgment proceeding in Vermont.


19. My colleague, Professor Perry Dane, has suggested that the isolation of the vertical covenant is, in fact, illusory. Once the federal court decides to enforce the vertical covenant and return the case to state court, the horizontal component comes into play again; the court must choose which state court to “return” the case to. The decision to conditionally dismiss in favor of a Vermont state court rather than remand back to the Georgia state court thus replicates the dilemma posed by defendant’s original 12(b)(3) motion in Georgia federal court. Section 1404 has not resolved enforcement of the horizontal covenant, since that only settled where the case would be tried in the federal system.

While this is a powerful critique, it is, I believe, predicated on the assumption that the vertical covenant creates a jurisdictional defect. There is no reason to return the case to the Georgia state court. The vertical covenant does not divest the federal courts of jurisdiction; rather, it renders the Vermont state court a preferable venue over the Vermont federal court. No reasonable construction of the forum selection clause renders the Georgia state court preferable to either the Vermont state or federal courts. Accordingly, it would not be an appropriate enforcement of the vertical covenant to remand to the Georgia state court, just as it would have been inap-
There is, I believe, a strong case to be made for treating the vertical covenant as a matter of federal law, particularly following transfer to Vermont federal court. Note that following the transfer, the choice of forum is no longer between a federal forum and a Georgia state court. Rather, it is between a federal and Vermont state court. Accordingly, Georgia, the source of any applicable state law on the question under *Van Dusen* would neither be vested nor divested of jurisdiction as a consequence of the vertical covenant. Any interest that it has in the case at this point would have to be derived from an interest in the substantive rights of the parties under the contract, as opposed to the mere “procedural” interest in regulating access to its own courts. Accordingly, it may not be at all clear that Georgia would apply its own law outlawing forum selection clauses to this transaction, or would be constitutionally permitted to do so.20

Given Plaintiff’s residence in Georgia, it may be that Georgia does have a legitimate interest in preventing its residents from being subjected to oppressive terms in contracts of adhesion. But where is the “oppression” now? The primary consequence of the vertical covenant at this point will be to direct on which side of the street the litigation will occur.21 It may well be that Georgia would not disapprove of forum selection clauses that did not have any interstate consequences.22 In

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21. There may be some impact of the applicable law since the federal court under *Van Dusen* will be bound to apply the law of the transferor court, namely Georgia law. The Vermont state court, in contrast, will be free to apply its own choice of law. The hypothetical record stipulates that Georgia normally enforces choice of law provisions. Thus, it appears that under the contract, Vermont law will apply to the substantive issues regardless of whether the case is heard in state or federal court. A significant change in the applicable law resulting from dismissal would create a more complex problem and might conceivably justify retention of jurisdiction in the federal court.

22. A similar distinction might be gleaned from the Alabama “ouster doctrine” at issue in *Stewart*. The state law against forum selection clauses only applied to contracts specifying a forum outside of Alabama. *See Redwing Carriers, Inc. v. Foster*, 382 So. 2d 554, 556 (Ala. 1980). Thus, the state’s concern over forum selection clauses only extended to those provisions that had interstate consequence.
other words, its outlaw of horizontal covenants is not dispositive of its attitude toward vertical covenants.

Moreover, it would be hard to say there is, in fact, any state law on the enforceability of the vertical covenant. A covenant requiring litigation in federal court would either be self-executing by the parties’ choice to file or remove to federal court, or unenforceable in the event federal jurisdiction did not otherwise exist.23 A covenant requiring litigation in state court would only be breached by litigation in the federal courts. *Thus, any law on the enforceability of vertical covenants would necessarily be made by federal courts.* While in theory, the question may still be a matter of “state law,” there will not be any state law to consult. It thus seems a bit silly to direct the federal court to this non-existent state law.24

Conversely, there would appear to be a particular federal interest in deciding whether parties may waive their right to a federal forum. The federal courts will absorb the costs of a no-waiver rule, and the federal interest in providing a diversity forum could be sacrificed by a pro-waiver rule.

In fact, federal law seems to be quite comfortable with waivers of federal jurisdiction. A party who fails to file a removal petition within the statutory twenty day period, as provided by 28 U.S.C. § 1447 (1988), unilaterally waives their right to a federal tribunal. Contractual waivers of jurisdiction are routinely enforced through the Federal Arbitration Act,25 as well as through the *Bremen* doctrine in admiralty.26 It is hard to see why the contractual waiver here would be any more problematic.27 Indeed, the federal courts routinely remand cases re-

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25. 9 U.S.C. §§ 1-208. Enforcement of an arbitration agreement necessarily precludes the exercise of federal jurisdiction over the case.

26. When an action is dismissed in favor of a foreign forum, the court, in effect, recognizes that there is no inalienable “right” to a federal adjudication.

27. *But see Linda S. Mullenix, Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 Fordham L. Rev. 291, 332 (1988) (arguing against remand of cases filed in violation of forum selection clauses) [hereinafter Another Choice of Forum]; *see also* Taylor, *supra*, at 851-52 (arguing that procedural waivers and arbitration agreements are distinguishable from agreements in advance of litigation to transfer authority from the federal to state
moved from state court in violation of a forum-selection clause without consulting the forum-state law, at least where the parties have manifest an unequivocal intent to waive their rights to a federal forum.28

So where does that leave us? Notwithstanding the Georgia law against forum selection clauses, defendants are accorded an opportunity through this bifurcated procedure to enforce the provision and litigate in the Vermont state courts.

This is perhaps an odd conclusion for someone who has argued in the face of black-letter law that state law should exert a greater influence on federal court access than is generally acknowledged.29 It seems to me, however, that the Supreme Court already crossed that bridge in Stewart. If Congress indeed wanted to preempt state forum-selection law in the § 1404 context, and if § 1404 generally preempts forum non conveniens, could it possibly be appropriate to circumvent that combination by the expediency of characterizing defendant’s initial motion as “jurisdictional” or by some other procedural sleight of hand?

The jurisdictional characterization prolongs the inevitable. If defendant loses its motion to dismiss, it will make a § 1404(a) motion any-

28. See, e.g., Milk ‘N’ More, Inc. v. Beavert, 963 F.2d 1342 (10th Cir. 1992); Foster v. Chesapeake Ins. Co., 933 F.2d 1207 (3d Cir. 1991); Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp., 838 F.2d 656, 659 (2d Cir. 1988); Pelleport Investors, Inc. v. Budco Quality Theaters, Inc., 741 F.2d 273, 280-81 (9th Cir. 1984). But see Mullenix, supra, Another Choice of Forum, at 339 (arguing that there is “high probability that the federal court will not enforce the forum clause so as to order a remand of the litigation to state court”). I do not read the cases cited by Professor Mullenix as supportive of her claim that there is federal hostility to vertical covenants. Most of the cases she cites are refusals to enforce forum selection clauses calling for litigation in other states, and are thus inapposite. See, e.g., Cutter v. Scott & Fetzer Co., 510 F. Supp. 905 (E.D. Wis. 1981); Lulling v. Barbaby’s Family Inns, Inc., 482 F. Supp. 318 (E.D. Wis. 1980). In other cases, the contract did not clearly specify exclusive jurisdiction in the state forum. See, e.g., Proyecfin de Venezuela, S.A. v. Banco Indus. de Venezuela, S.A., 760 F.2d 390 (2d Cir. 1985); First Nat’l City Bank v. Nanz, Inc., 437 F. Supp. 184 (S.D.N.Y. 1975). In another case, the court declined to remand because the plaintiff was not a party to the forum selection clause relied upon. See Transure, Inc. v. Marsh & McLennan, Inc., 766 F.2d 1297, 1299 n.1 (9th Cir. 1985). Professor Mullenix does not, in fact, cite any cases where the federal court declined to enforce an unequivocal waiver of federal jurisdiction.

29. As I acknowledged in an earlier article urging federal conformity to state forum non conveniens doctrine in some circumstances: “[v]irtually no federal court has considered itself bound by doctrines providing greater court access than would be granted by federal law.” Allan R. Stein, Erie and Court Access, 100 Yale L.J. 1936, 1938 n.5 (1991).
way. As a matter of sound judicial administration, if nothing else, it seems to me prudent to cut to the chase.

There is also a substantial fringe benefit to my approach that is, ironically, relatively protective of state law. Given the federal courts’ propensity to federalize all questions regarding federal court-access, the real risk of permitting enforcement of forum selection clauses outside of § 1404(a) is not that state law will play too great a role, but that federal common law will run amok. While I am critical of this trend, there is no denying that most federal courts, given the procedural opportunity, would extend federal common law developed in the admiralty context to diversity cases, rather than consult state law.

Consolidating federal enforcement of forum selection clauses under § 1404(a) substantially buffers the excesses of free-standing federal common law evident in *Carnival Cruise Lines*. That decision has been widely condemned as an unreflective enforcement of an unconscionable, unbargained-for, boiler-plate forum selection clauses. As several commentators have noted, that approach was facilitated by the procedural posture of the question. Because the issue was not raised in the context of § 1404(a), the *Carnival Cruise Lines* Court did not have to consider whether transfer was “in the interest of justice,” the standard for transfer under § 1404(a). Borchers, supra, at 86 n.9; Taylor, supra, at 845-46. Rather, the question was simply whether the contract should be enforced. Whether or not *Carnival Cruise Lines* represented an appropriate application of the *Bremen* reasonableness standard, it is clear that

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30. See, e.g., *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514-15 (9th Cir. 1988) (federal law controls enforceability of forum selection clause raised in motion to dismiss under rule 12(b)(3)); *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987) (federal court not bound by state law against forum non conveniens dismissals); cf., *Federal Practice & Procedure, supra*, § 3828, at n.42, & 1994 Supp. (control of federal docket is matter of federal law; “Any other result would be inconsistent with the independent status of the federal courts.”).

31. As Professor BORCHERS has noted, this trend is already apparent in the case law addressing the enforceability of forum selection clauses outside of § 1404. While there is a division in the circuits, a majority of courts addressing the issue have extended *Bremen* rather than consult state law. See Patrick J. Borchers, *Forum Selection Agreements In the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 Wash. L. Rev. 55, 79 (1992). (“In diversity cases that have explicitly considered and resolved the issue, the preponderant, but by no means unanimous, view is that federal law applies.”). Cf. Stein, supra, at 1981 n.218.

unhinging the inquiry from the § 1404(a) matrix set the stage for overenforcement of the provision.

Section 1404 is more than a procedural vessel; it imposes substantive limitations on the enforcement of forum selection clauses. Under § 1404(a), the forum selection clause is but one of several factors the court must look to in deciding whether to transfer. To the extent that a federal law of forum selection clauses clashes with state policies disfavoring these provisions, that conflict will be abated by the flexibility built into § 1404.

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SOLIMINE, J.*: (concurring in part and dissenting in part)

I agree with the majority of my colleagues hearing this case en banc that state law governs the validity of the forum selection clause in this diversity action. However, I conclude that on the facts of this case, Georgia law would not prohibit the enforcement of the clause. Therefore, I would affirm the decision of the district court.

Plaintiff, pursuant to a contractual agreement with the defendant Ski Vacations, went on a ski trip to Colorado, was injured on the slopes, and rendered a quadriplegic. Plaintiff brought a tort suit against Ski Vacations in a state court in Plaintiff’s state of residence, Georgia. The contractual papers included clauses directing that any tort claims be brought in a Vermont state court and would be governed by Vermont law. Ski Vacations removed the action to federal court on the basis of diversity jurisdiction, and moved to dismiss for lack of personal jurisdiction and/or improper venue, primarily on the basis of the choice of forum clause. The court below granted the motion, holding that federal law governed the issue, and that cases such as Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988) and Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991), favored enforcement of forum selection clauses like that involved in this case.

I. Erie Issues

I agree with Judges BURBANK, REDISH and SILBERMAN that, in this action, state law governs the validity of the clauses at issue. Unlike Carnival Cruise Lines, this is a diversity action, and no federal statute

* Michael E. Solimine: Donald T. Klekamp Professor of Law, University of Cincinnati College of Law.
or rule supplies a rule of decision on point. Despite the expansive interpretation given the transfer of venue statute, 28 U.S.C. § 1404 (1988), in Stewart, no such transfer is sought here and nothing in the text or purpose of the removal statutes, 28 U.S.C. §§ 1441-47 (1988), speaks to the issue of forum selection clauses. Unlike the discretion lodged in the former statute, the removal statute is more straightforward and removal is automatic once the requirements of the statute are met, as here.

The choice between federal and state law turns, then, on the “relatively unguided Erie choice” found, among other places, in the dicta in Hanna v. Plumer, 380 U.S. 460 (1965). Like my colleagues (save for Judge Borchers) I agree that application of federal law (which, for the moment, we can assume is more solicitous toward the clause at issue) would lead to intrastate forum shopping and the inequitable administration of law. A federal court should thus apply state law.

I also agree with Judges Redish and Silberman that a more systemic approach, considering both federal and state interests, is possible given that Byrd v. Blue Ridge Rural Elec. Cooper., 356 U.S. 525 (1958) has not been overruled. (However, such an approach was deemphasized in Hanna and later Rules of Decision Act cases like Chambers v. NASCO, Inc., 501 U.S. 32 (1991)). But the result would be the same. It is difficult to discern a federal interest in a diversity action paramount to a state regulatory interest limiting forum selection clauses. This state interest is of course derived from the power to police contractual dealings, at least of those that have a connection with the state. If the state interest is based on other, perhaps more parochial concerns, then the state policy might be due less deference. Cf. Allan R. Stein, Erie and Court Access, 100 Yale L.J. 1935, 1982 (1991). However, an examination of state case law on this point is apt to be disappointing. The oft-cited case from Georgia concluding that forum selection clauses will not be enforced contains but two unhelpful explanatory paragraphs. Cartridge Rental Network v. Video Entertainment, Inc., 209 S.E.2d 132, 133 (Ga. App. 1974). In these circumstances, it would be inappropriate to assume that regulatory interests are not driving the Georgia policy, at least in part.

Finally, the relevance of the choice-of-Vermont-law clause is worth mentioning. Like Judge Borchers, I would not argue that we should automatically credit that clause, and refer to state (Vermont) law to resolve the Erie issue. The Erie choice is a structural issue not amenable (unlike other choice of law issues) to advance determination by the parties. Thus, the Erie issue should not be delegated to the parties and should remain to be decided by the court. Moreover, there is no indica-
tion that the parties wished the clause to reach this issue. (If they had, it is interesting to note that Vermont presumptively enforces choice of forum clauses. *Chase Commercial Corp. v. Barton*, 571 A.2d 682 (Vt. 1990)).

For these reasons, Georgia law, not federal common law, supplies the rule of decision governing the validity of the forum selection clause in this case.

II. APPLICATION OF GEORGIA LAW

As noted above, Georgia has been regarded as a state which will not enforce forum selection clauses. However, more recent intermediate decisions from Georgia have distinguished the earlier cases and will presumptively enforce such clauses. *E.g.*, *American Fin. Serv. Group, Inc. v. Boswell Mem. Hosp.*, 447 S.E.2d 333 (Ga. App. 1994); *Harry S. Peterson Co. v. Natl. Union Fire Ins. Co.*, 434 S.E.2d 778 (Ga. App. 1993). Until and if the Supreme Court of Georgia addresses this issue, we can safely assume that Georgia courts have, or will, follow the trend in federal case law to generally enforce such clauses. (At this juncture, as suggested by Judges REDISH and SILBERMAN, it is tempting to utilize the Georgia certification procedure, Ga. Sup. Ct. R. 37, to permit the state supreme court to supply the definitive word.)

Thus, we return to *Carnival Cruise Lines* as point of reference. Most of my colleagues find this prospect dismaying, and argue either that *Carnival Cruise Lines* was wrongly decided, or is distinguishable from the facts of this case, or both. Even if we were so empowered, I would not overrule *Carnival Cruise Lines*. The decision in that case, enforcing a forum selection clause found in the fine print of a form cruise ticket contract, has been subject to scathing scholarly criticism. *E.g.*, Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 Wash. L. Rev. 55 (1992); Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 Tex. Int’l L.J. 323 (1992). My own view is that *Carnival Cruise Lines* is not an outrage and that forum selection clauses, even those contained in form contracts, should be presumptively enforceable, absent persuasive reasons pressed by the party seeking to vitiate the clause in a particular case. The principles of court review of such clauses should be drawn mainly, though not exclusively, from ordinary rules of contract law which would otherwise regulate contractual dealings among parties like the ones before us. Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 Cornell Int’l L.J. 51 (1992).

Likewise, I do not find *Carnival Cruise Lines* to be distinguishable, though I admit the facts of this case present a close question. The overall "reasonableness" standard of scrutiny advanced in *Carnival Cruise Lines* is not toothless and can lead to invalidating a clause in a particular case. Cf. *Lemoine v. Carnival Cruise Lines, Inc.*, 854 F. Supp. 447 (E.D. La. 1994) (forum selection clause like that in *Carnival Cruise Lines* case not enforced, since plaintiff presented evidence that she had no notice of the clause); *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809 (Utah 1993) (forum selection clause not enforced due to unreasonableness, based on, *inter alia*, parties being from Utah and Canada but clause designated New York as forum).

Is the present case one of those? The contractual aspects of this case are very similar to those in *Carnival Cruise Lines*. In both cases the clauses are found in form contracts prepared by the defendant, though the papers were sent to and signed by the plaintiffs in advance of the trips. The more difficult inquiry is whether the choice of the Vermont forum was unfair and, relatedly, whether Plaintiff here has an adequate alternative forum in that state. At first blush, Vermont in this case does not seem as reasonable a forum as does Florida in *Carnival Cruise Lines*. In the latter, Florida was a principal place of business for the defendant. Here, New York is the home base for the defendant, and it only does business in Vermont (Vermont, of course, is near New York). The record does not tell us if Vermont law or courts have some special expertise with regard to ski litigation. Perhaps defendant chose Vermont, in part, because of favorable Vermont law; the choice of law clause might confirm this suspicion. Certainly, Vermont is not devoid of interest in this case.

Similarly, the record tells us little about whether Plaintiff can litigate this matter in Vermont. A similar issue was addressed in *Carnival Cruise Lines*. As I read the opinions and record in that case, though it
was (and is) widely assumed that Ms. Shute (from the state of Washington) would have enormous difficulty in litigating her personal injury action in Florida, specific persuasive facts to that effect were not truly advanced by Ms. Shute nor made by the trial court. Here, we might assume that Plaintiff, now a quadriplegic, would have understandable problems in litigating this matter other than in the home state of Georgia. The record is quite bare on these points, however, and given modern modes of transportation and communication, and the likelihood that Plaintiff would only need to travel to Vermont once (for the trial, if there is one), we should not automatically assume that it is simply impossible for Plaintiff, and Plaintiff’s attorneys, to litigate this action in Vermont.

Since, in my view, Plaintiff has not met the burden of demonstrating that enforcing the forum selection clause would be unreasonable, the district judge correctly enforced the clause.

III. CONCLUSION

For the foregoing reasons, I respectfully dissent from the majority of my colleagues on this en banc Court. Given my conclusions, I find it unnecessary to reach defendant’s apparent alternative argument that there is no personal jurisdiction over it in Georgia.
Case Two: Extraterritorial Application of United States Law Against United States and Alien Defendants (Sherman Act)

INTRODUCTION*

One does not have to go back very far in United States Supreme Court jurisprudence, to arrive at a time when it was felt that each sovereign had control of its own territory, but lacked the prerogative (or power) to exercise authority in the territory of another.¹ This same principle of territorial exclusivity is recognized, and generally followed, in international relations.² If such principles were not observed, often

* Thomas C. Fischer: Professor of Law, New England School of Law; A.B. 1960, University of Cincinnati; J.D. 1965. Georgetown University Law Center.

¹. See, e.g., Pennoyer v. Neff, 95 U.S. 714 (1878).

². Restatement (Third) of the Foreign Relations Law of the United States § 401 (1986) (discussing "limitations," under general international law, on a state's "(a) jurisdiction to prescribe" (make its laws applicable); "(b) jurisdiction to adjudicate" (exercise judicial authority); and "(c) jurisdiction to enforce" (compel compliance or punish non-compliance)). Obviously, if the concept of "state sovereignty" is to have any force in international law, the ability of one state to interfere in the legal regime of another is very limited. See id. at § 402 which states that

[s]ubject to § 403, a state has jurisdiction to prescribe law with respect to:
(1)(a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Id. See id. at § 403 (stating that even when a basis for the exercise of jurisdiction exists, a state should not do so where, considering all relevant factors, it would be unreasonable); see also EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (holding that Title VII of the Civil Rights Act of 1964 does not apply extraterritorially, unless Congress clearly states such an intent in the statute. The Court held that there was a presumption against the extraterritorial application of United States law which
there would be great tension, and uncertainty about cross-border conduct.

Thus it was that the first time the extraterritorial application of United States antitrust law was considered by the Supreme Court, it was held to be confined to United States territory, notwithstanding the language of the statute. As the quantity of cross-border business transactions increased, however, it became clear that entities could take actions beyond our borders that had serious economic and legal consequences here.

American judicial precedents evolved with this trend. In due course, they allowed United States courts to exercise jurisdiction over absent parties (that had some “minimum contacts” with the state in question) and to apply local substantive law to non-local behavior that caused serious legal or economic “effects” in the state. At least, that was the case whenever the contacts with this country were not so attenuated that it would be inappropriate for United States courts to exercise judicial power, or when the application of our law would “surprise” the foreign defendant.

United States courts were not alone in reaching this conclusion. The European Court of Justice, considering the scope of application of European Community competition law in the “Wood Pulp” case, also found that acts taken beyond its borders could be actionable there.
However, the Court consciously chose a more limited basis (one based on territorialism), than that adopted by United States courts in Alcoa and subsequent cases.\footnote{12}

In both situations, the court in question exercised jurisdiction and applied domestic law, but not without considering the competing interests of other sovereigns. Rather, each court, after balancing those interests, convinced itself that it would be impossible to effectuate the legislative policy of the state it served without exercising judicial authority and applying its law to the foreign acts.

Consequently, this exercise of legislative and judicial authority may be thought limited to a narrow range of cases, in which the state's legal interest is equal to or greater than that of competing sovereigns, and where it could easily be frustrated if the extra-state behavior were not punished.\footnote{13} Hence this extra-territorial policy does not have a wide application. If it did, the political, economic, and legal chaos of which I

to agreements abroad between non-EEC producers, if they were meant to be executed in the European Community. \textit{Ahlström}, 1988 E.C.R. at 5242-43.

\footnote{12} In the Wood \textit{Pulp} case, the European Court of Justice rejected a test similar to the American “effects” test proposed by Advocate General Darmon. \textit{Ahlström}, 1988 E.C.R. at 5243. \textit{See Opinion of Advocate General Darmon}, 1988 E.C.R. 5214 (1988) (proposing that an “effects” test be used). By contrast, in \textit{Alcoa}, the United States Court of Appeals for the Second Circuit held that the Sherman Act covered extraterritorial agreements that both were intended to affect American imports/exports and, in fact, did affect them. \textit{Alcoa}, 148 F.2d at 444 (Hand, J., sitting by designation for the Supreme Court).

\footnote{13} The Sherman Act probably is the best example of a United States statute that was meant to apply extraterritorially to foreign acts. \textit{See generally} 15 U.S.C. § 1-36 (1988); \textit{Timberland Lumber Co. v. Bank of Am.}, 549 F.2d 597 (9th Cir. 1976) (holding that, in determining whether the Sherman Act applies extraterritorially, courts should ascertain whether the alleged restraint affected or was intended to affect the United States’s foreign commerce, and whether the extraterritorial assertion of United States jurisdiction would comport with principles of international comity and fairness). \textit{See Russell J. Weintraub}, \textit{The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a “Choice of Law” Approach}, 70 Tex. L. Rev. 1799 (1992), for a brief, readable examination of the extraterritorial application of United States law. \textit{See also Consolidated Gold Fields PLC v. Minorco, S.A.}, 871 F.2d 252, 263 (2d Cir.), \textit{modified}, 890 F.2d 569 (2d Cir.), \textit{cert. denied}, 492 U.S. 939 (1989) (holding that the anti-fraud provisions of the Security and Exchange Act of 1934, 15 U.S.C. § 78 (1988), apply whenever a predominantly foreign, fraudulent transaction has substantial effects within the United States. The court noted, however, that “[i]t is a settled principle of international and our domestic law that a court may abstain from exercising enforcement jurisdiction when the extraterritorial effect of a particular remedy is so disproportionate to harm within the United States as to offend principles of comity.”); \textit{Steele v. Bulova Watch Co.}, 344 U.S. 280 (1952). \textit{But see supra} note 2.
spoke above would surely result.

