

Conflict of Laws outline, Spring 2006. Russell Miller.

I. UNDERPINNINGS

A. THEORY

1. What is conflict of laws?

- a) **Definition:** a mechanism for resolving dispute and transactions that have legal implications involving more than one sovereign.
- b) **Components**
 - (1) Jurisdiction
 - (2) Choice of law
 - (3) Enforcement of judgments

B. HISTORY

1. The Egyptians: said that forum law always applies. Some states follow this approach.
2. The Romans: said that you don't choose one law, but rather mesh together the applicable laws into a new law to apply--*jus gentium*
3. The Statutists: (during the 14th and 15th centuries) looked at a particular statute to determine whether it was "real" or "personal." Real statutes operated only within the territory of the enacting state, whereas "personal" statutes followed all people who owed allegiance to the enacting state. This is a *unilateral* approach--it focuses on the applicable laws themselves to determine which applies.
4. The Dutch: (during the 15th and 16th centuries) applied laws generally only within the enacting state, but to all those there, whether temporarily or permanently. However, they also introduced the idea of *comity*, which called for application of foreign law when needed to preserve rights acquired in foreign states--so as to protect the forum state from retaliation when the tables were turned.
5. Savigny: (a German in the 19th century) reintroduced a *multilateral* approach, focusing not on the competing laws themselves, but on aspects of the dispute outside of those laws in order to determine which law to choose.
6. Beale: (the 20th century) who was a radical multilateralist, looking strictly at features outside the competing laws.

II. CHOICE OF LAW

A. The Choice of Law Analysis

1. What's the forum?
2. What are the interested jurisdictions?
3. What would be the different results?
 - a) Based on jurisdiction law?
 - b) Based on characterization?
4. (What law to choose?)

B. THE FIRST RESTATEMENT (BEALE)

Comment: Used by 10 states for torts, 11 for contracts.

1. Rules

- a) **Torts:** the law of the place of the wrong governs; that place is where the "last event necessary" to make the defendant liable occurred.
 - (1) **Restatement Rules**

(a) Torts

- i) 377. *The Place of Wrong*. The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.
 - a. Note: Summary of Rules in Important Situations Determining Where a Tort is Committed.
 - 1) Except in the case of harm from poison, when a person sustains bodily harm, the place of wrong is the place where the harmful force takes effect upon the body.
 - 2) When a person causes another voluntarily to take a deleterious substance which takes effect within the body, the place of wrong is where the deleterious substance takes effect and not where it is administered.
 - 3) When harm is caused to land or chattels, the place of wrong is the place where the force takes effect on the thing.
 - 4) When a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent representations are made.
 - 5) Where harm is done to the reputation of a person, the place of wrong is where the defamatory statement is communicated.
- ii) 378. *Law Governing Plaintiff's Injury*. The law of the place of wrong determines whether a person has sustained a legal injury.
- iii) 379. *Law Governing Liability-Creating Conduct*. Except as stated in 382 [Duty of Privilege to Act], the law of the place of wrong determines
 - a. whether a person is responsible for harm he has caused only if he intended it,
 - b. whether a person is responsible for unintended harm he has caused only if he was negligent,
 - c. whether a person is responsible for harm he has caused irrespective of his intention or the care which he has exercised.
- iv) 382. *Duty or Privilege to Act*.
 - a. A person who is required by law to act or not to act in one state in a certain manner will not be held liable for the results of such action or failure to act which occur in another state.
 - b. A person who acts pursuant to a privilege conferred by the law of the place of acting will not be held liable for the results of his act in another state.
- v) 384. *Recognition of Foreign Cause of Action*.
 - a. If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states.
 - b. If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state.
- vi) 385. *Contributory Negligence*. Whether contributory negligence of

the plaintiff precludes recovery in whole or in part in an action for negligent injury is determined by the law of the place of wrong.

vii) 386. *Liability to Servant for Tort of Fellow Servant.* The law of the place of wrong determines whether a master is liable for a wrong caused by a fellow servant.

viii) 387. *Vicarious Liability.* When a person authorizes another to act for him in any state and the other does so act, whether he is liable for the tort of the other is determined by the law of the place of wrong.

ix) 390. *Survival of Actions.* Whether a claim for damages for a tort survives the death of the tortfeasor or of the injured person is determined by the law of the place of wrong.

(b) Actions for Death

i) 391. *Right of Action for Death.* The law of the place of wrong governs the right of action for death.

(c) Workmen's Compensation

i) 398. *Compensation under Act of State of Employment.* A workman who enters into a contract of employment in a state in which a Workmen's Compensation Act is in force can recover compensation under the Act in that state for bodily harm arising out of and in the course of the employment, although the harm was suffered in another state, unless the Act provides in specific words or is so interpreted as to apply only to bodily harm occurring within the state.

ii) 399. *Compensation under Act of State of Harm.* Except as stated in 401 [Abolition Of Right Of Action For Common Law Tort Or Wrongful Death], a workman may recover in a state in which he sustains harm under the Workmen's Compensation Act of that state although the contract of employment was made in another state, unless the Act provides in specific words or is so interpreted as to apply only when the contract of employment is made within the state.

(d) Damages

i) 412. *Measure of Damages for Tort.* The measure of damages for a tort is determined by the law of the place of wrong.

ii) 421. *Exemplary Damages.* The right to exemplary damages is determined by the law of the place of wrong.

(2) Unintentional Torts (the basic rule)

(a) *Alabama Great Southern Railroad v. Carroll* (Ala. 1892) (p1): this case illustrates that, under the First Restatement (Beale), even when nearly every contact in the case is with State A (Alabama here, the forum state), if the place of the wrong (even if not the negligent conduct) was in State B (Mississippi here), then State B's law will apply.

i) This result shows how the Beale approach will reduce a court's discretion and thus promote uniformity (and prevent forum shopping).

a. However, note that the discretion in characterization is still there under Beale. Here, for instance, the state could characterize the dispute as one over contracts, not torts, and possibly reach a

different result.

(3) Intentional Torts (a special rule?)

(a) *Marra v. Bushee* (D. Vt. 1970) (p16): the court here, in a loss of consortium action, escapes the strict territorial approach of the First Restatement by emphasizing that intentional torts are different--that the purpose of them is at least partly punitive, thus the point of them is to control conduct, and therefore the *place of conduct* should govern which law to choose.

i) The court's approach here, deviating from Beale, foreshadows modern choice of law approaches that focus on state interests, sometimes over territoriality.

b) **Contracts:** the law to choose will depend on whether the dispute is over formation, validity, or performance. If over formation, use the Restatement Rules to determine where the contract *would* be formed if at all, and apply that state's law. If over validity, apply that law of the state where the contract was formed. If over performance, apply the law of the state where the contract was to be performed.

(1) Restatement Rules

(a) Place of Contracting

i) *311. Place of Contracting.* The law of the forum decides as a preliminary question by the law of which state questions concerning the formation of a contract are to be determined, and this state is, in the Restatement of this Subject, called the "place of contracting."

ii) *312. Formal Contract.* . . . place of contracting is where the delivery is made.

iii) *314. Formal Contract Completed by Mail of Carriage.* . . . place of contracting is where the document is posted or is received by the carrier.

iv) *315. Formal Contract Delivered by Agent.* . . . place of contracting is where the agent delivers it.

v) *323. Informal Unilateral Contract.* . . . place of contracting is where the event takes place which makes the promise binding.

vi) *325. Informal Bilateral Contract.* . . . place of contracting is where the promise is made in consideration for the first promise.

vii) *326. Acceptance Sent from One State to Another.* . . . place of contracting is as follows:

(a) If the acceptance is sent by an agent of the acceptor, the place of contracting is the state where the agent delivers it.

(b) if the acceptance is sent by any other means, the place of contracting is the state from which the acceptance is sent.

viii) *322. Law Governing Validity of Contract.* The law of the place of contracting determines the validity and effect of a promise with respect to

(a) capacity to make the contract;

(b) the necessary form, if any, in which the promise must be made;

- (c) the mutual assent or consideration, if any, required to make a promise binding;
- (d) any other requirements for making a promise binding;
- (e) fraud, illegality, or any other circumstances which make a promise void or voidable;
- (f) except as stated in 358, the nature and extent of the duty for the performance of which a party becomes bound;
- (g) the time when and the place where the promise is by its terms to be performed;
- (h) the absolute or conditional character of the promise.

