American Conflicts Law

Cases and Materials

Seventh Edition

2024–2025 Supplement

Robert L. Felix (1934–2020)

Ralph U. Whitten

SENATOR ALLEN A. SEKT PROFESSOR OF LAW EMERITUS
CREIGHTON UNIVERSITY

Richard Henry Seamon

MARGARET SCHIMKE DISTINGUISHED PROFESSOR OF LAW
UNIVERSITY OF IDAHO

Jesse M. Cross

PROFESSOR OF LAW
UNIVERSITY OF SOUTH CAROLINA

Carolina Academic Press

Durham, North Carolina

Carolina Academic Press

700 Kent Street

Durham, North Carolina 27701

Telephone (919) 489-7486

Fax (919) 493-5668

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Introduction to 2024 – 25 Supplement

This supplement covers the period from July 2019, when the course book went to press, through July 5, 2024. In addition to including citations or short descriptions of significant new judicial decisions and scholarly commentary, the supplement updates developments of the RESTATEMENT (THIRD) OF CONFLICTS OF LAW and, in the material on personal jurisdiction in Chapter 10, contains excerpts from *Ford Motor Co. v. Montana Eighth Judicial District Court*, 592 U.S. 351 (2021), and *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122 (2023).

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Chapter 1

Introduction

C. A Brief History

4. The First and Subsequent Restatements

[Insert the following citation at the end of Note 5 on page 12.]

Kevin M. Clermont, *Signaling Deference to Another Sovereign's Law*, 59 GONZ. L. REV. 207 (2023/2024).

Chapter 2

Choice of Law: Some General Problems

A. Selecting a Choice-of-Law Theory

1. The Vested Rights Theory

[Insert the following at the end of Note 4 on page 30.]

See also Doe v. Roe, ___ F.4th ___, 2022 WL 1447378 (11th Cir. May 9, 2022) (New York law, where contract made, selected to govern contracts elements under "lex Loci contractus" and New York law also selected to govern tort elements of case under significant contacts analysis).

2. Currie's Governmental Interest Analysis

[Add at the end of Note 3(f) on page 37.]

In *Hairu Chen v. Los Angeles Truck Centers*, LLC, 444 P.3d 727 (Cal. 2019), injured Chinese passengers and surviving relatives of deceased passengers sued an Indiana manufacturer and a California tour bus distributor for damages caused by a bus rollover accident occurring in Arizona. The trial court ruled that Indiana law applied under interest analysis. After the Indiana defendant settled, leaving the California distributor the sole defendant, the court refused to reconsider the choice-of-law decision at the behest of the plaintiffs, and entered judgment on a special jury verdict in favor of the distributor. The California Court of Appeals reversed and remanded, but the California Supreme Court reversed the Court of Appeals, holding that the trial court was not required to reconsider the choice-of-law analysis after the Indiana party's settlement. The court did not hold that a trial court could never revisit a choice-of-law decision after a settlement with one defendant, nor that there are no circumstances in which it would be required to do so. It only held that in the present case, the plaintiffs had failed to demonstrate that their acceptance of a settlement with one defendant constituted an exceptional circumstance requiring a reconsideration of the choice-of-law decision. Should a post-event pre-judgment settlement ever be allowed to change interest analysis? Does this depend on what form interest analysis takes in a state? (See Note 4 in the casebook on pages 37–38.) For example, if the analysis shows that California has no interest, how could dismissal of an out-of-state defendant create one? On the other hand, if California's interest is just not as strong as that of another state, dismissal of a party from the other state might mean California's interest is the strongest one left in the case, might it not?

[Add at the end of Note 4 on page 38.]

California follows a version of interest analysis called "comparative impairment" analysis. Under that version of interest analysis, a court must first determine whether there is a true or false conflict, and if there is a true conflict, apply comparative impairment analysis to determine which state's interest would be more impaired if its law is not applied. *Rustico v. Intuitive Surgical, Inc*., 993 F.3d 1085 (9th Cir. 2021), was a products liability action in California federal court based on an injury that occurred from a product in Connecticut. The California two-year statute of limitations barred the action, but the Connecticut three-year limitations statute did not. The district court held the case to be a false conflict, because California had the only interest in having its statute of limitations apply because the only defendant was from California and the action was in California. However, the court did not consider whether Connecticut had an interest in having its three-year statute applied. The Ninth Circuit Court of Appeals affirmed. The court of appeals held it was error for the district court not to consider whether Connecticut had an interest, but held that the district court was ultimately correct that California had the only legitimate interest in having its statute applied. Both the California and Connecticut statutes had the purpose of protecting parties and courts from the assertion of stale claims. However, the plaintiffs did not demonstrate that Connecticut's longer limitations period was supported by a particularly strong interest in protecting its citizens from defective products. Alternatively, the court of appeals held that even if Connecticut had an interest, California's interest was stronger and thus would be the most impaired if its law were not applied. This last conclusion was seemingly based on the fact that all the defendant's relevant activities in manufacturing and identifying the dangers of the product occurred in California, thus implicating California's defendant-protection interest in applying its shorter statute. *See* 993 F.3d at 1095, n. 5. After examining the Conflicts problems with statutes of limitation in Chapter 2.B.4 of the casebook, including the court-protection and party-protection policies that support such statutes, reevaluate the district court's and court of appeals' approaches to the California methodology. When a forum's shorter statute of limitations is supported both by court-protection and party-protection policies and the defendant is also from the forum, won't the forum always have the strongest **interest** in having its statute applied? If a plaintiff can still sue in the state with the longer statute (the plaintiff in Rustico probably could not), and if the forum's limitations dismissal is not "with prejudice" and would preclude a suit on the claim there, why shouldn't dismissal be automatic in cases like this? In addition to *Rustico*, see *Gerson v. Logan River Academy*, 20 F.4th 1263 (10th Cir. 2021), also involving the application of comparative impairment analysis to a statute of limitations issue. The claim was for child abuse in Utah, but the action was commenced in California federal court and transferred to Utah. As you will see in Chapter 8, Section C, under these circumstances, the transferee court in Utah must apply the choice-of-law system of the transferor state. The Utah district court applied comparative impairment to select the shorter Utah statute of limitations as applicable, and the Tenth Circuit Court of Appeals affirmed, agreeing that Utah's interest would be more impaired by failure to apply its law than California's. More recently, the U.S. Court of Appeals for the Ninth Circuit decided *Cassirer v. Thyssen-Bornemisa Collection Foundation,* ___ F. 4th ___, 2024 WL 89381 (9th Cir. January 9, 2024). The court had previously been reversed by the U.S. Supreme Court for attempting to formulate a federal choice-of-law standard in an action to recover art from the foundation that had been stolen by the Nazis. (This part of the case is discussed in Chapter 8, Section E of this supplement on federal common law after the *Erie* decision.) On remand, the Ninth Circuit first tried to certify a question to the California Supreme Court about whether California's choice-of-law system would produce the application of California law or the law of Spain (do you blame them?). The California Supreme Court

refused to answer (do you blame *them*?) (Certified questions are examined in Chapter 8D of the casebook on ascertaining state law after the *Erie* decision.) The court of appeals then applied the comparative impairment approach to the case and determined that the law of Spain applied, which meant the plaintiff lost. (California law did not permit a party to acquire title to stolen property by adverse possession, but Spain did.) In examining which jurisdiction's interest would be more impaired by non-application of its law, the court seemed to be influenced by the fact that none of the events giving rise to the suit occurred in California and the state's interest was only created by the fact that the plaintiff "fortuitously" moved to California after the events giving rise to suit. In examining the other systems (below in the casebook) that have evaluation of state interests as part of their analysis, ask yourself whether this case would have come out differently.

4. Leflar's Choice-Influencing Considerations

[Add at the end of Note 5 on page 49.]

Philippe Matthew Roy, *Recovering Art Looted by the Nazis: A Comparative View of Two Cases*, UIC JOHN MARSHALL L. REV. 547, 562 (2021) (describing Rhode Island as applying Leflar's approach and the Second Restatement's "most significant relationship approach for tort claims").

5. The "Most Significant Relationship" Approach

[Insert at the end of Note 3 on page 64.]

See Horejs v. Kitchin, 2023 WL 4044582 (6th Cir. June 16, 2022) (court stating that Ohio employs different "interest analysis" tests depending on whether the case is a contract or tort case, but citing authorities that hold Ohio follows the Second Restatement in contracts and torts; court then holds that because the alleged fraud (tort) was committed in Ohio and the contract was entered into in Ohio, there is no doubt that Ohio law applies; maybe, but is this a correct Second Restatement analysis?).

[Add the following note after the end of Note 3 on page 108.]

3A. How are the federal courts applying Arizona's version of the RESTATEMENT (SECOND) after *Deloach, et. al* examined in section A5 of the casebook? Consider *Jensen v. EXC, Inc.*, 82 F.4th 835 (9th Cir. 2023), a tort case involving injury and wrongful death claims arising out of a collision between a sedan and a tour bus on a U.S. highway within the boundaries of the Navajo Nation reservation in Arizona. One question was whether Arizona would ever apply its conflicts system to select Navajo law in a situation like this. The court of appeals did not definitively decide this question, but instead held that even if it would, application of the significant contacts analysis would produce the application of Arizona state law in this case. In its conflicts analysis, the court examined the factors listed in § 145 of the Second Restatement, indicating that two of the factors pointed to Arizona and one pointed to Navajo law, while one factor was neutral. Then the court stated: "On balance, we conclude that these factors weigh in favor of applying Arizona law." The court then stated that Arizona law would apply unless the "general factors" of § 6 "warrant a different result." After evaluating the § 6 factors, the court states: "We conclude that, considered as a whole, the general factors in Restatement § 6 do not warrant reaching a different conclusion from the one that follows from an evaluation of the specific factors to be considered in tort cases under § 145 of the Restatement." Thus, it seems like the court views that the correct process under

the Second Restatement is to first independently examine the contacts under § 145 to consider what conclusion they produce, and then examine the § 6 factors to determine whether they trump that conclusion. Is this a correct way to apply the most significant contacts analysis of the Second Restatement? Given *Deloach* and its progeny, is this an adequate application of Arizona's method of applying the Second Restatement?

7. Eclectic Systems

[Add the following paragraph**s** to this subsection.]

In addition to the systems we examine in this book, you should note that conflicts scholars are always busy proposing new systems for our consideration. *See, e.g.,* Roger Michalski, *Fractional Sovereignty*, 13 UC IRVINE L. REV. 683 (2023) (proposing that we "reimagine" conflicts scholarship based on a "fractional conceptualization of sovereignty," whereby instead of asking which sovereign gets to set all the rules, we should ask how to equitably share governance power and responsibility; this would arguably result in a model of shared authority that distributes the power to regulate conduct according to the fraction of the conduct that touches and concerns the sovereign.)

For a discussion and evaluation of Oregon's choice-of-law statutes, including an assessment of the reasons for and against statutory reform of choice of law as compared to the status quo and the Third Restatement scheme, see John T. Perry, *Some Realism About Choice-of-Law Statutes and the Common Law: The Oregon Example,* 27 LEWIS & CLARK L. REV. 197 (2023).

8. The Restatement of the Law Third

[Add after the second paragraph on page 68.]

On June 7, 2021, the RESTATEMENT OF THE LAW (THIRD) CONFLICT OF LAWS (Tentative Draft No. 2, March 25, 2021) was presented to the membership of the American Law Institute for consideration. Tentative Draft No. 2 contains Chapter 1 (Introduction) §§ 1.01 – 1.04 (containing definitions and limitations), Chapter 2 (Domicile) §§ 2.01 – 2.09 (containing definitions and rules pertaining to the domicile of natural and juridical persons), and Chapter 5 (Choice of Law) Topic 2 (Foreign Law), §§ 5.06 – 5.08 (dealing with proof of foreign law). At the June 7 meeting, the membership approved the tentative draft, subject to such editorial modifications as the Reporters deem necessary based on the comments and questions posed at the meeting. This means that some provisions of the tentative draft will change, as least in minor ways. Any changes will be described in later editions of this supplement. Further examination of the provisions of Tentative Draft No. 2 will be examined in this supplement below in Chapter 1G (Ascertaining a Person's Domicile) and H (Proving Foreign Law).

In October 2021, the ALI published *Preliminary Draft No. 7,* containing Chapter 5, Topic 1 Introduction (§§ 5.01 – 5.04) (see the discussion of *Tentative Draft No. 3*, below) and Chapter 7 Property, Topic 4 Succession (Introductory Note, §§ 7.25 – 7.30). Section 5.01 deals with the nature and development of choice-of-law. Section 5.02 deals with choice-of-law analysis (how choice-of-law analysis should be conducted). Section 5.03 articulates the "manifestly more appropriate" exception to the rules of the Third Restatement. It states that the law selected by the rules of the Third Restatement will not be

used if a case presents exceptional and unanticipated circumstances that make the use of a different state's law manifestly more appropriate, but that, in such cases, the manifestly more appropriate law will be used. Section 5.04 states that a court may decline to decide an issue under foreign law if the use of the use of the foreign law would be offensive to a strong forum public policy. These provisions were discussed at the November 2021 meeting of the Reporters, Advisers, and Members Consultative Group. Any revisions based on those discussions will be examined in later editions of this supplement. Sections 7.25 -7.30 were also discussed at the same meeting. They will be examined below in Chapter 6A of this supplement.

In March 2022, the ALI published *Tentative Draft No. 3*, containing Chapter 5, Topic 1 Introduction (§§ 5.01 – 5.06). This draft was presented to the membership of the ALI on May 16, 2022 at the annual meeting of the ALI. The membership approved the draft on that date, subject to the discretion of the Reporters to make changes based on comments made at the meeting. Section 5.01 states that choice-of-law is a two-step process that involves, first, identifying the laws that are relevant to the rights and liabilities of persons involved in matters having connection to more than one state, and, second, if the relevant laws conflict, selecting the most appropriate relevant law to govern particular issues in those matters. Section 5.02 deals with how choice-of-law analysis should be conducted. It states that a court will decide a choice-of-law issue by determining whether a material difference exists between relevant laws and if so which of the laws should be given priority. The section also states that a court, subject to constitutional limitations, will follow a local statute that identifies the law to be given priority, and in the absence of such a law will use the rules of the Third Restatement to identify the law that receives priority. Section 5.03 contains the "manifestly more appropriate" exception to the rules of the Third Restatement. It provides that the law selected by those rules will not be used if a case presents "exceptional and unaccounted-for circumstances" that make the use of a different state's law manifestly more appropriate. Section 5.04 states that a court may decline to decide an issue under foreign law if the use of foreign law would offend a deep-rooted forum public policy. Section 5.05 provides that the characterization of issues or claims is performed under the law of the forum, except as stated in § 5.06, that the interpretation of conflict-of-laws concepts and terms is performed under forum law except as stated in § 5.06, and that the interpretation of internal-law concepts and terms is performed in accordance with the law that governs the issue involved in the case. Section 5.06 provides that when the forum's choice-of-law rules direct it to apply the law of some state, the forum applies the internal law of that state unless the objective of the forum's choice-of-law rule is that the forum reach the same result on the facts as would the courts of another state, in which case the forum applies the choice-of-law rules of the other state "subject to considerations of practicability and feasibility."

When encountering provisions of the Third Restatement in the casebook or this supplement, you should keep in mind the "manifestly more appropriate" exception of § 5.03. When (and how often) will that provision come into play to trump the general rules of the Third Restatement? What will constitute "exceptional and unaccounted for circumstances" of the sort that will bring the exception into play? If troublesome circumstances can easily be anticipated with one of the general rules of the Third Restatement when it is drafted, but the ALI does not create a specific exception to the rule in its black letter, will it be appropriate to use the manifestly more appropriate exception to avoid the rule?

On May 24, 2023, the Reporters submitted to the membership at the 2023 annual meeting *Tentative Draft No. 4* (March 2023) of the RESTATEMENT (THIRD) OF CONFLICT OF LAWS. Tentative Draft No. 4 contains Topics 1 & 2 of Chapter 6 on torts, Topics 1 & 2 of Chapter 7 on Property, and § 8.01 of Topic 1 of

Chapter 8 on Contracts. These topics in the draft will be discussed in later chapters of this supplement (4, 5, 6 & 7) where relevant.

B. Classifying Rules as Substantive or Procedural

1. Evidence

[Add the following note after Note 2 on page 72.]

2A. *See also Bagby v. Davis*, ___ P.3d ___, 2023 WL 3573764 (Idaho 2023) (In an action to set aside a property transfer, parties agreed that California law applied to the "substantive" issues in the case, but the court held that on the question of whether an adverse inference should be drawn from the defendants' failure to disclose, or their destruction of, certain documents relevant to the case, the issue was procedural and Idaho law would apply, citing §§ 124, 127, 133-35, and 138 of the Second Restatement).