Thus, the United States Supreme Court recognized as early as the Sabbatino case (1964), that it lacked the authority (and probably the power) to interfere with certain foreign acts, legal where taken, although those acts violated United States law.14 Except in the rare circumstances cited above, this makes good sense.

We want foreign governments to respect our territory, policies and prerogatives after all. They are not likely to do so if we do not respect theirs. That is, if our nation and its businessmen are to get along in a world increasingly dominated by cross-border transactions, then we must, in appropriate situations, accommodate competing foreign interests, policy and law. Reciprocally, we expect them to accommodate ours.

Since the Sabbatino decision, the United States Supreme Court and other federal courts have exhibited, in my opinion, an increased sensitivity to the conflicts that arise in cross-border activity. That sensitivity is reflected in case dicta that states that United States courts will not always have enough interest in foreign matters to take jurisdiction of them, or to apply United States law.15

I have always felt that the American judiciary’s acceptance of this international reality was long overdue. The interdependence of world governments and businesses is a fact of life today. It is insufferably arrogant to think that there is an American tribunal or legal rule to deal


with every situation, regardless of its international contacts. In today’s legal and economic environment, the reality is quite otherwise. We Americans simply have been slow to recognize it.\(^{16}\)

A more-sensitive international posture was taken by our executive branch in the 1980s, as well. Its “guidelines” concerning foreign behavior actionable under the Sherman Act, said that: “the ... Act [did] not reach the activities of United States or foreign firms in foreign markets if those activities [had] no direct, substantial and reasonably foreseeable effect on U. S. interstate commerce. ...”\(^{17}\) Moreover, even if the Justice Department found that foreign acts produced such an “effect” on United States commerce, it still was to inquire whether the conduct abroad was “encouraged or promoted by the law and policy of [the] foreign sovereign”. Hence, the Department was to weigh a series of six comity “factors,” in order to balance the interests of the United States and the foreign government\(^ {18}\). A similar sensitivity to competing

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16. A good, recent example is the *Consolidated Gold Fields*, 871 F.2d 252, 263 (2d Cir.), *modified*, 890 F.2d 569 (2d Cir.), *cert. denied*, 492 U.S. 939 (1989). In it, a United States court exercised jurisdiction, and enjoined a securities offering, simply because it did not meet the standards of our Securities and Exchange Act. The goal was to protect a mere 2.5 percent of the investor group who were Americans. Upon reconsideration (at the urging of the Securities and Exchange Commission), the court modified its decree; for its action went far beyond any interest our government had, relative to other sovereigns, in exercising United States authority or applying United States law to this situation.


1. the relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad;
2. the nationality of the persons involved in or affected by the conduct;
3. the presence or absence of a purpose to affect United States consumers or competitors;
4. the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad;
5. the existence of reasonable expectations that would be furthered or defeated by the action; and
6. the degree of conflict with foreign law or articulated foreign economic policies.

sovereign prerogatives is reflected in an anti-trust agreement negotiated between the United States and the European Community in 1991. In it, both parties pledge to cooperate in international antitrust matters, and to defer to one another in appropriate circumstances.19

The Department of Justice “Guidelines” follow prior Congressional legislation (the Foreign Trade Antitrust Improvements Act (FTAIA) of 1982), that effectively codifies the “effects” test regarding United States antitrust jurisdiction, then generally applied by United States courts.20 Its purpose was “to exempt from the Sherman Act export transactions that did not injure the U.S. economy”.21

One final example of our awareness of the interdependency of world nations is our zeal to complete the General Agreement on Tariffs and Trade (GATT), including a World Trade Organization (WTO) that should help to resolve international trade disputes.22 The latter may involve some modest loss of United States sovereignty. In return for it, however, we will enjoy more stable international business relations.23 Thus, the pre-Hartford Fire state of the law was founded principally on a balancing of United States versus foreign interests.24

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19. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws, Sept. 23, 1991 [hereinafter US/EC Commission Agreement]. In this Agreement there is a list of interests to be balanced before deciding whether the United States or the European Community should proceed in a matter of interest to one or both, or whether they should collaborate. Id. at 11-12. Although the agreement was struck down by the European Court of Justice in C-327/91, French Republic v. Commission of the European Communities, Aug., 9, 1994, it worked quite satisfactorily while in force, and is likely to be renegotiated. Monthly Bulletin of European Union Economic and Financial News, EJC Annuls EU-US Antitrust Accord, Eurecom vol. 6, no. 8 (Sept. 1994). The European Court of Justice voided the agreement for reasons of lack of negotiating competence, but it is expected that the competent Community institution will negotiate an agreement to replace it.


23. See id. (particularly Articles IX and X); Ambassador and Deputy United States Trade Representative Rufus Yerxa, Testimony to the Senate Foreign Relations Committee, 1994 WL 266468 (F.D.C.H.) (Jun. 14, 1994).

You will appreciate from the foregoing that the issues confronting United States courts, when they are asked to adjudicate cases with substantial foreign elements, are: first, whether or not to exercise jurisdiction over a foreign entity (not generally subject to jurisdiction in this country); and, second, whether domestic law ought to be applied to the act(s) in question.

In Sherman Act litigation, however, one can safely assume that a United States court would not exercise jurisdiction (that is, would dismiss the case), if it did not propose to apply United States law. We are told that this question turns on a “reasonableness” standard, but whether this is an absolute limit (the exercise of jurisdiction is unreasonable), or a discretionary one (it would be unreasonable to apply our substantive law to the acts in question) is unclear. What is clear is that more than one sovereign could meet this test, exercise jurisdiction, and apply its law to regulate cross-border transactions.

That being so, I should think it more important than ever to be conscious of the competing interests of various states and their regulatory regimes. Hence, the United States Supreme Court majority decision in Hartford Fire is difficult for me to fathom. While the judgement may be entirely correct on the merits, the majority's reasoning seems insensitive and backward-looking.

In the Hartford case, it appears that United States and British business collaborators intended to evade United States law and policy. Their actions abroad (and in the United States as well) either were intended to, or foreseeably would, have a substantial anti-competitive “effect” on the American insurance market. Consequently, United States courts were fully competent to exercise jurisdiction over the foreign actors, and to apply the Sherman Act to their behavior. That outcome should have surprised no one, the defendants included.

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25. See Asahi, 480 U.S. at 102; Helicopteros, 466 U.S. at 408.


27. Restatement (Third) of the Foreign Relations Law of the United States § 415(3) (1986); see also Restatement (Third) of the Foreign Relations Law of the United States §§ 401, 402(3), 403 (1986); Mannington Mills, 595 F.2d at 1287; Timberlane, 549 F.2d at 597.


29. See id. at 2895-99.
What is surprising, however, is that the Court appears to forego any interest-balancing, when deciding whether or not to exercise jurisdiction. Rather, Mr. Justice Souter, writing for a bare majority, said that if a United States court could exercise personal jurisdiction over the defendants (one assumes this is a test of constitutional permissibility), then it should do so, and apply American law, if "their conduct . . . produced [a] substantial effect" in the United States.30 This despite the fact that the legislation involved would allow the court to "employ notions of [international] comity. . . ."31 You will search Justice Souter's opinion in vain for any material degree of interest-weighing, although the subject is clearly raised by the defendants.32 It might be inferred from Justice Souter's dicta, therefore, that "balancing" the interests of the United States against those of foreign states is a political matter; one for the executive and not the courts.33 This is an oft-repeated judicial maxim, but I am not certain it fits the situation.

It has always seemed to me that it is the quintessential function of courts to balance competing interests. This is especially so when the legislative scheme is not a model of clarity (e.g., the Sherman Act) and, if applied aggressively and literally, clearly would do more harm than good to international commerce.34 Indeed, it is often the legislature's

30. Id. at 2909-10.
31. Justice Souter stated that "[w]hen it enacted the Foreign Trade Antitrust Improvements Act of 1982 . . . Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity." Id. at 2910.
32. Id. at 2909.
33. See Hartford Fire, 113 S. Ct. at 2909-10 & nn.23, 24 (citing Mannington Mills, 595 F.2d at 1294 with approval); Mannington Mills, 595 F.2d at 1294-1298.
34. A well-established United States antitrust litigator writes:
Many foreign governments have rejected the U.S. assertion of 'extra-territorial' jurisdiction as unauthorized by international law. As America's economic power has declined, its allies have become increasing critical of the application of U.S. concepts of market organization and competition to activities outside the United States. . . . To complicate matters further, the European Community and several countries have begun actively to enforce their own competition laws, which, in some circumstances, may impose penalties on conduct by U.S. companies that is permitted by U.S. law.

and/or executive's inability to agree to a single view of a regulatory scheme, that precipitates the court's involvement in the first place. Moreover, courts sometimes reject the balance that the executive branch urges upon them. One might argue that the executive made this "balancing" judgement when it initiated an enforcement action. But most Sherman Act suits are brought by private parties. Moreover, the executive branch has indicated in its own guidelines that balancing be done.

But if Justice Souter would allocate responsibility between governmental branches, he allows virtually no opening for it. If United States courts exercise jurisdiction whenever the Constitution permits it; and, whenever they do, they apply United States law, then the international sensitivity developed in prior cases is lost. Hartford Fire seems like an inflexible, opportunistic ruling; not one well-suited to our times.

Given the enhanced international interdependency of our economy in recent years, one would expect a more sensitive approach to have been taken; even if, in the end, the court chose United States law. To allow no weighing whatever, unless foreign law required the offending behavior, seems to invite foreign nations to structure their laws to confront ours. (The Hartford Fire dicta did suggest that a balancing of interests would be attempted if the foreign conduct was required—not just permitted—by the foreign sovereign.)

35. See, e.g., Consolidated Gold Fields, 871 F.2d at 252, which involved a relatively small United States interest. The executive branch, in the person of the Securities and Exchange Commission, urged the judiciary not to be too heavy-handed in applying United States law. Id. at 263. In the end, they were successful, because the injunction imposed by the court, covering a large body of non-United States activity, was overzealous in its attempted protection of the United States interest at stake. Consolidated Gold Fields, 890 F.2d at 569. But even Consolidated Gold Fields involved some weighing and balancing.


37. Justice Souter's majority allows an exception to the Hartford Fire principle when "there is . . . a true conflict between domestic and foreign law [so that the business entity might not be able to obey both]." Hartford Fire, 113 S. Ct. at 2910 (citing Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522, 555 (1987) (Blackman, J., concurring in part and dissenting in part)); see also, Restatement (Third) of the Foreign Relations Law of the United States § 415(2)-(3) (1986). Of course, to suggest that a basis for United States court jurisdiction exists, does not mean that it must be exercised, and United States law imposed. Perhaps Justice Souter considered this policy-weighing judgement subsumed in the Department of Justice's decision to prosecute. However, the British government went
The passage of "clawback" legislation by a number of nations indicates that at least some foreign states will accept this invitation and adopt statutes that put their law on a collision course with ours.  

Not to be outdone, the executive branch has proposed that the 1988 anti-trust guidelines be discarded, and a new, rather more heavy-handed, set be adopted.

...to considerable lengths and expense in *Hartford Fire* to defend the acts of its insurers. *Hartford Fire*, 113 S. Ct. at 2910; see Reuland, supra, at 170-73.


39. Department of Justice, Request for Comments on Draft Antitrust Enforcement Guidelines for International Operations, 59 FR 52810 (Oct. 19, 1994). The draft guidelines extend United States jurisdiction to “anti-competitive conduct, wherever occurring, that restrains U.S. exports . . . [or where] the U.S. Government is a purchaser, or substantially funds the purchase, of goods or services for consumption or use abroad.” Id. at 52817 (emphasis added). The 1994 Draft Guidelines were not warmly received by the United Kingdom, which is not likely to be alone in its hostile response. Robert Rice, *Guidelines Meet a Cold Front*, Financial Times, March 7, 1995 at 12. *But see* International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6201-12 (1994) (aiming to promote international cooperation in extraterritorial antitrust enforcement); *see also* Assistant Attorney General Anne K. Bingaman, Testimony to the Subcommittee on Economic and Commercial Law, United States House of Representatives Committee on the Judiciary, 1994 WL 413408 (F.D.C.H.) (Aug. 8, 1994) [hereinafter Bingaman testimony]. Ms. Bingaman, noting for her aggressive stance on international antitrust enforcement, welcomed the statute stating that it “will allow us to get the evidence we need to enforce our antitrust laws in today’s global economy . . . through expanded international antitrust cooperation.” Bingaman testimony, supra, at 7. Bingaman further stated that “the bill specifically directs the Attorney General and the Federal Trade Commission to include in their consideration any proprietary interest the foreign government involved may have that could benefit from or be affected by the assistance the U.S. agencies have been asked to provide.” Bingaman testimony, supra, at 7. Despite the Depart-
It hardly needs be said that what America considers to be anti-competitive behavior is probably the most capitalistic view taken anywhere in the world. Almost any other country (for example, the European Union) would tolerate a greater degree of collaboration between companies, and between business and government. To enforce our view concerning such relationships whenever we have the power do so, threatens to do enormous damage to our professed desire to improve international business relations.

We must bear in mind, of course, that the facts in our hypothetical are not identical to those in Hartford Fire. In our case, all anti-competitive acts took place abroad. As observed above, that may not be dispositive of the matter, however. It also may be implicit in the Hartford holding that the application of United States regulatory law to foreign conduct is limited to a few sectors where this practice is essential to enforcement.

It is against this backdrop that our distinguished panel of conflict of laws and international law experts will tell us what they believe was at stake in Hartford Fire, and in our hypothetical case.

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FACTS

Primary Insurers are United States insurance companies which desired to effect changes in comprehensive general liability (CGL) insurance issued via standard policies in the United States. London is one of the major markets for reinsurance or excess coverage that American insurance companies would wish to buy in relation to CGL policies issued in the United States. Count X of the complaint alleges that Primary Insurers conspired with Key Actors (primarily British insurance companies, but also some other brokers involved in the London insurance market), persuading them to boycott (not reinsure or issue excess coverage against) any policies which did not contain the form language which Primary Insurers desired. The desired form language would decrease Primary Insurers’s and Key Actors’s ultimate liability by decreasing coverage available for environmental disasters and toxic torts. The language places a cap on the legal defense costs provided by CGL insurance, and shortens the effective coverage period of CGL insurance.

ment of Justice’s apparent willingness to take unilateral action in their 1994 Draft Guidelines, it still seems to recognize the need for cooperation and solicitude for the sovereigns’ interests.
Count X refers only to meetings among Key Actors and between Primary Insurers and Key Actors. These meetings took place outside the United States and related to the actions of neither reinsuring nor providing excess insurance through the London market.

Assuming extraterritorial reach of the Sherman Act, the allegations stated would constitute a violation of the Act by both American companies, under the boycott exception to the McCarran-Ferguson antitrust exemption for insurance companies, and foreign companies. Neither the London actions of Primary Insurers nor of Key Actors would violate any United Kingdom law. It is the British government’s position that the London insurance market is effectively and exclusively regulated by its own system of laws, and that any application of United States law to these facts, especially against Key Actors, would constitute improper interference with United Kingdom government and regulatory processes. Primary Insurers and Key Actors moved to dismiss the Count X claims against them, on the ground that the Sherman Act does not reach their actions. The trial court granted Key Actors’s motion to dismiss Count X, denied Primary Insurers’s motion to dismiss Count X, and certified interlocutory appeal on the Count X issue. The lower appellate court found that the Sherman Act applied to the actions of both sets of defendants and denied the motions to dismiss Count X.

As members of the United States Supreme Court, review these extraterritoriality issues.

May and should the Sherman Act, with regard to the actions which took place outside the United States, be applied extraterritorially against Primary Insurers? Against Key Actors?

* * *

BURBANK, J.*: (affirming)

Our cases construing the applicability of the Sherman Act to extraterritorial conduct are not a model of consistency, and we welcome this opportunity to put our house in order.

When we last visited this question, in a strikingly similar case, the Court was closely divided as to the result and the appropriate analytical approach. See Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891

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* Robert G. Fuller, Jr., Professor of Law, University of Pennsylvania.
(1993). Because we believe that analytical clarity is essential not only to a wise resolution of the issues before us but to a resolution that respects the proper role of federal courts, we take some pains in charting our decisional path.

The complaint in this case seeks recovery directly under the Sherman Act, and the claims it states are neither immaterial nor frivolous in the sense of those words intended by this Court in Bell v. Hood, 327 U.S. 678 (1946). There is, therefore, subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337 (1988). Congress is, of course, free to enact more specific jurisdictional statutes and in doing so to make relevant to the question of subject matter jurisdiction matters that, under our long-standing interpretation of § 1331, are properly considered as part of the merits. If 15 U.S.C. § 15 (1988), is properly regarded as a jurisdictional provision, it nonetheless furnishes no basis for treating the question of territorial scope as an aspect of subject matter jurisdiction. There is, however, evidence in the legislative history of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) of an intent to do something similar. See H.R. Rep. No. 686, 97th Cong., 2d Sess. 13 (1982). We do not decide that question, however, because the FTAIA is not involved in this case and those who drafted the legislative history of the FTAIA may have been misled by decisions of this and other federal courts that lost sight of both the rule announced in Bell and the reasons for it. See Comment, Sherman Act “Jurisdiction” in Hospital Staff Exclusion Cases, 132 U. Pa. L. Rev. 121 (1983).

Part of the appeal of a dismissal for lack of subject matter jurisdiction may repose in the capacity of the concept to induce belief that the decision was inevitable, or at least clearly attributable to congressional choices. Moreover, if a court considers matters that implicate the territorial scope of federal law as part of the jurisdictional inquiry, it is hard to see how that court could properly decline to exercise the jurisdiction.

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1. Jurisdiction, therefore, is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. . . . The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

Congress has conferred. That was the dilemma confronting the majority in the *Hartford Fire* case, under the influence of the FTAIA, if not of its legislative history.

Having determined that the FTAIA does not control this case and that there is subject matter jurisdiction under the standards set forth in *Bell*, we are required to explore what Justice Scalia identified as a problem of legislative or prescriptive jurisdiction. See *Hartford Fire*, 113 S. Ct. at 2918 (Scalia, J., dissenting with respect to Part II). To say that the Sherman Act simultaneously exercises prescriptive jurisdiction and grants subject matter jurisdiction, even if true, hardly settles the question whether the two are congruent. *But see Hartford Fire*, 113 S. Ct. at 2909 n.22.

The problem of legislative jurisdiction can arise in domestic state law cases when the choice of law normally available to a court is constrained by federal constitutional limits. It can arise in federal law cases because, although the Supremacy Clause dictates a choice of pertinent federal law, the Constitution also limits the lawmaking power of the federal government.

When either federal constitutional or self-imposed limits foreclose the application of a state’s law, the case can often be decided on the merits under the law of another state. A decision that federal law does not apply also imports, as we have discussed, a decision on the merits, but it often does not usher in the application of the law of another jurisdiction. That is because, although (supplemental) subject matter jurisdiction may exist to apply state or foreign law, see 28 U.S.C. § 1367 (Supp. II 1990), often federal law is the only law under which a plaintiff seeks or can seek relief.

Although different in important respects, interstate choice of law and determinations about the extraterritorial application of federal law share one salient characteristic. They are usually unconstrained by textually explicit signs of legislative self-restraint. See Stephen B. Burbank, *The World in Our Courts*, 89 Mich. L. Rev. 1456, 1460 (1991) (book review). Honestly viewed, state choice of law decisions are typically not judicial attempts to carry out actual legislative intent so much as they are attempts to confect rational solutions of problems to which legislatures rarely give attention. See Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 Mich. L. Rev. 392 (1980). The same is true of the decisions of this Court with respect to extraterritoriality, with the “rational solution” in each case being influenced by the felt necessities, including the jurisprudential climate, of the times.

To say that our decisions on extraterritoriality have been a product
of the times in which they were decided is, more or less, to admit that they are hard to defend as consistent. That is true of our decisions interpreting the Sherman Act. The influence of domestic choice of law thinking on those decisions is hard to miss, see Burbank, supra, at 1460-61, and, as Justice Scalia has observed, it is equally hard to explain what happened to the presumption against extraterritorial application. See Hartford Fire, 113 S. Ct. at 2918-19 (Scalia, J., dissenting with respect to Part II). It is time to clarify the proper role that both choice of law analysis and presumptions play in determining the extraterritorial application of federal statutes.

Even if we were competent to identify the interests of another sovereign nation, it is not consistent with our proper function as a federal court interpreting an act of Congress to attempt to weigh those interests against the interests of the United States. A presumption against the interpretation or application of federal law so as to bring the United States in violation of international law is entirely appropriate. “International comity” is not, however, international law, and few people other than those who drafted the relevant sections of the Restatement (Third) of the Foreign Relations Law of the United States (1986), believe that section 403 states rules of customary international law. See Burbank, supra, at 1464-65. Certainly, the European Court of Justice cannot believe such a thing, having brought the European Union’s approach to antitrust law closely in accord with that taken in Hartford Fire. See Case 89/95, Ahlström v. Commission, 1988 E.C.R. 5193, 4 C.M.L.R. 901 (1988). Although federal common lawmaking and statutory interpretation are different in degree rather than in kind—particularly when the statute is the Sherman Act—federal courts do not have the freedom in implementing congressional choices through statutory interpretation that they have when making federal choices through federal common law. Congress might grant that freedom, but when foreign relations could be affected, we require more than an ambiguous sentence in a committee report on another statute. Cf. Andreas F. Lowenfeld, Act of State and Department of State: First National City Bank v. Banco Nacional de Cuba, 66 Am. J. Int’l L. 795 (1972).

On the facts alleged in this case, the purposes of the Sherman Act would be served by its application to the domestic and foreign defendants alike. In choice of law parlance, the United States is an interested state. The same would be true if the FTAIA’s requirement of “a direct, substantial, and reasonably foreseeable effect” were applicable (and deemed a requirement on the merits). The complaint alleges such an effect. In the absence of some specific indication of congressional will to forebear or of an applicable general interpretative rule, there is no
legitimate basis upon which we may decline to enforce the statute.

For much of our history, there have been two “general interpretative rules” to which the courts could appeal to avoid the potential antagonisms or embarrassments that extraterritorial application of United States law might entail. Those rules, of course, are the presumption against the extraterritorial application of statutes and the presumption against statutory violation of international law. Together with traditional territorial choice of law rules—and more than one of these devices might be involved in the same case—they were long adequate to the task.

Today, traditional territorial choice of law rules may not be wholly obsolete, but they are hardly available to us as a plausible surrogate for congressional intent. Considering the place of the United States in the world economy, one might say the same about the presumption against extraterritorial application. See Jonathan R. Turley, “When in Rome”: Multinational Misconduct and the Presumption Against Extraterritoriality, 84 Nw. U. L. Rev. 598 (1990). Perhaps for that reason, this presumption has long ceased to operate in connection with the Sherman Act. Thus, even if we were persuaded to adopt in its stead a presumption in favor of extraterritorial application, this would not be the occasion to do so. Perhaps we should reconsider the presumption in an appropriate case, but we only recently affirmed its vitality. EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991). Moreover, it is less important what the content of such an interpretative rule is than that it be clear, clearly understood by Congress, and consistently applied by the federal courts.

Acknowledging our own inconsistency in applying the presumption against extraterritoriality in the past, we believe that it is the better part of valor to strive to improve in the future. We, therefore, leave it to Congress to clearly signal when it has determined that the potential costs of either unilateral regulation or unreciprocated forbearance are outweighed by the potential benefits of enforcing otherwise applicable United States law. This, in any event, seems to us a better approach to statutory interpretation than one which relies on “international comity,” which is neither clear nor clearly understood by Congress, and which, in the view of many informed observers, is consistent only in permitting federal courts to apply United States law. See, e.g., Harold G. Maier, Interest Balancing and Extraterritorial Jurisdiction, 31 Am. J. Comp. L. 579 (1983).