(b) Creation of a Contract

- i) 333. *Capacity to Contract.*** The law of the place of contracting determines the capacity to enter into a contract.
- ii) 334. *Formalities for Contracting.*** . . . law of the place of contracting.
- iii) 335. *Sealed Instruments.*** . . . law of the place of contracting.
- iv) 336. *Negotiable Instruments.*** . . . law of the place of contracting.
- v) 340. *Contracts to Transfer of to Convey Land.*** . . . law of the place of contracting.

(c) Performance of a Contract

- i) 355. *Place of Performance.*** The place of performance is the state where, either by specific provision or by interpretation of the language of the promise, the promise is to be performed.
- ii) 358. *Law Governing Performance.*** The duty for the performance of which a party to a contract is bound will be discharged by compliance with the law of the place of performance of the promise with respect to:
 - (a) the manner of performance;
 - (b) the time and locality of performance;
 - (c) the person or persons by whom or to whom performance shall be made or rendered;
 - (d) the sufficiency of performance;
 - (e) excuse for non-performance.
- iii) 360. *Illegality of Performance.***
 - (1) If performance of a contract is illegal by the law of the place of performance at the time for performance, there is no obligation to perform so long as the illegality continues.
 - (2) If the legality of performance is temporary and the obligation of the contract still continues, whether the contract must be performed within a reasonable time after its performance becomes legal depends upon the law of the place of performance
- iv) 361. *What Amounts to Performance.*** The law of the place of performance determines the details of the manner of performing the duty imposed by the contract.

(2) Cases

- (a) *Poole v. Perkins* (Va. 1919) (p29):** the court here, in a contract dispute,

characterizes the issue as one of performance, even though common sense suggests the issue--about a wife's capacity to contract--is one of contract validity. Moreover, the court makes its determinations by looking at the parties' *intentions*--something that Beale would hate.

(b) *Linn v. Employers Reinsurance Corp.* (Pa. 1958) (p33): this Pennsylvania court must determine where a contract negotiated by telephone was formed. It looks at decisions from other states in order to follow any pattern so to promote uniformity and combat forum-shopping. It finds that the majority rule is that acceptance by telephone takes place where the words are spoken.

(c) *Burr v. Beckler* (Ill. 1914) (p76): this Illinois court determines that a trust deed, conveying Illinois real estate as security for a note that the plaintiff alleges she was induced to execute, was a contract, not a conveyance. Thus, it applies the contract conflicts rules, which dictate that the law of the place of contracting (Florida here) govern, rather than the real property rules, which dictate that the law of the place where the property is governs (Illinois here). Under those rules, the plaintiff wife had no capacity to contract and so the whole conveyance is blown.

c) **Domicile** (a mechanism to assist in choosing law): a person's domicile is the place where he has at least some actual physical presence *and* an intent to make that place his principal home.

(1) Restatement Rules

(a) Meaning of Domicil

i) *9. Domicil.* Domicil is the place with which a person has a settled connection for certain legal purposes, either because his home is there, or because that place is assigned to him by the law.

ii) *10. Domicil by What Law Determined.*

a. A question of domicil as between the state of the forum and another state is determined by the law of the forum.

b. A question of domicil as between one or another of several states other than the forum, the law of each which differs from that of the other and from that of the forum, is determined by the law of the forum.

(b) General Requirements of Domicil

i) *11. One and Only One Domicil.* Every person has at all times one domicil, and no person has more than one domicil at a time.

ii) *12. Relation between Domicil and Home.* Except as stated in 17 and 26 to 40, relating to domicil in a vehicle and to domicil by operation of law, when a person has one home and only one home, his domicil is the place where his home is.

iii) *13. Home Defined.* A home is a dwelling place of a person, distinguished from other dwelling places of that person by the intimacy of the relation between the person and the place.

(c) Acquisition and Change of Domicil

i) *14. Domicil of Origin.* The domicil of origin is the domicil assigned to

every child at its birth.

ii) 15. Domicil of Choice.

- a.** A domicil of choice is a domicil acquired, through the exercise of his own will, by a person who is legally capable of changing his domicil.
- b.** To acquire a domicil of choice, a person must establish a dwelling-place with the intention of making it his home.
- c.** The fact of physical presence at a dwelling-place and the intention to make it a home must concur; if they do so, even for a moment, the change of domicil takes place.
- d.** A person can have a domicil of choice only in one of three ways:
 - 1)** having no home, he acquires a home in a place other than his former domicil;
 - 2)** having a home in one place, he gives it up as such and acquires a new home in another place;
 - 3)** having two homes, he comes to regard the one of them not previously his domicil as his principal home.

iii) 16. Requisite of Physical Presence. To acquire a domicil of choice in a place, a person must be physically present there; but a home in a particular building is not necessary for the acquisition of a domicil.

iv) 18. Requisite of Intention. A person cannot change his domicil by removal to a new dwelling-place without an intention to make the new dwelling place his home.

v) 19. Nature of Intention Required. The intention required for the acquisition of a domicil of choice is an intention to make a home in fact, and not an intention to acquire a domicil.

vi) 20. Present Intention. For the acquisition of a domicil of choice the intention to make a home must be an intention to make a home at the moment, not to make a home in the future.

vii) 21. Presence under Compulsion. A person cannot acquire a domicil of choice by any act done under legal or physical compulsion.

viii) 23. Continuing Quality of Domicil. A domicil once established continues until it is superseded by a new domicil.

ix) 25. Domicil in Dwelling-House Cut by Boundary Line. Where a person has his home in a dwelling-house which is situated upon a dividing line between political subdivisions of territory, his domicil is within the division in which the preponderant part of his dwelling-house is situated; if there is no preponderance, the domicil is in the territorial division in which the principal entrance to the house is situated.

(d) Domicil by Operation of Law

i) 27. Domicil of Married Woman.

ii) 41. Domicil of Corporation.

(2) Cases

(a) *White v. Tenant* (W.Va. 1888) (p43): the decedent in this case was

domiciled in Pennsylvania, the court here said, even though he never actually began living there--his actual presence at his new home there (putting his stuff and his stock there) and his intent to move from West Virginia was enough to establish domicile.

- (b) *Rodriguez Diaz v. Sierra Martinez* (1st Cir. 1988) (p46) (not discussed in class): a federal court must determine where a minor is domiciled in order to determine whether there is sufficient diversity for federal jurisdiction. In doing so, it recites the general domicile test: (1) physical presence in a place plus (2) intent to make that place a home. This case is complicated by the fact that the minor's infancy may deprive him of any legally cognizable intent to establish domicile, and yet even if forum law were applied to resolve that question the minor would end up as a citizen of both New York and Puerto Rico.
- d) **Marriage:** generally, a marriage that's valid where it was celebrated is valid everywhere else (and invalid everywhere if invalid in the celebration state). But, marriages against the statutory law of the domicile of either spouse (132(d)) are invalid everywhere; and marriages "sufficiently offensive" to the policy of a state will not be given effect in that particular state.

(1) Restatement Rules

(a) Marriage

- i) *121. Law Governing Validity of Marriage.* Except as stated in 131 [Remarriage After Parties To Divorce Both Forbidden To Remarry] and 132 [Marriage Declared Void by Law of Domicil], a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with.
- ii) *122. Requirements of State of Celebration.* A marriage is invalid everywhere if any mandatory requirement of the marriage law of the state in which the marriage is celebrated is not complied with.
- iii) *123. "Common Law" Marriage.*
- iv) *128. Marriage in a Nomadic Tribe.*
- v) *129. Evasion of Requirement of Domicil.* If the requirements of the law of the state of celebration are complied with, the marriage is valid everywhere, except under the circumstances stated in 131 and 132, although the parties of the marriage went to that state in order to evade the requirements of the law of their domicil.
- vi) *130. Remarriage after One Party to Divorce Forbidden to Remarry.*
- vii) *132. Marriage Declared Void by Law of Domicil.* A marriage which is against the law of the state of domicil of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere in the following cases:
- a. (a) polygamous marriage,
 - b. (b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil,
 - c. (c) marriage between persons of different races where such marriages are at the domicil regarded as odious,

- d. (d) marriage of a domiciliary which a statute at the domicile makes void even though celebrated in another state.
- viii) 133. *Effect of Foreign Marriage*. Except as stated in 134 [Marriage Contrary to Public Policy], a state will give the same effect to a marriage created by the law of another state that it gives to a marriage created by its own law.
- ix) 134. *Marriage Contrary to Public Policy*. If any effect of a marriage created by the law of one state is deemed by the courts of another state sufficiently offensive to the policy of the latter state, the latter state will refuse to give that effect to the marriage.
- x) 136. *Law Governing Nullity*.
- (b) Legitimacy
 - i) 137. *Law Governing Legitimacy*.
 - ii) 138. *Legitimacy at Birth*.
 - iii) 139. *Legitimacy from Birth*.
 - iv) 140. *Legitimation after Birth*.
 - v) 141. *Effect of Legitimacy Created by Foreign Law*.