[Add the following Note after Note 4 on page 77.]

4A. *Goguen v. NYP Holdings, Inc.*, ___ P.3d ___, 2024 WL 1068633 (Mont. March 12, 2024), was a defamation action brought in Montana in which there was a conflict between New York's fair reporting privilege (which was absolute) and Montana's privilege (which was conditional). After identifying the conflict, the Montana Supreme Court analyzed the issue under §§ 145 and 6 of the Second Restatement and concluded that New York's privilege was applicable. The court never mentioned § 139, maybe because counsel apparently did not discuss it. If § 139 had been applied, which state's privilege would have been applied? Note that fair reporting privileges are not evidentiary privileges. They prevent a defendant from being held liable altogether for the publication of defamatory statements about another person in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern if the report is accurate or complete or a fair abridgement of the occurrence reported. Is this the kind of "privilege" that § 139 was designed to deal with? If not, does that explain why the court did not mention it.

2. Burden of Proof

[Add at the end of Note 1 on page 80.]

But see Dale A. Nance, *Choice of Law for Burdens of Proof*, 46 N.C. J. INT'L L. 235 (2021) (examining the functions of the burden of production and the burden of persuasion and arguing that in choice of law, the burden of production should be governed by forum law in both its allocation and the severity of the burden and the burden of persuasion should be governed by the substantive law chosen by the forum to govern whenever that burden regulates the fact-finder's inferences about an ultimate material fact).

[Add at the end of Note 3 on page 81.]

Hisert v. Haschen, 980 F.3d 6 (1st Cir. 2020) (diversity action in which court describes Massachusetts' approach as a "functional approach to choice-of-law analysis"; court employs general significant contacts

analysis rather than the particular provisions of the Second Restatement §§ 133–34 to select Massachusetts law of fraud over Maryland's even though the two states had significantly different burdens of proof).

4. Statutes of Limitation

[Add at the end of Note 1 on page 90.]

As in *Jones*, courts applying the first Restatement system today often tend to ignore the actual structure of the system and apply "substantive" statutes of limitation of other states whether they are longer or shorter than the forum's statute. A recent example is *Alabama Aircraft Industries, Inc. v. The Boeing Company*, ___ F.4th ___, 2022 WL 433457 (11th Cir. Feb. 14, 2022). The plaintiff sued Boeing in Alabama state court for misappropriation of trade secrets arising out of a complicated transactional arrangement between the parties. Boeing removed the action to federal court in Alabama, arguing that under Alabama's lex loci system, Alabama law applied. After a jury verdict for the plaintiff, Boeing appealed. The court of appeals held that a choice-of-law clause in the contract between the parties selecting Missouri law was broad enough to encompass the misappropriation claim, even though it was a tort claim. However, the court then evaluated the claim alternatively under Alabama's lex loci rule and concluded that the misappropriation occurred in Missouri, where the trade secrets were allegedly appropriated, rather than Alabama where the financial harm had impacted the plaintiff. The court then evaluated whether Missouri's *longer* statute of limitations should be applied on the grounds that it was "substantive," rather than the shorter two-year limitations period of Alabama, which would bar the claim. The court held that the Missouri statute was substantive and should be applied. The court neither referred to the structure of the first Restatement system, whether the Alabama statute was "procedural" or substantive, or what policies supported the Alabama statute. Note that if interest analysis were applied to the conflicts question before the court and Alabama's statute were held to be supported by policies of preventing inaccurate determination of claims in Alabama's courts, the Alabama statute would have to be applied notwithstanding the policies supporting the Missouri statute. Likewise, if the first Restatement system had been applied by the court as written, the same would be true. *But see Auld v. Forbes*, 848 S.E.2d 876 (Ga. 2020) (wrongful death action arising out of drowning in Belize; court holds Belize law applicable under lex loci rule; court also holds that Georgia public policy does not forbid application of that law, including its shorter statute of limitations; Georgia did not provide an action for wrongful death for out-of-state injuries).

[Add at the end of Note 2 on page 90.]

Grosshart v. Kansas City Power & Light Co., 623 S.W.3d 160 (Mo. Ct. App. 2021) (statutes of repose are substantive for choice-of-law purposes; statutes of repose run from some legislatively selected point in time that is unrelated to the accrual of any cause of action and reflect a legislative policy that a time should come beyond which a potential defendant will be immune from liability for past acts and omissions).

[Add the following case reference at the end of Note 3 on page 97.]

See also Reclaimant v. Deutsch, 211 A.3d 976 (Conn. 2019) (action for unjust enrichment in Connecticut, which is a Second Restatement jurisdiction; court held that Delaware substantive law was applicable because of a choice-of-law clause in the contract selecting that law; however, the court also held that

Connecticut's limitations law applied to the case rather than Delaware's because the choice-of-law clause did not select procedural law; the limitations period here was procedural because the plaintiff's claim was created by the common law and was not newly created by statute; period was governed by the doctrine of latches).

[Add at the end of Note 4(b) on page 99.]

See also Griffith v. LG Chem America, Inc., 1 N.W.3d 899 (Neb. 2024) (claim for injuries received when battery for e-cigarette sold in Nebraska exploded in Pennsylvania; court held that under Nebraska's Uniform Act, Nebraska longer statute would apply unless the claim was based on the law of another state; after evaluating the claim under a RESTATEMENT (SECOND) analysis, the court concluded that it was based on the law of Pennsylvania, with the result that Pennsylvania's shorter two-year statute of limitations applied and barred the claim against two of the defendants; note that the court explicitly indicated that Pennsylvania had an interest in applying its law both as to the claim and as to rules limiting the claim, such as the statute of limitations); *Portfolio Recovery Assocs., LLC v. Sanders*, 462 P.3d 263 (Ore. 2020) (Oregon Act provides for the application of another state's limitation period if the action is based on the substantive law of the other state; if the laws of Oregon and the other state do not conflict, the common law of conflict of laws provided that Oregon's law would apply, and that common law rule has not been repealed; thus, because there is no conflict between the "account-stated law" of Virginia and that of Oregon, Oregon's substantive law and its statute of limitations applied and the action is not time barred)**;** *Kornfeind v. New Werner Holding Co., Inc.,* 280 A.3d 918 (Pa. 2022) (Uniform Statute of Limitations on Foreign Law Claims Act does not apply to foreign statutes of repose; when a shorter foreign statute of repose conflicts with Pennsylvania's statute, the court must perform a choice-of-law analysis).

[Add at the end of Note 3 on page 108.]

See also De Prins v. Michaeles, 942 F.3d 521 (1st Cir. 2019) (diversity case transferred from Arizona to Massachusetts; court applies Arizona law to govern statute of limitations, using a general significant contact analysis under what it perceives to be Arizona law rather than the particularized *DeLoach* analysis under § 142.).

[Add at the end of Note 5(c) on page 110.]

See also Frank v. Drury Hotels Co. LLC, ___ F.4th ___, 2022 WL 4007805 (11th Cir. Sept. 2, 2022) (Slip and fall accident in Georgia; action brought in the Middle District of Florida based on diversity; court applies Florida conflict-of-laws system and selects Georgia law as applicable under a significant contacts analysis in tort; court then holds the action barred under Georgia limitations law, even though it would not be barred under Florida law; Court does not mention § 142 of the Second Restatement.).

[Add the following after Note 7(c) on page 112.]

(d) For a recent application of Rhode Island's conflicts method to statutes of limitation, see *Webster Bank, NA v. Rosenbaum*, 268 A.3d 556 (R.I. 2022). The issue was whether Rhode Island's ten-year "catch all" statute of limitations applied to the lender's claim for breach of a home equity line of credit or Connecticut's six-year statute for contract actions. The court held that a choice-of-law clause in the contract did not clearly specify which state's statute of limitations would apply. It then stated that it applied an "interest weighing" approach to choice-of-law questions to select the state with the "most

significant relationship" to the event and the parties and, in doing all this, applied Leflar's choice-influencing considerations to select the longer Rhode Island statute as applicable.

[Insert after Note 7(c) on page 113.]

(d) *See also Nyberg v. Portfolio Recovery Associates, LLC*, ___ F.4th ___, 2023 WL 436 3119 (9th Cir. July 6, 2023) (both Oregon and Virginia have a relevant connection to the dispute and neither party has identified a substantive conflict between Virginia and Oregon laws governing claims for account stated; therefore, Oregon's statute of limitations applies to the plaintiff's action and it is not barred).

5. Other Issues

[Insert at the end of Note 1 on page 115.]

See also Randy Kinder Excavating, Inc. v. JA Manning Constr. Co., Inc., 8 F.4th 724 (8th Cir. 2021) (affirming the district court's award of attorneys' fees under Arkansas law on the ground that the issue was procedural and thus Arkansas law applied; the court rejected the argument that Missouri law applied under a choice-of-law clause in the contract in question on the grounds that Arkansas law applies another state's law only when the other state's law is substantive; it is not clear on this latter point whether the court was saying that the choice-of-law clause only adopted the substantive law of Missouri or that general Arkansas conflicts law provided that another state's law could only be applied when it was substantive and the choice-of-law clause was therefore somehow irrelevant).

[Insert at the end of Note 8 on page 117.]

For a discussion of the substance-procedure distinction, drawing on the Third Restatement of Conflict of Laws and the Supreme Court's decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.,* examined in the casebook at page 683, see Glen S. Koppel, *Interstate Federalism Implications of a Uniform Code of State Civil Procedure: Lessons From the Draft of the Third Restatement of Conflict of Laws and* Shady Grove, 50 CAP. U. L. REV. 191 (Nov. 8 2022).

C. Characterizing The Issues

[Add at the end of Note 2 on page 130.]

Geerdes v. West Bend Mut. Ins. Co., 70 F.4th 1125 (8th Cir. 2023) (action against auto insurer to recover uninsured/underinsured benefits for non-economic damages not recoverable under British Columbia law, where accident occurred; held: language in insurance contract limiting damages to those a party is "legally entitled to recover" means entitled to recover in a tort action which could only be brought in British Columbia because that is the only place personal jurisdiction could be acquired over the alleged tortfeasors bus company and driver); *Hale v. Emerson Electric Co*., 942 F.3d 401 (8th Cir. 2019) (Missouri choice-of-law rules apply the most significant relationship test, but that test applies different factors for claims sounding in tort, contract, and unjust enrichment; because district court did not conduct an individualized choice-of-law analysis, case must be remanded for that analysis so meaningful appellate review can be conducted).

D. Protecting the Forum's Public Policy

[Add at the end of Note 2 on page 137.]

For further discussion of *Coon* see Joanna B. Apolinsky & Jeffrey A. Van Detta, *The Antebellum Iron of Georgia's Lex Fori Doctrine: O Where Have You Gone, Brainerd Currie?*, 50 CUMBERLAND L. REV. 407 (2019-2020); Gary J. Simson, *An Essay on Illusion and Reality in the Conflict of Laws*, 70 MERCER L. REV. 819 (2019).

[Insert the following note after Note 4(d) on page 139.]

5. Recall the description of § 5.04 of *Tentative Draft No. 3* of the Third Restatement of Conflicts in Section 2.A.8, above. In the comments to that section, the Reporters make it clear that if the forum invokes the public policy exception, but does not dismiss the case, it will be inappropriate to allow the plaintiff to maintain a claim under foreign law while denying the defendant a defense under foreign law unless some other relevant state has a policy in favor of recovery. *See Comment c*, lines 10 – 31, page 36 of *Tentative Draft No. 3.* Would this comment justify the result in *Alexander* or other cases discussed in the notes following it, assuming the courts involved were applying the Third Restatement?

G. Ascertaining a Person's Domicile

[Insert at the end of Note 1(a) on page 167.]

See also Bicknell v. Kansas Dep't of Revenue, 509 P.3d 1211 (Kan. 2022) (burden of proof to show taxpayer's domicile had shifted to another state was on taxpayer and district court did not improperly shift it to state; taxpayer's domicile was in Florida at relevant time for tax purposes).

[Add **after** the end of the last paragraph on page 171 before Problem 2.20.]

Tentative Draft No. 2 of the ALI Third Conflicts project, discussed in section 2.A.8 of this supplement above, was presented to the ALI membership on May 7, 2021 and approved by the membership, subject to such editorial modifications as the Reporters deem necessary based on the comments and questions posed at the meeting. The draft contains nine sections pertaining to domicile, as opposed to the ten sections in Preliminary Draft No. 2. Section 2.01 contains general rules about the domicile of natural and juridical persons for purposes of resolving conflict-of-laws issues. Section 2.02 contains general rules on presumptions about the place where a natural person is domiciled, while § 2.03 contains the definition of the domicile for a natural person. Section 203(1) states that a natural person's domicile is the place where the person's life is centered "and the person is physically present." The "physical presence" language is perhaps misplaced here, and does not mean that a person loses their domicile in a particular place if they are temporarily absent from the place. Rather, as Comment b makes clear, this reference is simply designed to refer to the requirement that a person simultaneously be physically present in a place when the objective evidence shows that their life is centered there. Nevertheless, this language is awkward and may be altered or moved to another section, such as § 2.06, which directly deals with change of domicile. Of particular importance is § 2.03(2), which states that where

a person's life is centered (their domicile) is determined by objective evidence of the person's "domestic, familial, social, religious, economic, professional, and civic activities." This is designed to ensure that a person's intent to make a place the center of their life is made on the basis of that objective evidence of where the party has the closest relationship rather than the place that the party wishes to be their domicile. *See* Tentative Draft No. 2, cmt. d. Section 2.04 defines domicile of origin, while § 2.05 defines domicile of minors. Section 2.06 states that a natural person with capacity may change their domicile, while § 2.06 states that a natural person's domicile does not change because that person is compelled to be present in a place. Section 2.08 sets out the rules that govern the domicile of juridical persons, such as corporations. Section 2.09 states that, except for purposes of judgment-recognition and enforcement actions, the forum determines the domicile of natural and juridical persons according to the law of that forum.

H. Proving Foreign Law

[Add at the end of Note 1 on page 175.]

See also Germaninvestments AG v. Allomet Corp., 225 A.3d 316 (Del. 2020) (defendant did not meet its burden of proof on Austrian law to govern a forum selection clause; therefore, Delaware law applied and the clause was held permissive rather than mandatory). Proof of foreign law problems in modern conflicts systems can often bedevil parties depending on how a state structures the analysis under its system. For example, *In Re Ambassador Insurance Company (Bestwall LLC, Appellant)*, 2022 VT 11, 275 A.3d 122, involved an insurance claim that depended for its success on whether Vermont or Georgia law applied. Vermont applies the Second Restatement, but the Vermont Supreme Court stated that the first step in the conflicts analysis under the system must be to determine whether the law of Vermont and that of Georgia conflict. If they do not, Vermont law is applied. Georgia law was unclear, and the claimant (Bestwall) argued that the court should presume that the law of the two states conflicted under these circumstances. The Vermont Supreme Court rejected this, holding that the claimant had the burden of proving what Georgia law was (and that it conflicted with Vermont law) before a Second Restatement analysis could be performed. The claimant perforce failed to do this, and the result was that Vermont law applied and the claim failed.

[Add at the end of Note 4(**e**) on page 17**7**.)

See also Wiener v. AXA Equitable Life Ins. Co., 58 F.4th 774 (4th Cir. 2023) (insurance company waived possible application of Connecticut law by affirmatively litigating the action under the substantive law of North Carolina). *But see M.D. Russell Constr., Inc. v. Consolidated Staffing, Inc.*, ___ F. 4th ___, 2023 WL 8798086 (4th Cir. December 20, 2023) (choice-of-law question not waived by raising it for the first time at the summary judgment stage; choice-of-law is often a fact-intensive undertaking and parties may not be able to make appropriate and persuasive choice-of-law arguments without the benefit of discovery). Is there a distinction between (1) a failure to prove foreign law, (2) consent to the application of a particular law, and (3) waiver of the possible application of a particular state's law? Clearly, sometimes the concepts overlap. For example, if a party fails to properly raise a conflicts question under forum law, any or all of the descriptions listed might be applied. Nevertheless, are there cases in which only one of the descriptions properly applies but not the others? In the *Wiener* case, cited above, the insurance company

litigated the entire case under North Carolina law and, having lost, moved to dismiss for lack of jurisdiction under a Connecticut statute. The district court dismissed on this ground. Under the circumstances, the court of appeals correctly reversed, holding that choice-of-of law questions were not jurisdictional and were subject to waiver. Use of the waiver rationale seems correct, but note that the court could have said that the company failed to timely plead and prove Connecticut law. Consent, on the other hand, does not seem to fit. Does it really matter what description is applied, as long as the court reaches the correct result? See also *Martins v. Vermont Mutual Insurance Co.*, 92 F.4th 325 (1st Cir. 2024), in which, after noting that the case was a diversity case in which state law applied (*See* Chapter 8 on the *Erie-Klaxon* doctrine), the court of appeals stated that it was appropriate in such cases to accept the parties' reasonable agreement as to which state's law applied. Is it ever inappropriate for counsel to agree to consent to the applicable law with the other party's counsel? For example, if counsel does not know much about conflict of laws and does not want to investigate the issue with all its complexities, is ok to just agree with opposing counsel to apply forum law? If it later turns out that law of a non-forum state would be more favorable to counsel's client and that it would have been applied if a conflicts issue had been raised, has counsel committed malpractice by consenting to apply forum law?