All of this is not to say that statutory interpretation is the best approach to the problem. It would be far better for Congress to provide more specific guidance in the text of the antitrust laws, and it should
start by clarifying the scope of the FTAIA and the relationship of the standards it contains to other provisions of those laws. Moreover, recognizing that even the most thoughtful rewrite of the antitrust laws could not anticipate all of the nuances arising from the interplay of domestic competition policy and foreign relations, Congress may wish to reconsider the relationship between public and private enforcement when it is proposed to apply the antitrust laws extraterritorially. Reciprocal forbearance is impossible so long as public law is in private hands, and progress will not be made so long as we insist on jurisprudential notions—whether about the public/private dichotomy or the proper role of courts—that are uncongenial to other countries with whom we desire cooperation. The Executive Branch has made progress in this area on which Congress might build. See, e.g., Agreement between the Government of the United States of America and the Commission of the European Communities regarding the Application of their Competition Laws, Sept. 23, 1991, 30 I.L.M. 1487. Arrayed against the competence and resources of both the Executive Branch and Congress in foreign relations, both a judicially created presumption against extraterritorial application and judicially interpreted norms of international comity are feeble tools indeed.

The presumption against interpreting or applying a federal statute so as to bring it in violation of international law is, as we have indicated, by no means obsolete. It remains a vitally important means to bridge the gap between this country's essentially dualist traditions and monist aspirations for an international legal order. Except in the case of treaties or ius cogens, however, it too is a feeble tool, and we would honor neither our traditions nor those aspirations by projecting home-made choice of law movies onto a world screen. Nothing in international law prevents the application of the Sherman Act to the facts alleged in this case. The decision below is therefore

Affirmed.

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COX, J.*: (affirming)

Affirmed. The Sherman Act should be applied to the actions of Primary Insurers and Key Actors, even though these actions took place wholly outside the United States and were in conformity with local law.

I largely agree with the opinions of Justices SCHARF and

* Stanley E. Cox: Assistant Professor of Law, New England School of Law.
WEINTRAUB. I write separately to indicate minor points of potential disagreement from their positions, and to further emphasize that the current Court presumption against extraterritoriality outside of the Sherman Act context is wrongheaded and should be abandoned.

Both Justices WEINTRAUB and SCHARF properly acknowledge the unworkableness of any balancing or weighing approach for determining whether United States law should be applied extraterritorially. United States judges merely pretend to balance United States interests against foreign interests; it would be more honest and helpful to hold that we only have authority to evaluate whether our own interests are strongly implicated. As a matter of fundamental jurisdictional power and legitimacy, we have no authority to “neutrally” decide whether United States interests predominate over foreign interests. We are not an international court of justice, but rather an appellate court of a single sovereign. To the extent that our decisions are constrained by “international law,” the content of that international law is not dictated to us from an outward source, but is something which we fashion or recognize ourselves (i.e., the law of our foreign relations versus international law in a more abstract or universal sense). Both Justice WEINTRAUB’s strong presumption of extraterritoriality and Justice SCHARF’s unilateral approach, with the possibility of a sovereign compulsion defense, properly inquire into the extent of our own interest and properly reach the same result—application of United States law is proper whenever our regulatory interests are legitimately implicated.

I further agree with Justice SILBERMAN that Justice MAIER’s attempt to carve out a regulatory or quasi-criminal enclave, where a unilateral approach can operate unimpeded, does not adequately address the problem in this or related types of cases. Private plaintiffs, in addition to state department prosecutors, are entitled to remedies under the Sherman Act. Even when private plaintiffs sue foreigners under other statutes, which have no quasi-criminal cast or state department involvement, United States regulatory interests are similarly implicated. The absence of a sovereign party does not eliminate the source of regulation. Plaintiffs who seek application of United States laws, in American courts, are asking that our nation’s regulatory and enforcement power be applied to regulate conduct via a court judgment.

Accordingly, the question we should ask in any suit, regardless of who brings it, is whether the conduct at issue was meant to trigger application of American law. Contrary to the implications in Justice SCHARF’s opinion, I would not automatically foreclose application of our own law even in situations where actions abroad are “compelled.”
case two

595

at least to the extent compulsion is determined according to another sovereign's law. Our law may be meant to apply without defenses; whatever defenses are meant to apply are governed by United States law, rather than dictated by the actions of other sovereigns.

This unilateral approach does not support the application of United States law without an initial determination that there is enough effect in the United States for us legitimately to regulate. Justice WEINTRAUB addressed this concern of overreaching in condemning the application of securities law to a whole transaction that only slightly affects United States interests. A more unilateral approach allows regulation of conduct only partially aimed at the United States, regardless of the effects of such regulation on defendant's activities elsewhere. If there is a significant harmful effect in the United States, there is presumably a need to regulate that portion of the conduct, regardless of how this might cause the defendant to change its whole method of operations. Otherwise, the net result is the immunization of foreign manufacturers from product liability suits because the majority of their products are sold overseas, although they knowingly direct a small portion of harmful products to particular local plaintiffs. This is a tort result Justice WEINTRAUB elsewhere disapproves. See WEINTRAUB, infra, at 664.

The instant litigation is an easy case for extraterritorial application of United States law. To determine whether United States law is triggered by any particular actions abroad is partly a matter of statutory construction and partly a matter of judicial application. The statutory interpretation part of our analysis, in the instant case, indicates that Congress intended to prohibit conduct of the type alleged here. Congress has expressed no limit regarding the geographical reach of the law that was meant to apply. Judicial application of the Sherman Act to actions abroad, having substantial effect in the United States (apparently actions directed towards parties in the United States, according to plaintiffs' allegations), would be a reasonable exercise of our governmental regulatory power. Accordingly, the judgment should be affirmed.

I additionally emphasize that we should, at the first available opportunity, abandon the nearly irrebuttable presumption against extraterritoriality which we foolishly adopted in EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) [hereinafter Aramco]. Although not directly at issue in

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1. Even if Congress expressly limits geographical reach, there are situations where such a limitation is arguably unconstitutional. Where similarly situated persons are treated dissimilarly, or other constitutional rights are infringed by immunizing conduct abroad, we should at least consider whether even Congress's express intent should be declared invalid.
this case, since the Sherman Act previously has been construed to have clear extraterritorial reach, the presumption against extraterritoriality will only cause future additional mischief. *Cf. Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2918 (1993) (Scalia, J., dissenting) (indicating that, were the matter not governed by precedent, the territorial reach of the Sherman Act would be worth reconsidering under *Aramco*). A presumption that United States laws are meant to apply extraterritorially when defendants intend and do have effects clearly within the United States’s regulatory sphere of interest is a more sensible construction of legislative intent, and is a prudent exercise of federal common law discretion.

In the instant case, especially as applied to the actions of Primary Insurers, a presumption of extraterritoriality prevents insurers from moving offshore, aiming their actions back at their home country, and then claiming lack of jurisdictional reach. I did not agree with this Court’s immunization of United States tortfeasors for their wrongful actions in either Saudi Arabia (*Aramco*) or Antarctica (see *Smith v. United States*, 113 S. Ct. 1178 (1993)). We should reverse the trend, begun in *Aramco*, of providing safe harbors for wrongdoing.

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KRAMER, J.*: (affirming)

In this case we consider the applicability of the Sherman Act, 15 U.S.C. § 1, to an alleged conspiracy formed in England between various American insurance companies (“Primary Insurers”) and their British counterparts (“Key Actors”). The court of appeals ruled that both sets of defendants could be held liable under the Act. We affirm.

I.

Comprehensive general liability (“CGL”) insurance is sold in the United States under a standardized agreement drafted by the Insurance Services Office (ISO), an association of approximately 1,400 domestic property and casualty insurers. Primary Insurers sought changes in the terms of this agreement that would decrease their liability for environmental disasters and toxic torts. In particular, they wanted to shorten the effective term of coverage of any CGL insurance agreement and to

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* Larry Kramer: Professor of Law, New York University School of Law.
impose a cap on their responsibility for litigation costs. When they failed to convince the ISO to make these changes, Primary Insurers contacted Key Actors and persuaded them to use their market power to produce the desired results.

Key Actors control a significant portion of the London insurance market, a major source of reinsurance and excess insurance coverage. At meetings held in England, Key Actors agreed with Primary Insurers to refuse to sell reinsurance or provide excess coverage to any company whose insurance form did not include the terms sought by Primary Insurers. It is conceded by all parties that this agreement constitutes a restraint of trade within the meaning of the Sherman Act and, further, that it calls for a boycott under the McCarran-Ferguson Act, 15 U.S.C. § 1101. Primary Insurers and Key Actors nonetheless moved to dismiss the plaintiffs’ complaint on the ground that American law does not apply to an agreement made and executed entirely in England. They are supported in this position by the British government, which has filed a brief *amicus curiae* arguing that the conduct at issue does not violate any law of the United Kingdom and that the application of United States law would constitute “improper interference with United Kingdom government and regulatory processes.”

II.

Before turning to the problem of whether the Sherman Act reaches conduct outside the United States, we briefly discuss the question of subject-matter jurisdiction. For reasons that are unclear, a number of courts and commentators have confused the question of whether a particular law applies to foreign conduct—a question of the merits that asks whether the party relying on a law states a claim or defense—with the question of whether the court has subject-matter jurisdiction. See, e.g., *Steele v. Bulova Watch*, 344 U.S. 280, 282 (1952); *Boureslan v. Aramco*, 653 F. Supp. 629 (S.D. Tex. 1987), aff’d, 499 U.S. 244 (1991); Gary Born & David Westin, *International Civil Litigation in United States Courts* 616 (2d ed. 1992); Note, *Extraterritorial Application of United States Laws*, 28 Stan. L. Rev. 1005 (1978). Indeed, Justice Souter made this mistake in his opinion for the Court in *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2909 n.22 (1993), though ultimately it did not affect the disposition of the case. Perhaps the confusion arises from the fact that extraterritorial application in international cases is often described as a question of “prescriptive jurisdiction” and use of the word jurisdiction misleads. Certainly, no one makes the same mistake in domestic choice of law cases, where the question of applying forum law rather than deferring to another state’s law is every-
where understood as a question on the merits that has nothing to do with the court's subject-matter jurisdiction (and hence is waivable).

Be that as it may, there is simply no question about subject-matter jurisdiction here. The plaintiffs have filed an action seeking damages under the Sherman Act. As such, there is jurisdiction under 28 U.S.C. §1331, which gives federal courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." See Hartford Fire, 113 S. Ct. at 2917-18 (Scalia, J., dissenting). The defendants maintain that the Sherman Act does not reach this far—that the Act does not render their conduct unlawful because it applies only to conduct occurring in the United States. If so, the plaintiffs' complaint would fail because they could not establish an essential element of their claim (conduct within the United States), and the proper course would be to dismiss under Federal Rule of Civil Procedure 12(b)(6). See Romero v. International Terminal Operating Co., 358 U.S. 354, 359 (1959); Lauritzen v. Larsen, 345 U.S. 571, 575 (1953).1

III.

We turn, therefore, to the argument that the plaintiffs may not recover under the Sherman Act because the conduct, alleged to constitute a conspiracy, took place outside the United States.

A.

That we need to discuss this question at all may seem surprising given our recent decision in Hartford Fire, supra, holding the Sherman Act applicable on facts virtually identical to these. But the narrow majority opinion in that case is questionable in several respects, and these have convinced us to revisit the issue in order further to clarify the law.

First, the majority opinion in Hartford Fire failed adequately to deal with our almost contemporaneous decision in EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) [hereinafter Aramco], which held "that legis-

1. The plaintiffs might still be able to litigate in federal court if they could state a claim under the law of another nation and the parties are diverse or the court retains supplemental jurisdiction under 28 U.S.C. §1367. In many cases, however, such a claim would be based on a foreign penal, tax, or regulatory law, and our courts do not enforce these types of foreign law. See, e.g., Huntington v. Atrill, 146 U.S. 657 (1892); The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825). The continuing viability of this limitation is dubious, but we need not reach that question in light of our holding that these plaintiffs state a claim under the Sherman Act.
lution of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”” Id. at 248 (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)). Since nothing in the language (or, for that matter, the legislative history) of the Sherman Act indicates an intent to regulate conduct abroad, one might have expected the Court to find the Sherman Act inapplicable to a conspiracy that, like the conspiracies alleged in Hartford Fire and in this case, consists entirely of conduct outside the United States. This is particularly true if one recalls that the presumption against extraterritoriality was first articulated in a case brought under the Sherman Act. See American Banana Co. v. United Fruit Co., 213 U.S. 357 (1909). Yet not only did the Hartford Fire Court allow plaintiffs to sue based on allegations of conduct that took place entirely outside the United States, but it did so without even mentioning, much less attempting to distinguish, Aramco. Hence, we revisit these decisions to clarify the apparent conflict between them.2

Second, the Hartford Fire majority’s explanation of extraterritoriality is questionable and confusing. Justice Souter says the Sherman Act applies presumptively whenever there are effects within the United

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2. Justice Scalia discussed EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) [hereinafter Aramco], in his dissent, concluding (with obvious disappointment) that, while one might have expected Aramco to control the outcome, “it is now well established that the Sherman Act applies extraterritorially.” Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2918-19 (Scalia, J., dissenting) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 n.6 (1985); Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. 690, 704 (1962); and United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945)[hereinafter Alcoa]). In fact, none of the cases Justice Scalia cites supports so broad a conclusion. The reference in Matsushita is a dictum that cites only Continental Ore, and Continental Ore holds merely that the Sherman Act applies if some culpable acts were committed in the United States even if some were committed abroad. It does not, in other words, abandon the territorial requirement or hold that the Sherman Act reaches conduct that took place wholly outside the United States and only had effects within it. (Other decisions reaching the same conclusion include United States v. Sisal Sales Corp., 274 U.S. 268 (1927); Thomsen v. Cayser, 243 U.S. 66 (1917); and United States v. Pacific & Arctic Ry., 228 U.S. 87 (1913)). As for Alcoa, it is only a court of appeals decision, and while the case was referred to the Second Circuit because the Supreme Court was unable to muster a quorum, that does not enhance its precedential effect. Hence, prior to Hartford Fire, there was no Supreme Court authority holding the Sherman Act applicable on the basis of effects alone (though there was considerable lower court authority as well as an interpretation to this effect from the Justice Department). The unexplained adoption of such a position in Hartford Fire, coming close on the heels of Aramco’s strong presumption against extraterritoriality, thus gives rise to an apparent conflict.
States. He then reserves the question whether this presumption can ever be overcome based on comity. According to Justice Souter, such considerations “would not counsel” against the application of United States law unless there was a “true conflict,” and a true conflict exists only if foreign law requires something United States law forbids (or vice-versa). *Hartford Fire*, 113 S. Ct. at 2910.

However one thinks such problems ought to be resolved, this reasoning is obviously flawed. To begin with, Justice Souter bases his analysis on the Restatement (Third) of the Foreign Relations Law of the United States § 403 (1986), but as Justice Scalia points out in dissent, *Hartford Fire*, 113 S. Ct. at 2922 (Scalia J., dissenting), Justice Souter misreads the provision. Justice Souter’s argument is, moreover, inconsistent with the conventional understanding of “true conflict,” which requires only that the laws of different states or nations regulate the same conduct differently. Finally, and most importantly, Justice Souter’s approach leads to the application of United States law in situations where it advances United States interests only marginally while interfering with the regulatory objectives of other nations. Not only is this wrong as a matter of principle, but as we have seen in recent years, it can be expected to trigger aggressive responses from other nations that will subvert United States interests in cases of more immediate or significant concern. See, e.g., G. Born & D. Westin, *supra*, at 600-03 (discussing England’s “blocking statute,” which prevents recovery of treble damages and authorizes British officials to forbid compliance with United States discovery orders). For this reason too, we think reconsideration of the *Hartford Fire* problem is appropriate.³

3. Justice WEINTRAUB offers an alternative reading of Justice Souter’s *Hartford Fire* opinion to make it more palatable. We should, he tells us, “credit Justice Souter with being able to read section 403” and interpret his opinion “as saying that under any form of comity analysis, the facts of *Hartford Fire* justified application of the Sherman Act, the only possible defense was that the defendants were required by the United Kingdom to act as they did, and there was no evidence of compulsion.” WEINTRAUB, *infra*, at 617-18. But this saves Justice Souter the embarrassment of misreading section 403 only by having him make an equally embarrassing comity argument. For even if one thinks (as I do) that comity analysis favors the application of United States law in both this case and *Hartford Fire*, Justice SILBERMAN’s opinion makes clear that there are strong arguments on the other side. In any event, Justice WEINTRAUB’s rewrite of Justice Souter’s opinion is not true to the original. Read in context, it is perfectly clear that Justice Souter was saying that no conflict exists if a party can comply with the law of both nations, and that without such a conflict there is “no need . . . to address other considerations that might inform a
We turn, then, to the problem of determining the scope of the Sherman Act in multinational cases (i.e., cases whose facts include some contact or connection with a foreign nation). And we begin with an elementary proposition: that this is, first and foremost, a problem of statutory interpretation. Congress enacted a law that gives injured parties a right to seek relief; our task is to interpret this law in order to determine the circumstances that must exist for a party to obtain that relief. The appropriate territorial connection is simply one aspect of this inquiry—an element of the claim to be determined, like any other element, by reference to the statute. Just as the plaintiff must plead a “contract” that is “in restraint of trade,” so too must the plaintiff plead an appropriate connection to the United States. Unfortunately, while Congress was clear about some terms, it was less clear about others, including extraterritorial application. Indeed, as with most state and federal legislation, there is no mention of territorial scope in either the statute’s language or its legislative history. We are consequently faced with a familiar problem of statutory construction—uncontemplated circumstances—that calls upon us to fill a gap in the statute’s coverage.4

4. To say this is a problem of statutory construction does not make my approach “unilateral” as opposed to “multilateral.” The distinction between unilateral and multilateral approaches turns on whether the forum analyzes the problem in terms of forum interests only or views it from a multistate or multinational perspective. Treating the problem as one of statutory interpretation, in contrast, reflects separation of powers concerns and has no bearing on this choice of perspectives. The scope of a law, in terms of its territorial reach as much as anything else, is determined by Congress. Our task is to make sense of what Congress did, whether it was done from a unilateral or multilateral perspective. That task would be simple, for example, if the Sherman Act stated clearly that it applies whenever an agreement is made in the United States or whenever an agreement has effects in the United States or whatever. For unless Congress acted unconstitutionally, the Court is bound to respect a clear statutory directive. That Congress has not said anything changes the kind of statutory construction problem we face, but not the fact that it is such a problem.

Having said this much, I should add that I think the debate over “unilateral” and “multilateral” approaches is a waste of time, because any sensible approach will incorporate elements of both. To start, the analysis must necessarily include an initial inquiry that is unilateral—whether the forum has any interest in applying its law at all—because it makes no sense to start worrying about balancing forum and foreign interests without some reason first to think that forum law applies. After that, the distinction between “unilateral” and “multilateral” approaches ceases to matter, because even a state determined to advance only its own interests will want to take the interests of other states or nations into account. In theory, such a state will defer to
Some approaches to filling this gap can be rejected out of hand. The sort of “plain language” interpretation that has recently become popular in certain circles, for example, is obviously inappropriate here. After all, the text of the Sherman Act contains no territorial limitations whatever; its plain language declares “every contract” in restraint of trade to be illegal. 15 U.S.C. § 1. Read literally, this would make United States law universally applicable—even to agreements between foreign parties with no connection to the United States—a preposterous result.

Of course, Congress could not make United States law universally applicable even if it wanted to, because (as in every area) Congress’s power is limited by the Constitution. The most significant constraint in this regard is probably the Due Process Clause of the Fifth Amendment, though other provisions might also come into play. In addition, Congress is further restrained by the well-established principle that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). While not a binding restriction as such, this canon of construction tells us not to read an Act of Congress to exceed the limits of international law unless the legislature has indicated explicitly in the language of the statute that this is what it wants.

Hence, a second possible construction would be to assume that the Sherman Act reaches as far as permitted by the Constitution and international law (whichever is more restrictive). But this is scarcely better than interpreting the statute’s reach to be universal, because the limits imposed by the Constitution and international law are quite modest. See Lea Brilmayer & Charles Norchi, Federal Extraterritoriality and Fifth Amendment Due Process, 105 Harv. L. Rev. 1217 (1992); Matthias Herdegen, Book Review, 39 Am. J. Comp. L. 207, 209-10 (1991). These limits are designed to impose only minimal restraints while leaving government room to act in a wide variety of potential circumstances. As such, there is no a priori reason to expect such cautious restrictions to serve appropriately in the context of a particular
A third possibility is to use a case-by-case balancing test such as that proposed in section 403 of the Restatement (Third) of the Foreign Relations Law of the United States (1986). This is the practice in antitrust cases in the lower courts, see, e.g., Manning Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 608-15 (9th Cir. 1976), where it has been endorsed by the Justice Department. See U.S. Dept. of Justice, Antitrust Enforcement Guidelines for International Operations (1988). Indeed, this Court itself adopted such a balancing approach for questions of extraterritorial discovery in Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522 (1987).

Nonetheless, like all my colleagues, I think case-by-case balancing is a bad idea. It seems attractive enough in concept—what could be better, after all, than an approach that enables the court to take all relevant considerations into account and tailor them to the particular situation?—but balancing of this sort tends not to work very well in practice. The considerations being weighed are always imprecise enough to permit several answers and to dictate none. As a result, there is no greater certainty about the correctness of particular outcomes—only more uncertainty about what those outcomes are likely to be. When it comes to choice-of-law, these problems are exacerbat- ed by the incommensurable nature of the factors being balanced and by the fact that the stakes often depend on outcomes in many cases rather than on the disposition of any particular case. In the final analysis, multi-factored balancing leads to the worst sort of intuitive decisionmaking; rather than being guided by the test, judges simply manipulate the considerations to justify a result already reached by intuition. This may explain why judges like this kind of approach, but it is a good reason to reject it.

A fourth approach is the one embraced by this Court in Aramco: a presumption that federal statutes apply only to conduct in the United States. Aramco says that such a presumption protects “against unintended clashes between our laws and those of other nations which could result in international discord.” Aramco, 111 S. Ct. at 1230 (citations omitted). This may, in fact, sometimes be true—though a territorial pre-

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5. The drafters of the Restatement appear to believe that the “reasonableness” requirement embodied in section 403’s balancing test reflects limits required by international law. If so, as Justice BURBANK points out, they are about the only ones who believe this. The limits of international law more closely resemble the bases identified in section 402 of the Restatement. Section 403 then provides a discretionary overlay, a method for exercising restraint within those limits.
sumption does nothing about clashes that arise because foreign nations would apply their laws to conduct in the United States. More important, even if restricting American law to conduct in the United States does avoid some conflicts, it does so in a manner that is often arbitrary, since the underlying objectives of many laws are not related to (or solely concerned with) where the conduct took place. The arguments here should already be familiar, for while much of modern conflicts theory remains unsettled, if anything is established, it is that across-the-board territoriality is a poor system for resolving conflicts. (This is a point that I, like many others, have explored elsewhere.) See Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 Sup. Ct. Rev. 179, 207-13). Rather than repeat the arguments here, suffice it to say that *Aramco* was a mistake—a step back to an outmoded jurisprudence that was abandoned long ago, and for good reason, in every other area where it once was used. *Aramco* should be overruled; at the very least, its presumption should not be extended.

(2)

I prefer to determine the extraterritorial scope of the Sherman Act in the same manner as I would decide any problem of statutory construction—by asking what is the most reasonable interpretation in light of the purposes Congress sought to achieve. Obviously, this calls for an exercise of practical judgment. But Congress left us with a problem, and any decision we make will affect parties acting in the world outside the courtroom. That being so, it would be irresponsible to do less than

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6. The presumption against extraterritoriality was part of a 19th Century system for regulating intersovereign relations in which territoriality was thought to define the permissible scope of authority on a broad range of issues, including public and private international law, personal jurisdiction, choice of law, and recognition of judgments. By mid-20th Century, the notion that sovereignty is defined exclusively in territorial terms had come to be seen as increasingly implausible. In area after area, territoriality was replaced by a broader understanding that recognizes other grounds for exercising jurisdiction. These developments were reflected in this Court’s later cases on the extraterritorial application of federal statutes, none of which relied upon, or even discussed, a presumption against extraterritoriality. See, e.g., *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948). But none of these decisions contained the sort of unequivocal declaration needed to lay the presumption to rest, and *Aramco* thus presented the Court with its first opportunity in many years to complete the process of modernization. Instead, the Court ignored these decisions (except for *Steele*, which was distinguished on unpersuasive grounds), and slid back to the 19th Century.
try to make the best sense we can of the statute. If we are wrong, Congress can always clarify its will by overruling our decision.\footnote{Legislative overruling is not necessarily easy and certainly is not costless: the press of other business must be put aside, inertia must be overcome, and private interest groups may be able to block legislation (for as we know, it is easier to block legislation than to enact it). This is precisely why we have a responsibility to give statutes their most reasonable interpretation rather than avoiding the problem and endorsing a solution we know is undesirable.}

The objective of the Sherman Act is not in dispute, and the Court is unanimous in reading the Act to protect American markets, or, more accurately perhaps, to ensure a proper level and type of competition within those markets. It follows that the Sherman Act applies to conduct that affects competition in United States markets and that this is true, as a \textit{prima facie} matter at least, regardless of where the conduct is committed or takes place. I say as a \textit{prima facie} matter, because it does not follow that just because the Sherman Act applies to conduct that affects competition in United States markets that it applies to \textit{all} such conduct. The reasons for this are spelled out in Justice SILBERMAN's opinion: conduct that affects competition in United States markets may take place or affect markets in other countries and thus implicate foreign regulatory interests as well.