(2) Cases

- (a) *Lanham v. Lanham* (Wis. 1908) (p65): a Wisconsin court voids a Michigan marriage between a divorced woman and an 84 year old man from, both from Wisconsin. The court characterizes the exceptions to the general Restatement rule as (1) marriages contrary to the law of nature won't be recognized anywhere (132(d)) and (2) the forum can refuse validity in the forum state based on public policy (134). Here, the court uses 132(d), saying that such state statutes must clearly intend to apply extraterritorially (cf. *May's Estate*), and that this statute was clearly intended to apply extraterritorially because the statute didn't say it *wasn't* so intended.
 - i) This is probably an instance of a court using wiggle room within the conflicts rules to do what it wants--invalidate this marriage by a gold digger to an 84 year old.
 - ii) Cf. *In re May's Estate* (N.Y. 1953) (p60) (not discussed in class): a New York court allows a Rhode Island marriage between an uncle and a niece despite a New York statute prohibiting such marriages in New York, because of the First Restatement rule. The court said the marriage did not fall within the 132(d) exception because the NY statute did not *expressly* prohibit such marriages if made *abroad*.
- (b) *Burns v. Burns* (Ga. 2002) (h/o): this Georgia court decides that it will enforce a divorce consent decree prohibiting child visitation with a parent cohabiting while not married, despite that the former wife entered a same-sex civil union in Vermont. The court rejected the wife's argument that under the FFCC, her civil union was a marriage in Georgia, saying that (1) Vermont law expressly distinguishes civil unions from marriages and (2) even if the civil union was a divorce, it would be contrary to Georgia public policy and Georgia would not have to give it full faith and credit

under DOMA.

e) **Property**

(1) **Real Property:** the law of the place where the property is located governs.

(a) **Restatement Rules**

i) Property in General

a. *211. Property in Tangible Thing: Where Created.* The original creation of property in a tangible thing is governed by the law of the state where the thing is at the time of the events which create the interests.

ii) Immovables

a. Conveyances

1) *214. Legal Effect and Interpretation of Words Used in an Instrument of Conveyance.*

(1) Words used in an instrument of conveyance of an interest in land which, by the law of the state where the land is, have a given operative effect irrespective of the intent of the conveyor, will be accorded such effect in any state.

(2) Words used in an instrument of conveyance of an interest in land which, by the law of the state where the land is, have a given operative effect unless a contrary intent is shown by admissible evidence, will be accorded such effect in any state.

(3) The meaning of words used in an instrument of conveyance of an interest in land which, by the law of the state where the land is, are accorded neither of the effects described in Subsections (1) and (2), is in the absence of controlling circumstances to the contrary, determined in accordance with usage at the domicile of the conveyor at the time of the conveyance.

2) *216. Capacity to Convey Interest in Land.* . . . determined by the law of the state where the land is.

3) *217. Formalities of Conveyance of Interest in Land.* . . . determined by the law of the state where the land is.

4) *218. Substantial Validity of Conveyance of Interest in Land.* Whether a conveyance of an interest in land, which is in due form and is made by a party who has capacity to convey it, is in other respects valid, is determined by the law of the state where the land is.

5) *219. Capacity of Grantee to Take or Hold Land.* . . . determined by the law of the state where the land is.

6) *220. Effect of Conveyance of Interest in Land.* . . . determined by the law of the state where the land is.

7) *221. Nature of Interest Created by Conveyance of Land.* . . . determined by the law of the state where the land is.

8) *222. Non-Possessory Interests in Land.* . . . determined by the law of the state where the land is.

- b. Transfers by Operation of Law
 - 1) 223. *Transfer of Interest in Land by Operation of Law.* An interest in land can be transferred by operation of law only by the law of the state where the land is.
- c. Incumbrances
 - 1) 225. *Mortgage on Land; By What Law Determined.* The validity and effect of a mortgage on land is determined by the law of the state where the land is.
 - 2) 226. *Assignment of Mortgage on Land.* . . . determined by the law of the state where the land is.
 - 3) 227. *Foreclosure of Mortgage on Land.* . . . determined by the law of the state where the land is.
- d. Marital Property
 - 1) 237. *Effect of Marriage on Existing Interests in Land.* . . . determined by the law of the state where the land is.
 - 2) 238. *Effect of Marriage on an Interest in Land Later Acquired.* . . . determined by the law of the state where the land is.
- e. Equitable Interests
 - 1) 244. *Equitable Conversion of Trust Property.* Whether the interest of the beneficiary of a trust of land is real estate or whether, because of a direction to sell the land, it is personal property, is determined by the law of the state where the land is.
- f. Succession on Death
 - 1) 245. *Inheritance of Land.* The law of the state where the land is determines its devolution upon the death of the owner intestate.
 - 2) 246. *Legitimacy of Claimant by Decedent.* A person who is heir by the law of the state where the land is, only if legitimate, is heir if, but only if, he is born legitimate as stated in 138 or has been legitimized as stated in 139 and 140.
 - 3) 248. *Share of Spouse in Land upon Termination of Marriage.* . . . determined by the law of the state where the land is.
 - 4) 249. *Will of Land.* . . . determined by the law of the state where the land is.
 - 5) 250. *Revocation of Will of Land.* . . . determined by the law of the state where the land is.
 - 6) 251. *Interpretation, Construction and Effect of Will of Land.*
 - (1) Words used in a devise of an interest in land which, by law of the state where the land is, have a given operative effect irrespective of the intent of the testator, will be accorded such effect in any state.
 - (2) Words used in a devise of an interest in land which, by the law of the state where the land is, have a given operative effect unless a contrary intent is shown by admissible evidence, will be accorded such effect in any state.

(3) The meaning of words used in a devise of an interest in land which, by the law of the state where the land is, are accorded neither of the effects described in Subsections (1) and (2), is, in the absence of controlling circumstances to the contrary, determined in accordance with usage at the domicile of the testator at the time when the will was made.

(b) Cases: illustrating the characterization (of an instrument as either a conveyance or a contract for conveyance) makes all the difference here.

- i) *Burr v. Beckler* (Ill. 1914) (p76):** this Illinois court determines that a trust deed, conveying Illinois real estate as security for a note that the plaintiff alleges she was induced to execute, was a contract. Thus, it applies the contract conflicts rules, which dictate that the law of the place of contracting (Florida here) govern. Under those rules, the plaintiff wife had no capacity to contract and so the whole conveyance is blown.
- ii) *Thomson v. Kyle* (Fla. 1897) (p77):** this Florida court determines that a note evidencing a mortgage on Florida land will be governed by the law of the place where the land is (Florida), even though the note was made and had everything to do with Alabama, where its maker lacked the capacity to make it.

(2) Trusts: the law to choose will depend on whether the dispute is over validity, interpretation, or administration of the trust, and whether the trust is a testamentary or inter vivos trust. The rules fall out like this:

Validity dispute

IV: law of the place where the property was when the trust was created

T: law of the testator's domicile at death

Interpretation dispute: law of the domicile of the grantor at execution of the instrument

Administration dispute

IV: law of the place where the instrument locates administration

T: law of the testator's domicile at death, unless intent otherwise

(a) Restatement Rules

i) Movables::Equitable Interests

a. 294. *Validity of Trust of Movables Created Inter Vivos.*

(1) Except as stated in 263, the validity of a trust of chattels created by settlement or other transaction inter vivos is determined as to each item by the law of the state in which the particular chattel is at the time of the creation of the trust.

(2) The validity of a trust of choses in action created by a settlement or other transaction inter vivos is determined by the law of the place where the transaction takes place.

b. 295. *Validity of Trust Created by Will.* The validity of a trust of movables created by a will is determined by the law of the testator's domicile at the time of death.

c. 296. *Interpretation of Trust Instrument.* The meaning of the words

used in an instrument creating a trust of movables is, in the absence of controlling circumstances to the contrary, determined in accordance with the usage at the domicile of the settlor of the trust at the time of the execution of the instrument which created it.