[Add after Note 8(b) on page 181.]

Tentative Draft No. 2 of the ALI Third Conflicts project, discussed in Section 2.A.8 and 2.G of this supplement was presented to the ALI membership on June 7, 2021 and approved by the membership, subject to such editorial modifications as the Reporters deem necessary based on the comments and questions posed at the meeting. Tentative Draft No. 2 contains Chapter 5 (Choice of Law), Topic 2 (Foreign Law), §§ 5.06 (Notice of Foreign Law). 5.07 (Information About Foreign Law), and 5.08 (Determination of Foreign Law). These provisions are substantially the same as those of Preliminary Draft No. 1 described in the principal text at pages 180 – 81.

I. Dealing with Extraterritorial Conduct in Criminal Cases

[Add the following reference to the end of Note 5 on page 190.]

See also Commonwealth of Pennsylvania v. Peck, 242 A.3d 1274 (Pa. 2020) (Pennsylvania statute provided jurisdiction to prosecute a crime that occurred partly outside Pennsylvania; however, the substantive criminal statute under which the accused was prosecuted required proof that a drug delivery took place in Pennsylvania; under the latter statute the evidence was insufficient to support a conviction).

[Add at the end of Note 2 on page 199.]

For an extensive discussion of the choice of law and exclusionary rule approaches, see *Commonwealth of Pennsylvania v. Britton*, 229 A.3d 590 (Pa. 2020).

Chapter 3

Choice of Law: Some Constitutional Problems

[Add at end of Note 2(a) on page 232.]

See also In re Senior Health Ins. Co. of Pennsylvania, 310 A.3d 26 (Pa. 2024) (applying *Hyatt* "policy of hostility" analysis addressing competing regulatory laws for rehabilitation of insurance company).

[Add at end of Note 2(b) on page 232.]

See also In re Senior Health Ins. Co. of Pennsylvania, 310 A.3d 26 (Pa. 2024) (finding no *Hyatt* "policy of hostility" due to "significant harmony" with competing states' laws).

[Add after Note 3 on page 233.]

4. *See also* William Baude, *Constitutionalizing Interstate Relations: The Temptation of the Dark Side*, 44 HARV. J. L. & PUB. POL'Y 57 (2021) (contrasting Court's willingness to find constitutional limits on interstate relations in sovereign immunity context in Hyatt III with its repeated reluctance to find such limits in choice-of-law domain).

[Add after "with McBurney, supra subsection 2" on page 282.]

See also Mallory v. Norfolk S. Ry. Co., 600 U.S. 122 (2023) (describing Dormant Commerce Clause test as focused on discriminatory purpose, but elaborating that "facially neutral" rule with discriminatory "practical effects" suffices for violation).

[Add after "397 U.S. 137 (1970)" on page 282.]

The Court has suggested that the "heartland" of this test is situations where its benefits-versus-burdens calculus suggests a discriminatory purpose, but lacking the votes to narrow the test to such discriminatory situations, it has left this *Pike* test intact. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023).

[Page 283, replace the paragraph beginning "The Court has also" with the following new paragraph.]

Previously, the Court also had directed that state laws must respect an extraterritoriality principle in order to survive a Dormant Commerce Clause challenge. Under this principle, a state could not enact legislation that had the effect of regulating commerce occurring wholly outside its borders. *See, e.g.*, *Healy v. Beer Inst.*, 491 U.S. 324 (1989). However, the Court now has disavowed any independent extraterritoriality principle. *See Ross*, *supra*. Electing not to overturn this line of cases, however, the Court

has reframed them as further examples of the antidiscrimination principle—noting that they were motivated by in-state protectionist impulses which the Dormant Commerce Clause does prohibit.

[Add after paragraph ending "the State of Illinois."" on page 284 the following new paragraph]

In a concurrence in *Mallory v. Norfolk Southern Railway Co.*, a case that appears in Chapter 10, Justice Alito argued that the dormant Commerce Clause should aggressively curtail this state power to regulate external corporate affairs. 600 U.S. 122, 150 (2023) (Alito, J., concurring in part and concurring in the judgment). In *Mallory*, Pennsylvania had a statute requiring registration by any foreign corporation doing business in the state—and a second statute requiring any registered corporation to submit to general jurisdiction in the state. Analyzing the jurisdiction statute, Justice Alito straightforwardly applied the Dormant Commerce Clause test to it—concluding that it certainly failed the primary anti-discrimination prong, and arguably failed the *Pike* benefits-versus-burdens test. No other Justices joined the concurrence, however.

Chapter 4

Choice of Law: Torts

A. The Traditional Rules Method

[Add at the end of Note 2 on page 292, following the citation to Dowis.]

See also Harvey v. Merchan, 860 S.E. 2d 561 (Ga. 2021) (applying traditional approach to conclude that Quebec law and Georgia law applied to tortious conduct that respectively occurred in those jurisdictions). More recently, the North Carolina Supreme Court refused to abandon the traditional system for tort claims asserting misappropriation of trade secrets. *SciGrip, Inc. v. Osae*, 838 S.E.2d 334 (N.C. 2020).

[Add at the end of Note 3 on page 293.]

See also Nunes v. Cable News Network, 31 F.4th 135 (2d Cir. 2022)) (Virginia lex loci rule required application of California law in defamation case because California was place where greatest reputational harm occurred; case was transferred from Virginia to the Southern District of NY under 28 U.S.C. § 1404(a)); *Harvey v. Merchan*, 860 S.E.2d 561 (Ga. 2021) (plaintiff, resident of Georgia, alleged defendants committed acts of sexual abuse in Quebec and Georgia; court held that Quebec substantive law governed acts occurring in Quebec because both tortious conduct and injury occurred there; court rejected plaintiff's argument that acts in Quebec constituted "continuing torts" giving rise to injuries in Georgia).

B. The New York Experience and Approach

[Add as new Note 2(c) on page 323, and renumber existing Note 2(c) as 2(d).]

2(c) In *Omari v. Buchanan*, 2022 WL 4454536 (2d Cir. Sept. 26, 2022), the court of appeals applied New York's conflicts system to select North Carolina law on two state defamation claims. The court treated these as conduct-regulating rules and said that normally intentional tort claims occur where the plaintiff is located; however, the court then held that one of the claims was time-barred under North Carolina's one-year statute of limitations without analyzing the statute of limitations issue separately from the defamation issue.

[Add at the end of Note 4 on page 335.]

See also Kinsey v. N.Y. Times Co., 991 F.3d 171 (2nd Cir. 2021) (defamation case in which court applied New York law on defendant's fair reporting privilege defense, holding that New York had the "most significant interest" partly because it "has strong policy interests in regulating the conduct of its citizens and its

media," though this resulted in application of New York's "absolute" privilege instead of the "qualified" privilege of the District of Columbia, where plaintiff worked and where allegedly defamatory statement quoted in newspaper was made).

C. Second Restatement: The Most Significant Relationship

[Add a new citation at the end of Note 1 on page 342.]

Cf. Jensen v. EXC, Inc., 82 F.4th 835 (9th Cir. 2023) (claims for personal injury and wrongful death arising from collision between sedan and tour bus in Arizona within boundaries of Navajo Nation Land; court of appeals in diversity action assumes arguendo Arizona courts would apply Navajo law if Second Restatement analysis so indicated, but concludes that use of Arizona law is indicated by analysis under §§ 146 and 171, and that "general factors" in § 6 do not "warrant a different result" (quoting *Bates*, *supra*)). For a case citing *Bates, supra*, to support treating bad faith insurance claims as sounding in tort rather than in contract, see *Scott Fetzer Co. v. Am. Home Assurance Co., Inc.*, 229 N.E.3d 70 (Ohio 2023).

[Add a new citation at the end of Note 6 on page 358.]

Nix v. Major League Baseball, 62 F.4th 920 (5th Cir. 2023) (defamation case in which court holds that Texas conflicts law requires the application of New York defamation law; court purports to apply the most significant contacts analysis, but simply counts contacts), *cert. denied*, 144 S. Ct. 165 (2023).

[Add at the end of Note 7 on page 359.]

See also Buckles v. BH Flowtest, Inc., 476 P.3d 422 (Mont. 2020) (wrongful death case in which court applied forum law, rather than law of place of injury (North Dakota), where decedent and all but one corporate defendant were residents of forum); *First Bank of Lincoln v. Land Title of Nez Perce Cty*., 452 P.3d 835 (Idaho 2019) (court applied most significant relationship test to conclude that Idaho tort law governed claim that Idaho bank negligently disbursed proceeds of sale of Washington bowling alley)**;** *Rodrigue v. Illuzi*, 2022 VT 9, 216 Vt. 308, 278 A.3d 980 (plaintiff claims defendant attorney committed malpractice by having plaintiff sign broad release to settle Vermont workers' compensation proceeding, which precluded plaintiff's later suit against coworker who caused injury in Virginia; Vermont Supreme Court holds that under Second Restatement § 146 Virginia law governed suit against co-worker and would have barred it; therefore attorney did not cause any injury to plaintiff by having plaintiff sign prior release); *Axline v. 3M Company*, 8 F.4th 667 (8th Cir. 2021) (multidistrict litigation in Minnesota federal court; court applies Ohio choice-of-law rules to plaintiff who claimed tort occurred and caused injury in Ohio, which follows Second Restatement; holding, after analysis of Sections 6, 145, and 146, that Ohio substantive law applied); *Rey v. General Motors, LLC*, 76 F.4th 1125 (8th Cir. 2023) (vehicle rollover claim arising in Mexico; court of appeals held that Missouri conflicts rules, based on Restatement Second, applied and under those, law of Mexico would be applied); *Goguen v. NYP Holdings, Inc.*, 2024 MT 47, 415 Mont. 356, 544 P.3d 868 (applying Restatement Second to hold that New York law governed New York Post newspaper's defense based on the fair report privilege in defamation action by Montana resident).

[Add the following before Section F on page 394.]

4. Restatement Third Conflict of Laws

On May 24, 2023, the Reporters submitted to the membership at the 2023 annual meeting *Tentative Draft No. 4* (March 2023) of the RESTATEMENT (THIRD) OF CONFLICT OF LAWS. Tentative Draft No. 4 contains, among other subjects, Topics 1 & 2 of Chapter 6 on torts. The draft was approved by the membership, subject to comments and suggestions made at the meeting and the Reporters' editorial discretion to make changes based on those comments and suggestions.

Topic 1 of Chapter 6 contains §§ 6.01 – 6.10 (General Rules). Section 6.01 is entitled "State of Dominant Interest," and generally directs that, in the absence of a valid choice of law by the parties, a tort issue is governed by the state with the dominant interest. The section further describes how to determine the state of the dominant interest, and observes that the later sections of the restatement (§§ 6.11 – 6.12) set out rules for identifying the states with the dominant interest for particular torts and issues and for "broader categories of issues" based on the distribution of connecting factors. The section also directs (in subsections (1) – (3)) that in determining which state has the dominant interest in a particular issue, courts should first determine whether the issue is governed by one of the tort- or issue-specific rules of §§ 6.11 – 6.12 and, if so, apply that section; if not (subsection 2) the court should determine whether the issue in question relates to conduct or to persons (as set out in §§ 6.03 – 6.05), and (subsection 3) apply the rule from §§ 6.06 – 6.09 appropriate to the type of issue and distribution of connecting factors.

Section 6.02 provides that states whose laws are not in material conflict on a particular issue may be considered the same state in determining the governing section for that issue.

Section 6.03(a) states that in tort issues relating to conduct, connecting factors such as the location of the conduct and injury are of primary importance. Section 6.03(b) states that in tort issues relating to persons, connecting factors such as the parties' domicile are of primary importance.

Section 6.04 contains a nonexclusive list of issues relating to conduct (e.g., whether conduct is tortious). Similarly, § 6.05 contains a nonexclusive list of issues relating to persons (loss allocation issues), such as guest statutes.

Section 6.06 states that with regard to issues relating to conduct, the law of the state of conduct and injury will govern when conduct and injury occur in the same state. Section 6.07 states that when parties are domiciled in the same state, that state's law governs an issue relating to persons (loss allocation). When the relevant parties are domiciled in states whose laws are in material conflict and the conduct and injury occur in the same state, that state's law governs loss allocation issues. Section 6.08 states that when the relevant parties are domiciled in different states whose laws are in material conflict and conduct and injury are in the same state, that state's law will govern issues of loss allocation. Section 6.09 deals with cross-border torts where conduct in one state causes injury in another; the law of the state of conduct will govern issues relating to conduct and loss allocation unless application of § 6.07 provides otherwise, unless the injured party shows that the location of the injury was reasonably foreseeable, in which case that state's law will govern; but whether a defendant was under a duty to act is always determined by the law of the state of the conduct, though whether the existence of such a duty precludes liability is otherwise determined by the preceding rules of the section. Section 6.10 provides that parties may by mutual agreement choose the law to govern a tort after the tort occurs (§ 6.10(a)) and parties may

by mutual agreement choose the law to govern a tort before it occurs as long as the chosen state has a substantial relationship to the parties or the underlying events or there is another reasonable basis for the choice, but the chosen law must not be contrary to a fundamental policy of the state whose law would otherwise govern.

Topic 2 of Chapter 6 deals with particular torts and issues. Section 6.11 deals with products liability and section 6.12 deals with punitive damages.

E. Other Approaches

2. Eclectic Solutions: Combining Choice-of-Law Approaches

[Add at the end of Note 4(d) on page 389.]

The Tenth Circuit drew upon *Offshore Rental* and *McCann* in *Gerson v. Logan River Academy*, 20 F.4th 1263 (10th Cir. 2021). The plaintiff, a 25-year-old California resident, filed a sex-abuse claim against a residential treatment facility in Utah. This diversity suit was transferred from a federal court in California to the federal District of Utah under 28 U.S.C. § 1404(a). As discussed in Chapter 8.C of the casebook, in situations like this, the transferee court applies the choice-of-law rules of the transferor court's forum State—here, California. The Tenth Circuit held that the Utah statute of limitations applied and required dismissal of the suit as untimely. It relied primarily on *McCann*, which it described as holding that "a foreign State's interest in setting clear limitations on liability for conduct within its borders that injuriously impacted the plaintiff while also within the State predominated over California's interest—reflected through a special, more generous statute of limitations—in facilitating recovery by its residents for latent injuries (in that case, arising from asbestos) that are often difficult to prosecute within ordinary limitations periods." *Id.* at 1276.

Chapter 5

Choice of Law: Contracts

A. The Traditional Approaches

[Add at the end of Note 2 on page 406.]

See also Nationwide Prop. & Cas. Ins. Co. v. Renaissance Bliss, LLC, 823 Fed. Appx. 815 (5th Cir. 2020) (court observes that although Georgia generally follows lex loci approach, Georgia courts do not follow common law of other states, even when otherwise required by that approach; court therefore holds that, while California was the place of performance, issue related to condition precedent for performance was not governed by California common law rule).

B. Some Modern Approaches

1. When the Contract Does Not Contain a Choice-of-Law Clause

[Add to Note 1 on page 425, after sentence citing Ballard and before citation to *Tidyman's*.]

For a Fifth Circuit decision applying Texas's conflict law with more attention to § 6 principles, see *Eastern Concrete Materials, Inc. v. ACE American Insurance Co.*, 948 F.3d 289 (5th Cir. 2020) (holding that Texas—which was where insurance policy was negotiated, brokered, and delivered—had most significant relationship to issue of whether insurance policy's pollution exclusion clause applied to discharge occurring in New Jersey).

[Add at the end of Note 6 on page 428.]

See also RSUI Indem. Co. v. Murdock, 248 A.3d 887 (Del. 2021) (insurance coverage dispute in which court canvasses its choice-of-law precedent applying Second Restatement and emphasizes that analysis under it varies depending on "subject matter and animating purpose" of insurance policies at issue; risk insured by policies at issue there was "directors' and officer's honesty and fidelity" to corporation and its stockholders and investors," which implicated specific policies embodied in Delaware substantive law); *Stillwater Mining Co. v. National Union Fire Ins. Co. of Pittsburgh*, 289 A.3d 1274 (Del. 2023) (Delaware Supreme Court determines in an insurance case that Montana and Delaware law conflict and that Delaware has the most significant relationship to the policies and parties under the Restatement 2d).