We could, of course, simply ignore those interests and apply the Sherman Act to any conduct that affects our markets (or, to put a slight gloss on the rule, apply the Act to conduct that has more than a \textit{de minimis} effect on United States markets). This, as I understand it, is the position of Justices SCHARF and COX (though Justice SCHARF would allow a defense of sovereign compulsion). According to them, courts are not institutionally equipped to evaluate the interests of foreign nations because they lack the resources and perspective to perform the task adequately, and because it is an "inherently political" function that should be left to Congress or the President.

I would not agree with these propositions even were we talking about the sort of open-ended, case-by-case balancing approach that both justices seem to presuppose. Courts engage in balancing all the time, and have been doing so without causing undue harm in myriad contexts for a good many years now (there are other reasons, discussed above, for rejecting balancing in this particular context). Moreover, courts routinely decide cases in which they apply foreign law, though misapplication is as or more likely to cause the harms feared by Justices SCHARF and COX. Finally, notwithstanding the lip-service paid to the act-of-state doctrine, courts routinely judge the validity of acts of for-
eign governments. See Anne-Marie Burley, Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine, 92 Colum. L. Rev. 1907 (1992). There may be room for a “political question” doctrine, and certainly it is important for courts to proceed with caution in controversial areas. But the claim that such considerations are important with regard to choice-of-law is an outmoded shibboleth, the product of an earlier era when courts were still stinging from the effects of Lochner and judges and scholars of the “legal process” school adopted an overly cautious view of their task (best exemplified by the jurisprudence of Felix Frankfurter or, in choice-of-law, of Brainerd Currie). Too much time has passed, and we have too much contrary experience, to adhere to such quaint notions any longer.

More important, we are not talking about a process of open-ended balancing of United States and foreign interests anyway. We are talking about the possibility of reading a specific limitation into a particular statute in order to avoid needless conflicts with the laws of other nations. I am confident that had Congress addressed this question, it would not have written the Act in a way that totally ignores foreign interests. Not only would such a step be inconsistent with our recognized obligation to respect the interests of co-equal sovereigns, it would also, ultimately, undermine United States interests by provoking retaliatory action. See supra, at 600.

That still leaves the problem of deciding what kind of limitation to impose. Justice SILBERMAN interprets the Sherman Act to apply to conduct abroad only if, in addition to affecting United States markets, the conduct is illegal in most foreign countries.8 But this construction is

8. Even under this test, the Sherman Act would reach the conduct at issue here, because there is a consensus in the international community that agreements like that alleged by the plaintiffs’ are illegal. See Eleanor Fox, Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade, 4 Pac. Rim. L. & Pol’y J. (forthcoming 1995). In this connection, it is worth noting that Justice SILBERMAN’s reliance on the fact that the McCarran-Ferguson Act exempts domestic insurers from antitrust liability in deference to state regulation is misplaced, since the conduct alleged here constitutes a “boycott” that states cannot exempt. See 15 U.S.C. § 1103(b). But I would not make much of the McCarran-Ferguson Act anyway, because allowing states to displace federal antitrust law does not pose the same risks to federal objectives. This is so for at least two reasons: First, state regulation is a product of the same basic legal culture and hence less likely to diverge from federal goals too much. Second, if a state exempts conduct that significantly threatens national interests, Congress can preempt it. Neither of these conditions is true of foreign regulation—which could explain why the McCarran-Ferguson Act was limited to states in the first place, but which does, in any event, suggest that we proceed
both too restrictive and beside the point, because it limits United States law in a way that bears no relation to the likely strength of either United States or foreign interests, and does so based on the practice of nations other than those whose interests are actually affected.

I would read the Sherman Act to apply to conduct abroad if: (a) the conduct has substantial effects on competition in the United States, and (b) the conduct is either (i) intended to affect competition in the United States or (ii) has its primary effects here. I believe that such a test would make the Sherman Act applicable in cases where United States interests are strongest relative to those of other nations. This is particularly true because the Sherman Act governs practices that are intentional, and foreign defendants will often be able to segregate their activity to comply with United States law when acting in United States markets without having to forego options available under foreign law when acting in non-United States markets.9

This test obviously does not accommodate United States and foreign interests perfectly. To the extent that foreign companies must act differently when operating in United States markets, they will undoubtedly lose some advantages that foreign law might provide. But there is no perfect accommodation, because these are genuine conflicts of interest and someone’s interests must necessarily be subordinated. Nonetheless, I believe that the interpretation proposed here offers the most reasonable accommodation—one that applies United States law in cases where United States interests are likely to be significant and minimizes the extent of any interference by requiring foreign companies to modify only those practices directed toward United States markets. Moreover, it does so by offering a relatively straightforward rule that is easy to understand and apply and that does not create the kind of confusion and uncertainty associated with ad-hoc balancing.

A final note: the interpretation offered here is applicable only to the Sherman Act. Unlike Justice WEINTRAUB, who says that all United States laws should be read to apply to “conduct abroad [that] produces substantial and foreseeable effects here . . . ,” WEINTRAUB, infra, at 616, I have not attempted to articulate a general rule. My reasoning may have force in the context of analogous statutes, but it is crucial to examine each law on its own terms. The reason is simple, but important: because different laws have different purposes, any general pre-
scription—whether it be a presumption against extraterritoriality or for effects—will lead to inappropriate results. Nor is a broad rule needed. Each statute governs its own domain, and while these occasionally overlap, we are comfortable interpreting laws independently in every other context. We do not, for example, require a single rule to determine the required mental state or the kind of injury that must be alleged, and I see no reason to treat extraterritorial scope differently. The interpretive gloss put on each statute should, of course, be as clear as possible, but it is not important that every statute have the same gloss.

IV.

Applying this test to the facts alleged here, the plaintiffs have stated a valid claim against both sets of defendants. They allege that Primary Insurers and Key Actors entered a conspiracy that was aimed solely and exclusively at United States markets and whose anticompetitive effects were felt entirely within the United States. Under such circumstances, it is hard to understand why United States law should not apply. If the defendants stood in England and lobbed explosives into the United States, we would not hesitate to apply our law to make them pay for the injury that resulted—even if England made such conduct legal or chose not to prosecute it. That scenario is indistinguishable from this one except that the injuries alleged here are economic, and surely that does not make a difference.

The judgment of the court below should be affirmed.

* * *

MAIER, J.*: (affirming)

I affirm the decision of the court of appeals. Under the circumstances of this case, the Sherman Act is properly applied to the conduct of the London reinsurers.

I divide this opinion into three parts. The first distinguishes decisions about jurisdiction to prescribe in regulatory cases from choice of law decisions in non-regulatory cases. The second part describes the relationship between the international legal system’s limitations on a

* Harold G. Maier: Professor of Law and holder of the David Daniels Allen Distinguished Chair in Law, Vanderbilt University School of Law. Professor Maier’s research was supported by a summer research grant from Vanderbilt University School of Law.
nation-state's exercise of prescriptive jurisdiction and a United States court's determination of congressional intent with respect to a statute's territorial scope. The third section describes the principle of international comity and distinguishes those considerations from both the policies that inform determinations of domestic legislative intent and those reflected in the jurisdictional limitations of customary international law.

II. BILATERAL AND UNILATERAL CHOICE OF LAW DISTINGUISHED

Determining whether United States regulatory statutes apply to foreign-situs conduct requires an analysis different from that employed in ordinary bilateral choice of law cases. In bilateral cases, the court must decide whether to apply the local law of a foreign country or that of the United States (or some subdivision thereof) in the case at bar.

In such cases, the forum court identifies legal standards that are appropriate guides for its decision in the light of the relationships among the parties, their conduct, and the bodies politic with which these elements have contacts. The forum's selection is guided by its own choice of law rules in the light of the policies that those rules reflect. To the extent that those rules indicate that foreign legal norms should govern with respect to a particular issue, the court, subject to a limited number of exceptions, will apply those foreign rules, rather than its own.

Regulatory cases, on the other hand, usually require unilateral choice of law decisions. In those cases, a United States court does not choose between the regulatory standards of the United States and those of foreign countries to find applicable law. In such cases the substantive content of a foreign nation's law is irrelevant with respect to the jurisdictional issue, except to the extent that the existence of foreign interests might make the application of the forum's statute unreasonable. Even in that event, if it is clear that Congress intended the statute to apply to a case like that at bar, the court has no choice but to apply the statutory rule.

Thus, in unilateral choice of law cases, once judicial jurisdiction is

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3. Laker v. Belgian, Sabena Airlines, ALI, Restatement (Second) of Conflicts of Law § 6(1) and cmt. b (1969); Elliot E. Cheatham & Willis L. M. Reese, Choice of Applicable Law, 52 Colum. L. Rev. 959, 961 (1952).
established, the court asks only if the law of the forum governs the case before it.\textsuperscript{4} The key question is, has the forum decided to exercise prescriptive jurisdiction to apply its regulations under the facts of the case at bar? If the answer is “yes,” the forum court decides the case under its own regulatory law.\textsuperscript{5} If the answer is “no,” forum law does not properly govern and the case is dismissed.\textsuperscript{6}

The policies supporting this approach are sound. Most modern regulatory statutes are so intimately connected with the economic, social and political structures, and policies of the nation that promulgates them that their accurate application by a decision maker foreign to the promulgating state is often extremely difficult, if not outright impossible.\textsuperscript{7} This intimate connection between regulatory norms and society’s economic, social and political mores, informed the traditional rule that one nation

\begin{thebibliography}{9}


\bibitem{6} \textit{Steiner & Vagts, supra}, at 932-34.

\bibitem{7} \textit{See Maier, supra, There and Back Again}, at 289. \textit{Cf. David Lord Hacking, The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America}, 1 Nw. J. Int’l L. & Bus. 1 (1979). Conflicts over regulatory policy are especially prevalent with respect to statutes dealing with restraints of trade. For example, the origins of the Sherman Act reflect just as much a desire to protect United States democracy and free enterprise from interference by private concentrations of economic power as a desire to protect consumers from artificially high prices or shoddy merchandise. \textit{See generally Mark S. Massel, Competition and Monopoly}, 16-20 (1962).
\end{thebibliography}
will not enforce the criminal laws of another. Most of the international limitations on jurisdiction to prescribe were originally derived from situations involving the extraterritorial application of criminal statutes. 8

This close connection among regulatory rules, general social attitudes, and political mores of the body politic whose law they represent does not exist with the same intimacy or intensity with respect to most ordinary non-regulatory private law rules. 9 See, e.g., Romero v. International Terminal Operating Co., 358 U.S. 354, 384 (1959), rejecting the place of injury rule in a Jones Act case in favor of an analysis emphasizing recognition of the legitimate interests of foreign nations. 10 Therefore, any effort by this forum to select between applying our own regulations and those of a foreign state would at best be counter-productive.

III. CUSTOMARY INTERNATIONAL LAW AND CONGRESSIONAL INTENT

Because regulatory legislation reflects direct governmental policy interests, this Court must be specially cognizant of the public international legal limitations on national authority to assert legislative control over activities that take place outside the United States’s borders. Consideration of these limitations is not required because this Court must (or even may) give preference to international legal norms over those contained in controlling congressional acts. The Paquete Habana, 175 U.S. 677, 700 (1900). United States courts must obey a clear command of Congress, even if that command violates international law. 11 But,

10. In Lauritzen v. Larsen, 345 U.S. 571 (1953), this Court refused to review an award made under Danish law to a Danish seaman injured in Havana Harbor on board a ship of Danish registry when it concluded that the Jones Act did not apply to grant him an additional remedy. Claims under Danish law were administratively determined solely on the fact of injury and the extent of liability, not with respect to the possible negligence of the defendant ship owner. Id. at 575-76. Cf. Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306 (1970), where this Court applied the Jones Act to a maritime injury on board a Greek ship in the port of New Orleans on the grounds that the compensatory policies of the Jones Act were intended to apply to such a tort.
11. See, e.g., Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 949 (D.C. Cir. 1984). The court stated:

The desirability of applying ambiguous legislation to a particular transaction may imply the presence or absence of legislative intent. However, once a decision is made that the political branches intended to rely on a legitimate base of prescriptive jurisdiction to regulate activities affecting foreign com-
absent clear congressional direction to the contrary, this Court will presume that the political branches intended to act within the confines of the jurisdictional limits of international law. United States v. Aluminium Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945) [hereinafter Alcoa].

International legal limitations on the authority of a nation-state to apply its regulatory rules to activities or parties located outside its borders derive from principles of territorial sovereignty and the relationship between those principles and a nation state’s right to protect its territory. Those principles necessarily reflect a state’s right to protect its population by prohibiting acts that occur in other states when those acts have effects within the forum’s territory that the forum state reprehends. Limitations on a nation’s right to protect itself in this manner will not be presumed.

In the case of the S.S. “Lotus,” the Permanent Court of International Justice wrote:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

Those limitations are found in customary international law, evidenced by state practice from which community consent to the limitations can be inferred. See Art. 38(2), Statute of the I.C.J.

Under our tripartite federal governmental structure, it would be highly inappropriate for the judicial branch to place the United States in violation of its international legal obligations when such a result had

\[\text{merce within the domestic forum, the desirability of the law is no longer an issue for the courts.}\]

Id. at 949.

12. In this case, Judge Learned Hand sat by designation for the Supreme Court of the United States because the Court was unable to mount a quorum.


not been intended by the political branches who hold direct commissions to regulate and conduct this country's international affairs. *Alcoa*, 148 F.2d at 443; *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1957).

Furthermore, a judicial assertion of congressional intent to apply a United States regulation to extraterritorial events might raise an inference that the United States courts believed that international law condoned such a result or that the courts had found that Congress had disregarded international law entirely. Such an assertion in the context of the demand-response-accommodation process that characterizes customary international law formation\(^\text{15}\) would necessarily have law-creating effects in the international community that the political branches may neither have contemplated, intended nor welcomed. See *McCulloch*, 372 U.S. at 21 (1963); *Benz v. Compania Naviera Hildago*, 353 U.S. 138 (1957); *Alcoa*, 148 F.2d at 443.

In light of the above, cases raising the question of congressional intent concerning the applicability of United States federal regulatory statutes to foreign events or parties are appropriately divided into three categories:

1. Where Congress has made it clear that it intends the legislation in question to apply to foreign activities like those in the case at bar, the courts must follow the congressional command unless to do so would be otherwise unconstitutional under the United States Constitution.

2. Where Congress has made it clear that it does not intend the regulatory statute to apply to foreign activities like those in the case at bar, the courts may not apply the statute and must dismiss the case. The courts have no commission to substitute their own views for those of the Congress.\(^\text{16}\)

3. Where the language of a regulatory statute is so broad that it might encompass activities outside the forum state but there is no additional affirmative evidence that Congress actually intended to give it such broad extraterritorial scope, the courts will presume that the statute is intended to apply within the limitations established by international law.

The Sherman Antitrust Act falls into the third category.\(^\text{17}\) Its broad language is clearly sufficient to encompass the activities of the London-based insurance companies in this case.\(^\text{18}\) Thus, we must now deter-


\(^{16}\) See, e.g., *United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir. 1977).

\(^{17}\) See *Alcoa*, 148 F.2d at 443 (2d Cir. 1945) (Hand, J).

\(^{18}\) The Sherman Act prohibits "every contract, combination . . . or conspiracy,
mine whether the Sherman Act is properly applied to the activities of the British reinsurance companies carried out principally in England.

Sections 401 through 403 and section 415 of the American Law Institute’s Restatement (Third) of the Foreign Relations Law of the United States (1986), provide a useful analytical framework under which the case at bar is properly judged. *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891 (1993). Here, the question is whether the standards of the Sherman Act properly apply to test the validity of the actions by British insurers who are alleged to have used their combined economic power to wring concessions from American insurance firms doing business in the United States.

Under section 402(1)(c), a nation may prescribe rules of law to regulate “conduct outside its territory that has or is intended to have substantial effect within its territory.” Id. Under section 403(1), even a jurisdiction that meets the test of section 402 may not be exercised if such exercise would be otherwise unreasonable in light of a series of factors contained in section 403(2).

Taken together, these two provisions make ultimate good sense. Lacking any true central enforcement mechanism, the international legal system necessarily depends upon its ability to reflect the long-term self-interests of the nations that are its component parts. International community recognition that a given course of conduct adversely affects the welfare of community members necessarily supports the existence of a rule of law prohibiting such conduct. Customary international law is necessarily evidenced, in part, by state practice from which community consent can be inferred. 19

It can safely be presumed that, despite the apparent validity of a given state action under one accepted standard of international law, that action would be prohibited if it were carried out in an unreasonable manner. That is the message of sections 403(1) and 403(2) of the Restatement (Third). Put another way, no action can be legal under consensusal community standards when that action is determined, in a particular case, to be unreasonable under those same community standards. 20

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19. See Art. 38(2), Statute of the I.C.J.
This reasonableness test is not comparative; it is, in a sense, absolute. In other words, the acts or assertions of more than one nation may meet the test of reasonableness on the same facts. See Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 952 n.169 (D.C. Cir. 1984). When this is so, concurrent jurisdiction exists. In the event that two or more states having such concurrent jurisdiction prescribe conflicting courses of conduct, the state having the lesser interests should, but need not, defer to the other if the latter’s interest is clearly greater. See Restatement (Third) of Foreign Relations Law of the United States § 403(3) (1986).

Section 403(3) does not purport to be a legal requirement and United States courts have not treated it as such. It is, rather, a policy guide to decision. The subsection embodies the principle of international comity: that a nation will give that effect to the laws of other nations that it would have them give to its own in the same or similar circumstances. That comity principle reflects the wise counsel of Mr. Justice Robert Jackson when in Lauritzen v. Larsen, 345 U.S. 571 (1953), he wrote:

[In dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

Id. at 582.

This “enlightened self-interest” principle of reciprocal expectation is a fundamental guide to determining the reach of United States antitrust laws (and other statutes) in transnational regulatory cases.

In light of the principles above, the results in the case at bar present little difficulty. The alleged conspiracy between Key Actors and Primary


22. For a review of this section’s drafting history and a discussion of its conversion from one of mandatory intent to one of hortatory intent, see Harold G. Maier, 83 Am. J. Int’l L. 676, 678 (1989) (reviewing The Extraterritorial Application of National Laws (Dieter Lange & Gary Born eds., 1987)).


Insurers is clearly intended to have sufficient effect within the territory of the United States to meet the requirements of section 402. If such an effect is intended, the burden of proof shifts to the parties charged to demonstrate that no such effect has in fact occurred. See Alcoa, 148 F.2d at 416.25

In light of the additional considerations noted in section 403(2), the application of the Sherman Act to this alleged contract is not unreasonable. Both the United States and the United Kingdom have a legitimate basis for applying their domestic regulations. The nationality principle of section 402 confers jurisdiction on Great Britain to prescribe rules governing the conduct of its own nationals. Furthermore, the agreement in question will have some effects in British territory as well as in the United States. Given these circumstances, and contrary to the conclusion reached by my brother WEINTRAUB, I do not find it unreasonable under the standards in section 403(2) for the British to exercise jurisdiction to prescribe.

But the facts in the case at bar do not reveal that Great Britain has, in fact, promulgated any conflicting legislation that would be applicable in this case. The mere absence of legislation is not an exercise of conflicting concurrent jurisdiction like that described in section 403(3). Consequently, the principle of reciprocal regard, generally called the principle of comity, embodied in section 403(3), does not indicate the need for United States courts even to consider refusing to apply the Sherman Act to the facts of the case at bar. Absent such a conflict, the literal language of the Sherman Act clearly encompasses this case.

I affirm the court of appeals.

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WEINTRAUB, J.*: (affirming)

Affirmed. The Sherman Act should apply to the actions of the London reinsurers. Before deciding to apply United States law to conduct abroad that causes effects in the United States, the Restatement (Third)

25. Judge Learned Hand, sitting by designation for the United States Supreme Court who could not muster a quorum.

of the Foreign Relations Law of the United States § 403(2) (1986), counsels a delicate weighing of at least eight factors, including a comparison of the United States’s interest in forbidding the activity and the interest of the foreign country in permitting the activity. I do not agree. The concerns stated in section 403 are the stuff of diplomatic negotiations or the wise exercise of discretion by the Department of Justice in deciding whether to prosecute. The section 403 list is too amorphous and multidirectional for a court to apply cogently to resolve litigation.

The problem of extraterritorial application of United States public law is better approached by a presumption that our law applies whenever conduct abroad produces substantial and foreseeable effects here that it is the purpose of our law to avoid. The presumption would be rebutted when the effects here are slight when compared with the reasonable interest of the foreign country in permitting the conduct centered there. An example would be Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir.), modified, 890 F.2d 569 (2d Cir.), cert. denied, 492 U.S. 939 (1989), in which the Second Circuit, I suggest unwisely, enjoined worldwide a tender offer even though only 2.5 percent of the target company’s shareholders were Americans.

This presumption, in favor of application of United States public law when effects are foreseeable caused here by conduct abroad, is a better approach than an attempt to “balance” irreconcilable sovereign interests. The presumption produces results that are more predictable and, in the end, less insulting to friendly foreign countries. Even a nodding acquaintance with reality indicates that United States law will be applied under the “weighing” test whenever it would be applied under the presumption. At least, however, the presumption does not say to the foreign country, “our interests are greater than yours.”

If, as seems likely, the section 403(2) factors are intended as a statement of considerations that would rebut a presumption in favor of applying our public law to actions abroad that foreseeably cause substantial effects here, I do not find the section 403 list as helpful as the simpler test stated above. Section 403 attempts to span the gap between choice of the most reasonably applicable law and unilateral determination of the territorial reach of forum law. It fails.

Even if a court were to indulge in application of the Restatement’s multi-factor test, application of the Sherman Act is justified on these facts. Section 415 applies the reasonableness test of section 403(2) to the specific topic of antitrust law. Under section 415(2), conduct outside the United States is subject to our law “if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that com-
merce.” Id. “Some effect” would be an understatement on the facts of this case. Comment (a) to section 415 states that “[a]ny exercise of jurisdiction under this section is subject to the requirement of reasonableness.” Id. That requirement is also met.

Justice Souter’s opinion under the remarkably similar circumstances of Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993), has been condemned for requiring a “sovereign compulsion” defense as a condition precedent to applying the comity analysis of section 403(2). This is a possible meaning of a cryptic passage in his opinion. I think it more reasonable, however, to credit Justice Souter with being able to read section 403, which he cites, and as saying that under any form of comity analysis, the facts of Hartford Fire justified application of the Sherman Act, the only possible defense was that the defendants were required by the United Kingdom to act as they did, and there was no evidence of compulsion. Although in our case the acts within the United States that were present in Hartford Fire are absent, I would echo the sentiments that I have attributed to Justice Souter. Even if I were to apply a comity analysis, the effects intentionally caused here are beyond the pale of what any self-respecting sovereign would permit without claiming the right to impose the sanctions of its law.