- d. 297. *Administration of Trust of Movables Created Inter Vivos*. A trust of movables created by an instrument inter vivos is administered by the trustee according to the law of the state where the instrument creating the trust located the administration of the trust.
- e. 298. *Administration of Trust of Movables Created by Will*. A testamentary trust of movables is administered by the trustee according to the law of the state of the testator's domicile at the time of his death unless the will shows an intention that the trust should be administered in another state.

(b) Cases

- i) *Wilmington Trust Co. v. Wilmington Trust Co.* (Del. 1942) (p103): a Delaware court determines whether an appointment made under a trust created in New York but then moved to Delaware should be governed by New York law (which would void the appointment as against the Rule Against Perpetuities) or Delaware law (where the appointment would be okay. The court makes its determination by looking at contacts and the intent of the grantor--that is, rejecting territoriality (and Beale's fixation).

- (3) Personal Property:** the law of the state where the chattel is at the time of conveyance, and conveyed interests will be recognized if the chattel is later moved into another state.

(a) Restatement Rules

i) Movables

a. Conveyances

- 1) 255. *Capacity to Convey Chattel*. . . . determined by the law of the state where the chattel is at the time of conveyance.
- 2) 256. *Formalities of Conveyance of Chattel*. . . . determined by the law of the state where the chattel is at the time of conveyance.
- 3) 257. *Substantial Validity of Conveyance of Chattel*. . . . determined by the law of the state where the chattel is at the time of conveyance.
- 4) 258. *Nature of Interest Created by Conveyance of Chattel*. . . . determined by the law of the place where the chattel is at the time of conveyance.
- 5) 260. *Moving Chattels into Another State; Effect on Title*. An interest in a chattel acquired in accordance with the law of the state in which the chattel is at the time when the interest is acquired will be recognized in a state into which the chattel is subsequently taken.

6) 261. *Chattel Embodied in a Document.*

(1) Whether the title to a chattel is embodied in a document is determined by the law of the place where the chattel is at the time when the document is issued.

(2) The validity of a conveyance of a chattel, title to which is embodied in a document, depends upon the validity of the conveyance of the document.

(3) The validity of the conveyance of a document in which title to a chattel is embodied as stated in Subsection (1), is determined by the law of the place where the document is at the time of the conveyance.

b. Marital Property

1) 289. *Effect of Marriage on Title to Existing Movables.* . . . law of the domicile of the husband at the time of marriage.

2) 290. *Movables Acquired during Marriage.* . . . law of the domicile of the parties when the movables are acquired.

3) 291. *Removal of Movables of Spouses to Another State.*
Interests in movables acquired by either or both of the spouses in one state continue after the movables have been brought into another state until the interests are affected by some new dealings with the movables in the second state.

c. Succession on Death

1) 300. *Devolution of Chattels on Death of Owner.* At the death of the owner of chattels the title to the chattels passes to the executor or administrator appointed by the court of the state in which the chattels are habitually kept.

2) 301. *Right of Widow or Child Outside Will.* . . . determined by the law of the state in which the decedent died domiciled.

3) 302. *Enforcement of Widow's Allowance in Another State.*

4) 306. *Will of Movables.* . . . determined by the law of the state in which the deceased died domiciled.

5) 307. *Revocation of Will of Movables.* determined by the law of the state in which the deceased was domiciled at the time of his death.

(b) **Case**

i) *Morson v. Second National Bank of Boston* (Mass. 1940) (p111) (not discussed in class): this Massachusetts court says that although shares of stock are chattels, conveyances of stock will not be governed by the law of the place where it is conveyed--rather, they will be governed by the law of the place of incorporation of the issuing corporation.

f) **Corporations:** the law to choose will depend on whether the dispute is over the formation of the entity, the entity's external acts, or the entity's internal (organizational) acts. If over formation, use the Restatement Rules to determine where the entity *would* be formed if at all, and apply that state's law. If over external acts, apply the law of the state where the acts were done. If over internal

act, apply the law of the state of formation.

(1) Restatement Rules

(a) Creation, Recognition and Dissolution

- i) 154. *Recognition of Foreign Corporation.*** The fact of incorporation by one state will be recognized in every other state.
- ii) 155. *Questions of Incorporation.***
 - (1) Whether an association has been incorporated is determined by the law of the state in which an attempt to incorporate has been made.
 - (2) The effects of an unsuccessful attempt to incorporate are governed by the law of the state in which the attempt was made.
 - (3) Defects in the process of incorporation which may give the incorporating state a power to dissolve the corporation are governed by the law of such state.

(b) Action by Corporation

- i) 165. *Powers of Foreign Corporation.*** A foreign corporation can legally perform any act within its corporate powers under the law of the state of incorporation unless the act is prohibited by the law of the state where it is to be performed.
- ii) 166. *Law Governing Act of Foreign Corporation.*** The effect of an act directed to be done by a foreign corporation is governed by the law of the state where it is done.

(c) Shareholders and Directors

- i) 182. *Law Governing Title to Share.*** . . . determined by the law of the state of incorporation.
- ii) 183. *Participation in Management and Profits.*** . . . determined by the law of the state of incorporation.
- iii) 187. *Director's or Shareholder's Liability.*** . . . determined by the law of the state of incorporation.
- iv) 188. *Liability Imposed by State Where Corporation Acts.*** So far as the directors or agents are participants in acts done within the state, a state can impose liability upon the directors or agents of a foreign corporation doing business in the state for acts done within the state or for failure to do acts required by the law of the state as a condition of doing business within the state.
- v) 190. *Direct Liability of Shareholder Imposed by State of Incorporation.*** The state of incorporation can impose liability on a shareholder running directly to creditors, for debts of the corporation incurred in another state and this liability will be enforced in any state which has judicial jurisdiction over the shareholder.
- vi) 191. *Direct Liability of Shareholder Imposed by Foreign State.*** Liability for an act caused by a foreign corporation to be done by its agent can be imposed on a shareholder by the law of the state where the act is done only if the shareholder
 - (a) is domiciled in the state, or
 - (b) has personally taken part in doing the act or causing it to be done,

or

(c) has notice that the corporation was formed to do business there. This liability will be enforced in any state having judicial jurisdiction over the shareholder.

(d) Interference with Internal Affairs

i) *192. Action Concerning Shares.* . . . a court will usually not entertain a suit brought against a foreign corporation to obtain a decree against it requiring or enjoining the issuance, transfer, or cancellation of shares.

(e) Association Incorporated by More Than One State

i) *205. Creation of Shares by Reincorporated Association.* . . . governed by the law of the state which first incorporates the association.

(2) Cases

(a) *Vanderpoel v. Gorman* (N.Y. 1894) (p84) (not discussed in class): the New York court here reasoned that there were fundamental differences between foreign corporations and domestic corporations, which were created pursuant to the laws of the state, and concluded that the existence of a statute prohibiting a transaction by a domestic corporation did not in itself demonstrate a public policy against such transactions and thus the foreign corporation was not prohibited, as domestic corporations were.

i) *Irving Trust Co. v. Maryland Casualty Co.* (2d Cir. 1936) (p87) (not discussed in class): the court grapples with a state statute designed to overrule *Vanderpoel*, and concludes that it can't directly effect foreign property but can order the defendants to reconvey.

(b) *McDermott Inc. v. Lewis* (Del. 1987) (p89) (not discussed in class): this Delaware court invokes the internal affairs doctrine and applies Panamanian law to a voting dispute involving a Panamanian corporation. Moreover, the court declined to apply Delaware law, despite the doctrine, for public policy reasons and in fact felt that the internal affairs doctrine was constitutionally compelled by the Commerce Clause.

2. Problems

a) Characterization

(1) Substance vs. substance: note that there are no Restatement rules here.

(a) *Haumschild v. Continental Casualty Co.* (Wis. 1959) (p114): in a dispute over whether a wife could sue her husband for negligence, a Wisconsin court must determine whether the dispute is about torts (in which case the law of California, where the last act occurred, applies and gives the wife no capacity to sue) or about capacity to sue (in which case the law of Wisconsin, the domicile of the spouses, applies and gives the wife capacity). The court concludes (conveniently) that real nature of the dispute is about capacity to sue, and so domicile law (which is, incidentally, forum law in this case) governs. So, this case illustrates how characterization gives courts some wiggle room.

(b) *Poole v. Perkins* (Va. 1919) (p29): the court here, in a contract dispute, characterizes the issue as one of performance, even though common sense suggests the issue is one of contract validity. Moreover, the court makes

its determinations by looking at the parties' *intentions*--something that Beale would hate.