[Add at the end of Note 7 on page 428.]

See also Melmark, Inc. v. Schutt, 206 A.3d 714 (Pa. 2019) (action by private residential facility in Pennsylvania against parents, residents of New Jersey, for costs of caring for their adult son; court held that in case before it true conflict existed between Pennsylvania and New Jersey filial support statutes; court concluded that Pennsylvania had stronger interest in applying its law).

2. When the Contract Contains a Choice-of-Law Clause

[Add at the end of Note 1(a) on page 454.]

See also Fishback Nursery, Inc. v. PNC Bank, Inc., 902 F.3d 932 (5th Cir. 2019) (case concerned priority of liens held by nurseries that sold trees and shrubs to bankrupt farm vis-à-vis lien held by bank that loaned money to the farm and operated it as debtor in possession; sales contract between nurseries and bankrupt farm contained choice-of-law clause; court held that clause did not govern dispute over lien priority involving bank, which was not party to the contract).

[Add at the end of Note 1(b) on page 454.]

Cf. Viscito v. Nat'l Planning Corp., 34 F.4th 78 (1st Cir. 2022) (affirming summary judgment against plaintiff with respect to his claims under Massachusetts Wages Act; Massachusetts choice-of-law principles would choose California law to govern employment relationship; choice-of-law clause in plaintiff's contract with defendant that pointed to California law was not dispositive but was a factor supporting conclusion that California had most significant relationship).

[Add at end of Note 4(a) on page 457.]

See, *e.g.*, *C.H. Robinson Worldwide, Inc. v. Traffic Tech, Inc.*, 60 F.4th 1144 (8th Cir. 2023) (action by employer against former employees for violation of non-compete clauses in employment contracts; one employee's contract has choice-of-law clause choosing California law for "claims or disputes arising in California" and Minnesota law for "all other claims or disputes"; court of appeals holds that this clause, "which resembles depéçage," is enforceable and remands case for determination of where claim arose).

[Add new Note 4(d) on page 457.]

(d) One area in which party autonomy is typically limited concerns issues that the forum state characterizes as procedural. For example, in *Randy Kinder Excavating, Inc. v. JA Manning Construction Co., Inc.*, 8 F.4th 724 (8th Cir. 2021), the Eighth Circuit held that the law of the forum state, Arkansas, governed the issue of attorneys' fees, even though the parties' choice-of-law clause pointed to Missouri, because Arkansas classified the issue as procedural.

[Add at the end of Note 6 on page 459.]

See also Pitzer Coll. v. Indian Harbor Ins. Co., 447 P.3d 669 (Cal. 2019) (insurance coverage dispute in which policy's choice-of-law clause chose New York law; New York law precluded coverage if insured failed to notify insurer of accident for which coverage sought, whereas California's "notice-prejudice rule"

precluded coverage only if failure to give notice caused prejudice to insurer; court holds that, as applied in the case before it, choice-of-law clause violated California's fundamental public policy in enforcing its notice-prejudice rule); *Cannon Oil & Gas Well Servs., Inc. v. KLX Energy Servs., LLC*, 20 F.4th 184 (5th Cir. 2021) (applying Texas's Restatement 2d analysis to hold that Wyoming law applied rather than Texas law, despite choice of law provision in contract pointing to Texas, and that under Wyoming law the contract's indemnity clause was unenforceable as contrary to fundamental public policy expressed in Wyoming statute)**;** *Rose v. Am. Fam. Ins. Co.*, 995 N.W.2d 650 (Neb. 2023) (Nebraska resident injured in Nebraska car accident sued insurance company for underinsured motorist coverage issued in Iowa, with choice-of-law clause choosing Iowa law and separate clause putting two-year limit on asserting claims under policy; Nebraska Court cites Restatement 2d § 187(1) and enforces both clauses, stating that Nebraska law does not prohibit the 2-year limitation clause in contract entered into in another state; court also concludes it must enforce the clause under Full Faith and Credit Clause, even though it would have been void in Nebraska, relying on Nebraska case law from era when U.S. Supreme Court interpreted that Full Faith and Credit Clause to incorporate territorial rules of First Restatement); *Carbon Crest, LLC v. Tencue Prods., LLC*, 2023 WL 8271969 (9th Cir. Nov. 30, 2023) (holding that choice of law clause choosing Delaware law was invalid because Delaware's law conflicted with law of California, which would otherwise have applied and, contrary to Delaware law, have required plaintiff to have brokerage license to perform contracted-for services); *Smith v. Prudential Ins. Co.*, 88 F.4th 40 (1st Cir. 2023) (under Rhode Island conflicts law, choice-of-law clause selecting New York law would not be applied because New York did not bear a substantial relationship to insured, insurer, and policy, requiring determination whether of which state had most significant relationship to policy; court held that Rhode Island did, and then certified to Rhode Island Supreme Court question whether Rhode Island law would enforce the policy provisions limiting policy holder's time to sue under policy); *Barber v. Bradford Aquatic Grp., LLC*, 2023 MT 233, 414 Mont. 170, 539 P.3d 648 (choice-of-law clause in employment contract pointing to North Carolina law valid under Restatement Second; even if choice-of-law clause had not been in contract, Montana law would not have applied because Montana did not have a materially greater interest in governing employment contract than North Carolina); *Pinther v. Am. Nat'l Prop. & Cas. Ins. Co.*, 2024 WY 18, 542 P.3d 1059 (Wyo. 2024) (court holds that valid choice-of-law clause selects Missouri law as to contract disputes in the case, but did not select that law with regard to tort disputes, with the result that Wyoming law applied to those; court relies heavily on prior cases interpreting choice of forum clauses).

[Add a new note after Note 8 on page 460.]

8A. In *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC*, 601 U.S. 65 (2024), the Court addressed a choice-of-law clause in a marine insurance policy. The Court held that federal maritime law had established the rule that such clauses are presumptively enforceable, with only narrow exceptions. The Court refused to create a new exception modeled on Restatement Second § 187(2)(b), which makes a choice-of-law clause unenforceable when it conflicts with "a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue." That exception, the Court explained, "arose out of interstate cases and does not deal directly with federal-state conflicts, including those that arise in federal enclaves like maritime law." *Great Lakes*, 601 U.S. at 79. Moreover, the proposed exception modeled on the Restatement Second would be a "poor fit for maritime cases," the Court determined, because of the strong policy of uniformity and certainty underlying federal maritime law. *Id*.

[Add at the end of Note 10 on page 460.]

See also John F, Coyle, *A Short History of the Choice-of-Law Clause*, 91 U. COLO. L. REV. 1147 (2020); Patricia Youngblood Reyhan, *Choice of What? The New York Court of Appeals Defines the Parameters of Choice-of-Law Clauses in Multijurisdictional Cases*, 82 ALB. L. REV. 1241 (2018-2019).

[Add at the end of the *Note on RESTATEMENT (THIRD) and Choice-of-Law Clauses* on page 461.]

At the annual meeting of the American Law Institute on May 24, 2023, the Reporters of the RESTATEMENT THIRD OF CONFLICT OF LAWS presented to the membership Tentative Draft No. 4 of the restatement, containing § 8.01 of Topic 1, among other provisions on property and torts. The membership approved of the draft, subject to the editorial discretion of the Reporters to make changes based on comments and suggestions at the meeting.

Section 8.01 provides that contract issues are resolved by the law chosen by the parties under the rule of 8.02, but in the absence of an effective choice of law by the parties, contract issues are resolved under the provisions of §§ 8.05 – 8.12.

On October 26, 2023, the reporters, advisers, and members consultative group examined Preliminary Draft No. 8 of the Third Restatement of Conflict of Laws. This draft contained §§ 8.13 and 8.14 of Chapter 8, Topic 2 (Specific Contract Issues). Section 8.13 provides that the rules of §§ 8.01 and 8.05 – 8.12 determine what law governs issues related to capacity of the parties to contract. Section 8.14 provides that the rules of §§ 8.01 – 8.12 determine what law governs issues related to the formalities required to make a contract. Neither the Council of the American Law Institute nor the general membership have yet considered these provisions.

C. Some Special Problems

2. The Uniform Commercial Code

[Add at the end of Note 3 on page 475.]

See, *e.g*. *Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, 51 F.4th 456 (2d Cir. 2022) (discussing explicit choice-of-law rule in New York's version of U.C.C. § 8-110(a)(1), providing that "local law of issuer's jurisdiction" governed validity of security; federal court certified to New York Court of Appeals question whether this provision required application of Venezuelan law to securities issued under bond swap agreement); *Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, 235 N.E.3d 949 (N.Y. 2024) (on certification, holding that Venezuelan law governed under New York's version of U.C.C. § 8-110(a)(1), which overrode choice-of-law clause in document governing the bond swap agreement).

[Add at the end of Note 5 on page 476.]

See also Ulrich G. Schroeder, *Simplification of the Commercial Process for the International Sale of Goods through the 1980 Vienna Sales Convention (CISG)*, 50 NO. 1 UCC L.J. ART. 3 (2021).

[Add a new note after Note 5 on page 476.]

6. The UCC was amended in 2022 to address choice of law, among other issues, connected with digital assets like cryptocurrency and NFTs (nonfungible tokens). So far, eighteen states and the District of Columbia have adopted the 2022 Amendments.

The 2022 Amendments created a new article, Article 12, which identifies and defines a new type of asset, a "controllable electronic record" (CER). Article 12 defines a CER as "a record stored in an electronic medium that can be subjected to control under Section 12-105." § 12-102(a)(1). Under § 12-105, in turn, a person generally has "control" if the person has the "power to avail itself of all the benefit from the electronic record," (2) the "exclusive power … to prevent others from availing themselves of substantially all the benefit from the electronic record," and (3) the "exclusive power … to transfer control of the electronic record to another person." § 12-105(a)(1). The person who has control must also be able "readily to identify itself," such as "by name, identifying number, cryptographic key, office, or account number," as the person having the three required powers described in the last sentence. § 12-105(a)(2).

Substantively, Article 12's "principal function" is "to specify certain rights of a *purchaser* of a controllable electronic record." Prefatory Note to Uniform Commercial Code Amendments (2022), Note 3. As to those rights, Article 12 "confers an attribute of negotiability on controllable electronic records because a qualifying purchaser takes its interest free of conflicting property claims to the record." Prefatory Note to Uniform Commercial Code Amendments (2022), Note 2.a.

Article 12's choice-of-law provision is § 12-107. Section 12-107 establishes choice-of-law rules for "the matters covered by" Article 12. It states, as a "general rule," that "the local law of a [CER's] jurisdiction" controls. § 12-107(a). Article 12 then prescribes a "waterfall" of rules for determining "jurisdiction." Prefatory Note to Uniform Commercial Code Amendments (2022), Note 5. If the CER or related document that is readily available for review has a choice of law clause, the jurisdiction specified in the clause has jurisdiction over the CER. § 12-107(c)(1) & (3). If neither the CER nor a related document has such a clause, one looks to "the rules of the system in which the controllable electronic record is recorded" to see if the system rules contain a choice-of-law clause, in which case that clause controls jurisdiction. § 12-107(c)(2) & (4). If no jurisdiction is specified in the CER, a related record that is readily available for review, or the system's rules, then the CER's jurisdiction is the District of Columbia. § 12-107(c)(5).

An official comment explains that this designation of the District of Columbia "follows Section 9-307(c), which designates the District of Columbia as the location of a debtor that otherwise would be located in a jurisdiction whose law does not provide for a generally applicable system of public notice." § 12-107 cmt. 7. This linkage reflects that CERs can furnish security for secured transactions, and the 2022 Amendments include amendments to Article 9 addressing the perfection and priority of security interests in CERs.

Chapter 6

Choice of Law: Property, Trusts, and Estates

A. Land

[Add the following to Note 2 on page 485.]

Nijensohn v. Ring, 278 A.3d 1008 (Vt. 2022), was a dispute over real property in Vermont arising out of a divorce proceeding in Massachusetts, in which the Massachusetts court ordered a special master to sell the real property. After the sale, the plaintiff sued in Vermont to rescind the sale and quiet title to the property. The Vermont trial court dismissed the action on grounds of comity, deferring to the ongoing proceeding in Massachusetts. The Vermont Supreme Court affirmed. Among other arguments, the plaintiff cited *Ward*, arguing that Kansas' refusal to give effect to the Nebraska decree on grounds of comity supported reversal here. The Vermont Supreme Court disagreed, distinguishing *Ward* on the grounds that the Kansas court refused effect to the Nebraska decree where there was no indication that the decree had been appealed "or was otherwise not final." Here the Vermont trial court had deferred to the pending case as a whole to allow Massachusetts to decide the issue. Do you find this distinction persuasive? Earlier the Vermont Supreme Court had recounted the plaintiff's argument based on the case of *Fall v. Eastin,* reprinted in Chapter 9 at page 810 of the casebook and examined there. *Fall* was one of the cases relied on by the Nebraska Court of Appeals for the proposition that Virginia did not have subject-matter jurisdiction to control the real property in Nebraska. In *Nijensohn*, the plaintiff argued that the Massachusetts court did not have jurisdiction to order the special master to sell the property in Vermont. After you examine *Fall* in Chapter 9, ask yourself whether the plaintiff's argument was not just backwards.

[Add the following subnotes after Note 8(d) on page 490.]

(e)(i) At the 2023 general meeting of the American Law Institute in May, the Reporters presented a revision of portions of Chapter 7 on Property in the RESTATEMENT THIRD OF CONFLICT OF LAWS, *Tentative Draft No. 4* (March 2023). These were organized under Topic 1 (Core Property Issues), Title A (Classification of Property), Title B (Core Real Property Issues), and Topic C (Other Core Property Issues), and Topic 2 (Property in Marriage and Nonmarital Domestic Relationships). Tentative Draft No. 4 was approved by the membership, subject to the editorial discretion of the Reporters to revise the draft based on comments and suggestions made by the membership at the meeting. There follows a general description of the provisions of Tentative Draft No. 4, with the exception of Topic 2, which is described in Chapter 7D of this supplement dealing with marital property.

(ii) Title A of Topic 1 contains § 7.01, which simply states that as used in Chapter 7, "real property" means land, buildings located on it, fixtures attached to it, and things growing on it, while "personal property" means any moveable or intangible thing that is not classified as real property.

(iii) Title B of Topic 1 contains §§ 7.02 – 7.05. Section 7.02 states simply that the law of the state where real property is located governs the permissible types of interests in that property. Section 7.03 similarly states that the situs state's law governs servitudes on real property. Section 7.04(a) states that a transfer of an interest in real property by deed is generally governed by the law of the situs; however, § 7.04(b) states that the construction or interpretation of a deed for transfer of realty is governed by the law selected by the parties in the deed or, in the absence of a designation, by the law of the situs. Section 7.05(a) provides that recording system matters are governed by the law of the situs, and § 7.05(b) provides that situs law will govern the effect of recording or failing to record a real property document on the priorities of interests on that real property.

(iv) Title C of Topic 1 contains §§ 7.06 – 7.11. Section 7.06(a) provides that situs law governs the transfer of an interest in real property by adverse possession, while § 7.06(b) states that transfer of an interest in tangible personal property is governed by the law of the state where the personal property was located at the time the first adverse possessor took possession of it. Section 7.07(a) states that a restraint on the alienation of a real property interest is governed by the law of the situs state; section 7.07(b) states that a restraint on the alienation of a personal property interest is governed by the law governing the legal instrument governing the restraint. Section 7.08 states that situs law governs whether the making of a contract to sell realty results in the equitable conversion of the seller's and buyer's interests in the realty, as well as the nature of the resulting interests, the consequences of the conversion, and the limits, if any, on the seller's and buyer's authority to govern those issues by contract or to select the law of a non-situs state to govern them. Section 7.09(a) provides that issues about a lease are governed by the law chosen by the parties, but only if situs law permits them to be governed by contract, and otherwise (as if there is no contractual choice of law) by situs law. Section 7.09(b) provides that issues concerning a lease of personalty covered by the UCC are governed by the law determined under the UCC's choice-of-law rules, while other issues are governed by the law chosen by the parties under § 8.02, or in the absence of such a choice by the law of the state where the lessee takes possession of the leased property. Section 7.10 is a complex provision governing security interests in real and personal property and describing when the parties can choose the applicable law and how the section interacts with the UCC. Section 7.11 deals with choice of law for gifts by living donors. Section 7.11(a) states that, except as provided in subsection (b), the law chosen by the parties governs if the gift is made by an agreement between the donor and the donee, or by the law chosen by the donor in a gift instrument other than an agreement (if there is one), and otherwise by the law of the state of the donor's domicile at the time the gift was made. Subsection (b) provides that the situs state will govern whether a gift of realty by a living donor must be evidenced by a writing, the formalities of the writing, and the effect of recording or failing to record a writing on the validity of the gift.