It is unlikely that the test I propose would produce different results from the purely unilateral approach of Justice SCHARF. The reason that I prefer a presumption in favor of applying our public law and do not say that this presumption can never be rebutted, is that “never” is a long time. Justice SILBERMAN notes that the English authorities regulate the activity of the English insurers and suggests that we should defer to them, just as the McCarron-Ferguson Act defers to state regulation of insurance. 15 U.S.C. § 1012(a) (1988) (subject to an exception for “boycott, coercion, or intimidation,” id. at § 1013(b)). The McCarron-Ferguson Act’s exception of the business of insurance is based on the belief that state regulation will adequately protect the public from anticompetitive insurance practices. 15 U.S.C. § 1012(b) (1988). English regulation does not provide this protection if, as the English insurers contended, their conduct was privileged under English law. Hartford Fire, 113 S. Ct. at 2910.

* * *

SCHARF, J.*: (concurring in the judgment)

* * *

* Michael P. Scharf: Assistant Professor of Law, New England School of Law.
I \textit{concur} in the judgment of the majority, but write separately because I do not agree with the comparative interest balancing analysis embraced to varying degrees by some of my colleagues, most notably Justices MAIER and WEINTRAUB.

For two decades now, the extraterritorial application of United States law has purportedly been governed by a comparative-interest balancing test. Under this test, a United States court is to determine whether the application of United States law to persons and conduct abroad is appropriate by balancing several factors, including the competing interests of the foreign State involved, the nationality of the parties, and the degree to which there is an actual conflict with foreign law or policy. See \textit{Mannington Mills, Inc. v. Congoleum Corp.}, 595 F.2d 1287 (3rd Cir. 1979); \textit{Timberlane Lumber Co. v. Bank of Am.}, 549 F.2d 597 (9th Cir. 1976); Restatement (Second) of the Foreign Relations Law of the United States § 40 (1965); Restatement (Third) of the Foreign Relations Law of the United States § 403 (1986). The Supreme Court specifically endorsed the comparative interest balancing approach of the Restatement (Third) in \textit{Société Nationale Industrielle Aérospatiale v. United States Dist. Court}, 482 U.S. 522 (1987).

Application of comparative-interest balancing by the lower courts, however, has resulted in confused, ad hoc decision making. See Michael P. Scharf, \textit{Beyond the Rhetoric of Comparative Interest Balancing}, 50 Law & Contemp. Probs. 95, 101 (1987). In opposing the Court’s support of the Restatement’s comparative-interest balancing formula in \textit{Aérospatiale}, Justice Blackmun stated, “I dissent ... because I cannot endorse the Court’s case-by-case inquiry ... and its failure to provide lower courts with any meaningful guidance for carrying out that inquiry.” \textit{Aérospatiale}, 482 U.S. at 548. In addition to the problem of vagueness, there are several other difficulties inherent in the comparative-interest balancing approach, namely: (1) domestic courts lack the institutional resources and expertise to assess and evaluate the substantive policies or interests of foreign states; (2) domestic courts are incapable of sitting as international tribunals and evenhandedly balancing foreign and domestic interests; (3) the balancing of disparate interests of two
For this reason, it has long been recognized that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

Comparative-interest balancing was added to this “effects test” under the theory that Congress would not have intended for the Sherman Act to apply extraterritorially where the United States interest in the Act’s extraterritorial application is outweighed by a foreign State’s interest against its extraterritorial application. In light of the deficiencies inherent in comparative-interest balancing, a better approach would be for courts simply to undertake a unilateral assessment of the strength of the United States interest in the extraterritorial application of its law. In antitrust cases, United States interests of a constitutional magnitude are implicated. Such cases “are as important to the preservation of our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.” *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1154 (N.D. Ill. 1979). Therefore, the United States interest would be sufficient in any antitrust case such as the case at bar in which the foreign conduct produces a substantial and foreseeable effect in the United States. No balancing of foreign interests would be required.

This would not, however, foreclose foreign defendants from asserting the defense of foreign sovereign compulsion when their conduct abroad which contravenes United States law is compelled by a foreign sovereign. See Restatement (Third) of the Foreign Relations Law of the United States § 441 (1986). Under the United States Department of Justice, Antitrust Enforcement Guidelines for International Operations 33 (1988), the government has announced that it “will not prosecute anticompetitive conduct that has been compelled by a foreign sovereign.” *Id.* Courts should correspondingly recognize the defense of foreign sovereign compulsion in cases brought by private parties. Recognizing such a defense does not require comparative-interest balancing, but rather merely a finding that: (1) there is an actual conflict between the law of the State in which the defendant is located and United States law, (2) the defendant did not in bad faith court the foreign legal impediments in order to avoid compliance with United States law, and (3) the defendant would be subject to severe penalties if forced to act in contravention of the local law. This defense would not be available in the case at bar since the United Kingdom has not promulgated any conflicting legislation that would impose a penalty on defendants if they acted in compliance with the Sherman Act. By focusing on whether there exists a “true conflict,” the Court in *Hartford Fire* in effect con-
States is an inherently political, rather than judicial, function, and therefore contravenes the principles underlying the political question doctrine as enumerated in *Baker v. Carr*, 369 U.S. 186 (1962); and (4) the comparative-interest balancing approach has not furthered the interests of international comity since, in the vast majority of cases, United States courts refuse to defer to foreign interests.

Perhaps in recognition of these deficiencies, Justice WEINTRAUB in this case, and the majority in the recent case of *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891 (1993), each depart to some extent from the traditional formulations of the comparative-interest balancing test. Justice WEINTRAUB advocates an alternative test whereby courts would apply a presumption that United States law applies abroad when foreign conduct produces a substantial and foreseeable effect in the United States which can be rebutted by a finding that the effects are slight compared with the reasonable interest of the foreign country in permitting the conduct. Under Justice WEINTRAUB's approach, however, a court would still find itself in the troublesome position of having to assess the interests of a foreign State and weigh those interests against the interests of the United States.

The Court in *Hartford Fire* modifies the traditional comparative-interest balancing formulation by changing the "degree of conflict with foreign law or policy" from one factor among many to be considered which must be established before a court may consider the competing interests of the foreign state. *Id.* While the holding in *Hartford Fire* will effectively reduce the number of cases in which courts have to balance foreign interests, comparative-interest balancing will still be necessary whenever there is a "true conflict."

These approaches amount to no more than tinkering on the margins when what is needed is the imposition of a new conceptual framework with guiding rules. It is time we reject comparative-interest balancing altogether as a bankrupt method of determining the extraterritorial application of United States law.

Ultimately, the question is whether Congress intended the particular statute in question to have extraterritorial effect. If the statute is silent as to its extraterritorial reach, congressional intent to apply the statute extraterritorially can nevertheless be inferred by the statute's legislative history or the statutory scheme. In this regard, a narrow construction of the Sherman Act would frustrate the Act's purpose by allowing persons engaged in anticompetitive activities directed at the United States to escape the Act's bite simply by locating their operations abroad. *Cf. United States v. Noriega*, 746 F. Supp. 1506, 1517 (S.D. Fla. 1990).
fuses this defense with the doctrine of comity.

Under the unilateral interest analysis approach advocated in this opinion, the court of appeals decision is affirmed.

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SILBERMAN, J.*: (dissenting)

Reversed. I write separately in dissent because I believe my colleagues have failed to provide the appropriate principles and guidance for deciding choice of law issues in “public”/“regulatory” transnational cases. The majority—with a mix of rationales—has once again advanced American regulatory policies without due consideration of competing interests of other nations in the context of the international and world market of insurance. See Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993).

Justices WEINTRAUB, MAIER, BURBANK, and SCHARF—to varying degrees—all adopt a unilateral choice of law approach to the issue of the extraterritorial application of the American antitrust laws. In effect, their inquiry goes only so far as to determine whether or not American interests are furthered by the application of the Sherman Act in this case; if the answer to that question is “yes,” no further interest balancing or weighing of the competing interests of other nations is required.¹

Justice MAIER, in particular, has a lengthy explanation about why the comparative-interest and balancing approaches of traditional choice of law methodology—used to decide both domestic and international private bilateral cases—is inappropriate in resolving regulatory transnational cases, such as the instant matter.

I disagree with that basic premise. Formal categorizations of public and private law have begun to blur, and even if there is yet no unified field, domestic conflict of laws principles have much to offer in thinking about legislative jurisdiction in the transnational area. Professor Andreas Lowenfeld, the architect of the general sections on legislative jurisdiction (§§ 401-403) in the Restatement (Third) of Foreign Relations Law of the United States (1986), has made precisely this argu-

* Linda J. Silberman: Professor of Law, New York University School of Law; B.A. University of Michigan, 1965; J.D. University of Michigan, 1968.

¹ The majority does appear to accept the long-standing principle that Congress did not intend extraterritorial application of a law when such application would violate international law.
In his 1979 Hague Lectures, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 Recueil des Cours 311 (1979-II), Professor Lowenfeld urged a conflict of laws approach of interest balancing to decide transnational cases when more than one state has an interest in having its law applied. The Restatement (Third) of the Foreign Relations Laws of the United States (1986), building upon prior judicial decisions, see *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), reflects just such a methodology. Section 402 identifies the relevant bases for jurisdiction to prescribe; section 403(1) imposes a standard of reasonableness upon such prescriptive jurisdiction and section 403(2) sets forth a number of factors for assessing whether regulation under the circumstances is reasonable, taking into account the interests of other states; and section 403(3) urges a principle of deference when another state has a greater interest.

Though I endorse the underlying philosophy of the Restatement (Third) of Foreign Relations—that the United States should exercise its legislative jurisdiction in moderation with an eye toward the interests of other states—the Restatement’s somewhat overlapping provisions and its failure to offer more precise guidelines has led to some basic misunderstandings. See *Hartford Fire*, 113 S. Ct. at 2891. Moreover, as Justice WEINTRAUB writes, the list of factors is “too amorphous and multidirectional” to guide courts in making a particular decision. WEINTRAUB, *supra*, at 616.

To some degree, I share these criticisms of the Restatement (Third). The rule of “reasonableness” to which the Restatement consistently looks, has been a muddled and confusing principle in other areas where it has been tried, such as adjudicatory jurisdiction, see *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), and discovery under the Hague Evidence Convention, see *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522 (1987). I do not believe it offers any greater utility for resolving conflicts of legislative jurisdiction.

The solution, however, is not to throw out the baby with the bathwater. Rather, courts—as they have done in resolving other types of “true conflicts” in the domestic context—should attempt to formulate principles of preference for resolving important clashes of policy. Cf. David Cavers, *The Choice of Law Process* 120-38 (1965). Both the United States and the United Kingdom have important policies at stake in the instant case. The agreement between Primary Insurers and Key Actors has a direct impact upon the United States insurance market and
the purposes underlying the United States antitrust laws is furthered by their application to these English defendants. However, there is no justification for the United States to pursue its interest “Currie-like”\(^2\) without attention to the legitimate concerns of other players in the international community. The British regulatory scheme—largely a system of self regulation but with superintendence—was designed to assure solvency and thus the reliability and security of the London reinsurance market.\(^3\) Certainly those policies, whether or not they should ultimately trump, are entitled to serious consideration in any decision about the reach of the American antitrust laws. Indeed, it is interesting that the Sherman Act exempts domestic insurers from federal antitrust regulation to the extent that insurance is regulated by state law, see McCarran-Ferguson Act, 15 U.S.C. § 1012 (1988), and yet my colleagues in the majority pay little attention to the British regulatory scheme in determining the reach of the Act.

The Restatement (Third) of Foreign Relations, correctly understood, provides a start for deciding the instant case. As Justice Souter points out in *Hartford Fire*, the conduct of the defendants does have a substantial impact on the availability of American purchasers to obtain certain types of insurance in the United States, thus implicating American regulatory interests. But the conflict with the British regulatory scheme and framework cannot be dismissed. In *Hartford Fire*, Justice Scalia took account of the British regulatory interests and concluded that application of the American antitrust laws would be “unreasonable” under section 403(2) of the Restatement. Justice Souter acknowledged the British interests but rejected the need to weigh the competing interests in the absence of clear “compulsion,” i.e., the situation where the law of one state directly requires that which is prohibited in another. Justice Souter, it appears, misconstrued the broad interest balancing envisioned by the Restatement (Third) and prior cases. See Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 Am. J. Int’l L. 42 (1995); see Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness* (Hague Academy General
Perhaps Justice Scalia, too, went awry in another direction by failing to acknowledge two “reasonable” but conflicting clashes of policy in *Hartford Fire*, and thereby avoided any interpretation of section 403(3).

But it is under section 403(3) of the Restatement where courts should identify principles of preference—or principles of deference as they might be referred to in the international context—for resolving transnational conflicts of jurisdiction to prescribe. Territorial and relational tie-breakers, such as those advocated by Professor David Cavers, *see Cavers, supra*, at 120-38, may be more difficult to arrive at than in domestic cases. However, a similar approach identifying particular criteria can also help to resolve true transnational legislative conflicts. First, the strength of the competing policies can be evaluated within the framework of the international community. In the present case, the need for uniformity in the international insurance market is critical, and given the absence of any international consensus about the illegality of the arrangements, the regulatory norms at the location of the market—here, England—should trump. Second, the detail with which the regulatory policy is crafted may be evidence of how strongly particular state interests are being pursued. The history of Parliament’s superintendence of the regulatory framework applicable to the Lloyd’s insurance market, and the Department of Trade and Industry’s authority over the insurance industry appears to be a more detailed scheme of regulation than Congress’s more general antitrust legislation, particularly when Congress has expressed no intention of an extraterritorial reach and the statute offers exemptions when alternative regulatory mechanisms are in effect. Finally, territorial principles may still play a role, and it may be justifiable to view the instant transactions as involving American insurers bringing their product—primary insurance—to the reinsurance market in London.

Application of the above criteria point to the application of United Kingdom and not American law to the English defendants in this action. Therefore, I would reverse the decision of the court of appeals.
Case Three: Personal Jurisdiction

INTRODUCTION*

It is a tenet of modern interpretive theory that the cases at the margins tell you a great deal about the core.1 The personal jurisdiction hypothetical, in this regard, would make Jacques Derrida very happy, indeed. Like a well-crafted final exam, the case finds all of the major seams in current jurisdictional doctrine: what constitutes specific jurisdiction?; is a stream of commerce theory still viable?; how much contact is required for general jurisdiction?; may contacts with other states be considered in evaluating jurisdiction over a foreign defendant?

The problem’s effect on the panelists resembles the “Unrecoverable System Error - Division by Zero” message that my computer seems to generate whenever I try to load some new Windows application.2 While the panelists are unanimous in finding personal jurisdiction on the facts presented, all of the opinions but two find the need to overrule, or at least limit, cases at the very core of modern doctrine in order to get there. Cumulatively, it seems the panelists would overrule: International Shoe v. Washington, 326 U.S. 310 (1945);3 World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980);4 Burnham v. Superior Court, 495 U.S. 604 (1990);5 and Shaffer v. Heitner, 433 U.S. 186 (1977).6 Indeed, it

* Allan R. Stein: Professor of Law, Rutgers School of Law-Camden.


2. For those not having the pleasure of working with Windows, this message, or some variant on it, means that your computer is not working the way it is supposed to, and you probably have just lost the last five pages of work that you spent the previous day working on.

3. Only Professors BRUSSACK and MULLENIX find the resolution of the hypothetical under existing doctrine relatively comfortable. While Professor SILBERMAN does not explicitly call for the reversal of any case, her suggestion for legislative reform would be at tension with much of existing doctrine. See SILBERMAN, infra, at 661.

4. Professor BORCHERS.

5. Professors WEINTRAUB and COX.

6. Professor MAIER.

7. Professor COX, (in suggesting that whenever court could apply its own law it may constitutionally assert jurisdiction).
would be hard to identify any major jurisdictional pronouncement by
the Supreme Court that would not be undermined by at least one of the
opinions here. Such a striking pattern should lead all but the most stoic­
ally anti-theoretical observer to ask: what gives, Jacques?

The answer may simply be that swashbuckling law professors would
not be content to simply apply the law as they find it. Some dramatic
flair, like overruling a major precedent, is de rigueur. (It is remarkable
how even imaginary power can go to people’s heads?) There is surely,
as Professor MULLENIX implies, some of that going on here.

Such an account, I think, would be incomplete. I want to suggest
that the panelists’ reaction is symptomatic not of a character trait, but
of a pathology in the law itself. The intriguing questions raised by the
hypothetical cannot be resolved by extrapolating existing doctrine be­
because existing doctrine fails to provide a convincing answer to a fun­
damental question: what justifies the assertion of personal jurisdiction
over a defendant? The responses of the panelists all, in different ways,
attempt to provide an answer to that question. Without such an answer,
the questions raised cannot be resolved.

A. BACKGROUND

In this hypothetical, plaintiffs are suing over the death of Innocent
Victim, who was killed in an automobile accident allegedly caused by
defective brake parts manufactured by defendant Brake-O Corporation in
South Korea. Innocent Victim, a citizen of State Y, was killed in State
Y when the anti-lock brakes on another car, a “Fishfin,” allegedly
failed, causing the accident.

Brake-O is a South Korean corporation. Approximately 30% of its
revenues are derived from the sale of its products in the United States.
Unlike the defendant is Asahi Metal Indus. Co. v. Superior Court, 480
U.S. 102 (1987), Brake-O does have a presence in State Y. However,
that presence is not directly related to the product alleged to have
caused the accident. The Brake-O personnel located in State Y distribute
“Brakeman” replacement brake pads. State Y is a major market for
those pads. There is no allegation that the brake pads contributed to the
accident. As far as we know, this is the only product that Brake-O
retails in the United States. Its other sales are as component parts.8

8. The facts are ambiguous as to how the component parts find their way to the
United States. While 30% of Brake-O’s revenues are said to derive from sales in the
United States, it is unclear whether Brake-O actually ships the bulk of its products
directly into the United States, or whether they are purchased abroad and imported
by a United States manufacturer, as apparently happened to the brake components
The brake parts at issue here were sold F.O.B. South Korea to Suregrip, a manufacturer of brakes. The brakes were assembled elsewhere in the United States, and then sold to Fishfin, also presumably an American manufacturer. Brake-O knew that many of its parts would end up as Suregrip brakes in Fishfins, large numbers of which are operated in State Y. However, the parts were not uniquely designed for Suregrip or Fishfins.

The defective brakes in question did not, as it happens, come to State Y through commercial distribution at all. The driver of the defective car bought that car out-of-state and brought it, upon moving, to State Y.

Plaintiffs initially sued Fishfin, who then impleaded Suregrip and Brake-O. Unlike the procedural posture of Asahi, damages were awarded against the defendant directly for the benefit of the plaintiffs.

B. THE ISSUES RAISED

The hypothetical manages to elude easy resolution under any established precedent. Unlike Asahi, the defendant has a presence in the forum and is defending a claim directly against the injured plaintiff. Unlike World-Wide Volkswagen, the victim was a resident of the forum, was not responsible for bringing the product into the forum, and the defendant knew exactly where its product would end up. Unlike Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984), the defendant’s contacts were not temporary, and were not limited to purchases.

The proper resolution of the hypothetical depends on a series of issues that the Supreme Court has consistently avoided. Plaintiffs’ claims do not arise out of defendant’s direct contacts with the forum in the sense that it was not those contacts that caused plaintiffs’ injuries. But the contacts were not entirely unrelated either. The sale of replacement brake pads presumably made their brake parts more attractive to the United States market, which in turn generated a demand for the replacement pads. Is that relationship sufficient to assert general jurisdiction over Brake-O?

And what of the indirect contact, the “stream of commerce connection?” This contact, the use of defendant’s defective product in the forum, was clearly the source of plaintiffs’ injuries. But can it be attributed to defendant for jurisdictional purposes? Defendant is twice removed from that contact. First, these brakes did not come through the

relevant to the litigation.
stream of commerce at all. Rather, the unilateral action of the other driver brought the car into the state. A comparable break in the chain of distribution in *World-Wide Volkswagen* was fatal to the stream of commerce theory advanced by plaintiffs there. However, unlike *World-Wide Volkswagen*, the defendant here did ship large quantities of the same product to State Y through the stream of commerce. Should those contacts be considered related to plaintiffs’ injuries from a product that did not come in through that network? Second, even if the non-tortious distribution of defendant’s products in State Y are considered related to plaintiffs’ claims, does the stream of commerce jurisdictionally connect a defendant to the forum? A split in the *Asahi* Court prevented a definitive answer to whether *Gray & Standard Sanitary Corp. v. American Radiator*, 176 N.E.2d 761 (Ill. 1961), is still good law after *World-Wide Volkswagen*. The *Asahi* Court thus failed to tell us whether “mere knowledge” of down-stream commercial distribution is a sufficient jurisdictional predicate, or whether a defendant has to “seek-out” that market. That distinction is critical to evaluating the jurisdictional significance of Brake-O’s conduct here.

As for general jurisdiction, the Supreme Court has provided virtually no contemporary guidance as to when jurisdiction may be asserted over a claim unrelated to defendant’s forum contacts. Brake-O’s presence in the forum is certainly more extensive than defendant’s presence in *Helicopteros*, but that case simply represents a denial of general jurisdiction; other than the *Burnham* decision upholding jurisdiction based on service of process alone, there is no contemporary Supreme Court decision upholding a finding of general jurisdiction.

Finally, as Professor WEINTRAUB notes, the facts of the hypothetical arguably place it somewhere between an instance of “specific” and “general jurisdiction.” The case does not appear to “arise” out of defendant’s forum contacts, but the claim certainly has a great deal of connection with the forum: the resident plaintiffs were injured in the forum by a product similar to those products brought into the forum by a defendant with extensive connections to the forum. If plaintiffs’ claims are not closely enough related to defendant’s contacts with the forum to support specific jurisdiction, is the only alternative to ask whether defendant’s contacts are sufficiently pervasive to support general jurisdiction? May courts view the relationship between the forum and the claim on a continuum, or must they choose between the two polar extremes of specific and general jurisdiction?

C. The Panelists’ Response

As outlined above, these issues do not challenge existing doctrine
per se; the major precedents are all distinguishable. The answer requires some clarification of existing law. What is the meaning of specific and general jurisdiction, and what is the relationship between those two categories? Why then could not the panelists simply expand upon rather than overrule so much existing case law?

The explanation, I think, is that resolution of these issues requires deeper understanding of why jurisdiction is justified than the United States Supreme Court has been willing to articulate to date. In order to know whether a case is "related" to defendant's contacts for jurisdictional purposes, we need to know why we care about relatedness. In order to know how much affiliation is required for purposes of general jurisdiction, we need to know why general jurisdiction is fair. Not only do the cases not tell us, but it is impossible to even extrapolate the answers; the cases yield no consistent conceptual model. As the panelists demonstrate, almost any vision of jurisdictional legitimacy will run afoul of some precedent.

For Professor BORCHERS, the answer is very different from the other panelists: the assertion of personal jurisdiction requires no special constitutional justification. For BORCHERS, constitutional scrutiny of jurisdictional issues is no different from constitutional scrutiny of any other exercise of a state's police power; it should generally be upheld unless it is irrational, or deprives a defendant of procedural due process, i.e., an effective opportunity to be heard. He declines to import into the Due Process Clause any function of allocating jurisdiction among sovereigns. Thus, the wrong turn in Supreme Court doctrine for Professor BORCHERS came very early, at least as of International Shoe, if not Pennoyer v. Neff, 95 U.S. 714 (1877). Applying this minimal scrutiny, Professor BORCHERS is willing to accept any assertion of jurisdiction that serves a rational purpose, including the efficiency of consolidating all claims in a single proceeding.

On the opposite pole are Professors COX, MAIER and BRUSSACK who quite explicitly insist upon testing the assertion of jurisdiction under a constitutional standard of political legitimacy. What, in Profes-

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9. Professor BORCHERS has elsewhere argued that Pennoyer has been generally misread as standing for the proposition that there is a constitutionally enforceable standard for measuring the adequacy a state's jurisdictional claim over a defendant. See Patrick J. Borchers, The Death of Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again, 24 U.C. Davis L. Rev. 19 (1990). The true meaning of the constitutional guarantee in Pennoyer, Professor BORCHERS argues, is simply that a defendant has a procedural opportunity to raise objections to jurisdiction; the constitution does not insure any particular jurisdictional foundation.
sor COX’s terms, “empowers . . . [a state] to meddle in our lives?” COX, *infra*, at 647. For Professor COX, there is only one constitutionally valid reason for asserting jurisdiction: to regulate the underlying cause of action. Thus, he would not permit the exercise of jurisdiction in any case where a state would not be justified in applying its substantive law to the case. While he does not here spell-out a comprehensive conflicts approach, a decision to apply State Y’s law here could be justified by some combination of State Y’s regulatory interest in protecting its inhabitants from dangerous products, with the foreseeability on defendant’s part that the product could, in the normal course of commercial distribution, find its way into the forum. Since such a theory of jurisdictional legitimacy was implicitly rejected in *World-Wide Volkswagen*, that case must give way. So too must go any theory of jurisdiction based on mere affiliation of the defendant with the forum where there is no other forum-interest in the underlying transaction; in other words, the exercise of general jurisdiction is never legitimate.