(c) *Burr v. Beckler* (Ill. 1914) (p76): in this land case, it depends on whether the dispute is characterized as one over the validity of the *contract* for conveyance (law of place of contracting) or the actual conveyance itself (law of the place where the property is applies).

i) *Thomson v. Kyle* (Fla. 1897) (p77): a case with the same characterization issue as *Burr*, but the court comes out the other way. This illustrates how characterization inserts discretion into the choice of law process.

(2) Substance vs. procedure

(a) Generally

i) Restatement Rules

a. Distinction between Substance and Procedure

- 1) 584. *Determination of Whether Question Is One of Procedure.* The court at the forum determines according to its own Conflict of Laws whether a given question is one of substance or procedure.
- 2) 585. *What Law Governs Procedure.* All matters of procedure are governed by the law of the forum.

b. Proceedings in Court

- 1) 588. *Parties.* The law of the forum determines who may and who must sue and be sued.
- 2) 591. *Commencement of Action.* The law of the forum determines at what moment action is begun.
- 3) 594. *Mode of Trial.* The law of the forum determines whether an issue of fact shall be tried by the court or by a jury.
- 4) 595. *Proof of Facts.*
 - (1) The law of the forum governs the proof in court of a fact alleged.
 - (2) The law of the forum governs presumptions and inferences to be drawn from evidence.
- 5) 596. *Witnesses.* The law of the forum determines the competency and the credibility of witnesses.
- 6) 597. *Evidence.* The law of the forum determines the admissibility of a particular piece of evidence.
- 7) 599. *Integrated Contracts.* When a contract is integrated in a writing by the law of the place of contracting, no variation of the writing can be shown in another state which could not be shown in the place of contracting under the law of that state, whatever the law of the other state as to integrated contracts.
- 8) 600. *Execution of Judgment.* The law of the forum determines matters pertaining to the execution of a judgment, and what property of a judgment defendant within the state is exempt from execution and on what property within the state execution

can be levied, and the priorities among competing execution creditors.

c. Conditions of Maintaining Suit

- 1) *601. Freedom from Fault.* If the law of the forum makes it a condition of maintaining an action that the party bringing the action show himself free from fault, the condition must be fulfilled though there is no such requirement in the state where the cause of action arose.
- 2) *606. Limitation of Amount Recoverable.* If a statute of the forum limits the amount which in any action of a certain class may be recovered in its courts, no greater amount can be recovered though under the law of the state which created the cause of action, a greater recovery would be justified or required.

ii) Case

- a. *Sampson v. Channell* (1st Cir. 1940) (p131): in an action about a car wreck in Maine, the 1st Circuit considering a case that was brought in diversity in a Massachusetts federal district court must determine (1) whether to apply the federal or state burden of proof on contributory negligence and then, because it determines to apply state law, (2) whether to apply the Maine or Massachusetts burden of proof.
 - 1) (1) The federal-state question is an *Erie* question and turns on whether the burden of proof is substantive or procedural. The court determines that under the policies announced in *Erie*, it is substantive, and so state law governs.
 - 2) (2) Since state law governs, the court is thrown into another choice of law--Maine or Massachusetts. Here, it determines, based on a decision from the Massachusetts Supreme Court, that the burden of proof is *procedural*--and so forum (Mass.) law governs.

(b) Statutes of limitations

i) Restatement Rules

a. Procedure::Conditions of Maintaining Suit

- 1) *603. Statute of Limitations of Forum.* If action is barred by the statute of limitations of the forum, no action can be maintained though action is not barred in the state where the cause of action arose.
- 2) *604. Foreign State of Limitations.* If action is not barred by the statute of limitations of the forum, an action can be maintained, though action is barred in the state where the cause of action arose.
- 3) *605. Time Limitations on Cause of Action.* If by the law of the state which has created the right of action, it is made a condition of the right that it shall expire after a certain period

of limitation has elapsed, no action begun after the period has elapsed can be maintained in any state.

ii) Cases

- a. Borrowing statutes will trump the Restatement rule: *Duke v. Housen* (Wyo. 1979) (p146):** although this Wyoming court recognizes the First Restatement rule that the forum SOL will govern, it nevertheless applies the SOL of the state where the cause arose, because of Wyoming's borrowing statute, which says: "If by the laws of the state or country where the cause of action arose the action is barred, it is also barred in this state."
- 1) Idaho has a borrowing statute, I.C. 5-239: "Actions barred in another state. When a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof an action thereon can not there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state and who has held the cause of action from the time it accrued."
 - 2) *Flowers* (9th Cir. 2002) (h/o): this 9th Circuit panel interprets the "except in favor of a citizen thereof who has held the cause of action from the time it accrued" clause in Nevada's borrowing statute, saying that it applies to aid Jennifer Flowers, who moved to Nevada *after* she acquired the right of action at issue. Compare the "except" clause language in Idaho's borrowing statute.
- b. The Restatement rule is generally constitutional...: *Wells v. Simonds Abrasive Co.* (1953) (p398):** the Court allows Pennsylvania to apply its own SOL to a claim brought under Alabama's wrongful death statute, an application that has the effect of door-closing. That is, the Court simply adheres to its precedent that SOL's are procedural and that the FFCC therefore doesn't compel a forum state to substitute its own policy, embodied in its SOL, with that of another state's.
- 1) **...but the Due Process Clause could trump the Restatement rule:** *Home Insurance Co. v. Dick* (1930) (p343): here, the Court must decide whether Texas can choose its own two-year SOL over a Mexican one-year SOL that was also inserted into the contract under dispute. It says that SOL can *not* apply its SOL, because that application would be so unfair and arbitrary as to be a deprivation of property without due process of law, violating the DPC of the 14th amendment.

(3) Substance vs. law of conflicts (Renvoi)

(a) Restatement Rules

i) Rules for the Application of Conflict of Laws

- a. 7. *Law of Forum Applied.*** Except as stated in 8, when there is a difference in the Conflict of Laws of two states whose law are

involved in a problem, the rule of Conflict of Laws of the forum is applied;

- 1) (a) in all cases where as a preliminary to determining the choice of law it is necessary to determine the quality and character of legal ideas, these are determined by the forum according to its law;
- 2) (b) where in making the choice of law to govern a certain situation the law of another state is to be applied, since the only Conflict of Laws used in the determination of the case is the Conflict of Laws of the forum, the foreign law to be applied is the law applicable to the matter in hand and not the Conflict of Laws of the foreign state.

b. 8. Rule in Questions of Title to Land or Divorce.

(1) All questions of title to land are decided in accordance with the law of the state where the land is, including the Conflict of Laws rules of that state.

(2) All questions concerning the validity of a decree of divorce are decided in accordance with the law of the domicile of the parties, including the Conflict of laws rules of that state.

(b) Case

- i) *University of Chicago v. Dater* (Mich. 1936) (p122): here, in a case involving land, renvoi is not nipped in the bud, and the result is that the forum (Michigan) law points to Illinois law, which points to Michigan law (and so on infinitely). The court here decides to let that go round just once, and strip of Michigan conflicts law once Illinois returns the question to Michigan's law.

b) Public policy

(1) Restatement Rule

(a) Procedure::Access to Courts

- i) *612. Action Contrary to Public Policy.* No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum.
- ii) (1948 Supp.) [A] distinction has to be noted between the situation dealt with in this Section and the situation where a party sets up a defense which is contrary to the strong public policy of the forum. the latter situation involves more than a matter of denial of access to the court. The plaintiff is asking for a judgment even though there is a defense otherwise valid. It is, therefore, not within the scope of the rule of this Section.

(b) See also the *specific* public policy exceptions for marriage disputes, 132 (d) and 134.

(2) Case

- (a)** *Holzer v. Deutsche Reichsbahn-Gesellschaft* (N.Y. 1938) (p162): here, a German national sued his German employer because his employment contract entitled him to money if he was discharged. But German law

required the employer to discharge the plaintiff, yet the NY court still applies the German law to let the employer out of its obligation--since it was forced by law to discharge the plaintiff--focusing not on the anti-Jewish aspects of the law, in conflict with NY law, but on the lack of conflict with NY's policy to hold nationals to the contracts that they made in their own country.

C. MODERN APPROACHES

1. Interest Analysis (Currie)

Comment: Used by 3 states for torts, 0 for contracts.