[Add the following Note after Note 9 on page 490.]

10.(a) The RESTATEMENT OF THE LAW THIRD CONFLICT OF LAWS (*Preliminary Draft No. 7* Oct. 2021), contains Topic 4 to Chapter 7 on Property. The topic deals with succession and applies the same rules to both personal and real property. At this time, the rules generally prescribe the domicile of the testator as the governing law, thus eliminating the situs rule for land in most situations. Section 7.25 states that the law of the state of the testator's domicile at the time of death governs the formal validity of a will. Section 7.26 provides that the law of the testator's domicile at death governs whether a will is invalid due to the

testator's incapacity or another's wrongdoing. Section 7.27 provides that the law of the testator's domicile at the time of death governs the rights of persons to take from the testator's estate even if the will does not provide for the person. Section 7.28 provides that the construction of a will is governed by the law of the state designated for that purpose in the will, but in the absence of a designation, the law of the state of the decedent's domicile at the time of death governs. Section 7.29 provides that the law of the state of the decedent's domicile at death determines intestate succession. Finally, § 7.30 provides that whether there is an escheat of a decedent's property is determined by the location of the property at the time of death. **For a discussion of the merits of the merits of the domicile rule versus the situs rule in real property cases by one of the Associate Reporters for the ALI's Third Restatement project, see Christopher A. Whytock, *Situs and Domicile in Choice of Law for Succession Issues*, 97 TUL. L. REV. 1181 (2023).**

(b) At the annual meeting of the Reporters, Advisers, and Members Consultative Group on November 19, 2021, there was extensive discussion of Topic 4, including questions concerning whether the law of the state of the decedent's domicile at death should govern issues, such as issues of construction, or whether the law of the state where the testator was domiciled when the will was drafted should govern these issues. At the meeting, there was no discussion of the traditional territorial subject-matter jurisdiction limitations on the power of a non-situs state to affect the title to land located elsewhere, but there were extensive written comments submitted on this question. The Reporters appear to agree that these rules must be dealt with in order for the ALI to be able to alter the situs rule in the ways set out in Topic 4. As *Estate of Hannan* and the notes following it illustrate, it is critical to resolve the status of these rules if Topic 4 is to remain in its present form. You will study the land-title subject-matter jurisdiction rules in more detail in Chapter 9.B.2.b(3). When you do, remember that the rules are virtually always enforced in ancillary proceedings at the situs brought to enforce the non-situs court's judgment. Be sure and ask what effect litigation at the non-situs court should have in these ancillary proceedings under the case of *Durfee v. Duke,* p. 818 of the casebook.

Problem

Problem 6-2A. D, who is domiciled in State *X*, dies intestate in State *X* owning land in State *Y.* Under the intestate distribution law of State *X*, *S, D's* spouse, would inherit the land in its entirety. Under the intestate distribution law of State *Y, C, D's* only child, would inherit a ½ interest in the land and *S* would inherit a ½ interest in the land. In a probate proceeding in State *X* in which both *S* and *C* are joined and adequately represented, the court determines under § 7.29 that State *X's* intestate distribution law should be applied and that *S* should inherit the land. In an ancillary proceeding in State *Y* to enforce the State *X* judgment and vest title to the land in *S*, can State *Y* refuse to enforce the judgment and declare *C* and *S* to each inherit 50% of the land under State *Y's* scheme of intestate distribution? Reconsider this problem after studying the materials in Chapter 9.B.2.b(3) of the casebook. What effect under those materials should *C's* litigation of the State *X* proceeding have on her ability to resist enforcement of the judgment assuming that (a) she did not litigate any issue of territorial subject-matter jurisdiction (but only litigated whether State *X's* or State *Y's* law should be applied) or (b) she litigated the issue of whether State *X* had territorial subject-matter jurisdiction to determine the ownership question and apply its law to the question, but lost, the State *X* court finding that it did have jurisdiction both to adjudicate the issue and apply its law to the issue?

B. Personalty

[Insert at the end of Note 1(d) on page 516.]

See also In Re: Cuker Interactive, LLC, Debtor, ___ F.3d ___, 2022 WL 612671 (9th Cir. Mar. 2, 2022) (federal bankruptcy proceeding; court applies federal choice-of-law rules in the form of the Second Restatement: holds that § 251, providing for choice-of-law in determining the validity and effect of a security interest in a chattel, governed, and that the presumption in favor of the location of the security interest in a chattel at the time the security interest attached had not been overcome), *petition for cert. filed*, 91 U.S.L.W. 3001 (U.S. June 30, 2022) (No. 22-18).

[Add to Note 1(g) on page 517.]

See also Appeal of TRADZ, LLC (N.H. Dep't of Safety), 281 A.3d 235 (N.H. 2022) (New Hampshire's abandoned vehicle statute does not apply to vehicle towed from owner's property in Massachusetts).

[Add after Note 2(c) on page 518.]

(d) For an excellent discussion of the situs problem in the context of data, see Stephen T. Black, *Where Does Data Live?*, 72 DEPAUL L. REV. 793 (2023).

D. Trusts

[Add at the end of Note 3 on page 527.]

See also Foster v. Foster, 304 So. 3d 211 (Ala. 2020) (language in trust providing that trust would be "construed according to California law" did not mean that issues of administration of the trust had to be governed by California law; therefore, trial court was not required to consult California law to determine the propriety of a request for an accounting); *Benjamin v. Corasaniti*, 267 A.3d 108 (Conn. Dec. 6, 2021) (exercise of non-general testamentary power of appointment is valid if valid under the law that governs the validity of the trust, citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a)).

Chapter 7

Family Law

A. Marriage and Its Termination

1. Marriage

[Add at the end of the text on page 545.]

On October 26, 2023, the reporters, advisers, and members consultative group considered Preliminary Draft No. 8 of the Third Restatement of Conflict of laws. That draft contained §§ 11.01 – 11.03 of Chapter 11 (Families), Topic 1 (Marriage and Other Domestic Relationships), Subtopic A (Formation and Recognition of Domestic Relationships). Section 11.01(a) provides that the validity of a marriage is determined by the law of the state where it was contracted, except as provided in subsection (b), and subject to the rule in § 5.04 (the public policy exception). Section 11.01(b) provides that notwithstanding subsection (a), a court may apply the law of another state with a significant connection to the spouses to uphold the validity of their marriage. Section 11.02(a) provides that a state "usually" gives the same incidents to a foreign marriage that is recognized as valid under § 11.01 as it would give to a marriage contracted within its territory. Section 11.02(b) provides that a state may extend some incidents of marriage to a foreign marriage valid where it was contracted even if the marriage is not recognized as valid under § 11.01. Section 11.03 deals with nonmarital domestic relationships. Section 11.03(a) provides that a state may recognize as "equivalent to marriage" for purposes of dissolution and other matrimonial relief a nonmarital domestic relationship that has a legally recognized that has a legally recognized status and legal effects that are fully equivalent to marriage in the state where it was contracted. Section 11.03(b) states that a state may extend "limited recognition" to a nonmarital domestic relationship that has a legally recognized status in the state where it was contracted, "based on its legal incidents in the state where it was recognized." These provisions have not yet been considered by the ALI Council or the general membership at an annual meeting.

Consider § 11.03(b). It is clear from the language "based on its legal incidents in the state where it was recognized" and Illustration No. 2, that the subsection is designed to establish a flat rule that the forum may not extend "legal incidents" available to similar nonmarital relationship under its own law, if those incidents are not available under the law where the relationship was contracted. Thus, assume two parties establish a domestic partnership under the law of State X, which extends all the incidents of marriage to the relationship except the right of the partners to inherit from each other by intestate distribution. The partners then move permanently to State Y, where all their other family members also permanently live. They live in State Y for 20 years, whereupon one of the partners dies intestate. State Y also recognizes domestic partnerships and extends all the incidents of marriage to them, including the right to inherit by intestate distribution. Under § 11.03(b), the surviving partner could not inherit by intestate distribution under these circumstances. Why shouldn't State Y, which appears to have the only

governmental interest in determining intestate distribution rights of the parties at the point of the deceased partner's death, be able to extent this incident of marriage to the surviving partner? What possible interest does State X have in preventing it from doing so? Shouldn't § 11.03(b) be redrafted to allow a state to extend the benefits of its law to the partners when it is clear that it is the only interested state in determining the issue?

[Add at the end of Notes 1 & 2 on page 547.]

With *Wilkins* and *In re May's Estate*, compare *In Re Marriage of Medina*, 2019 WL 7212282 (CMNI. N. Mariana Isl. 2019). H married S-1 before the Philippine Consul in Saipan, which is in the Commonwealth of the Northern Mariana Islands (CNMI). Thereafter, S-1 returned to the Philippines, where she had the first child of H. H remained in Saipan. Subsequently, H married S-2 in Chuuk, Federated States of Micronesia, H declaring in the marriage certificate that he had no previous marriages. H and S-2 returned to Saipan, where they lived continuously. H visited the Philippines twice after his marriage to S-2, where on his first visit he and S-1 conceived their second child. When H committed suicide in 2017, S-1 sought a declaration that she was the lawful wife of H in order to repatriate his remains to the Philippines. The trial court declared that CNMI law governed the validity of the marriage performed by the Philippine Consul and that the marriage was invalid under that law for failure to comply with several statutory requirements. The Supreme Court of the CNMI affirmed. The court held that the first marriage between H and S-1 did not meet several requirements of CNMI law. In the alternative, it held that if it were to perform a conflict analysis (as urged by S-1), CNMI law would apply under a Second Restatement analysis. Although S-1 had spent her life in the Philippines with S-1 and H's children, H-1 had spent his life in the CNMI and had a substantial relationship with the CNMI, not the Philippines. If the issue had concerned the validity of the marriage for purposes of determining the legitimacy of the children, say for inheritance purposes, would the result have been the same? *See also In the Matter of the Estate of Guerrero,* 2023 Guam 10, 2023 WL 6617183 (Guam Terr. October 10, 2023) (Probate court holds wife married in violation of time restrictions imposed after divorce and thus not entitled to be recognized as surviving spouse of decedent; Supreme Court of Guam reverses, holding that Guam law requires courts to look to the substantive law of the foreign jurisdiction where a marriage occurred, here the Philippines; court interpreted marriage as validly contracted under that law.)

2. Divorce

[Add at the end of Note 1(a) on page 557.]

See also Melki v. Melki, 2020 WL 5797869 (Md. Ct. Spec. App. 2020) (unreported) (parties married in Lebanon at an Orthodox Christian church; domiciled in Maryland; in 2017, wife sought and obtained an absolute divorce from husband; husband appealed, arguing inter alia that the court had no subject-matter jurisdiction because Lebanon, where the marriage was contracted, did not permit divorce under the circumstances; the appellate court rejected this argument, holding that under the Second Restatement the divorce law of the forum applied because the parties were domiciled in Maryland); *Evans-Freke v. Evans-Freke*, 75 V.I. 407 (V.I. 2021) (Supreme Court of the Virgin Islands reverses dismissal of husband's divorce action on grounds of lack of personal jurisdiction and forum non conveniens; court held that there was jurisdiction over the wife under the "transacting business within the forum" provision of the Virgin Islands' long-arm s0tatute, which required only purposeful contacts between the wife and the territory;

the court did not discuss the fact that the husband was domiciled in the Virgin Islands and that domicile-based divorce jurisdiction was provided for under Virgin Islands' law, but concurring justice Swan concluded that both domicile-based jurisdiction was present and personal jurisdiction over the wife sufficient to justify adjudication of the other (property and monetary) issues in the case (*see* Section B.1 of the casebook on divisible divorce).

[Add after Note 1(f) on page 562.]

(g) Chapter 10C.2 examines the doctrine of forum non conveniens. After studying that doctrine, ask whether it would provide a practical way for a defendant to obtain dismissal of a foreign divorce action based on a newly acquired domicile by the plaintiff in the foreign forum in preference to an action in the defendant's state of residence. *See Guh-Siesel v. Siesel,* 2024 WY 54, 548 P.3d 585 (Wyo. May 16, 2024) (California was an adequate alternative forum, but defendant husband failed to demonstrate that the public and private interest factors of the doctrine of forum non conveniens justified dismissal in preference to that forum).

C. Custody

1. The Uniform Child Custody Jurisdiction Enforcement Act

[Add at the end of the carryover paragraph on page 591.]

See Roman v. Karren, 461 P.3d 1252 (Alaska 2020) (jurisdiction attached under UCCJEA if child had lived in Alaska at least six consecutive months before dissolution proceeding commenced; original dissolution proceeding was never closed, but simply was converted into a divorce proceeding, with the same parties, case number, judge, and trial record; trial court's discretionary decision that Alaska was not an inconvenient forum was not an abuse of discretion); *Mouritsen v. Mouritsen*, 459 P.3d 476 (Alaska 2020) (expression "presently resides" in Alaska's UCCJEA provision governing exclusive continuing jurisdiction should not be interpreted as meaning physical presence, but as consistent with a "holistic" definition of domicile—a permanent home with an intention to remain; under this definition, father's transfer to an air force base in South Carolina did not destroy the court's continuing exclusive jurisdiction where father intended to retire in Alaska, Alaska was his state of residency on his pay stubs, income tax returns, voter's registration, car registrations, driver's license, and receipt of Alaska Permanent Fund Dividend); *In re Teagan K.-O.*, 242 A.3d 59 (Conn. 2020) (UCCJEA did not eliminate the territorial limitation of Connecticut court's jurisdiction to adjudicate a neglect petition involving a child "in this state"; Florida rule governing transfer of proceeding to another state as a more convenient forum did not authorize transfer of proceeding to Connecticut, which did not have jurisdiction over neglect case; and Connecticut did not have "significant connection jurisdiction" under UCCJEA).

3. International Child Abduction

[Add after Note 5(b) on page 610.]

(c) In *Golan v. Saada,* 596 U.S. 666 (2022), the Court held that determining whether a grave risk of harm exists that prevents return of a child does not require that a court consider any or all ameliorative measures before denying return. The discretion given to courts under the Convention does permit consideration of ameliorative measures that could ensure the child's safe return.
However, the risk of harm determination and the consideration of ameliorative measures are two separate questions. The Second Circuit's categorical requirement that the two must be considered together is atextual and rewrites the Convention. This elevated return over the Convention's other objectives.

[Add at the end of Note 6 on page 611.]

See also Sonja van Wichelen, *Moving Children Through Private International Law: Institutions and the Enactment of Ethics*, 53 LAW & SOC'Y REV. 671 (2019) (examining how the Hague Adoption Convention plays a central role in justifying the institution of legal adoption).

D. Marital Property

[Insert on page 620 at the end of the introductory material to this section before the *Seizer* case.]

At the general meeting of the American Law Institute in May 2023, the Reporters for the RESTATEMENT THIRD OF CONFLICT OF LAWS presented *Tentative Draft No. 4* (March 2023) to the membership. The draft was approved by the membership on May 24, subject to the editorial discretion of the Reporters to make changes based on comments and suggestions at the meeting. This draft contains revised provisions of Chapter 7 on property. Some of these provisions have already been discussed in Chapter 6 on property. Below is a description of Topic 2 dealing with property in marriage and nonmarital domestic relationships. Topic 2 contains §§ 7.12 – 7.18, which are described below. As the Third Restatement is adopted by the courts over time, these provisions may affect the results of the cases presented in this section.

Section 7.12 deals with marital domicile and states that the marital domicile is the state of the spouses' common domicile if the spouses are domiciled in the same state (subsection (a)), but if not, the state where the spouses last had a common domicile and where one spouse remains domiciled or has reestablished domicile if the spouses do not have a common domicile (subsection (b)); but if neither subsection (a) nor (b) is applicable, the state with which the spouses jointly have the closest connection under all the circumstances.

Section 7.13(a) deals with management and control of matrimonial property during marriage and provides that management and control rights between spouses during marriage as to property owned by a spouse before marriage are governed by the law of the marital domicile at the time of marriage. Section 7.12(b) provides that as to property acquired by a spouse during marriage, management and control rights are controlled by the law of the marital domicile at the time of acquisition. Section 7.14 provides that

matrimonial property rights between spouses are governed by the law of the marital domicile at the time of divorce.