Professor MAIER similarly resists any assertion of jurisdiction not justified by a forum interest in the underlying transaction. For Professor MAIER assertions of general jurisdiction are at odds with an underlying right of defendant to be treated “fairly.” That fairness right, in Professor MAIER’s view should be defined by reference to whether “a case will be heard in a forum whose political and social context is related to the events in the case . . . .” MAIER, *infra*, at 656. Where those connections are absent, a state unfairly brings to bear its values and preferences on the outcome of the case, even if it were to apply another state’s law. At bottom, this position seems quite related to Professor COX’s position: the “unfairness” is not so much that the outcome of the case will be “distorted”—judges bring their own values and preferences to bear on every case—but such influences are “illegitimate” without a regulatory justification.

Professor BRUSSACK, in contrast to Professor COX, accepts the theoretical constraint of *World-Wide Volkswagen*—that a state’s political legitimacy is *conferred by the defendant* through forum contacts that evince some form of consent or social contract. A mere regulatory interest is insufficient. But, Professor BRUSSACK asserts there is no requirement that such “purposeful availment” be found in the same acts giving rise to defendant’s claim. Professor BRUSSACK would take issue with the notion that “specific” jurisdiction measures the relationship between a defendant’s contacts and a plaintiff’s claim. Thus, for Professor BRUSSACK, this is a relatively easy case: the resident plaintiffs’ injuries in the forum bring the case under the “specific jurisdiction” rubric, and defendant’s contacts, related or not, provide pur-
poseful availment.

A similar approach is evident in Professor SILBERMAN’s opinion: “Brake-O’s high volume of sales should provide sufficient contacts when the claim arises out of an injury in the state, and the defendant engages in additional activity that takes advantage of the forum state’s market.” SILBERMAN, infra, at 663. Like Professor BRUSSACK, she does not appear to insist that plaintiff’s claim be related to defendant’s activities in the forum. It is sufficient that the claim arises in a forum in which defendant has purposely availed itself. While not critical to this case, she finds it anomalous that a foreign defendant can do massive amounts of business cumulatively in the United States, but might avoid jurisdiction because its contacts with any particular state are insufficient. At least for foreign defendants, Professor SILBERMAN rejects the notion that jurisdictional legitimacy must be established on a state-by-state basis. She urges, as a matter of legislative reform, that foreign defendants be subject to suit in any country where their product causes injury, and in which the product’s import was foreseeable. Venue, in such cases would be based in the place of injury. Her test requires a fairly narrow construction of World-Wide Volkswagen. In that case, the Court rejected the notion that mere foreseeability of a product’s entry into a state justified the assertion of jurisdiction over a defendant who did not avail itself of that market. Thus, Professor SILBERMAN puts a great deal of weight on the distinction between the stream of commerce and the stream of traffic. She is prepared to impute to a defendant a commercial distributer’s contact with the forum, but not the foreseeable actions of other parties outside of the chain of commercial distribution.

Outright rejection of World-Wide Volkswagen is central to Professor WEINTRAUB’s approach. While Professor WEINTRAUB’s theoretical foundations are less explicit than Professor COX’s, the notion of regulatory need as a jurisdictional justification pervades Professor WEINTRAUB’s opinion. The spectrum between general and specific jurisdiction for Professor WEINTRAUB is a measure of the state’s regulatory interest in the case: “The more the action arises out of or is related to acts or consequences in the forum, the less the requirement for additional nexus between forum and defendant.” WEINTRAUB,

10. As professor SILBERMAN points out, the recent amendment to Federal Rule of Civil Procedure 4(k)(2) aggregates national contacts only where jurisdiction is premised on a federal question. Professor SILBERMAN urges legislation applying such an approach to all claims against foreign defendants in both state and federal court.
infra, at 665. This regulatory need justifies jurisdiction wholly apart from defendant’s purposeful availment: “any forum with an interest in providing a remedy to the plaintiff should have jurisdiction over the defendant, subject to a cogent showing of unfairness.” WEINTRAUB, infra, at 665. Of course, depending on Professor WEINTRAUB’s understanding of “unfairness,” he may either be radically reconceptualizing jurisdiction on a par with Professor BORCHERS’s due process test, or simply importing all of the Court’s purposeful availment requirement into the concept of “fairness.”

Perhaps most comfortable with existing doctrine is Professor MULLENIX. Professor MULLENIX finds even the heightened stream of commerce standard advocated by Justice O’Connor satisfied by Brake-O’s knowledge that large numbers of its products would “wind up in the state.” She contrasts this with Asahi’s position that the corporation never contemplated that its limited sales of valves to Cheng Shin in Taiwan would subject it to lawsuit in California. Implicit in her approach is that a defendant should expect to be subject to jurisdiction where its products foreseeably cause harm. However, it is unclear why mere knowledge of a product’s ultimate destination would satisfy Justice O’Connor’s position that “a defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.” Asahi, 480 U.S. at 112. Similarly, Professor MULLENIX’s application of World-Wide Volkswagen to these facts might be considered optimistic. Professor MULLENIX reads that case as accommodating jurisdiction where there is: high state regulatory interest, low inconvenience to the defendant, efficient resolution in the forum, and a “shared interests . . . in furthering fundamental substantive policies.” MULLENIX, infra, at 659. She thus finds it unnecessary to grapple with the difficult issue of whether a stream of commerce connection between the defendant and the forum satisfies World-Wide Volkswagen’s “purposeful availment” requirement. Professor MULLENIX concludes that “[b]ecause this case may be resolved under the standards set forth in Asahi and World-Wide Volkswagen, it does not seem necessary to examine whether the state’s assertion of jurisdiction is supportable under either a theory of general jurisdiction or specific jurisdiction.” MULLENIX, infra, at 660. Since Asahi and World-Wide Volkswagen are generally understood to be cases about specific jurisdiction, she presumably means that specific jurisdiction is appropriate here. If so, one might take issue with her claim that she does not have to resolve whether the claim is sufficiently related to the jurisdictional contacts to be classified as a case of specific jurisdiction.
FACTS

Brake-O is a South Korean corporation which makes component brake parts, including brake part kits for anti-lock brake systems. Brake-O also manufactures replacement brake pads for do-it-yourselfers, which it retails under the “Brakeman” name in the United States. Brake-O sells its anti-lock brake components and kits to car and brake manufacturers throughout the world, as well as to companies that service or sell replacement anti-lock brakes. Total sales of all Brake-O products in the United States amount to about $30,000,000.00 annually, which represents approximately 30% of Brake-O’s total sales.

The litigation involves an automobile accident. Innocent Victim, a State Y resident, was hit in State Y by Driver, also a State Y resident (although a recent arrival), and killed. Innocent Victim’s Survivors sought recovery for wrongful death against Driver, Fishfin (the manufacturer of Driver’s car), and any and all defendants impleaded and cross claimed against (see next paragraph). The complaint pled many theories of recovery in the alternative and/or in combination against the various defendants, including: allegations that Driver negligently operated the vehicle; that the vehicle was negligently constructed; and that the vehicle was manufactured in a dangerously defective or unsafe condition. The accident occurred on wet roads on August 18, 1992, when Driver’s anti-lock brakes locked and Driver swerved into Innocent Victim’s car. Assume sufficient evidence to allow each cause of action to go to the jury under State Y law. As to Brake-O, there was no allegation that the Brake-O pad in the anti-lock system malfunctioned, but rather that other physical elements of the Brake-O system were defective.

Survivors initiated suit in November, 1992. Although the original complaint named only Driver and Fishfin, Fishfin quickly impleaded the manufacturer of the anti-lock brakes, Suregrip. Suregrip quickly impleaded the manufacturer of the component parts, Brake-O. Only Brake-O has raised the defense of personal jurisdiction.

The Fishfin vehicle involved in this accident was manufactured in early 1992 in State M, and was purchased new by Driver in State K in July, 1992, before moving to State Y. Brake-O sales to Suregrip in mid-1991 through mid-1992 (components that went into 1992 models) amounted to 7% of total Brake-O company sales by dollar amount ($7,000,000.00). Approximately 60% of these Brake-O components were purchased by Suregrip. These same components were used to assemble the anti-lock brakes sold to Fishfin and were incorporated into Fishfin
vehicles. State Y, the state where the injuries occurred, is a populous state and is one of Brake-O’s larger United States markets (15-20%) for Brakeman replacement parts. Brake-O has some personnel in one office related to the Brakeman enterprise in State Y and, on occasion, conducts negotiations and routing of other Brake-O business through its State Y office. The parties have stipulated that the Brake-O parts alleged to have malfunctioned were not distributed by Brake-O to Suregrip through State Y; these parts were purchased by Suregrip F.O.B. South Korea and incorporated by Suregrip into anti-lock brakes manufactured in States P and Q (both states are at least two time zones from State Y). It is further stipulated that all significant Suregrip/Brake-O negotiations involved principals from South Korea rather than any State Y personnel. Brake-O admits that Suregrip disclosed, in connection with the negotiations of the Brake-O/Suregrip contract, that most of the components it sold to Suregrip would be incorporated into Fishfins. The component parts were not, however, uniquely designed for Fishfins or for Suregrip. Although the exact number of Fishfins or other vehicles with Brake-O components in State Y is unknown, Plaintiff Survivors and Fishfin introduced evidence that as many as 20,000 Fishfins containing Brake-O anti-lock components as original equipment are in State Y. Further, perhaps as many as 60,000 other vehicle types which contain Brake-O anti-lock components as original equipment are in State Y. Brakeman pads are estimated to be on at least 225,000 vehicles in State Y.

The trial judge denied Brake-O’s motion to dismiss for lack of personal jurisdiction, and scheduled the case for trial. The jury awarded total damages of $4,000,000.00 to Survivors of Innocent Victim, apportioning 10% blame to Driver for negligent operation of the vehicle, and 30% each to Fishfin, Suregrip, and Brake-O via strict liability under State Y law. The intermediate State Y appellate court affirmed the trial court’s judgment despite numerous challenges by each defendant. Brake-O sought review of the personal jurisdiction issue before the State Y Supreme Court. The State Y Supreme Court, after emphasizing that State Y personal jurisdiction law reaches as far as due process permits, affirmed the intermediate State Y appellate court. In support of its ruling, the State Y Supreme Court cited Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987), and emphasized that State Y traditionally has asserted jurisdiction over those corporations which do significant business within State Y.

As members of the United States Supreme Court, review the State Y Supreme Court opinion.
May State Y assert jurisdiction over Brake-O?

* * *

BORCHERS, J.*: (affirming)

There should be an affirmance. A state may, consistent with the Due Process Clause of the Fourteenth Amendment, take jurisdiction over the seller of a product causing injury in that state in a lawsuit arising out of that injury.

This case presents a very close question under the minimum contacts test as to whether the third-party defendant (Brake-O)—the manufacturer of one of the component parts in the product causing injury—is subject to jurisdiction. The product causing the injury was neither sold nor resold in State Y. Under the stream of commerce test, the lack of an in-state sale of the product is probably fatal to obtaining jurisdiction on that theory. See Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980). Perhaps, though, the large number of Brake-O products that are otherwise sold in State Y is sufficient to allow jurisdiction under the rubric of “general jurisdiction.” Cf. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984) (large amount of in-state purchases unrelated to claim not sufficient to establish personal jurisdiction).

The “contacts” debate, however, ought be irrelevant. Cases like this point out two of the great failings of the minimum contacts test. First, it is maddeningly difficult to predict which types of activities will allow for jurisdiction, making appellate litigation on this subject a common and expensive phenomenon. Second, a case like this cries out for one forum to resolve all related disputes. Yet, by requiring that the “contacts” of each party be evaluated separately, the constitutional aspect of personal jurisdiction makes multiple fora necessary in many cases. See, e.g., Asahi, 480 U.S. at 102 (indemnity action in products case dismissed); World-Wide Volkswagen, 444 U.S. at 286 (action against seller and retailer in a products case dismissed).

The notion that the Due Process Clause operates as a direct restraint on state power to assert jurisdiction is an historical accident based, in all probability, on a misreading of Pennoyer v. Neff, 95 U.S. 714 (1877). See Patrick J. Borchers, The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again, 24

* Patrick J. Borchers: Professor of Law and Associate Dean, Albany Law School of Union University.
U.C. Davis L. Rev. 19 (1990). It is time to break the bonds of this ancient mistake and consider anew the circumstances in which a state crosses the constitutional line by taking jurisdiction over private parties.

The truth of the matter is that the Constitution is rarely jeopardized by state court assertions of jurisdiction. The Due Process Clause checks state court jurisdiction in only two circumstances. First, a state court assertion of jurisdiction might offend substantive due process if lacking a rational basis. Simply taking jurisdiction over parties does not by itself implicate any recognized fundamental right such as voting or speech. Cf. Carey v. Brown, 447 U.S. 455 (1980) (state law imposing a content-based restriction on speech implicates a “fundamental right” and, therefore, must serve a compelling state goal by the least restrictive means possible). Thus, state court assertions of jurisdiction require only minimal rationality to pass constitutional muster. See, e.g., Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) (state economic regulation does not violate the Due Process Clause as long as it bears a “rational relationship” to a “legitimate” state goal).

State Y’s assertion of jurisdiction passes the rationality test. The Survivors clearly have jurisdiction over most of the defendants in State Y. Therefore, a consequence of dismissing the third-party action against Brake-O is that a separate action for contribution will have to be pursued in another forum. It is a legitimate goal of State Y to protect defendants in its courts from having to fight battles on two fronts and thereby protect them from added cost and the risk of inconsistent adjudications. State Y is the situs of the injury, making access to the physical evidence and the witnesses cheaper and easier for all concerned. State Y’s assertion of jurisdiction is, at a minimum, a rational endeavor, and thus does not violate substantive due process.

The other circumstance in which a state court’s assertion of jurisdiction might arguably be unconstitutional is if procedural due process concerns are implicated. If a defendant could show the chosen forum is so inconvenient that, as a practical matter, the defendant is prevented from mounting a defense, procedural due process would be offended. Cf. Mathews v. Eldridge, 424 U.S. 319 (1976) (test for procedural due process requires balancing cost of procedure against parties’ interest in accurate resolution of the dispute). A consumer haled to a distant forum on a small dispute might, for instance, be able to show that the choice of that forum makes defaulting, rather than defending, the economically rational choice. In such a circumstance a state court assertion of jurisdiction would offend procedural due process. Cf. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 485 (1985) (Supreme Court shares “broader concerns” of lower court that requiring consumers to defend small dis-
putes away from home is unfair); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) ("When [insurance] claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the [insurance] company judgment proof.").

Plainly, Brake-O's situation is far removed from our hypothetical consumer's situation. Given that the underlying dispute is being litigated in State Y, and that the physical evidence is located in State Y, the chosen forum is undoubtedly the cheapest place for all concerned (including Brake-O) to litigate the case. Further, there is no reason to believe that Brake-O cannot get competent counsel to represent it in State Y. Brake-O has an office in State Y, and conducts some business from it. An enterprise as large and successful as Brake-O undoubtedly has access to legal representation, and has—or can readily find—competent counsel to handle matters for it in State Y. Indeed, the fact that the case went to trial below belies any suggestion that Brake-O would be unable to defend itself. Therefore, Brake-O cannot show that procedural due process has been offended.

I would lay down a *per se* rule that in products liability cases the state of the injury may take jurisdiction over all defendants in the chain of distribution, both on actions against them by the injured party, and on third-party and cross actions between them for contribution and indemnity. This case adequately demonstrates why the state of the injury is a rational forum that does not unconstitutionally disadvantage any party. A *per se* rule would decrease the incentive for appellate litigation of the mundane and preliminary matter of jurisdiction, and would afford a single forum for the resolution of all related disputes. This is the approach taken by the Brussels Convention,1 which—in tort cases—confers jurisdiction on the state in the European Union in which the "harmful event occurred." See Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 Am. J. Comp. L. 121, 144-45 (1992).

For these reasons I would affirm.

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BRUSSACK, J.*: (affirming)

The question we must answer is whether a foreign corporation that aggressively markets its products in an American state (doing perhaps millions of dollars of business there annually) is constitutionally immune from the judicial power of the state in a products liability action, merely because the particular product involved in the case happened to reach the state through the conduct of a consumer. We hold that State Y may exercise jurisdiction over Brake-O.

Brake-O argues that our jurisdictional due process precedents protect it from having to answer in State Y for the deadly consequences of an alleged defect in anti-lock brake components that it manufactured, because the facts support neither specific jurisdiction nor general jurisdiction. There is no specific jurisdiction, according to Brake-O, because the brake parts that allegedly malfunctioned did not reach State Y through Brake-O’s distribution system. Instead, the brake parts entered State Y when Driver, in whose automobile the parts were installed, moved to State Y. Brake-O reminds us of our insistence in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), that a company’s products are not agents for service of process that subject the company to jurisdiction wherever consumers decide to take them. *Id.* at 296. Moreover, Brake-O argues, there is no general jurisdiction over it in State Y, because general jurisdiction allows a court to exercise judicial power over a defendant in any lawsuit that anyone wishes to bring against the defendant, as if the court were a court of the defendant’s own state or nation. For example, Brake-O is right when it protests that State Y would not be entitled to exercise jurisdiction over Brake-O to resolve a contract dispute between it and a Japanese automobile manufacturer arising from Brake-O’s alleged failure to supply parts on time to a factory in Japan.

Brake-O’s argument is too clever. Brake-O skillfully manipulates some of the doctrinal details elaborated in our jurisdictional due process precedents without addressing the principles that drive the precedents. The principles are principles of political legitimacy. See Robert D. Brussack, *Political Legitimacy and State Court Jurisdiction: A Critique*

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* Stephen D. Brussack: Professor of Law, University of Georgia School of Law.
of the Public Law Paradigm, 72 Neb. L. Rev. 1082, 1083-88 (1993). If Brake-O were a corporation chartered under the laws of State Y, with its principal place of business in State Y, there would be no question about State Y’s authority to resolve this products liability dispute. A political community may summon its own members to answer in its courts. Because Brake-O is a South Korean company, however, State Y needs some other jurisdiction for deploying judicial power against Brake-O besides the justification that Brake-O is a *de jure* member of the political community of State Y. Jurisdictional due process protects citizens of other states and nations from the judicial power of state courts when no such alternative justification exists.

The notions of specific jurisdiction and general jurisdiction flow from two alternative justifications for a state’s deployment of judicial power against a political stranger. General jurisdiction recognizes that a stranger’s contacts with a state may be so extensive that the stranger is not really a stranger at all. The stranger may be treated as a *de facto* citizen, as vulnerable as any *de jure* citizen to summonses issued by the state’s courts, even in lawsuits wholly unrelated to the defendant’s in-state activities. *Id.* at 1093. Specific jurisdiction recognizes that a state may summon a stranger when the stranger’s conduct engages a legitimate regulatory interest of the state. *Id.*

Brake-O concedes that State Y may have a legitimate regulatory interest in resolving a dispute arising from a deadly collision within its borders. But Brake-O correctly insists that *World-Wide Volkswagen* and other precedents impose an additional requirement for specific jurisdiction—purposeful availment. We have said that a state court may not exercise jurisdiction over a nonresident defendant unless the defendant purposefully has established an affiliation with the forum state. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). It is not enough that some consumer has brought the defendant’s product to the forum state and that the product then has caused injury there. The choice to establish an affiliation with the forum state must be the defendant’s own choice. Brussack, *supra*, at 1094. This requirement reflects a Lockeian, or consent-based, element in the overall conception of political legitimacy that drives our jurisdictional due process precedents. *Id.* at 1095-96.

Brake-O made the choice. Although Brake-O’s very extensive marketing in State Y is not enough to subject Brake-O to general jurisdiction in the state, and although the particular brake parts involved in the collision did not reach State Y through Brake-O’s distribution system, Brake-O decided to do big business in State Y, and even has an office in the state for prosecuting that business. Brake-O purposefully established an affiliation with State Y, and because the state also claims a
legitimate regulatory interest in resolving this dispute, the Due Process Clause of the Fourteenth Amendment does not stand in the way.

Another factor that influences our decision in this case is a factor not sufficiently emphasized in our jurisdictional due process precedents. If we were to rule in Brake-O's favor, the decision would present the plaintiffs with the dilemma of foregoing any claim against Brake-O or pursuing the claim in the courts of some other state or nation. It would be a dilemma because the courts of South Korea or of some American state besides State Y might be more alien to the plaintiffs than the courts of State Y are to Brake-O. Political boundary lines matter as much, and in the same ways, to plaintiffs as they matter to defendants. These plaintiffs, just like Brake-O, want to have their dispute resolved close to home in a forum governed by familiar laws and procedures applied by neighbors rather than strangers. There is no sufficient reason to automatically prefer Brake-O's place-of-trial interests over the plaintiffs' similar interests. State Y is an attractive forum because Brake-O and the plaintiffs both have very substantial relationships with the forum. In fact, there may be no other state or nation with which the plaintiffs and Brake-O both have a substantial relationship.

* * *

COX, J.*: (affirming)

Affirmed. Although this case presents a close call, I believe State Y may apply its substantive law to plaintiffs' claims made against Brake-O. Therefore, Brake-O is not entitled to have the claims against it dismissed for lack of jurisdiction.

I. JURISDICTION TO APPLY STATE Y LAW

I agree with my brother WEINTRAUB, and other members of this Court, that our prior (what we have labelled) personal jurisdiction precedents resemble more the trail of an inebriated sleepwalker than a path headed toward or from any kind of sensible principles. Radical reformulation and clarification of our jurisdiction jurisprudence is required. We should use this case as an opportunity to abandon our absurd insistence that constitutional inquiry for personal jurisdiction is different from how we determine constitutionality for (what we have labelled) choice of law. Once we recognize that there is but one inquiry—whether a particular court constitutionally may bind a particular defendant by its

* Stanley E. Cox: Assistant Professor of Law, New England School of Law.
If we would recognize the interrelation of all jurisdiction doctrines and abandon compartmentalization into arbitrary categories we would stop misleading litigants and commentators into thinking: 1) that unfairness in one part of the jurisdictional system can be ameliorated by other jurisdictional doctrines and 2) that different purposes are served by different doctrines. We have so long repeated as mantra that the constitutional concerns regarding personal jurisdiction are distinct from the concerns governing choice of law, that we have come unthinkingly to accept our chantings as truth. When pressed to prove the need for the distinction between doctrines, however, we offer no convincing rationales. In practice we allow choice of law considerations to influence our personal jurisdiction determinations more often than our rhetoric about absolute distinctions would indicate. See, e.g., Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114-15 (1987) (indicating an additional reason for not granting jurisdiction, doubtfulness that California law should govern the transaction); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 481-82 (1985) (indicating that choice of law clause supports assertion of personal jurisdiction).

One problem in getting us to rethink our jurisdictional analysis is that we have accepted our labels as truth, and that these conceptualizations prevent us from seeing across their boundaries to what the labels actually seek to identify. In my attempts to persuade my colleagues that there is (or at least should be) no distinction between state authority to assert personal jurisdiction and state authority to (choose and) apply law, I am compelled to use the different terms “personal jurisdiction” and “choice of law.” Some would argue that this terminology itself means there is a distinction; otherwise, why use different words? Accordingly, I beg the indulgence of my colleagues to permit me to use the term “jurisdiction” to encompass all situations where a court attempts to bind parties by its adjudications.

If we ask, in situations where the complaining party wishes to resist the court’s actual judgment, whether there should be no restrictions on the “jurisdiction” of the adjudicating court, I do not think members of this Court would deny constitutional restrictions on state court jurisdiction. What we apparently disagree on, in addition to whether these restrictions should be strong or weak, is where and how they should be imposed. I suggest we recognize that whatever we constitutionally impose and wherever we impose it, we are placing limits on the state court’s jurisdiction. We should stop viewing, in a vacuum, the place in the proceedings at which the restrictions are imposed.