- a) **Purposes:** this approach is a response to criticisms of Beale's approach: that it was (1) arbitrary and content-blind, (2) policy-blind, and (3) unrealistic, in that to really deliver uniformity, all characterizations, generic substantive rules, last act determinations, and public policy exception (612) invocations would have to be done of one mind across all courts.
 - (1) But Currie's approach receives its own criticisms:
 - (a) Although it is not policy-blind, it does not consider "macro" policies like comity and unity, and rather favors local interests.
 - (b) It has no good resolution of true conflicts.
 - (c) It's goal of effectuating legislative policy isn't articulated well enough and maybe isn't a good goal.
 - b) **The Analysis:** "no choice of law rules at all." Instead, courts are to use their existing jurisprudential mechanisms to resolve conflicts.
 - (1) Is anyone arguing for non-forum law? If not, then forum law applies.
 - (2) If so, does one state have a stronger interest in enforcing its policies? If not, then we've got a "false conflict." If so, however, then maybe we'll apply that state's law. But...
 - (3) If so, are you sure? Try harder to identify one state that's most interested. If this added push resolves things, then we had an "apparent conflict."
 - (a) *Bernkrant v. Fowler* (Cal. 1961) (p223): confronted with a Californian statute of frauds that would invalidate the contract at issue and a Nevadan statute of frauds that would not, a California court determines that there is no true conflict because California would have no interest in applying its statute of frauds to a contract where the parties had no way of knowing that California's, not Nevada's, statute of frauds would ever apply. (There is, arguably, some of the renvoi problem going on here.)
 - (4) If you're sure: then we have a "true conflict." Apply forum law.
 - (a) *Lilienthal* (Or. 1964) (p219): here, an Oregon court picks Oregon law to apply to a contract dispute. The contract was made in California, so under Beale's approach, California law would apply. But this court went through Currie's interest analysis, looking at (1) California's (a) policies and (b) interests, then at (2) Oregon's (a) policies and (b) interests. Although it seems like everything's about equal (a true conflict), the court suggests that Oregon's policies trump California's (so is this a false conflict?).
 - (5) But, what if none of this is relevant to me? That is, what if no state is

interested in applying its policies, or if the forum isn't interested. These are "unprovided-for cases," and you apply forum law.

(a) *Hurtado v. Superior Court* (Cal. 1974) (p228) (not discussed in class): in deciding whether to apply California wrongful death damage measures or Mexico measures to a Californian accident between Mexican residents, the California court here determines that Mexico has no interest at all in having its measures used, since they were meant to protect only defendants resident in Mexico. Thus, because here the defendant's (decedent's heirs) resided in California, the forum state's (California's) law governs.

(6) Couldn't Congress just solve all of this? Yes, it arguably could. And that's what Currie would really like.

2. The "Better Rule" (Leflar)

Comment: Used by 5 states for torts, 2 for contracts.

a) Better Rule Rules

(1) Predictability of Results

(2) Maintenance of Interstate and International Order

(3) Simplification of the Judicial Task

(4) Advancement of the Forum's Governmental Interests

(5) Application of the Better Rule of Law

b) Cases

(1) *Milkovich v. Saari* (Minn. 1973) (p254) (not discussed in class): to choose whether or not to apply a foreign "guest statute" from the law of both plaintiff's and defendant's residence (Ontario, Canada), the court considers Leflar's Better Rule factors. It determines that forum law--no guest statute--should apply, finding that the rationales for the guest statute (fear of collusive suits or, alternatively, of vindictive hosts) were unpersuasive.

3. The Second Restatement (Reese)

Comment: Used by 22 states for torts, 24 for contracts. This is Idaho's approach.

a) **Second Restatement Rules:** a schizophrenic approach, where there are presumptive, interest-blind rules for each cause of action, which look Bealean, unless another state has a more "significant relationship" to the action, in which case more general rules and approaches (e.g. 145 for torts and 6 in all cases) which call for policy analysis and look Currie or Leflaresque.

(1) Introduction

(a) 6. *Choice-of-Law Principles.*

i) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

ii) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

a. the needs of the interstate and international systems,

b. the relevant policies of the forum,

c. the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

- d. the protection of justified expectations,
- e. the basic policies underlying the particular field of law,
- f. certainty, predictability and uniformity of result, and
- g. ease in the determination and application of the law to be applied.

(2) Wrongs::Torts

(a) *145. The General Principle.*

- i) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of that state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in 6 [Choice-Of-Law Principles].
- ii) Contacts to be taken into account in applying the principles of 6 to determine the law applicable to an issue include:
 - a. the place where the injury occurred,
 - b. the place where the conduct causing the injury occurred,
 - c. the domicil, residence, nationality, place of incorporation and place of business of the parties, and
 - d. the place where the relationship, if any, between the parties is centered.
- iii) These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(b) *154. Interference with Marriage Relationship.* The local law of the state where the conduct complained of principally occurred determines the liability of one who interferes with a marriage relationship, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

b) **Cases**

(1) *Phillips v. General Motors Corp.* (Mont. 2000) (p264): the Montana Supreme Court adopts the Second Restatement approach for resolving tort law conflicts and then does a thorough application of 146, 145, and 6, taking the following steps: (1) 146 presumptively applies the law of the state of injury unless another state has a more significant relationship; (2) 6, using 145 factors for each 6 factor, prescribes the analysis for determining whether another state has a more significant relationship; (3) a court can give more or less weight to each 6 factor, and here the most important factor to this court is 6(2)(b) and (c), the relevant policies of the various interested states, has the most weight and points to Montana law--the law of the residence of the parties before the accident.

(a) This case is also an example of renvoi, because the court finds some significant relationships between North Carolina and the action, but mostly ignores them because North Carolina, a First Restatement jurisdiction, would not even apply its own law.

(2) *Kuntz v. Lamar Corp.* (E.D. Wash. 2002) (h/o): a Washington federal district court, sitting in diversity, recognizes that Washington applies the "most significant relationship" (Second Restatement) approach to torts conflicts and

applies that approach to determining what contributory fault law to use. In applying the approach, the court basically counts contacts and determines that any significant relationship Washington might have to the action is not enough to overcome the presumption that law of the place of injury, Idaho (also the state with the most contacts, here), governs.

4. **Significant Contacts:** determine which which state has the most significant contact or aggregate of contacts, and apply that state's law.

Comment: Used by 3 states for torts, 5 for contracts.

5. **Lex Fori:** always apply forum law.

Comment: Used by 3 states for torts, 0 for contracts.

6. **Combined Modern:** various hybrids of interest analysis, better rule, Second Restatement, and significant contacts.

Comment: Used by 6 states for torts, 10 for contracts.

D. CONSTITUTIONAL BOUNDARIES

1. Choice of Law Limitations

a) The Text

- (1) *The Due Process Clause of the Fourteenth Amendment.* Nor shall any State deprive any person of life, liberty, or property, without due process of law. Amend. XIV, Sec. 1.

(a) The DPC, Miller says, is primarily concerned with *individuals*.

- (2) *The Full Faith and Credit Clause.* Full Faith and Credit shall be given in each State to the public Acts, records, and judicial Proceedings of every other State. And the Congress may by general laws prescribe a Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof. Art. IV, Sec. 1.

(a) *The Full Faith and Credit Act.* Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. 28 U.S.C. 1738.

(b) The FFCC, Miller says, is primarily concerned with *states*.

(c) "Acts" versus "records" and "judicial proceedings": the FFCC doesn't protect all of its subjects equally--rather "acts" (legislative measures and common law) are not due the absolute full faith and credit that "records" and "judicial proceedings" are.

i) Compare *Pacific Employers* and *Shutts*, regarding "acts" (where the FFCC does *not* compel a state to substitute another state's statute for its own) with the recitation in *Baker* that "the full faith and credit obligation is exacting" in the case of judgments, giving all judgments "nationwide force."

- b) **The Old, Separated Rules:** arbitrariness (DPC) and interest balancing (FFCC).

(1) **Due Process:** *Home Insurance Co. v. Dick* (1930) (p343): here, the Court must decide whether Texas can choose its own two-year SOL over a Mexican one-year SOL that was also inserted into the contract under dispute. Despite plaintiff's arguments that the SOL is procedural and thus governed by forum law and that Texas's SOL was Texas public policy and therefore within the

public policy exception, the Court said that choosing the Texas SOL would be a deprivation of property (contract rights) without due process of law, because that choice would be arbitrary and unfair in light of the complete absence of *any* connection between the dispute and Texas. This result shows a Court leaning towards a Bealean approach to choice of law.

(a) Miller suggests that it's the Court's *outrage* here that is the measure of Due Process Clause protection in the choice of law realm, after this case. That is, the more outraged at the choice the Court is, the more likely the choice will be determined to be arbitrary and unfair.

(b) The Court mention that the plaintiff's residence in Texas was "without significance." Of course, Beale would not even *mention* this--it's less than "without significance" to him, it's completely irrelevant.