Section 70.15 deals with matrimonial property rights at the time of death and provides that the law of the marital domicile governs. However, comment a states that the section does not cover choice of law for issues concerning a surviving spouse's rights to a deceased spouse's property under the laws of testate or intestate succession, which are governed by specific sections devoted to those subjects (see the discussion of these in Chapter 6). Then, Illustration 1 (the only illustration to the section) concerns a issue of a spouse's right to take on the death of the other spouse after a death occurring subsequent to a move from a separate to a community property state whose laws conflict (albeit for the purpose of applying the "manifestly inappropriate" exception of § 5.03 to determine the outcome). This creates some confusion about when § 7.15 should apply of its own force as opposed to subsequent sections dealing with testate and intestate distribution, or how the section interacts with those specific sections. The aim of the Reporters is to draw a proper scope line between marital property law and succession law, with § 7.15 governing issues of a spouse's rights upon death that flow from how property is classified during marriage, while the testate and intestate succession provisions govern rights upon death that flow from succession law. The Reporters are aware of a need for clarification of this section and will do so by additional comments or illustrations.

Section 7.16 deals with rights of third parties to matrimonial property. Subsection (a) states that if one spouse incurs a debt to a third-party creditor, the right of the creditor to satisfy the debt against the other spouse's property is governed by the law of the marital domicile at the time of the marriage if the debt was incurred prior to the marriage or the law of the state of the marital domicile at the time the debt was incurred if the debt was incurred during the marriage. Subsection (b) states that if a spouse transfers an interest in property to a third party during marriage in violation of the other spouse's management and control rights, the law of the marital domicile governs the effect of the violation on the third-party's rights to the property and whether the third-party's rights are subject to a right of the non-transferring spouse to a remedy as to the property due to the violation.

Section 7.17 deals with marital agreements and marital property. Subsection (a) states that if the parties have entered into a valid marital agreement governing their marital property rights, that agreement governs rather than "this Topic's choice-of-law rules." Subsection (b) provides that if the spouses have entered into a valid marital agreement that is enforceable under § 8.02, their choice of law will govern rather the law determined under "this Topic's choice-of-law rules."

Section 7.18 provides that "this Topic's choice-of-law rules" apply by analogy to issues arising about property rights arising from nonmarital domestic relationships with legally recognized status and with legal effects equivalent to those in marriage.

2. Party Autonomy in Marital Property Arrangements

b. Bilateral Party Choice

[Add at the end of Note 3 on page 633.]

See also Blondeau v. Baltierra, 252 A.3d 317 (Conn. 2020) (parties' premarital agreement provided that French law would be applicable to their matrimonial regime; arbitrator disregarded this provision and distributed the parties' matrimonial home equity in accord with Connecticut law, concluding that the choice-of-law clause did not designate French law to govern the distribution of joint property; deference owed to the arbitrator's decision is not defeated simply by showing that the arbitrator misinterpreted the choice-of-law clause in the agreement; while choice-of-law clause declared that French law governed the parties' "matrimonial regime," it left this critical term undefined; therefore, under the standard for reviewing the award, the decision did not amount to an egregious or patently irrational misperformance of duty).

Chapter 8

Vertical Choice of Law

B. The Erie Doctrine

[Add at the end of Note 4 on page 645.]

For an example of the blurry line between substance and procedure, see *The Resource Group Int'l Ltd. v. Chishti*, 91 F.4th 107 (2d Cir. 2024). The contract between the parties in this business dispute required arbitration "pursuant to, the Uniform Arbitration Act as in effect in the State of New York from time to time." Chishti initiated arbitration to resolve the dispute, in response to which The Resource Group International (TRGI) filed a diversity action in federal court for a preliminary injunction staying the arbitration. On appeal from the district court's denial of a preliminary injunction, the Second Circuit initially had to decide whether it had appellate jurisdiction or, instead, whether jurisdiction was barred by a provision in the Federal Arbitration Act (FAA) that expressly bars appeals to the federal courts of appeals "from an interlocutory order . . . refusing to enjoin an arbitration that is subject to [the FAA]." *Id.* at 111 (quoting 9 U.S.C. § 16(b)(4)). The court of appeals held that the FAA allows parties to contract out of its applicability, and that the parties in this case had done so by the clause referring to New York arbitration law. The court further held that, unlike the FAA, New York's Civil Practice and Rules Article 75 grants appellate jurisdiction over appeals from the denial of a preliminary injunction to stay an arbitration. The court concluded that the FAA provision denying appellate jurisdiction and the New York law granting it "are both substantive provisions." *Id*. at 113. The court based this conclusion on a U.S. Supreme Court opinion from an unrelated area of law (retroactivity), in which the Court said that statutes that "create[ ] jurisdiction where none previously existed … speak[] not just to the power of a particular court but to the substantive rights of the parties as well." *Id.* (quoting *Hughes Aircraft Co. v. United States ex. rel. Schumer*, 520 U.S. 939, 951 (1997) (emphasis removed and brackets added by court of appeals)). The result is a conclusion that jurisdictional provisions can be substantive. *See also Rodgers-Rouzier v. Am. Queen Steamboat Operating Co., LLC*, 104 F.4th 978 (7th Cir. 2024) (holding that, for *Erie* purposes, arbitration is substantive matter, and so federal court had to enforce Indiana arbitration statute to an arbitration agreement that fell outside Federal Arbitration Act).

[Add a new note after Note 5 on page 653.]

6. Whereas *Erie* addressed federal court power to make substantive rules of common law, *Guaranty Trust* addressed the power of federal courts to exercise "the authority conferred upon them by Congress to administer equitable remedies." Quoted in casebook at p. 646. The Court concluded that in conferring that remedial power, Congress did not empower federal courts in equity to create substantive federal rights. At the same time, the Court added, "This does not mean that whatever equitable remedy

is available in a State court must be available in a diversity suit in a federal court, or conversely, that a federal court may not afford an equitable remedy not available in a State court." Casebook at p. 648. For an interesting discussion of this aspect of *Guaranty Trust*, see *Vital Pharmaceuticals, Inc. v. Alfieri*, 23 F.4th 1282, 1293 (11th Cir. 2022) (Pryor, J., concurring) (addressing whether a federal court in a diversity case must, in deciding whether to grant a preliminary injunction, apply a Florida law establishing a presumption of irreparable injury; and answering "no," based on *Guaranty Trust*'s outcome determinative test and its discussion of federal courts' power to administer equitable remedies).

[Add at the end of Note 2 on page 658.]

Consider which category applied in *Wideman v. Innovative Fibers LLC*, 100 F.4th 490 (4th Cir. 2024). The case arose from an explosion at Innovative Fiber's plastic processing plant in South Carolina. Four workers and one of the worker's spouses sued Innovative Fibers and other defendants in a South Carolina state court for injuries from the explosion. Defendants removed the case to federal court on diversity grounds but then moved to dismiss the case for lack of subject matter jurisdiction, a strategic move that the court of appeals described as a "(permissible) *volte-face*." *Id.* at 494. In seeking dismissal, defendants relied on a South Carolina law that, they argued, gave the state workers' compensation commission exclusive jurisdiction over such claims, to the exclusion of both state and federal courts. The Fourth Circuit rejected that argument, holding that "state law cannot oust federal courts of jurisdiction that they already possess pursuant to federal law." *Id.* at 497. The court acknowledged: "True, the [South Carolina] Law excludes covered employees from enjoying rights or remedies at common law, confers immunity from tort suits on employers, and vests exclusive jurisdiction in the Workers' Compensation Commission." *Id.* And the court recognized that these facts "reflect the substantive policy of South Carolina, which, under *Erie*, we are required to enforce in diversity jurisdiction." *Id.* (citing *Byrd*). But the court concluded, "[T]his limitation only determines whether Plaintiffs have stated a claim upon which relief can be granted; it cannot strip us of subject matter jurisdiction that we otherwise enjoy." *Id.* at 497-98. So, into which of the three categories identified above would the court of appeals put the South Carolina laws on which the defendants relied in seeking dismissal for lack of subject matter jurisdiction?

[Add at the end of Note 3 on page 667.]

A more recent case involving the interaction between a federal statute and state law is *Franco v. Mabe Trucking Co., Inc.*, 3 F.4th 788 (5th Cir. 2021). Franco filed his diversity case against Mabe Trucking in a federal district court in Texas that lacked personal jurisdiction over Mabe Trucking. Rather than dismiss, the Texas district court transferred the case to a district court in Louisiana that could exercise personal jurisdiction. The question was whether the case should be dismissed as untimely. The case was indeed untimely if judged solely under Louisiana law. The Fifth Circuit, however, held that the action was timely in light of 28 U.S.C. § 1631. Section 1631 states in relevant part that after a case is transferred for "a want of jurisdiction," the case "shall proceed as if it had been filed in . . . the court to which it was transferred . . . on the date it was actually filed in . . . the court from which it was transferred." The Fifth Circuit held that Section 1631 controlled the date upon which, and the venue in which, it was filed for purposes of applying Louisiana's one-year prescriptive period; dissent argued, by analogy to *Walker v. Armco Steel Corp*. (supra Note 2(a)), that "Section 1631 is not so broad as to countermand" Louisiana law. *Franco*, 3 F.4th at 802 (Jones, J., dissenting). *Cf. Wilson v. United States*, 79 F.4th 312 (3d Cir. 2023) (*Erie* analysis does not control choice of law analysis in actions under Federal Tort Claims Act (FTCA), because "FTCA's

incorporation of state law is limited in scope and reaches only a subset of potentially relevant state legal rules").

[Add at the end of Note 5 on page 668.]

See also Gallivan v. United States, 943 F.3d 291 (6th Cir. 2019) (holding that Ohio affidavit of merit rule did not apply in claim under the Federal Tort Claims Act, in which government can be held liable under substantive law of state in which negligence occurred, because Ohio rule conflicted with FED. R. CIV. P. 8(a)); Albright v. Christensen, 24 F.4th 1039 (6th Cir. 2022) (holding that Michigan's affidavit of merit statute and pre-suit notice rules for medical malpractice actions conflict with a number of Federal Rules of Civil Procedure and that the Federal Rules in question—namely, 3, 8(a), 9, 11, and 12(b)(6))—were valid under Justice Stevens' "controlling" test from *Shady Grove* (reproduced in casebook at p. 683).

[Add at the end of Note 1 on page 671.]

Cf. Romspen Mortg. Ltd. P'ship v. BGC Holdings LLC, 20 F.4th 359 (7th Cir. 2021) (issue on appeal was mooted by losing party's failure to get a stay of judgment and ensuing sale to a third party of the property that was the subject matter of this diversity action; court applied Illinois law requiring the party who sold the property and argued mootness to show by unequivocal proof that the third-party purchaser was not a party or nominee of any party; court determined that this issue was not covered by FED. R. CIV. P. 62, and thus Rule 62 and Illinois law "can exist side by side" (quoting *Walker v. Armco Steel Corp.*, discussed in the casebook at pp. 665-66)).

[Add at the end of the carryover paragraph on page 673.]

See generally Ethan J. Leib, *Are the Federal Rules of Evidence Unconstitutional?*, 71 AM. U.L. REV. 911 (2022) (arguing that it violates the separation of powers doctrine and Article III for Congress to allow U.S. Supreme Court to amend or repeal congressionally enacted rules of evidence).

[Add at the end of Note 4 on page 721.]

For a recent lower court case applying the *Byrd* categorization approach, see *William Powell Co. v. National Indemnity Co*, 18 F.4th 856 (6th Cir. 2021) (holding that federal court in diversity action did not have to apply an Ohio law that would have required an Ohio state court to honor a litigation-stay order entered by Pennsylvania official liquidating an insurance company that was a party to the diversity action; Ohio law was a rule "of form and mode" under *Byrd*, that conflicted with the "strong federal interest in courts exercising their jurisdiction and resolving the cases before them").

[Add at the end of Note 6 on page 722.]

See also Klocke v. Watson, 936 F.3d 240 (5th Cir. 2019) (holding that Texas anti-SLAPP statute did not apply to state-law defamation claim within supplemental jurisdiction because statute conflicted with FED. R. CIV. P. 12 and 56).

C. Horizontal Choice of Law under Erie

[Add at end of Note 7 on page 722.]

See also Ellis v. Salt River Project Agric. Improvement & Power Dist., 24 F.4th 1262 (9th Cir. 2022) (putative class action against Arizona governmental entity in which the court holds that the Arizona notice-of-claims statute, which requires the plaintiff to file a notice of claim with the defendant governmental entity before bringing suit and with which the plaintiff did not comply, did not conflict with Federal Rule of Civil Procedure 23 and that under the general *Erie* doctrine the state statute was obligatory); *Corley v. United States*, 11 F.4th 79 (2d Cir. 2021) (holding that Connecticut law requiring plaintiff to file certificate of good faith when filing medical malpractice claim did not apply in action under Federal Tort Claims Act, which subjects federal government to tort liability under a state's substantive law to the same extent as a private party; court characterizes Connecticut law as procedural and also holds, using *Shady Grove* analysis, that it conflicts with FED. RS. CIV. P. 4 and 8).

[Add at the end of Note 8(d) on page 723.]

Cf. Banner Bank v. Smith, 30 F.4th 1232 (10th Cir. 2022) (holding that Utah statute authorizing award of attorneys' fees for bad faith litigation conduct conflicted with both federal policy in the form of the American Rule and with FED. R. CIV. P. 11 and a federal court's inherent authority to punish for bad faith litigation conduct).

[Add at the end of Note 8 on page 723.]

(e) *See also Showan v. Pressdee*, 922 F.3d 1211 (11th Cir. 2019) (holding that FED. R. CIV. P. 11 did not conflict with Georgia statute authorizing prevailing party to recover compensatory damages for assertion of frivolous claims or defenses, and that under second part of *Hanna* the Georgia statute should apply in case removed to federal court on diversity grounds).

[Add near the end of Note 3 on page 727, immediately before the citation to Prof. Green's article.]

; *Martins v. Vt. Mut. Uns. Co.*, 92 F.4th 325 (1st Cir. 2024) (class action in state court removed to federal court on the basis of diversity and the Class Action Fairness Act; court says it "accept[s] the parties' reasonable agreement that Massachusetts law controls," relying on case law holding that in diversity cases federal courts can accept parties' agreement as to which state's law controls).

[Add to the end of Note 4 on 727.]

For an argument that a federal court is generally better than a state court at applying the forum state's choice-of-law rules, when those rules require analyzing the relevant states' interests, see Lee Farnsworth, *Conflicts of Law, Federalism, and Institutional Competence*, 68 KAN. L. REV. 495 (2020).

[Add to the end of Note 5 on 728.]

See Clayton Servs. LLC v. Sun West Mortg. Co., Inc., 2023 WL 2781294 (2d Cir. Apr. 5, 2023) (Connecticut statute authorized offer-of-compromise interest on award of damages; court of appeals first examined Connecticut law and determined that under its conflict-of-law rules, the offer-of-compromise interest statute was procedural; however, court held that the issue was substantive for *Erie* purposes and accordingly applied it; court did not closely examine whether failure to apply the Connecticut statute would create forum shopping or inequitable administration of the law, nor did court examine whether the statute conflicted with any valid Federal Rule of Civil Procedure).

[Add at the end of Note 6 on page 728.]

Cases arising under the Bankruptcy Code provide another situation in which a federal court often resolves substantive claims and must decide whether or not to apply federal common-law choice-of-law rules. The Ninth Circuit has consistently applied federal common-law choice-of-law rules but acknowledged that other federal courts of appeals have disagreed with this approach. *See*, *e.g.*, *In re Cuker Interactive, LLC*, *Debtor*, 2022 WL 612671 (Mar. 2, 2022), *cert. denied*, 143 S. Ct. 1054 (2022); *In re Serba*, 852 F.3d 1175, 1177 n.1 (9th Cir. 2017) (acknowledging the circuit conflict). *See generally In re Lindsay*, 59 F.3d 942 (9th Cir. 1995) ("In federal question cases with exclusive jurisdiction in federal court, such as bankruptcy, the court should apply federal, not forum state, rules.").

[Add a new Note 6(d) after Note 6(c) on page 745.]

(d) In addressing the effect of a forum-selection clause upon analysis of a transfer motion under § 1404(a), the Court in *Atl. Marine* assumed that the forum-selection clause was valid. In contrast, the validity of a forum-selection clause was at issue in *DePuy Synthes Sales, Inc. v. Howmedica Osteonics Corp*., 28 F.4th 956 (9th Cir. 2022). DePuy and his employer brought a diversity action in California district court against DePuy's former employer, seeking a declaratory judgment about the validity of the forum selection clause and other provisions of the employment agreement between DePuy and his former employer. The defendant-former employer moved to transfer the case to New Jersey, in accordance with the very same forum-selection clause that plaintiffs sought to have declared invalid. The Ninth Circuit held that state law, not federal law, governed the validity of the forum-selection clause. In addition, the Ninth Circuit upheld the district court's determination that, under California choice-of-law rules (applicable under *Klaxon*), a California statute applied to, and invalidated, the forum-selection clause. In the absence of a valid forum-selection clause, analysis of the motion to transfer under § 1404(a) was governed by federal law as construed in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). *Stewart* is discussed in 10.C.1 (in Note 4(a) on p. 1035 of the casebook).