Presently, we claim that the concerns of choice of law can be ad-
dressed separate from personal jurisdiction. As a practical matter, in the modern age, we rarely have reversed state courts for choosing the wrong law. Our choice of law test has been criticized for placing too few restrictions on ability to choose law. Perhaps more significantly, we will not reverse a lower court even when it misapplies the law we allow it to choose. Creative judges, as a result, realize that they have de facto power to make whatever law they want most of the time. One hypothetical “solution” would be to impose truly meaningful constraints at the back end of litigation and to deprive courts of jurisdiction once it becomes clear that they have formed law improperly to the facts. Perhaps this is what Justice SILBERMAN meant by her famous aphorism that it is more important to know whether one will be hanged than where. See Linda J. Silberman, Shaffer v. Heitner: The End of an Era, 53 N.Y.U. L. Rev. 33, 88 (1978). The test for choice of law purportedly could be made more restrictive than the test for personal juris-

1. Compare Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) (finding application of Minnesota law constitutional despite arguably tenuous contacts); see also id. at 323 (Stevens, J., concurring) (“[T]he fact that a choice-of-law decision may be unsound as a matter of conflicts law does not necessarily implicate the federal concerns embodied in the Full Faith and Credit Clause.”) with Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (holding that Kansas had insufficient contacts to apply its law to all elements of a class action) with Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (holding Kansas’s application of its own statute of limitations to all elements of a class action constitutional, and upholding Kansas’s novel interpretation of other states’ laws as not reversible).

2. See Wortman, 486 U.S. at 730-31 (“To constitute a violation of the [Constitution] it is not enough that a state court misconstrue the law of another State. Rather, our cases make plain that the misconstruction must contradict law of the other State that is clearly established and that has been brought to the court’s attention.”); see also id. at 749 (O’Connor, J., concurring in part and dissenting in part):

   Faced with the constitutional obligation to apply the substantive law of another State, a court that does not like that law apparently need take only two steps in order to avoid applying it. First, invent a legal theory so novel or strange that the other State has never had an opportunity to reject it; then, on the basis of nothing but unsupported speculation, “predict” that the other State would adopt that theory if it had the chance.

   Id. at 749 (O’Connor, J., concurring in part and dissenting in part); cf. Faunleroy v. Lum, 210 U.S. 230 (1908) (requiring enforcement in Mississippi of a Missouri judgment which misconstrued Mississippi law).

3. See, e.g., In re “Agent Orange” Prod. Liab. Litig., 580 F. Supp. 690 (E.D.N.Y. 1984) (holding—and with a straight face, mind you—that every state court which would have been faced with the issue would have fashioned the same rule, that rule being that Judge Weinstein should fashion national consensus law, which of course never existed before he decided to make it up, to govern, as a matter of each state’s law, the consolidated litigation which was before him).
diction. It may be that this is what motivates my brother BORCHERS to abandon any limits on personal jurisdiction. Similarly, in oral conference, Justice REDISH insisted that the only meaningful constraints on personal jurisdiction should involve inconvenience rather than the sovereignty and regulatory interest issues that are associated with choice of law. Such arguments, for weak constraints on personal jurisdiction, do not assume no constraints on "jurisdiction." Rather, these arguments assume constraints should be limited to choice of law.

Neither on practical policy nor sound theoretical grounds can we successfully impose meaningful jurisdictional limits solely through after-the-fact choice of law review. It is no accident that our recent choice of law decisions have approved state choices of law. Without endorsing the result in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), our post-*Allstate* decisions correctly recognize that the most we can do is insist that the law of the chosen state have some connection to the litigation, unless we are willing to define for lower courts what is the correct law that must be applied to a particular controversy.

We repudiated vested rights as a constitutionally required system sixty years ago in *Alaska Packers Assoc. v. Industrial Accident Comm’n*, 294 U.S. 532 (1935), and we proclaimed there that "prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted." *Id.* at 547. Our *Allstate* test correctly emphasizes neither the method by which law is selected nor the content of the law selected, but instead demands contacts creating state interests in the underlying litigation. The shape or content of state law in any case is something we have no business deciding in the post-*Erie* age.

If we try to enforce meaningful jurisdictional limits through choice of law review, we would find ourselves embroiled in controversies about the shape and content of state law. We have adopted tests which rarely reverse determinations about the content of state law because, post-*Erie*, we realize as a part of sound jurisdictional theory that it is not our job to second-guess states about the content of state law. Our choice of law review is limited to determining only that the state had

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4. See, e.g., *Shutts*, 472 U.S. at 823 ("We make no effort to determine for ourselves which law must apply to the various transactions involved in this lawsuit, and we reaffirm our observation in *Allstate* that in many situations a state court may be free to apply one of several choices of law.").

5. See *Allstate*, 449 U.S. at 312-13 ("[F]or a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.").
sufficient connection to the litigation so that, in line with our pronouncement in *Alaska Packers*, the forum state would be entitled to apply its own law in its own courts to the case before it.

I would fully implement the implications of *Alaska Packers*, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and *International Shoe Corp. v. Washington*, 326 U.S. 310 (1945). We should recognize that the only meaningful restrictions on jurisdiction are imposed when deciding whether the court has power to apply law in the first instance, not after the court has decided the law it wishes to apply. As *Shutts* and *Wortman* demonstrate, it does us little good to proclaim that the court may not apply its own law to all elements of the litigation before it, when in that same breath we have told the court that it does have jurisdiction to hear the whole case. *Shutts*, 472 U.S. at 823. In our next breath we cannot remove the jurisdiction we have already granted; so long as the shape of the law which the court has fashioned to fit the facts before it conforms to some state’s law which has connection to the litigation, who are we to tell the court what state law should look like. *Wortman*, 486 U.S. at 731; *Shutts*, 472 U.S. at 823.

If we would recognize that when we approve “jurisdiction” to hear a case, we are granting power to that court to fashion law to the facts before it, we would end these needless charades about choice of law review. If there was a problem in *Shutts* or *Wortman*, it was that we allowed too much jurisdiction to begin with, not that the court abused the jurisdiction we allowed it to have. The only issue we have a right to review is whether the court has power to apply law it believes is appropriate to the litigation before it. When we realize this truth, we can start building a more sensible, unified jurisdiction theory. See generally Stanley E. Cox, *Razing Conflicts Facades to Build Better Jurisdiction Theory: The Foundation—There is No Law But Forum Law*, 28 Val. U. L. Rev. 1 (1993) (making similar arguments in greater detail).

My quarrel with those members of this Court who believe we should impose few constitutional constraints on personal jurisdiction and worry later about choice of law is that later is always too late to fix the jurisdictional problem. The real false lore of “law” school is not the general/specific dichotomy which my brother WEINTRAUB criticizes, but that courts and defendants are thought to exist in the abstract rather than the particular. This “lore” manifests itself in the twin false jurisdictional beliefs that: 1) state substantive law exists as an abstract truth which any law clerk can apply to any case, and 2) defendants must be fully jurisdictionally present somewhere for plaintiffs and courts to find them.

The incorrectness of the first belief bears directly on why we should
not approve jurisdiction on any basis other than that the forum will be applying its law to the controversy before it. As my brother MAIER so persuasively argues, it is not law books that decide cases, but rather judges and juries. The law is what judges and juries hearing actual cases make it to be in response to those cases. An open-ended grant of jurisdiction allows enormous forum shopping possibilities which expose the defendant to multiple interpretations and/or application of law. The forum permitted to take jurisdiction will decide the law of the case, and its decision is never the same as another forum's, regardless of what “book” law it applies.

The jurisdiction argument is more, however, than the luck of the draw for judges within the same courthouse or deciding a venires’ empaneling. The judge and jury hearing a case represent the power of the government. When the grant of jurisdiction is on the basis of convenience, presence, or some other non-litigation related factor, we are pretending that a disinterested state tribunal is nevertheless in a proper position to decide the parties’ fate.

Perhaps we are so used to thinking that “neutral” means “unbiased,” and that “unbiased” means “good,” that a disinterested panel seems a good idea. But do we really want disinterested courts to exercise their power against defendants? What should these forums do with the parties under their control? Create better law? I am not sure even my brother BORCHERS wishes to authorize courts anywhere in the nation to take jurisdiction of any and all cases and create law for any and all controversies. Instead, the question we should ask is why a particular forum should be allowed to hear a particular case.

Convenience should not create state power to meddle in peoples’ lives via litigation. Because my fellow Justices and academics from around the country can travel to Boston to attend a conference on jurisdiction does not imply that plaintiffs of any and all types should be able to litigate against us here. What empowers Massachusetts courts thus to meddle in our lives? We should examine the suit that a plaintiff brings to determine whether there is jurisdiction.

As my brother KRAMER has explained, regarding the choice of law inquiry, the question is whether the plaintiff has brought a suit upon which a claim for relief can be granted. See Larry Kramer, Rethinking Choice of Law, 90 Colum. L. Rev. 277 (1990). The plaintiff brings a particular suit, not an abstract assertion. If the plaintiff cannot articulate a claim with sufficient specificity, we instruct lower federal courts to throw the suit out. In deciding whether there is “jurisdiction” to hear a

6. I do not mean that the plaintiff must plead particular words, but only that the
case, we should inquire what the case is about. Otherwise, we create “super” courts which exist with abstract and undefined power. Our government, including our courts, should not possess such unlimited and undefined powers.

This emphasis on limited sovereignty leads necessarily to repudiation of the second false idea about jurisdiction—that defendants must exist in plenary fashion somewhere for plaintiffs and courts to find them. This is the territorialist view of jurisdiction that we rejected in *International Shoe*. We confirmed in *Shaffer v. Heitner*, 433 U.S. 186 (1977), that the minimum contacts approach to personal jurisdiction constitutes a replacement of, rather than just a supplement to, territorial jurisdiction. See, e.g., Stanley E. Cox, *Would that Burnham Had Not Come to be Done Insane! A Critique of Recent Supreme Court Personal Jurisdiction Reasoning, An Explanation of Why Transient Presence Jurisdiction Is Unconstitutional, and Some Thoughts about Divorce Jurisdiction in a Minimum Contacts World*, 58 Tenn. L. Rev. 497, 503-30 (1991). When *Shaffer* invalidated a form of territorial jurisdiction, this demonstrated that territorial jurisdiction can in practice be, and as a matter of sound jurisdictional theory always is, too inclusive and undiscriminating an exercise of governmental power. *Shaffer*, 433 U.S. at 212 n.39.

The replacement of territoriality by a more limited version of state sovereignty means that forums exercise limited, rather than plenary, jurisdiction over parties. A person is never fully jurisdictionally present, precisely because no government has (or at least no government should be allowed to have) complete control over a person’s life. It is absurd to uphold a totalitarian view of governmental power in our court system just because we previously thought in territorial terms in *Pennoyer v. Neff*, 95 U.S. 714 (1877), and never completely recovered from our jurisdictional malaise. A person should not be counted present before a court in abstract or in plenary fashion, but only as the particular suit gives the forum state legitimacy to intrude on that person’s life.

The mistake in allowing jurisdiction based on presence, convenience, or any basis other than litigation related contacts is that a court is given the authority to decide something about a party without regard to why the party is before the court. Territoriality was wrong because it held people captive without regard to what the suits were about. A more modern and fair view of jurisdiction is to insist that governments exercise their power against persons only when there is a legitimate reason

claim must be based on some specific allegations which implicate some particular remedy.
for doing so. This should mean that the only relevant contacts for determining jurisdiction are the contacts which produced the litigation.

If the practical and theoretical reality is, as argued earlier, that we cannot tell courts what law they must apply, then the only meaningful control we can exercise is that jurisdiction be granted only to courts which we believe could legitimately apply their substantive law to the underlying controversy. Jurisdiction means giving the court power to fashion law that it believes is most appropriate to the litigation before it. We should abandon attempts to have one tribunal do another’s bidding or to consolidate actions to a forum which does not have a right to apply its own substantive law. Explaining in sufficient detail why this insistence on forum law or no law would not create intersystem judicial paralysis or insensitive parochialism is subject for different opinions involving different underlying facts. In the instant case, State Y applied only its own law to Brake-O. The question before us is whether State Y had jurisdiction to bind Brake-O by its law.

Jurisdiction over Brake-O in State Y was appropriate if State Y legitimately could exercise its power to hold Brake-O liable in its courts under State Y law for an accident which occurred in State Y and resulted in the death of a State Y resident. Survivors claimed that third party defendant, Brake-O, manufactured a brake component that malfunctioned in State Y and caused Innocent Victim’s death. A State Y jury determined that, under State Y law, the brake component was defectively manufactured and that Brake-O’s action (or inaction) contributed to plaintiffs’ loss. A judgment to the tune of a $1,200,000 was awarded against Brake-O. We must determine whether State Y had a right thus to apply its products liability law against Brake-O.

Arguing in favor of holding Brake-O responsible under State Y law is that the defective component which contributed to Innocent Victim’s death in State Y made its way to State Y because of actions which were entirely foreseeable by Brake-O, since engaged in by those in the manufacturing and distribution chain. Designing and marketing these (albeit standard) components for profit, Brake-O should not be able to resist State Y jurisdiction when its parts go where they are intended and cause harm at that location. This is not a case where the unilateral acts of a plaintiff are substituted for a defendant’s purposeful directedness. Although component manufacturers are in a different position from manufacturers and distributors of finished products (which is why I consider this a close call), I conclude they should not be able to hide behind the manufacturing/distribution chain when their products cause harm to innocent victims. The state may apply its law against component parts manufacturers who are aware that their parts will reach that
state in a way the marketers of the finished products intended.

Accordingly, I agree with my brother WEINTRAUB’s test for stream of commerce jurisdiction. A defendant who releases its product for sale is subject to jurisdiction in any state where the product causes harm (for suits based on that harm) if the product arrives in that state via the normal course of commercial distribution or as a result of use the manufacturer reasonably should have expected. I further agree that World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), should be overruled to the extent that it is inconsistent with this test.

II. “GENERAL” JURISDICTION TO APPLY STATE Y LAW

I emphasize, however, that the above litigation related contacts are the only relevant contacts for determining whether State Y may bind Brake-O by its law. While the fact that Brake-O conducts unrelated business in State Y may be relevant to defeating Brake-O’s motions for forum non conveniens dismissal, or may otherwise show that it is not inconvenient for Brake-O to defend suit in State Y once jurisdiction has been established, these unrelated contacts cannot substitute for the litigation related contacts that Brake-O must have with State Y in order for jurisdiction to be constitutionally reasonable in the first place.7

I strongly resist the attempts by some members of this Court to expand notions of “general” jurisdiction into the type of presence based test which I thought we had rejected with territoriality when we emphasized in International Shoe that the question is not “a little more or a little less.” International Shoe, 326 U.S. at 319. If “general” jurisdiction is taken to mean that a defendant is “present” for all purposes, this type of jurisdiction should be found unconstitutional in a post-territorial, limited sovereignty world. Because most commentators and courts tend to view “general” jurisdiction as a substitute for the type of all-purpose jurisdiction which existed under Pennoyer, it would be better to discard the terminology. Nevertheless, since the term seems ingrained in the case law to describe situations where the forum adjudicates against a defendant whose conduct elsewhere produced consequences elsewhere, I emphasize that constitutionally permissible “general” jurisdiction is merely a special application of the minimum contacts rule that the forum may apply its own law to a defendant’s conduct which implicates the state’s regulatory interests, if that defendant is significantly enough

7. Language in Burger King supports assertions of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required, when purported convenience factors are high, see Burger King, 471 U.S. at 477, is accordingly hereby disapproved.
connected to the forum for purposes of the immediate litigation.\(^8\)

In “general” jurisdiction situations, the defendant’s contacts are judged to be so extensive with the state, and the defendant so closely identified with the state, that it is fair for the state to apply its substantive law against this defendant wherever the defendant may act. Such powerful regulatory control should be attempted sparingly, and must involve some level of voluntary, unique, and open-ended affiliation by a defendant with the forum such that the defendant can expect such open-ended obligations.

Contrary to some commentators’ territorially influenced assumptions, there is no need to retain a non-litigation related form of general jurisdiction as an insurance policy to guarantee that plaintiffs can sue defendants somewhere. Instead, the question must always be “For what purpose are you suing the defendant?” Whoever’s laws are implicated by the defendant’s actions are the forums with constitutionally presumptive right to hail the defendant before their tribunals. Until the defendant does something which violates laws, there is no right to hail the defendant before a tribunal anywhere. States which choose to entertain suits based on a theory of “general” jurisdiction should only do so only when they feel comfortable applying their own substantive law to the conduct of which the plaintiff complains.

Brake-O’s distribution of Brakeman products in State Y, with some minimal administrative presence in State Y related to that and other Brake-O operations, hardly entitles State Y to apply its laws against Brake-O for any and all actions which might occur elsewhere. State Y may not constitutionally assert “general” jurisdiction over Brake-O. The fact that its tribunals always have felt comfortable asserting jurisdiction over corporations which do significant business in State Y reveals that State Y should rethink and understand how jurisdiction constitutionally should proceed.

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8. Such view of “general” jurisdiction might cause us to rethink our analysis, though not necessarily our holding in *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). Since the litigation-related contacts in that case occurred before the defendant had established systematic and continuous contacts with Ohio, for Ohio to assert jurisdiction over the defendant, under my view of “general jurisdiction,” means that it is fair for a forum with which a defendant uniquely, strongly, and voluntarily affiliates, to hold that defendant responsible under forum law for prior actions elsewhere. Because I believe a “general” jurisdiction forum may indeed legitimately exercise such power, I believe any exercise of “general” jurisdiction must be tightly reined in.
MAIER, J.*: (affirming)

I am happy to concur in the result reached in this case by my brothers COX and WEINTRAUB. The cause of action and the defendant are sufficiently related to the forum to justify an exercise of jurisdiction over the defendant. But their opinions (and others) in this case raise the question of whether this forum can exercise what we have called "general jurisdiction"—jurisdiction justified by a continuing relationship between the defendant and the forum state unrelated to the genesis of this cause of action.

Because I believe that this Court’s continuing adherence to the concept of general jurisdiction is incorrect in the light of the policies reflected in the line of cases beginning with International Shoe Corp. v. Washington, 326 U.S. 310 (1945), I feel compelled to address that issue separately. In that context, I would add my specific disagreement with my brother WEINTRAUB’s conclusion that our cases on this subject are unintelligible. In my view, they would make perfect good sense, if their logic were followed consistently by this Court. A preliminary review of our most important cases in this line will be helpful.

The principal test to determine the validity of the exercise of judicial jurisdiction remains, of course, the test articulated by this Court in International Shoe. There, we held that whether a state could properly exercise jurisdiction over a defendant would be determined “according to our traditional conception of fair play and substantial justice.” International Shoe, 326 U.S. at 320. That determination would be made by examining “the quality and nature of the activity [within the forum state] in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.” Id. at 319. That conclusion was informed by the recognition that the concept of corporate “presence,” reflected in the rubric “doing business,” was a legal fiction. Id. at 316.

Thus, after International Shoe, jurisdiction, based on the physical presence of the defendant in the forum state, Pennoyer v. Neff, 95 U.S. 714, 733 (1877), was no longer definitive with respect to jurisdiction over corporations. This power theory of jurisdiction became impractical in light of the “increasing nationalization of commerce” during the

* Harold G. Maier: Professor of Law and holder of the David Daniels Allen Distinguished Chair in Law, Vanderbilt University School of Law. Professor Maier’s research was supported by a summer research grant from Vanderbilt University School of Law.

We refined the fair play and substantial justice test by identifying various relationships between the defendant and the forum state from which the fairness of the exercise of judicial jurisdiction could be inferred. The test could be met when the cause of action had a sufficiently reasonable relationship to the forum state making it fair to bring the defendant into that jurisdiction, *International Shoe*, 326 U.S. at 317, or by the defendant’s purposeful availment of the legal system of the forum state. *McGee*, 355 U.S. at 220; see *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

Despite the rationale of *International Shoe*, this Court maintained the fiction of corporate “location” within the forum as sufficient to legitimize the exercise of judicial jurisdiction. Thus, continuous and systematic business activity within a state, unrelated to the cause of action, remained sufficient to support such jurisdiction. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952). In *Shaffer v. Heitner*, 433 U.S. 186 (1977), we consolidated multiple categories of jurisdictional characterizations—in personam, in rem, quasi-in-rem—into a single test of fairness. We held that thereafter the validity of all assertions of judicial jurisdiction would be determined by examining the relationship between the defendant, the forum, and the cause of action under the fairness and justice test of *International Shoe*. *Shaffer*, 433 U.S. at 207. But see *Burnham v. Superior Court*, 495 U.S. 604, 621-22 (1990).

Later cases illustrate that identification of relevant, significant contacts to determine judicial jurisdiction is only one means of determining whether trying the case in that forum is unfair to the defendant. In *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), lack of

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1. In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), we made it clear that the availability of a forum anywhere in the world would make it unnecessary to consider whether this Court should designate a forum in the United States as acceptable solely on grounds of necessity. Id. at 419 n.13; cf *Shaffer v. Heitner*, 433 U.S. 186, 199 n.17 (1977).

2. The fairness to the plaintiff of the forum selected is not a due process concern because it is the plaintiff who chooses the forum in the first place. *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).
reasonable foreseeability that the defendant might be hailed into a given forum was a sign of possible unfairness. Id. at 295-98. More importantly, we pointed out that even though contacts that would satisfy due process concerns in other cases may exist, the special circumstances of a case may make the exercise of judicial jurisdiction by that same forum unfair.

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment. Id. at 294 (citing Hanson v. Denckla, 357 U.S. 235, 251 (1958)).

Thus, we recognized that due process depended not only on the defendant’s relationship with the forum state, but also upon the appropriate allocation of decision making authority among the states, recognizing a direct relationship between individual liberty values and the policy of local self-government that informs the federal structure. Id. Two years later, we noted this relationship specifically in Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982): “The restriction on state sovereign power described in World-Wide Volkswagen Corp. . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.” Id. at 702-03 n.10. We confirmed that relationship in Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) and Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.13 (1985).3

In Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987), we weighed the defendant’s burden of appearing in the forum against the forum’s interests in adjudicating the case and noted a direct parallel between the values of the federal system that informed our judgment in World-Wide Volkswagen and the international system values of the world community that informed our judgment in Asahi. Asahi, 480 U.S. at 115.

The principal concern in each of these cases is fairness to the corporate defendant whether measured by interest in avoiding undue surprise, interest in reaping the benefits of local self-government reflected in the

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federal system, or interest in having the case adjudicated in a forum with which the defendant and the cause of action have minimal significant contacts. The key question in all of these due process cases remains whether the defendant will receive fair play and substantial justice through the fair and orderly administration of the laws. This standard has not changed. It is the defendant’s rights that the Due Process Clause protects; and it protects the general public interest in preserving the values of local self-government that inform the federal system when it does so.

The continued recognition of the concept of general jurisdiction runs directly counter to the proposition that the case against a defendant should not be tried in a forum having no relationship to the cause of action that is the subject of the suit.4 Any attempt to determine whether a given forum meets the “fair play and substantial justice” test of International Shoe must reject the fantasy of “corporate presence” in favor of the recognition of certain incontrovertible real world facts. It is the result in a given case that may be unfair to a defendant, not the words that are used to justify that result. If the Due Process Clause is designed to protect a defendant against unfairness, it cannot do so unless all the attributes of a particular forum that influence the results in a case, and therefore, the relationship of the defendant’s acts to that forum, are taken into account.

The location of the forum will always influence the outcome of a lawsuit tried there. Furthermore, different forums will influence the outcome of a lawsuit differently. The precise impact of that influence on the suit’s outcome may be difficult or even impossible to determine in advance; but the fact of influence is incontrovertible. This is so because human beings, not rules of law or mechanical formula, decide lawsuits and the acts of human beings are always influenced by the environment in which those acts are committed. See Harold G. Maier, Baseball and Chicken Salad: A Realistic Look at Choice of Law, 44 Vand. L. Rev. 827, 829 (1991). This is no less true for judges than for any one else.5 Therefore, the political and social attributes of the forum

4. In Burnham v. Superior Court, 495 U.S. 604 (1990), Justice Scalia concluded that presence of a defendant within a forum state had always been sufficient to justify the exercise of judicial jurisdiction; therefore, such presence necessarily met the “traditional notions of fair play and substantial justice.” Id. at 619 (Scalia, J.); see International Shoe Corp. v. Washington, 326 U.S. 310, 320 (1945). But, at least with respect to corporations, International Shoe clearly rejected the “presence” test and, by logic and implication, general jurisdiction as well. See Shaffer, 433 U.S. at 216.