(2) **Full Faith and Credit:** *Pacific Employers Insurance Co. v. Industrial Accident Comm'n* (1939) (p350): the Court, simplifying an even older, dual approach (an "obnoxiousness" test and an interest-balancing test), adopts a straightforward interest-balancing test for FFC Clause choice of law cases. Here, a dispute over whether California can apply its worker's compensation law to a claim by a Mass. employee to his Mass. employer over a California injury, the Court suggests that the FFCC was intended to preserve the federal union and that therefore a foreign state (Mass. here) cannot demand that the forum state (Cal. here) substitute the forum's statute with a conflicting, foreign statute.

(a) This decision suggests that the Court has begun to lean away from a pure Bealean approach to choice of law. (Note that the brunt of the Great Depression may have awakened the Court, since *Dick*, to the states' interests in regulating the workplace.)

(b) Moreover, Miller suggests that the FFCC under this case is a constitutional *buffer* between the states.

c) **The New, Merged Rule:** arbitrariness/unfairness, determined by looking for significant contacts. But remember that the DPC and FFCC still protect distinct interests (those of individuals and states, respectively).

(1) *Allstate Insurance Co. v. Hague* (1981) (p359): the Court merges the DPC and FFCC choice-of-law rules in this dispute over whether Minnesota can apply its insurance coverage "stacking" law to allow the plaintiff here to recover three times as much money. The test: "examine[] the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation"; the Court will "invalidate[] the choice of a law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence of transaction," because that choice of law would be "arbitrary []or fundamentally unfair."

(a) Although both the majority and dissent agree on the merged analysis, they bicker over whether the contacts in this case are significant enough to constitutionally bless the choice of law. The contacts with Minnesota are: decedent's employment there, defendant's doing of business there, and the fact that the plaintiff (decedent's wife) moved there after the accident.

- i) *Phillips Petroleum v. Shutts* (1985) (p376): the Court invalidates a choice of law, in this class action about natural gas royalties, for the first time in the modern era. It does not change the *Hague* significant contacts test, although it does further articulate it, making it clear that the contacts analysis needn't be done at all if the chosen law does not conflict with any other law that could apply (i.e., there's a "false conflict"). Here, though, the Court found a real potential conflict, and did the contacts analysis and found that only 3% of the plaintiff class had any connection at all with the forum state (Kansas) that tried to apply its own law. That was not enough to pass constitutional muster.
 - a. The Court rejected the contacts that plaintiff urged, including that some class members were in fact from Kansas, that Kansas has a strong interest in regulating petroleum industries operating in Kansas, that the plaintiff class *wanted* Kansas law to apply, and the cart-before-the-horse argument that if Kansas law didn't apply the class certification would fail for inconsistency.
 - (b) Stevens, concurring along, would not merge the DPC and FFCC standards.

2. Discrimination

a) Discrimination in Providing a Forum

- (1) **Mechanisms** of discrimination: these might be pursued in order to promote judicial efficiency, party convenience, or deference to the state that created the cause of action in question.
 - (a) Door-closing provisions: those that require a court to refuse to hear certain disputes from other states.
 - i) Note that there has not been a problem with door-closing provisions in the criminal law or family law contexts.
 - (b) Localizing provisions: those that purport to prohibit the courts of other states from hearing certain disputes.
- (2) **The Full Faith and Credit Clause** as a check on discrimination
 - (a) *Hughes v. Fetter* (1951) (p394): the Court strikes down a Wisconsin door-closing provision that prohibits Wisconsin's courts from hearing wrongful death suits brought under the wrongful death statutes of states other than Wisconsin itself. To reach this result, the Court balances two interests: (1) the interest in comity and the federal union, embodied in the FFCC, and (2) Wisconsin's interest in its own policy, embodied in its door-closing provision.
 - i) The Court also looks at the contacts with Wisconsin in the case, but this is merely a supplementary, buttressing rationale.
 - (b) *Wells v. Simonds Abrasive Co.* (1953) (p398): the Court allows Pennsylvania to apply its own SOL to a claim brought under Alabama's wrongful death statute, an application that has the effect of door-closing. That is, the Court simply adheres to its precedent that SOL's are procedural and that the FFCC therefore doesn't compel a forum state to substitute its own policy, embodied in its SOL, with that of another state's. The Court notes, distinguishing other cases such as *Hughes*, that

Pennsylvania's approach is not discriminatory--everyone gets the same treatment.

i) *Hughes* can be specifically distinguished on the fact that there the Court said that Wisconsin, which had its own wrongful death statute, was not being forced to subordinate its own policies for others that were in conflict; whereas here, Pennsylvania, if required to use Alabama's SOL, would have to subordinate its policy on the expiry of actions for the conflicting such policies of Alabama.

(c) *State of Nevada v. Hall* (1979) (p402): the Court allows California to apply its limitless waiver of sovereign immunity to the State of Nevada, which has only a limited waiver, but was sued in a California court. To hold otherwise, the Court says, would require California to subordinate its own policies for those of another state (cf. *Wells*) (or surrender jurisdiction), and the FFCC doesn't require that (see *Wells, Shutts, Hague*).

i) This is a *horizontal* sovereign immunity issue, not the usual vertical (federal-state) sovereign immunity issue, which is covered by the 11th Amendment.

ii) And the Court specifically notes that although the result here might promote retaliation among the states, the more serious threat to constitutional federalism would be if the Court--a *federal* court--told California what to law to choose.

b) Substantive Interstate Discrimination

(1) The Privileges and Immunities Clause as a check on discrimination

(a) **The Text:** The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. Art. IV, Sec. 2.

i) The use of this clause in the choice-of-law context has been limited. In fact, the use of it, period, has been limited--just to questions about access to state resources (such as timber). If it did apply in the choice-of-law context, rational basis analysis would be employed, making it difficult to invalidate a choice with this clause.

(b) Case

i) *Austin v. New Hampshire* (1975) (p412): the Court invalidates a New Hampshire law that had the effect of taxing all commuters *into* the state, despite that New Hampshire did not tax its own citizens *at all*. The Court strikes the law down under the authority of the Article IV Privileges and Immunities Clause, saying that it requires "substantial equality of treatment" and the "reasonably fair distribution of burdens."

a. Despite the result in this case, it's still important to keep in mind that "substantial equality" does not mean *exact* equality, and that all of this, under the Article IV Privileges and Immunities Clause, will be analyzed merely for a rational basis.

(2) The Equal Protection Clause as a check on discrimination

(a) **The Text:** Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws. Amend. XIV, Sec. 1.

- i) Like the Article IV Privileges and Immunities Clause, the Equal Protection Clause has limited application in the choice-of-law context. This is mainly because rational basis analysis will be employed in nearly every possible choice-of-law case.
 - (b) *G.D. Searle & Co. v. Cohn* (1982) (p421): the Court upholds a New Jersey statute that tolls SOLs against corporations without a registered agent in the state. Because the corporation is not a protected class, and because states have absolute discretion in setting SOLs (i.e., they implicate no fundamental right), and finally because the Privileges and Immunities Clauses protect only "citizens" (which corporations aren't), the corporation is left with only the Equal Protection Clause, in rational basis mode, to argue with. And the Court thinks that its reasonable for New Jersey to assume that it could be hard to find unregistered corporations and therefore rational for it to toll its SOLs for unregistered corporations.
- 3. **The Commerce Clause** (not discussed in class): The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes. Art. I., Sec. 8.

III. JUDGMENTS

- A. **Preclusion Law:** we have these doctrines in order to guarantee some degree of *finality*. Thus, in a federal system, these doctrines also guarantee some degree of *portability*. Note, however, that we eschew finality in some contexts, such as child support, desegregation, and restraining orders.
 - 1. Res Judicata: the prohibition on the relitigation of a particular claim. I.e., the protection of the effect of a judgment in subsequent litigation.
 - a) Types
 - (1) "Bar": res judicata applied to prevent relitigation of the cause of action that was actually litigated previously.
 - (2) "Merger": res judicata applied to prevent relitigation of matters so closely related to the previously litigated matters that they should have been litigated all at once.
 - b) Identity: res judicata requires absolute identity or at least some privity.
 - 2. Collateral Estoppel: the prohibition on the relitigation of a particular issue. I.e., the protection of prior findings of fact and holdings in subsequent litigation.
 - a) Identity: originally, collateral estoppel required identity or privity, but these rules have become relaxed.
 - 3. Bar on reraising rejected arguments
 - 4. Bar on raising arguments not previously raised
 - 5. Full Faith and Credit
 - a) The Full Faith and Credit Clause: Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof. Art. IV, Sec. 1.
 - b) The Full Faith and Credit Act: State and Territorial statutes and judicial proceedings; full faith and credit.
 - The Acts of legislature of any State, Territory, or Possession of the United

States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. 28 U.S.C. 1738.