[Add to end of Note 7 on page 746.]

See also Enigma Software Grp. USA, LLC v Malwarebytes, Inc., 69 F.4th 665 (9th Cir. 2023) (suit was transferred under 28 U.S.C. § 1404(a) from federal district court in New York to one in California without the transferor court determining whether defendant was subject to personal jurisdiction there; 9th Circuit held that defendant was subject to personal jurisdiction in New York and therefore New York choice-of-law rules apply). *In re TikTok, Inc*., 85 F.4th 352 (5th Cir. 2023) (Fifth Circuit grants writ of mandamus directing transfer of case from Western District of Texas to Northern District of California, where plaintiffs alleged that defendants improperly used plaintiffs' source code for video-and-audio-editing software and

implemented it into TikTok using engineers most of whom were located in Northern District of California; Fifth Circuit minimizes importance of plaintiffs' inclusion of claims based on Texas law, stating that federal district court in Texas's possibly greater familiarity with that law was unimportant since the claims did not seem to involve any "arcane" issues of Texas law).

D. Ascertaining State Law

[Add a citation at the end of the carryover paragraph on the top of p. 749.]

See also Coleman E. Adler & Sons, L.L.C. v. Axis Surplus Ins. Co., 49 F.4th 894 (5th Cir. 2022) (refusing to revisit earlier 5th Circuit decision making an *Erie* guess about state law; revisiting of earlier decision was not justified by later, contrary ruling by Louisiana intermediate court of appeals); *Lousteau v. Holy Cross Coll., Inc.*, 81 F.4th 437 (5th Cir. 2023) (*Erie* guess case; federal district court Louisiana's "revival" provision in sex abuse cases unconstitutional as applied to a case barred at the time of the provision's enactment; pending appeal, the Louisiana Supreme Court came down with case holding that the provision did not apply to such cases, so the federal court of appeals held that district court erred in its *Erie* guess and followed the Louisiana Supreme Court case); *Green Plains Trade Grp.*, 90 F.4th (7th Cir. 2024) (action for tortious interference with contract; court of appeals held that district court erred in concluding that it could not adopt plaintiff's apparently novel choice-of-law argument because Nebraska Supreme Court had not yet done so, even though it "might" in an appropriate future case; court of appeals held that district court had to decide whether Nebraska Supreme Court *would* adopt plaintiff's argument, and briefly outlined what its prior decisions had established as "guardrails" for making the inquiry). *See generally* Aaron-Andrew Bruhl, *Interpreting State Statutes in Federal Court,* 98 NOTRE DAME L. REV. 61 (2022).

[Add a new paragraph after the first full paragraph on page 749.]

There is an arguable exception to the general unavailability of abstention for federal courts that want to avoid making *Erie* guesses. The exception arises in federal court diversity suits seeking declaratory judgments under the Declaratory Judgment Act (DJA), 28 U.S.C. §§ 2201–2202. The DJA states that a federal court "*may* declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a) (emphasis added). The U.S. Supreme Court has held that this wording gives federal district courts discretion to stay a DJA suit or dismiss it altogether. *E.g.*, *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995). *Wilton* involved a federal district court staying a DJA suit based on the pendency of a parallel state court suit in which the issues presented in the DJA suit would be resolved. Some lower federal courts, however, have held that the DJA grants discretion to decline jurisdiction even if there is no parallel state court proceeding pending at the time. And, more to the point, some courts have held that jurisdiction can be declined, even in the absence of a pending parallel state court proceeding, based on, among other factors, the novel or uncertain nature of state-court issues presented in the DJA suit. *See*, *e.g.*, *DiAnoia's Eatery, LLC v. Motorists Mut. Ins. Co.*, 10 F.4th 192 (3d Cir. 2021) (stating that district courts should be "particularly reluctant" to entertain DJA suits brought under diversity jurisdiction "when applicable state law is uncertain or undetermined") (internal quotation marks omitted). Consider whether these holdings improperly allow federal courts to use their discretion under the DJA to skirt the established principle that federal courts cannot dismiss a routine diversity action just because it presents an undecided issue of state law.

[Add at the end of carryover paragraph on page 750.]

See also McKesson v. Doe, 592 U.S. 1 (2020) (per curiam) (stating that "in exceptional circumstances" federal courts should certify questions of state law to state courts before deciding whether state law violates federal constitution); *Pitzer Coll. v. Indian Harbor Ins. Co*., 447 P.3d 669 (Cal. 2019) (answering questions certified by U.S. Court of Appeals for Ninth Circuit in decision cited supra this paragraph); *United States v. Defreitas*, 29 F.4th 135 (3d Cir. 2022) (extensive discussion of the factors that justify certification; denying certification in that case); *Longoria v. Paxton*, ___ F. 4th ___, 2022 WL 832239 (5th Cir. Mar. 21, 2022) (granting certification to Texas Supreme Court of questions concerning new provisions of the Texas Election Code); *Whole Woman's Health v. Jackson*, 23 F.4th 380 (5th Cir. 2022) (certifying to Texas Supreme Court novel issues concerning Texas abortion law), *mandamus denied*, 142 S. Ct. 701 (2022); *10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd*., 21 F.4th 216 (2d Cir. 2021) (denying certification of issue to New York Court of Appeals based on detailed consideration of costs and benefits); *Fire Prot. Serv., Inc. v. Survitec Survival Prods., Inc.*, 18 F.4th 802 (5th Cir. 2021) (certifying to Texas Supreme Court a novel issue of state law concerning Texas Constitution's ban on retroactive laws); *Fire Prot. Serv., Inc. v. Survitec Survival Prods., Inc.*, 18 F.4th 802 (5th Cir. 2021) (certifying to Texas Supreme Court a novel issue of state law concerning Texas Constitution's ban on retroactive laws); *Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, 51 F.4th 456 (2d Cir. 2022) (certifying to New York Court of Appeals question about applicability of Venezuelan law to case arising from bond swap); *Lelchook v. Société Générale De Banque Au Liban Sal*, 67 F.4th 69 (2d Cir. 2023) (certifying to New York Court of Appeals whether New York Long Arm statute applied to successor corporation on theory that it inherited predecessor corporation's jurisdictional status); *Sanders v. Boeing Co*., 68 F.4th 977 (5th Cir. 2023) (certifying to Texas Supreme Court issues concerning interpretation of Texas law allowing tolling of statute of limitations); *Hogan v. Southern Methodist Univ.*, 74 F.4th 371 (5th Cir. 2023) (student pleaded adequate breach of contract claim against university, but court certifies question to Texas Supreme Court to determine whether the Texas Pandemic Liability Protection Act violates the state constitution's retroactivity clause); *Am. Compensation Ins. Co. v. Ruiz*, ___ F.4th ___, 2023 WL 6644505 (5th Cir. Oct. 12, 2023) (certifying question to the Mississippi Supreme Court, concluding that neither prior panel of Fifth Circuit nor state supreme court had addressed the issue).

[Add a citation at the end of the carryover paragraph near the bottom of p. 751.]

; Aaron-Andrew P. Bruhl, *Interpreting State Statutes in Federal Court*, 98 NOTRE DAME L. REV. 61 (2022) (arguing that federal courts should use state methods of statutory interpretation when interpreting state statutes and that they mostly do (the latter view contrary to that of other commentators)).

E. Federal Common Law After Erie

[Add at the end of Note 3(a) on page 754.]

The answer seems to be "not always." In *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 596 U.S. 107 (2022), the plaintiff, a resident of the United States, sued an art museum that was located in Spain and was an entity of the Spanish government. The plaintiff sought to recover a valuable painting that the Nazi government had expropriated from plaintiff's grandmother. The suit was brought in a California federal district court under the Foreign Sovereign Immunity Act (FSIA), 28 U.S.C. §§ 1602–1611. After determining that the museum did not have foreign sovereign immunity, the Ninth Circuit held that federal common law governed analysis of whether ownership of the painting should be determined by reference to California law or the law of Spain. The U.S. Supreme Court reversed, holding that the lower courts should have applied the forum state's choice of law rule, not a rule derived from common law. The Court relied primarily on a provision in the FSIA stating that, in suits in which a foreign state was not entitled to immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. The Court reasoned that, if the defendant museum had been a private entity sued in federal court based on diversity, *Klaxon* would require application of the forum state's choice of law rules. Under § 1606, the same should be true in this suit against a foreign-state-owned museum. The Court added, however, that it would likely have reached the same conclusion if § 1606 were less clear on the matter, "because we see scant justification for federal common lawmaking in this context." *Cassirer*, 596 U.S. at 116. The Court noted that the federal government, which participated as an amicus curiae supporting the plaintiff, "disclaims any necessity for a federal choice-of-law rule in FSIA suits raising non-federal claims." *Id.* On remand, the Ninth Circuit certified a question to the California Supreme Court about how California's comparative impairment analysis applies in a situation where, under the laws of California, a person may not acquire title to a stolen item of personal property because a thief cannot pass good title and California has not adopted the doctrine of adverse possession for personal property, while under the law of Spain a person may acquire title to stolen property by adverse possession. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 69 F.4th 554 (9th Cir. 2023). **After the California Supreme Court denied the request, the Ninth Circuit analyzed the issue under California's choice-of-law approach and concluded that the law of Spain applied. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 89 F.4th 1226 (9th Cir. 2024).**

[Add at the end of Note 3(d) on page 755.]

See also David M. Howard, *A Revised Revisionist Position in the Law of Nations Debate*, 15 DUKE J. CONST. L. & PUB. POL'Y 53 (2020).

[Add at the end of Note 8 on page 760.]

; *Charles v. Portfolio Recovery Assocs.*, 2024 WL 1672350 (9th Cir., Apr. 18, 2024) (appeal from order compelling arbitration, which fell within federal question jurisdiction under 9 U.S.C. § 16(a)(3); court of appeals stated that in federal question jurisdiction cases, courts apply federal common law conflict-of-laws rules and that "[f]ederal common law follows the Restatement (Second) of Conflict of Laws").

Chapter 9

Judgments

B. Enforcement of State Judgments

1. The Full Faith and Credit Implementing Statute

[Add at the end of Note 4 on page 766.]

See also Joseph Woltmann, Comment, *Full Faith and Credit for Victims of Human Trafficking*, 55 U.S.F. L. REV. 469 (2021) (examining whether states should give full faith and credit to the expunged records of human trafficking victims when their criminal records are expunged in other states).

2. Basic Rules and Exceptions

a. Basic Rules

[Add at the end of Note 1 on page 770.]

See also In the Matter of the Cleopatra Cameron Gift Trust, Dated May 26, 1998, 931 N.W.2d 244 (S.D. 2019) (upon divorce judgment, trust ordered in California to make support payments directly to former husband; situs of trust later changed to South Dakota; trial court determined that under spendthrift provisions of trust, direct payments to husband were not permissible; Supreme Court of South Dakota affirmed, holding that full faith and credit did not require enforcing state to follow the mechanisms for enforcement of the judgment-rendering state, and the determination by the trial court about how the payments were to be made was an enforcement procedure.

b. Exceptions and Potential Exceptions to the Basic Rules

(1) General and Special Public Policy Exceptions

[Add at the end of Note 4(b) on page 795.]

See also Nat'l Trust Ins. Co. v. S. Heating & Cooling Inc., 12 F.4th 1278 (11th Cir. 2021) (declaratory judgment action by insurer for determination that policy did not provide coverage for wrongful death; district court dismisses because of factual overlap between declaratory judgment action and Alabama wrongful death action; court of appeals affirms; important factors included that Alabama had a compelling interest in deciding the issues, that the interpretation of the policy involved an important issue of Alabama

law, and that the Alabama court was in a better position to decide factual issues); *DiAnoia's Eatery, LLC v. Motorists Mut. Ins. Co.*, 10 F.4th 192 (3d Cir. 2021) (district court exercised discretion to deny a declaratory judgment in a case seeking to establish insurance coverage for damages occurring to restaurants due to covid virus; one factor influencing the decision was the novelty and uncertainty of state law; the court of appeals remanded for better consideration of the discretionary factors under the federal Declaratory Judgment Act); *Mueller v. Peetz*, 983 N.W.2d 503 (Neb. 2023) (district court should have declined to exercise jurisdiction over suit in light of pending Kansas probate proceeding; forum selection clause in settlement agreement did not deprive court of discretion to decline jurisdiction in the declaratory action).

[Add the following at the end of Note 4 on page 796.]

(e) Apart from policy exceptions and parallel actions to prevent enforcement of state judgments, are there circumstances in which a party can be held liable in a separate action for inappropriately interfering with the enforcement of a state judgment? *See Yegiazaryan v. Smagin*, 599 U.S. 533 (2023) (affirming the Ninth Circuit Court of Appeals decision holding that a Russian plaintiff had properly pleaded a "domestic injury" under RICO by alleging that his efforts to execute on a California judgment in California against a California resident were foiled by a pattern of racketeering activity that largely occurred in California and was designed to subvert enforcement of the judgment there). ***See also*** **Stephen M. Flanagin, *What is "Domestic Injury" Under RICO?*, 6, No. 8, FLETCHER CORP. L. ADVISER 5 (August 2023).**

(2) Lack of Personal Jurisdiction

[Add a new note after Note 4 on page 803.]

5. One basis for asserting personal jurisdiction is consent by the defendant, either by voluntarily appearing, by waiving a personal jurisdiction objection, by failing to raise it in a proper procedural manner, or through a valid forum selection clause in a contract. These issues are all examined thoroughly in Chapter 10 of the casebook. Normally, if consent is through a forum selection clause, it is limited to the parties to a contract. *But see Meribear Prods., Inc. v. Frank,* 265 A.3d 870 (Conn. 2021) (in an action to enforce a California default judgment, the court holds that a non-signatory to the contract was subject to personal jurisdiction under a forum selection clause in the contract because he was so closely related to the negotiation, formation, and execution of the contract that it was foreseeable that he would be bound by the clause). *See also Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122 (2023) (Pennsylvania required out-of-state companies to register to do business in Pennsylvania, and also required companies that register to appear in the state's courts on "any cause of action" against them; Pennsylvania's highest court held that this provision violated the Due Process Clause of the Fourteenth Amendment under later cases decided by the U.S. Supreme Court, despite an older precedent that found this kind of compulsion consistent with due process; held: the Pennsylvania Supreme Court should have followed the older precedent, which controls the case, and left it to the U.S. Supreme Court to overrule its own precedents if appropriate; Court goes on to affirm the due process validity of this kind of "compelled consent" jurisdiction; vacated and remanded; *Mallory* is examined further in Chapter 10 of this supplement, below.)

(3) Lack of Subject Matter Jurisdiction

[Insert at the end of Note 3 on page 817.]

Cf. Shim v. Buechel, 339 So. 3d 315 (Fla. 2022) (Florida statute validly authorized court with personal jurisdiction over debtor to order debtor to deliver a negotiable instrument located in South Korea).

[Insert at the end of Note 4 on page 825.]

See also Ex Parte Space Race, LLC, 357 So. 3d 1 (Ala. 2021) (Alabama gives full faith and credit to a New York judgment confirming an arbitration award; court holds that an issue of subject-matter jurisdiction involving sovereign immunity had been fully and fairly litigated in the New York proceeding and was therefore precluded, citing and discussing *Durfee* and § 12).

[Add the following at the end of this subsection at page 826.]

Reread the materials in Chapter 6.A of this supplement concerning the American Law Institute's proposal to (mostly) abolish the situs rule in succession cases. Apply the materials in this section of the casebook to Problem 6-2A which was reprinted in that section of the supplement. Can you make an outline of all of the questions a court in State *Y* would have to resolve in order to determine the enforceability of the State *X* judgment in that case?

(4) Fraud

[Add after Note 6 on page 831.]

7. Note, however, that for a party to obtain relief from a judgment on grounds of fraud, the fraud must be in the judgment as opposed to some other part of the parties' relationship, such as a separate contract. *See Gershon v. Back*, 288 A.3d 602 (Conn. 2023) (Ex-wife filed a motion to set aside a New York divorce judgment which included a separation agreement that was incorporated in the judgment but not merged with the judgment; Connecticut Supreme Court held that trial court should have denied the motion, because under New York "substantive" law a challenge to a separation agreement that survives a divorce judgment must be brought in a plenary action rather than as a motion for relief from the judgment).