5. “Rules are not self-applying but are wielded by people acting as decision
as well as its geographical location will necessarily influence the way in which legal norms are interpreted and applied.

The acts of the defendant, not its “corporate personality,” create the cause of action that the forum will try. To determine the legal results to be attached to those acts in a place unrelated to them is an egregious form of unfairness. This effect cannot be resolved solely by careful choice of law or by application of the principle of forum non conveniens, when the relevant differences that affect the total result in the case may have little to do with either the local law rules adopted by the court or the convenience of the parties.

Relevant differences among forums that influence the results in cases include the following: juries or judges may have a propensity to award different levels of recovery in similar cases depending upon the political and social setting in which the case is tried; the requirements of forum rules of evidence may be more advantageous to one side than to the other; the amount of attorney’s fees permitted or awarded may be larger or smaller in some forums than in others (this may be especially important when the only other forum available is in a civil law country in which contingent fees are usually nonexistent and attorneys fees are limited by statute); local attitudes toward particular corporate or individual defendants may influence the result in the case; local attitudes toward the type of cause of action may influence the result in the case; and the quality of the bench and bar may vary significantly among available forums.

Influences like those above are present wherever a case is tried. A choice among forums chooses among these result-affecting attributes as well as among possible choice of law rules or distances to be traveled by parties and witnesses. Seeking to take advantage of these differences is the essence of forum shopping.

Given the strength, multiplicity, and, in some instances, unpredictability of these local influences, jurisdictional rules should be designed and interpreted at least to assure that a case will be heard in a forum whose political and social context is related to the events in the case.


7. This may, in fact, be the principal justification for rules limiting judicial jurisdiction. See Wendy Collins Perdue, Personal Jurisdiction and the Beetle in the
not one that is solely the domicile of the defendant or a place where
the defendant does business unrelated to the cause of action. In this
way, all of the relevant influences on the result of the case, not solely
those addressed by choice of law rules or considerations of geographic
inconvenience, are more likely to be related to the defendant’s acts that
generated the cause of action that is subject to the forum’s adjudication.

Justice WEINTRAUB is absolutely correct when he points out that
the terms “specific jurisdiction” and “general jurisdiction” characterize
opposite ends of a dichotomy. For this very reason these characteriza-
tions are an inadequate guide to protecting the defendant’s due process
rights to fair play and substantial justice. Automatic refusal to consider
case-specific elements related to the propriety of the forum selected by
the plaintiff ignores the fundamental premises of International Shoe and
the cases that have followed it. Mere recitation of the mantra, forum
non conveniens or mechanical reference to the forum court’s ability to
choose relevant legal rules from other jurisdictions will not resolve this
important issue.8

Although I certainly would not attribute this sentiment to my col-
leagues on this bench, one cannot help but believe that insistence on
preserving the availability of general jurisdiction to permit plaintiffs to
shop for favorable forums stems from an unarticulated premise that
corporate defendants should always be liable for injuries caused by their
products, regardless of actual fault. Therefore, any jurisdictional system
that contributes to that plaintiff-favoring result is justified. If this insur-
ance principle is the social policy that supports maintenance of the
general jurisdiction concept, this Court should not participate in perpetu-
ating that masquerade. Let us either overtly adopt that principle; or
cease applying it without accurate analysis and identification.

I, for one, believe that procedural fair play and substantial justice
are equal rights of both plaintiffs and defendants. Procedural rules
should not be used to mask an inapposite social policy designed to

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8. This unfortunate tendency to lump all considerations concerning unfairness to
the defendant under the general heading of forum non conveniens may have its roots
in a doctrinal strain in the International Shoe opinion that discussed comparative
inconvenience of available forums. The Court’s failure to give any serious attention
to these concerns in Kulko v. Superior Court, 436 U.S. 84 (1978) and World-Wide
Volkswagen v. Woodson, 444 U.S. 286 (1980), make it clear that inconvenience of
forum is not the sole consideration in determining whether the defendant can receive
fair play and substantial justice in the forum that the plaintiff has selected. See
Harold G. Maier & Thomas R. McCoy, A Unifying Theory for Judicial Jurisdiction
favor the former while avoiding discussion and evaluation of that policy’s broader economic and social implications. I would abolish the principle of general jurisdiction as a means for determining the due process rights of defendants. To the extent that Burnham is inconsistent with this conclusion, I would overrule it.

The judgment below is affirmed.

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MULLENIX, J.**: (affirming)

I. concur with my colleagues that the state constitutionally may assert personal jurisdiction over Brake-O and would affirm the State Y Supreme Court judgment. I write only to suggest that the Court may resolve this case comfortably within existing doctrine, without need to further expand, clarify, modify, or reverse existing precedent.

This case involves a Korean corporate defendant and therefore Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987), provides the due process considerations for a state’s assertion of personal jurisdiction over a foreign corporate defendant. However, although Asahi embodies essentially a cautious approach in such circumstances, this case is sufficiently distinguishable as to mitigate any foreign policy concerns evident in Asahi.

Foremost, the California plaintiff in Asahi settled his claims against the foreign defendants, leaving only an indemnification cross-claim between two foreign corporate defendants, Cheng Shin and Asahi. As Justice O’Connor’s opinion suggests, California’s legitimate interest in that dispute was then diminished considerably (if not fatally). Asahi, 480 U.S. at 114. By contrast, the injured plaintiff in this case went to trial and received a favorable verdict. Since the structure of the lawsuit remained intact, the state retained an undiminished interest in protecting its citizen.

Moreover, in order to constitutionally assert jurisdiction over Brake-O, I do not believe that Brake-O’s actions need be measured against a standard of “purposeful direction towards the forum state” or any showing of “additional conduct.” Asahi, 480 U.S. at 112. But even under

these heightened stream of commerce standards, there seems to be more purposeful affiliating conduct than in Asahi. Thus, Brake-O admitted it knew its component parts would be used in Fishfins, large numbers of which wind up in the state. By contrast, Asahi’s president declared in an affidavit that the corporation never contemplated that its limited sales of valves to Cheng Shin in Taiwan would subject it to lawsuit in California.

II.

I also agree with my colleagues who urge that some generalized rule of reasonableness should govern assertions of personal jurisdiction. Justice Brennan’s concurrence in Asahi supplies such a standard. This standard requires only a showing of “regular and anticipated flow of products from manufacture to distribution to retail sale,” Asahi, 480 U.S. at 117 (Brennan, J., concurring), which is met on these facts. (“As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.”) Id. at 117.

In addition, we need not set forth any new stream of commerce theory because this case basically satisfies the analytical factors set forth in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (burden on the defendant, interests of the forum state, plaintiff’s interest in obtaining relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interests of the several states in furthering fundamental substantive policies). ¹

A consideration of these factors suggests that the burden on Brake-O to defend this lawsuit probably is somewhat equivalent to that of Asahi, although Brake-O has a greater presence in State Y than Asahi did in California. Brake-O conducted legal business in State Y, including but not limited to contract negotiations. Thus, Brake-O probably has a weak claim to being unfamiliar with either the state law or the American legal system.

As indicated above, State Y has an interest in the litigation and in protecting its citizens from the injurious conduct of non-resident domestic or foreign defendants. Certainly this interest is greater than in Asahi, in which California arguably had little or no interest in an indemnity

¹ With due respect to my colleagues, this case does not seem to cry out for overturning World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980), or for overruling the entire body of minimum contacts due process jurisprudence articulated by this Court in International Shoe Co. v. Washington, 326 U.S. 310 (1945), and its numerous progeny.
action involving two foreign corporations.

The injured plaintiff definitely has an interest in adjudicating his claims in state court, an interest also absent in Asahi. Moreover, as my colleagues sensibly suggest, if the plaintiffs here are unable to legitimately assert jurisdiction over Brake-O, these injured plaintiffs essentially will be left without a forum and remedy.

The same interstate considerations that informed the Court in Asahi are present here. In that case, the Court’s sensitivity to international and foreign policy implications mitigated against the state’s legitimate assertion of personal jurisdiction. But Justice O’Connor’s opinion also counseled that in assessing these shared interstate interests, each case is best served “by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case,” Asahi, 480 U.S. at 115, weighing burdens on the defendant against interests of the plaintiffs or the forum state. Since the plaintiffs’ and forum state’s interests loom large here and were de minimis in Asahi, Justice O’Connor’s balancing approach favors the state’s assertion of personal jurisdiction in this particular case.

Considering the great interests of the injured plaintiffs and the forum state, balanced against the burden on the defendant, and considering the international context, the state’s exercise of personal jurisdiction over Brake-O would not be unreasonable or unfair.

III.

Because this case may be resolved under the standards set forth in Asahi and World-Wide Volkswagen, it does not seem necessary to examine whether the state’s assertion of jurisdiction is supportable under either a theory of general jurisdiction or specific jurisdiction.3 See

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2. The state court’s assertion of personal jurisdiction probably is sustainable under general jurisdiction standards. Brake-O basically has more affiliating contacts with the state than certainly Asahi had with California (such as personnel and contract negotiations within the state), but it is a closer call whether Brake-O has more affiliating contacts than Helicol with Texas. See Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984). In this litigation, the underlying tort occurred in the state, Brake-O has a corporate presence (personnel) and sales in the state, conducted contract negotiations in the state, derived income from its activities in the state, and arguably enjoyed the benefits and protections of the state. Additionally, unlike Helicopteros, the plaintiffs were domiciled in the forum.

3. The underlying record gives no indication whether this state or federal circuit endorses any specific jurisdiction standard (e.g., a “related to,” “but for,” or “arising out of” test). While some federal circuits endorse various specific jurisdiction standards, the Supreme Court has yet to endorse any particular formulation and

Affirmed.

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SILBERMAN, J.*: (affirming)
The judgment below is affirmed.

The chaotic state of jurisdictional theory in the United States is apparent when one employs the doctrinal analysis prompted by this case instead of relying on common sense.

The foreign defendant here, Brake-O, has sales of 30 million dollars in the United States and State Y is one of Brake-O's larger United States markets for its general products. State Y is also a convenient forum for litigation since it is the place where the accident occurred.

On what basis then does Brake-O resist jurisdiction? Brake-O's argument stems in part from the fact that with respect to a product liability claim such as this, jurisdiction is determined on the basis of the defendant's relationship to an individual state and not the United States as a whole. Recently, a different standard has been adopted for the federal courts when federal claims are asserted against foreign defendants not subject to the jurisdiction of any one state. See Fed. R. Civ. P. 4(k)(2). In such a case, jurisdiction anywhere in the United States is constitutional if the foreign defendant has sufficient aggregate contacts with the United States.

Although it would be inappropriate to create by judicial fiat a "national" standard for asserting jurisdiction over foreign defendants, it would be wise for Congress to take up that task and revisit the issue of jurisdiction over foreign defendants for all types of claims (both state and federal) and legislate standards for jurisdiction to be applied in both state and federal courts. See Linda J. Silberman, Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard, 28 Tex.

indeed has twice left this question open for future determination. See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 589 (1991) (declining to address constitutional due process issue when narrower contract ground for decision available); Helicopteros, 466 U.S. at 415 n.10. In this case, the Court should again avoid addressing the validity or consequences of the distinction among forms of specific jurisdiction, since the issue has not been presented on the facts or prevailing law.

* Linda J. Silberman: Professor of Law, New York University School of Law; B.A. University of Michigan, 1965; J.D. University of Michigan, 1968.
Int'l L.J. 501, 513-16 (1993). Such a statute could bring some predictability to the field of jurisdiction by setting forth more precise rules for the exercise of jurisdiction. Such rules should be based on the foreign defendant's activities with the United States as a whole. Unwitting or unknowing defendants can be protected by limiting jurisdiction in product liability cases to defendants who injure United States claimants in the United States when the foreign defendants "knew or reasonably should have known that a product would be imported for sale or use in the United States." A monetary or quantitative amount of business could also be included in such a statute to protect those foreign defendants whose products have only sporadic use in the United States. The courts in the state where the injury occurs should be the appropriate venue for any such action, thus eliminating the possibility of widespread forum shopping by an injured plaintiff and assuring that the action is brought in a forum convenient for litigation.

In the instant case, a similar result can be achieved under existing doctrinal framework, but not without something of a struggle. The splintered opinion by this Court in Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987), leaves open the question of whether a foreign manufacturer has to do something more than just put its component part into the stream of commerce in order to meet the "minimum contacts" threshold required by our cases. The present case also adds a particular wrinkle in that the specific component part causing the injury was incorporated into a product sold in another state. In addition,


2. Lower courts have continued to struggle with the issue in the aftermath of Asahi. Compare Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610 (8th Cir. 1994) (Japanese manufacturer of fireworks—who used a network of United States distributors to place its products in the stream of commerce in the Midwest—was subject to jurisdiction in Nebraska where plaintiff was injured) and Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558 (Fed. Cir. 1994) (Taiwanese defendant subject to jurisdiction in Virginia in patent infringement action where defendant sold fans to New Jersey company who in turn distributed them to other United States retailers) with Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369 (8th Cir. 1990) (Japanese manufacturer of single component part not subject to jurisdiction where its product was incorporated by a third party into a piece of equipment and sold to plaintiff in forum state).

3. However, other cars incorporating Brake-O's component appear to be sold in State Y. Thus, this case is not like World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980), where the New York distributor and New York dealer did not distribute to the forum state's market at all. Cf. Vermeulen v. Renault U.S.A., Inc., 985 F.2d 1534 (11th Cir. 1993), cert. denied, 113 S. Ct. 2334 (1993) (Georgia as the place of
Asahi’s introduction of a formal second tier of “reasonableness” brings into play a myriad of other concerns, such as whether there are particular burdens for a South Korean defendant responding in an American court.4

On these facts, however, the outcome is clear. Under either Justice O’Connor’s or Justice Brennan’s view in Asahi, Brake-O’s high volume of sales should provide sufficient contacts when the claim arises out of an injury in the state, and the defendant engages in additional activity that takes advantage of the forum state’s market. Nor does there appear to be anything “unreasonable” about exercising jurisdiction over Brake-O. Unlike Asahi, claims brought by the resident plaintiff against a number of defendants did not settle; thus State Y is a forum in which all parties to the dispute should be joined in a single trial. In addition, Brake-O appears to have other connections with State Y. Although I would not go so far as to rely on a theory of general jurisdiction in asserting jurisdiction over Brake-O (i.e., the case might well be decided differently in the absence of the accident in State Y, cf. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984)), Brake-O’s other activities are not to be ignored in assessing either Brake-O’s contacts with State Y or the reasonableness of the assertion of jurisdiction. As Justice WEINTRAUB has already observed, the concepts of general and specific jurisdiction are not necessarily hard and fast categories. At the same time, however, there is a need to develop better criteria for identifying where a defendant may be sued without regard to the nature of the claim. Unlike Justice WEINTRAUB, I do not think the activities of Brake-O do or should satisfy such a “general jurisdiction” requirement. I would endorse something closer to the English rule that requires an overseas company to “establish a place of business” within the country for it to be subject to the exercise of general jurisdiction.5


One last cautionary note: The only issue we decide here today is one of personal jurisdiction. It is entirely possible that at a later time we might also find application of State Y’s law appropriate depending upon the particular issue. But the two questions are different, and Justice COX’s attempt to equate them is unfortunate. Different considerations come into play with respect to choice of law than for jurisdiction, and even when it is appropriate to require a defendant to respond in the American forum, it may be nonetheless inappropriate to impose American standards of liability. In the context of the international community, it is interesting to note that the jurisdictional reach under English Order 11 (Rules of the Supreme Court (England) Order 11, Rule 1 (1) (1995)) and Brussels Convention (Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, EC O.J. c.189 (28 July 1990)) is often more expansive than that of the United States. And yet, it is American jurisdiction that is so often complained about. Certainly, some of that critique has to do with objections to American-style discovery, large jury verdicts, and contingent fees. But much of the unhappiness is directed to the perceived view that an invitation to litigation in an American court may mean an unfair assertion of American law. Rules which secure convenience of litigation do not necessarily take account of the competing interests with respect to the applicable law. Those issues remain for another day.

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WEINTRAUB, J.*: (affirming)

Affirmed. A court sitting in State Y may constitutionally exercise personal jurisdiction over Brake-O.

At last, a chance to cleanse the Augean Stables of our personal jurisdiction leavings. We have constitutionalized personal jurisdiction. Instead of this freeing our courts to experiment within broad boundaries of civilized reasonableness, in our hands it has imposed restraints that suggest travel and communication are becoming increasingly more, not less, difficult.

I. SPECIFIC JURISDICTION AND STREAM OF COMMERCE

I will divide my analysis under the headings of “specific” and “gen-

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eral" jurisdiction, but this should not signal some sharp division between the two. These are analytical tools that lose their utility if we treat them as ends in themselves. Some lawyers and judges may have been brainwashed in law school into thinking that there is a bright line dividing these two concepts, but that is not the way the world works. Common sense suggests that specific and general jurisdiction are opposite poles of a spectrum of fact situations. At the extreme specific end, for example, a nonresident motorist who drives in the state only once and hits a pedestrian, we properly insist that the action arise out of that single contact. At the general jurisdiction end, a defendant who is domiciled or has a principal place of business in the forum, we invite the afflicted of the world to come with their distant complaints, subject to a wise use of *forum non conveniens*. The vast number of cases in the middle ranges of this spectrum properly receive different treatment. The less the cause has to do with events in the forum, the more additional forum contacts should exist. The more the action arises out of or is related to acts or consequences in the forum, the less the requirement for additional nexus between forum and defendant.

Even this may not be sensible enough. For interstate suits, particularly suits involving companies whose commercial activities are far-ranging and are likely to be represented by an insurer doing business in all states, perhaps any forum with an interest in providing a remedy to the plaintiff should have jurisdiction over the defendant, subject to a cogent showing of unfairness. Such unfairness would include choice of a forum for its lunatic conflict of laws rule—such as the now abrogated Mississippi rule that regarded its tort statute of limitations, longest in the states, as "procedural." For international suits, such as this one, a decent respect for friendly foreign countries requires that the defendant have some contact with the United States, not any individual state, that makes it reasonable under the circumstances to order the foreigner to appear and defend here. This idea has received limited and halting recognition in Fed. R. Civ. P. 4(k)(2), which took effect on December

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1. Mississippi was a target forum because it had a six-year tort limitations period and regarded limitations as "procedural" so that the Mississippi period applied to any suit brought in Mississippi, even though the injury occurred in a state with a shorter period that had run before suit in Mississippi. *See Ferens v. John Deere Co.*, 494 U.S. 516 (1990). Mississippi has shortened its tort limitations to 3 years (Miss. Code Ann. § 15-1-49 (Supp. 1994)) and has passed a "borrowing" statute that would apply the shorter statute of limitations of the place where the cause of action "accrued" if the plaintiff were not a Mississippi resident (Miss. Code Ann. § 15-1-65 (Supp. 1994)).
1, 1993. For federal law claims, that rule permits accumulating national contacts. It does so, however, in a manner that exhibits an unexpected sense of humor. As a condition precedent, the defendant must “not [be] subject to the jurisdiction of the courts of general jurisdiction of any state.” Id. This puts the plaintiff in the position of contending that it could not get jurisdiction over the defendant in a state court, and the defendant in the posture of saying “yes you could.” Marvelous. This undoubtedly is a result of tracking the Parthian shot of Justice Blackmun, in Omni Capital Int'l v. Rudolf Wolff & Co.² Not incidentally, since 1987, Australian courts have had nation-wide jurisdiction with transfer for demonstrated inconvenience. Austl. Acts P., Jurisdiction of Courts (Cross-Vesting) Act 1987 (No. 24). Be that as it may, it is not necessary to take such heroic measures to find jurisdiction over Brake-O.

First, let us give its deserved quietus to the attempt in Asahi Metal Indus. v. Superior Court, 480 U.S. 102 (1987), supported by four Justices, to convert the stream of commerce to a pathetic dribble. Although this part of the opinion got only four votes, Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 683 (1st Cir. 1992) declared that “those circuits that have squarely addressed the stream-of-commerce issue since Asahi have adopted Justice O'Connor's plurality view.” Id. at 683. Apparently, the First Circuit's Westlaw and Lexis programs do not include the Fifth Circuit. See Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383 (5th Cir.), cert. denied, 493 U.S. 823 (1989). At least this Court had the good sense not to grant certiorari in Irving to “clarify” the matter and resolve the split between circuits. Now that the AALS has marched upon the Court and replaced its members with this panel, we can act decisively. A defendant that releases a product for sale is subject to jurisdiction in any state where the product causes harm if the product comes there either in the normal course of commercial distribution or is brought into that state by someone using that product as it is intended to be used. Insofar as World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), is inconsistent with this formulation, it is overruled. Thus, we end the danger springing from the four-Justice opinion in Asahi, that we would turn the clock back fifty years so that manufacturers could proclaim in the words that Tom Lehrer gave to Wernher von Braun: “Once the rockets are up, who cares where they come down?

². 484 U.S. 97, 111 (1987), suggesting “[a] narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute . . . .” Id.

Once again, our conclusion is bolstered by the wise counsel of our European cousins. Convention on Jurisdiction and Enforcement of Judgments (Official J.E.C. 189, v. 33, July 28, 1990, at 1-34, reprinted 29 I.L.M. 1413; 28 I.L.M. 620 [E.U.-E.F.T.A. Convention]. The European Union and European Free Trade Association Conventions on Jurisdiction and Enforcement of Judgments provide for jurisdiction “in matters relating to tort . . . in the courts for the place where the harmful event occurred.” This has been interpreted liberally. In Handelskwekerij G. J. Bier B. V. v. Mines de Potasse d'Alsace S. A., 1976 E.C.J. 1735, the Court of Justice of the European Communities permitted a Netherlands horticultural company to sue in the Netherlands for damage to its seedbeds, located there, caused by defendant’s alleged discharging of pollutants into the Rhine in France. Moreover, article 6(2) of the Convention permits “any . . . third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing [the third-party defendant] from the jurisdiction of the court which would be competent in his case.” E.U.-E.F.T.A. Convention, supra, at art. 6(2).

II. GENERAL JURISDICTION

It would be sufficient here to say that any doubts we might have concerning suit against Brake-O based on the harm in State Y, are allayed by Brake-O’s continuous and systematic contacts with State Y. We elect to go further. Innocent Victim could sue Brake-O in State Y even if Innocent Victim, a State Y resident, had been injured while sojourning in State M or State K. United States courts have been criticized abroad for taking too expansive a view of general jurisdiction. In the E.U.-E.F.T.A. Convention, the only basis for general jurisdiction is domicile (art. 2), which for a corporation is its “seat.” E.U.-E.F.T.A. Convention, supra, at art. 53. The Convention is fine for specific jurisdiction when there is blood on the ground, but it may be too solicitous of commercial interests in other matters. Not only is its basis for general jurisdiction narrow, but also the specific jurisdiction provision for contract actions is limited to “the court for the place of performance of the obligation in question.” E.U.-E.F.T.A. Convention, supra, at art. 5(1). It should give us pause to move where others do not tread. On reflection, however, in this day of jet travel and instantaneous voice and television communication, the time has come to declare that a victim may sue at home if the defendant’s contacts with that forum are sufficiently continuous and systematic to make this reasonable. If, though
unlikely, any unfairness results from evidentiary problems, the doctrine of *forum non conveniens* is the necessary palliative.

Japan would find general jurisdiction over Brake-O on these facts. In *Goto v. Malaysian Airline Sys. Berhad*, 35 Minshu 1224 (1981), the Japanese Supreme Court upheld jurisdiction over the Malaysian Airline in a suit for breach of an air transportation contract resulting in the death of plaintiffs’ husband and father. The crash occurred in Malaysia on a domestic Malaysian flight. The court indicated that in international cases, jurisdiction is based on rules of reason for maintaining impartiality, fairness, and speediness. These requirements are met if the Japanese court has jurisdiction over the foreign party in accordance with the Japanese Code of Civil Procedure’s venue provisions including the defendant’s residence (art. 2, CCP), the place where the defendant has a place of business (art. 4, CCP) (the provision applicable in *Goto* - the defendant had an office in Tokyo although this office had no connection to the relevant transportation contract), where the defendant’s property is located (art. 8, CCP), and “a place of tort” (art. 15, CCP (Minsoho)). The decision in *Asahi* must have provoked gales of laughter in Japan.