6. Judgment Filing Statutes: some states have filing statutes, under which you can file a copy of a foreign judgment with the state and get full effect of that judgment in the state where its filed.
 - a) Idaho has a filing statute, I.C. 10-1302. Filed judgments have "the same effect and [are] subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a district court [in Idaho] and may be enforced or satisfied in like manner." The statute has exceptions, limiting modification, for child custody and child support judgments.

B. Jurisdictional Objections

1. The "ironclad" rule: *Durfee v. Duke* (1963) (p642): the Court requires a Missouri federal district court, sitting in diversity, to give res judicata effect to a Nebraska judgment determining that certain land was in Nebraska. The Court invokes what Miller calls the "ironclad rule" that an enforcing state cannot inquire into a judgment-rendering court's jurisdiction. However, the Court suggests that there's a possible exception to the ironclad rule if the jurisdictional issue was not "fully and fairly litigated and finally decided" in the rendering court (this suggestion, however, is merely dicta here; see *Chicot County* and *Sherrer*, prior cases, for suggestion otherwise).
2. A "land taboo" exception: *Fall v. Eastin* (1909) (p646): the Court does *not* require a Nebraska court to give full faith and credit to a Washington court's judgment over land located in Nebraska. The Court notes that the Washington court was sitting in equity and therefore had subject matter jurisdiction only over the parties before it, not over the actual land in question; thus, the Washington decree could only affect the parties. This result suggest that there truly is a "land taboo," but one limited to cases where the land in question was clearly outside of the jurisdiction of the rendering court.
 - a) Why a special rule for land? Because if there was no such rule, then land would have to be registered in every single county in the country or else not be protected against quiet title actions anywhere. That is, the land taboo promotes efficiency and convenience for landowners.
 - b) Note that even in this case, the Washington could have protected its judgment by coercing the defendant to comply with its order; e.g., through contempt proceedings.
3. A federal exclusive jurisdiction exception: *Kalb v. Feuerstein* (1940) (p652): the Court says that a Wisconsin court's dispossession judgment was not due full faith and

credit because it was entered while federal bankruptcy proceedings were pending. The Court says that Congress has granted the federal bankruptcy courts exclusive, monopoly jurisdiction over bankruptcy matters, and that while those courts are exercising jurisdiction over certain subject matters, other courts have no jurisdiction at all over those subject matters. What's more, the Wisconsin court's jurisdiction doesn't even have to be contested or raised by a collateral attacker--it is simply completely nonexistent.

C. Substantive Objections

1. The ironclad rule, again: *Fauntleroy v. Lum* (1908) (p657): the Court says that a Mississippi court must enforce a Missouri judgment even though that judgment (for collection on a futures contract debt) is directly in conflict with Mississippi's substantive policy (against the validity of futures contracts) embodied in statute. The Court concedes that state statutes *can* deprive a state court of jurisdiction, and so says that it must determine whether the Mississippi statute at issue was jurisdictional or merely a rule of decision. Because the statute here was just a rule of decision, it meant that the Mississippi court had jurisdiction and so under the FFCC had to use it to give effect to the Missouri judgment.
2. An administrative proceedings exception: *Thomas v. Washington Gas Light Co.* (1980) (p662): a fractured Court holds that a worker employed in Virginia but injured in D.C. can collect worker's compensation in Virginia and then get whatever extra worker's compensation that D.C. will give him. The Court was forced to try to make sense of two conflicting precedents, *Magnolia* (saying that a worker's decision to collect compensation in one state precluded him from seeking it elsewhere, too) and *McMartin* (saying that only "unmistakable language" in the state worker's comp. statute precluding recovery in other states would actually make a worker's first award res judicata so as to prevent compensation elsewhere). The plurality questioned *McMartin*, abrogating its "unmistakable language" rule, but ultimately sided with its narrow holding, allowing this worker to seek awards in multiple places. The crucial ratio decidendi for the plurality was that the Virginia judgment was not really a "judicial proceeding" within the meaning of that term in the FFCC--that rather it was a mere administrative proceeding, and that the Virginia administrative agency had limited statutory authority to consider *only* Virginia law, not to make any choice of law at all. Thus, the Virginia agency never made a choice of law determination and therefore full faith and credit is not due.
3. An "exclusive-province"-invasion exception: *Baker v. General Motors Corp.* (1998) (p677): the Court does not require Missouri to prevent a specific person from testifying, even though a Michigan court had issued a permanent injunction prohibiting that person from testifying. This injunction conflicted with Missouri's policy of hearing all relevant evidence. The Court says that State A (Missouri, here) need not enforce an injunction from State B (Michigan, here) that attempts to (1) accomplish an "official act within the exclusive province" of State A or (2) interfere with litigation over which State B has no authority. This rule may be limited, because the doctrines of preclusion, to situations where the litigants in State A are strangers to the underlying, State B litigation. Still, this case does not change that State A owes State B's judgment full faith and credit on the *merits* of the State B judgment.
 - a) This result isn't necessarily very radical, because throughout the law of conflicts

is an exception for procedure, where outside of exceptional, unconstitutional situations (see *Dick*), a forum is entitled to apply its procedural laws.

D. Preclusion Law Objections

1. Still an ironclad rule: *Union National Bank v. Lamb* (1949) (p689) (not discussed in class): the Court requires Missouri to enforce a Colorado judgment that had been revived in Colorado but could not have been revived in Missouri. Specifically, the Court cited *Roche v. McDonald* for the rule that a forum state can't defeat a foreign judgment on the grounds that it was obtained by a procedure that the forum state doesn't like or that it was based on a cause of action that the forum would not recognize.
2. An exception for statutes referring to the rendering state's preclusion law: *Watkins v. Conway* (1966) (p691) (not discussed in class): the Court upholds a Georgia statute that bars all suits on expired judgments that can't be revived in the rendering state. The Court concluded that the statute was no discriminatory, and that it actually insures full faith and credit rather than denies it.
3. The last-in-time rule: *Treinius v. Sunshine Mining Co.* (1939) (p696) (not discussed in class): the Court adopts a "last-in-time" rule for state court judgments rendered following concurrent litigation--the last one to be issued must be given full faith and credit.

IV. A Specific Example: Same-Sex Marriage

A. Rules

1. The Defense of Marriage Act
 - a) Certain acts, records, and proceedings and the effect thereof. No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship. 28 U.S.C. 1738C.
2. Full Faith and Credit
 - a) The Full Faith and Credit Clause: Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof. Art. IV, Sec. 1.
 - b) The Full Faith and Credit Act: State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of

such State, Territory or Possession from which they are taken. 28 U.S.C. 1738.

3. First Restatement

- a) *121. Law Governing Validity of Marriage.* Except as stated in 131 [Remarriage After Parties To Divorce Both Forbidden To Remarry] and 132 [Marriage Declared Void by Law of Domicil], a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with.
- b) *132. Marriage Declared Void by Law of Domicil.* A marriage which is against the law of the state of domicil of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere in the following cases:
 - (1) (a) polygamous marriage,
 - (2) (b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil,
 - (3) (c) marriage between persons of different races where such marriages are at the domicil regarded as odious,
 - (4) (d) marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state.
- c) *134. Marriage Contrary to Public Policy.* If any effect of a marriage created by the law of one state is deemed by the courts of another state sufficiently offensive to the policy of the latter state, the latter state will refuse to give that effect to the marriage.

B. Case

1. *Burns v. Burns* (Ga. 2002) (h/o): this Georgia court decides that it will enforce a divorce consent decree prohibiting child visitation with a parent cohabiting while not married, despite that the former wife entered a same-sex civil union in Vermont. The court rejected the wife's argument that under the FFCC, her civil union was a marriage in Georgia, saying that (1) Vermont law expressly distinguishes civil unions from marriages and (2) even if the civil union was a divorce, it would be contrary to Georgia public policy and Georgia would not have to give it full faith and credit under DOMA.

C. Commentary

1. Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 Fla. L. Rev. 799 (1999).
2. David P. Currie, *Full Faith and Credit to Marriages*, 1 Green Bag 2d 7 (1997).
3. Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act*, 32 Creighton L. Rev. 409 (1998).