(5) Statutes of Limitation

[Add at the end of Note 3 on page 835.]

In *Boudette v. Boudette*, 453 P.3d 893 (Mont. 2019), a former wife registered in Montana an Arizona divorce decree that required the former husband to pay her a sum certain for her share of the parties' community property. Several years later the former husband moved to extinguish the judgment because the Arizona statute of limitations for enforcing judgments had expired. The Montana trial court agreed with the husband, but the Montana Supreme Court reversed, holding that Montana's ten-year statute of limitations on enforcement of judgments applied rather than the five-year Arizona statute. This result was

produced by the language of the Uniform Enforcement of Foreign Judgments Act, which provided that registered foreign judgments may be enforced or satisfied in the same manner as judgments of Montana district courts, and the limitations period for enforcement of judgments "of any court of record… of any state" in Montana is ten years. Apart from the interpretive meshing of the Montana statutes in the case, does it make sense in the abstract for a court to enforce a judgment that could not be enforced in the judgment-rendering state? Should the party seeking enforcement have to seek to extend or revive the judgment where it was rendered before seeking enforcement in another state?

(7) Administrative Adjudications

[Add at the end of Note 5 on page 853.]

See Bahra v. County of San Bernardino, 945 F.3d 1231 (9th Cir. 2019) (state administrative proceedings receive the same preclusive effect in federal court that they would receive in state court; under California law, decisions by administrative agencies have preclusive effect if they have a sufficiently judicial character and the elements of claim and issue preclusion are satisfied; former county employee had a full and fair opportunity to litigate his termination before the county's civil service commission and thus the judgment precluded his § 1983 First Amendment retaliation claim against the county).

[Add at the end of Note 7 on page 854.]

See also Anderson v. Tri State Constr., LLC, 964 N.W.2d 532 (S.D. 2021) (worker obtained benefits under Wyoming workers' compensation law for an injury received there and later sought benefits under South Dakota's more favorable workers' compensation statutes; the South Dakota Supreme Court held that the South Dakota Department of Labor had jurisdiction to adjudicate the claim, relying on the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 181 (1971), and holding that South Dakota had a substantial connection to the employment relationship sufficient to provide the Department of Labor with authority to adjudicate consistent with due process).

(8) Nonfinal and Modifiable Judgments

[Add after Note 2(f) on page 860.]

(g) A final judgment is res judicata and enforceable, even if it is being appealed. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 13, cmt. f (1982). See also Id. § 16. However, if the judgment is actually reversed in the judgment-rendering state, it is no longer enforceable elsewhere. *See Lewis v. Brim*, 473 P.3d 694 (Alaska 2020) (Oregon judgments reversed on appeal were not entitled to recognition and enforcement in Alaska).

(9) State Judgments Adjudicating Federal Claims

[Insert at the end of Note 3 on page 863.]

For a good discussion of issue preclusion on federal constitutional questions by state judgments in later actions in federal court, see *Smith & Wesson Brands, Inc. v. Attorney General of New Jersey*, 105 F.4th 67 (3d Cir. 2024).

C. Enforcement of Federal Judgments

[Add at the end of Note 1 on page 868.]

See also Woo v. Spackman, 988 F.3d 47 (1st Cir. 2021) (42 U.S.C. § 1963 does not allow registration of state judgments in federal court).

[Add the following Notes after Note 4 on page 869.]

5. *In Re: Bair Hugger Forced Air Warming Devices Products Liab. Litig.*, 999 F.3d 534 (8th Cir. 2021), was a products liability action in which the plaintiff commenced an action in a multidistrict litigation (MDL) in federal court in Minnesota. The action was based on diversity jurisdiction. Four days later, the plaintiff commenced a duplicative action in a Texas state court through different attorneys. After negotiations between the plaintiff and the defendant in the MDL litigation, the parties entered an agreement to dismiss the MDL action "with prejudice." Several years later, after the Texas state action had progressed, the defendant filed an amended answer asserting the affirmative defense of claim preclusion based on the MDL dismissal. The defendant also moved before the MDL court for an injunction to prohibit the plaintiff from litigating the dismissed claims in the Texas action. The MDL court granted this injunction under the "relitigation exception" to the federal Anti-Injunction Act, 28 U.S.C. § 2283, which prohibits federal courts from enjoining state-court proceedings unless the injunction falls within one of three exceptions to the Act. (The Anti-Injunction Act is briefly discussed in Note 4 on page 1075 of the casebook.) The Eighth Circuit Court of Appeals held that the Anti-Injunction Act exception was not applicable to state claims that were not previously presented to and decided by a federal court. In this case, the court reasoned that the preclusion issue would be decided by federal common law which adopted state law, as in the *Semtek* case discussed in the casebook on pages 679-81 & 867. This presented the additional question of which state law, Minnesota or Texas, governed the preclusion question. On this issue, the court reasoned that the plaintiff had only brought his initial action in the Minnesota federal court because the MDL court had issued an order requiring that all actions that would otherwise be brought in other federal courts against Bair Hugger (3M) be brought there. If this order had not existed, the court reasoned, the plaintiff would have sued in Texas federal court. (How did the court know the plaintiff would have sued in Texas federal rather than Texas state court?). The Eighth Circuit then held (i) that Texas choice-of-law rules would govern the preclusion question, (ii) that Texas applied the most significant contacts analysis of the Second Restatement, (iii) that Texas would choose Texas "substantive law" to govern preclusion, and (iv) that Texas law would not provide for claim preclusion under the circumstances. Note that this applied the *Semtek* principle to adopt as federal common law the state law of a state (Texas) in which no federal or state court

had ever rendered a judgment. Note also the oddity that the court applied a Texas choice-of-law analysis to determine whether Texas would apply Texas law or Minnesota law to govern the effect of a dismissal by a Minnesota federal court. (Ordinarily, a court simply applies the preclusion law of the court that rendered the judgment, or at least guesses at what that law would be.) Would it be permissible for the Texas state court to reach a different conclusion on the claim preclusion question, or is that now impossible due to the issue preclusive effect of the Eighth Circuit's decision?

6. Note that class members who do not properly opt out of class actions under Rule 23 can be precluded from bringing individual actions. *See Matter of Navistar MaxxForce Engines Mktg., Sales Practices, and Products Liab. Litig*., 990 F.3d 1048 (7th Cir. 2021) (class member's failure to opt out of class action in a timely fashion barred ability to litigate in state court; continued litigation in state court did not excuse failure to follow proper opt out procedure).

D. Enforcement of Foreign Nation Judgments

[Add at the end of Note 1 on page 874.]

The State of the Netherlands v. MD Helicopters, Inc., 478 P.3d 230 (Ariz. 2020) (the term "law" in the Uniform Foreign-Country Money Judgments Recognition Act provision excluding from the Act judgments originating in a country that has not "adopted or enacted a reciprocal law" is a broad term that includes a foreign country's jurisprudence and is not limited to legislative enactments).

[Add at the end of Note 4(a) on page 875.]

See also Cassouto-Noff & Co. v. Diamond, 170 N.E.3d 319 (Mass. 2021) (Massachusetts Foreign Money Judgments Recognition Act requires the same notice as due process; the defendant received adequate notice of service; the cause of action on which the judgment was based did not violate the public policy of Massachusetts); *Akhmedova v. Akhmedov*, 139 N.Y.S.3d 33 (N.Y. App. Div. 2020) (alleged due process violation by British court did not preclude New York's recognition and enforcement of that court's money judgment in a matrimonial proceeding; New York's statute on recognition of foreign country judgments could not be relied on to challenge the legal processes employed in a particular litigation on due process grounds—here British court compelling husband's attorney to respond to wife's subpoena and testify in the British proceedings)**;** *Hennessy v. Wells Fargo Bank, N.A.,* 968 N.W.2d 684 (Wisc. 2022) (Mexican judgment enforced in Wisconsin; court holds that the substance of foreign law is a question of fact that must be pleaded and proved just as any other fact; sufficient evidence existed that the Mexican judgment was a money judgment as opposed to a judgment in rem; and that the trial court did not abuse its discretion in determining that comity warranted domesticating the judgment).

[Insert at the end of Note 16(e) on page 885.]

See also Micula v. Government of Romania, 2022 WL 2281645 (D.C. Cir. June 24, 2022) (unpublished opinion) (affirming district court enforcement against Romania of an arbitration award made by the International Centre for Settlement of Investment Disputes; Romania had defended on the grounds that it had satisfied a Romanian court's judgment providing the petitioners with some, but not nearly all, of what they were entitled to under the arbitration award, citing the Second Restatement of Conflicts § 116's provision that a judgment will not be enforced in other states if the judgment has been discharged under

the local law of rendition; the court of appeals held this inapplicable, because the arbitration award had not been satisfied under the law of the International Centre for Settlement of Investment Disputes; apparently Romania had voluntarily submitted to the arbitration tribunal).

Chapter 10

Personal Jurisdiction

A. Service of Process and Notice

2. Long-Arm Process

[Add at the end of carryover paragraph on page 889.]

See also Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., 460 P.3d 764 (Cal. 2020) (Hague Convention applies only when forum state law requires formal service sent abroad, and parties' agreement constituted waiver of formal service under California law, so Convention does not apply).

B. Fourteenth Amendment Restrictions on State-Court Jurisdiction

1. Traditional Territorial Restrictions

b. Evolution of the Territorial Rules

[Add on page 898, after "§ 32 cmts. a, d, e & f (1971)."]

As we will see in the *Mallory* case, *infra* Section 2(b), the Supreme Court in 2023 clarified that service on such an agent still can suffice for jurisdiction today.

2. Development of Modern Restrictions on State-Court Jurisdiction

[Add on page 899, after "(5th ed. 2013)."]

See also Mallory v. Norfolk Southern Railway Co., 143 S. Ct. 2028 (2023), in *infra* subsection b.

[On page 899, strike the first two sentences of the paragraph beginning "When a corporation" and insert the following.]

When a corporation was doing purely interstate business, the consent theory was not so straightforward. Under the U.S. Constitution, the states did not have the power to prevent foreign corporations from engaging in interstate commerce within the state—and so it was less clear whether states could condition the doing of business upon appointment of an agent.

a. Status of Traditional Territorial Rules After International Shoe

[Add after Note 5 on page 925.]

6. The author of *Burnham*, Justice Scalia, is widely known in constitutional law as an "originalist"—i.e., someone who believes that constitutional interpretation should preserve the original understanding or intent of provisions. Is Justice Scalia applying that method in *Burnham*? If so, how? What would it even mean to take an "originalist" approach to the jurisdictional test under the Fourteenth Amendment—a test construing an amendment ratified in 1868, yet introduced into American law by *Pennoyer* in 1878 (and restructured by *International Shoe* in 1945)? For scholarly treatments, see, e.g., Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part 2)*, 14 CREIGHTON L. REV. 735 (1981); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849 (1989); Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgmen*t, 33 B.C. L. REV. 981 (1992); Stephen E. Sachs, *Pennoyer Was Right*, 95 Tex. L. Rev. 1249 (2017); Mila Sohoni, *The Puzzle of Procedural Originalism*, 72 DUKE L.J. 941 (2023).

[Add the following case excerpt after "adjudicate the claim to the property" on page 933.]

Mallory v. Norfolk Southern Railway Co.

Supreme Court of the United States

600 U.S. 122 (2023)

JUSTICE GORSUCH announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and III–B, and an opinion with respect to Parts II, III–A, and IV, in which JUSTICE THOMAS, JUSTICE SOTOMAYOR, and JUSTICE JACKSON join.

. . . .

I

Robert Mallory worked for Norfolk Southern as a freight-car mechanic for nearly 20 years, first in Ohio, then in Virginia. During his time with the company, Mr. Mallory contends, he was responsible for spraying boxcar pipes with asbestos and handling chemicals in the railroad's paint shop. He also demolished car interiors that, he alleges, contained carcinogens.

After Mr. Mallory left the company, he moved to Pennsylvania for a period before returning to Virginia. Along the way, he was diagnosed with cancer. Attributing his illness to his work for Norfolk Southern, Mr. Mallory hired Pennsylvania lawyers and sued his former employer in Pennsylvania state court under the Federal Employers' Liability Act . . . . That law creates a workers' compensation scheme permitting railroad employees to recover damages for their employers' negligence. . . .

Norfolk Southern resisted Mr. Mallory's suit on constitutional grounds. By the time he filed his complaint, the company observed, Mr. Mallory resided in Virginia. His complaint alleged that he was exposed to carcinogens in Ohio and Virginia. Meanwhile, the company itself was incorporated in Virginia and had its headquarters there too. On these facts, Norfolk Southern submitted, any effort by a Pennsylvania court to exercise personal jurisdiction over it would offend the Due Process Clause of the Fourteenth Amendment.

Mr. Mallory saw things differently. He noted that Norfolk Southern manages over 2,000 miles of track, operates 11 rail yards, and runs 3 locomotive repair shops in Pennsylvania. He also pointed out that Norfolk Southern has registered to do business in Pennsylvania in light of its "'regular, systematic, [and] extensive'" operations there. . . . That is significant, Mr. Mallory argued, because Pennsylvania requires out-of-state companies that register to do business in the Commonwealth to agree to appear in its courts on "any cause of action" against them. . . . By complying with this statutory scheme, Mr. Mallory contended, Norfolk Southern had consented to suit in Pennsylvania on claims just like his.

. . . .

In light of [a] split of authority, we agreed to hear this case and decide whether the Due Process Clause of the Fourteenth Amendment prohibits a State from requiring an out-of-state corporation to consent to personal jurisdiction to do business there. . . .

II

The question before us is not a new one. In truth, it is a very old question—and one this Court resolved in *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U. S. 93 (1917). There, the Court unanimously held that laws like Pennsylvania's comport with the Due Process Clause. Some background helps explain why the Court reached the result it did.

Both at the time of the founding and the Fourteenth Amendment's adoption, the Anglo-American legal tradition recognized that a tribunal's competence was generally constrained only by the "territorial limits" of the sovereign that created it. . . . That principle applied to all kinds of actions, but cashed out differently based on the object of the court's attention. So, for example, an action *in rem* that claimed an interest in immovable property was usually treated as a "*local*" action that could be brought only in the jurisdiction where the property was located . . . . Meanwhile, an *in personam* suit against an individual "for injuries that might have happened any where" was generally considered a "*transitory*" action that followed the individual. . . . All of which meant that a suit could be maintained by anyone on any claim in any place the defendant could be found. . . .

[Here, the plurality noted that these rules for "transitory" actions were consistently used in American courts, from Chief Justice Marshall through *Burnham*. It further noted that, as corporations rose in the 19th century, "the question arose how to adapt the traditional rule about transitory actions for individuals" to corporations that attempted to do business in other states while avoiding jurisdiction.]

Lawmakers across the country soon responded to these stratagems. Relevant here, both before and after the Fourteenth Amendment's ratification, they adopted statutes requiring out-of-state corporations to consent to in-state suits in exchange for the rights to exploit the local market and to receive the full range of benefits enjoyed by in-state corporations. These statutes varied. In some States, out-of-state corporate defendants were required to agree to answer suits brought by in-state plaintiffs . . . . In

other States, corporations were required to consent to suit if the plaintiff 's cause of action arose within the State, even if the plaintiff happened to reside elsewhere. . . . Still other States (and the federal government) omitted both of these limitations. They required all out-of-state corporations that registered to do business in the forum to agree to defend themselves there against any manner of suit. . . . Yet another group of States applied this all-purpose-jurisdiction rule to a subset of corporate defendants, like railroads and insurance companies. . . .

III

A

Unsurprisingly, some corporations challenged statutes like these on various grounds, due process included. And, ultimately, one of these disputes reached this Court in *Pennsylvania Fire*.

That case arose this way. Pennsylvania Fire was an insurance company incorporated under the laws of Pennsylvania. In 1909, the company executed a contract in Colorado to insure a smelter located near the town of Cripple Creek owned by the Gold Issue Mining & Milling Company, an Arizona corporation. . . . Less than a year later, lightning struck and a fire destroyed the insured facility. . . . When Gold Issue Mining sought to collect on its policy, Pennsylvania Fire refused to pay. So, Gold Issue Mining sued. But it did not sue where the contract was formed (Colorado), or in its home State (Arizona), or even in the insurer's home State (Pennsylvania). Instead, Gold Issue Mining brought its claim in a Missouri state court. . . . Pennsylvania Fire objected to this choice of forum. It said the Due Process Clause spared it from having to answer in Missouri's courts a suit with no connection to the State. . . .

The Missouri Supreme Court disagreed. It first observed that Missouri law required any out-of-state insurance company "desiring to transact any business" in the State to file paperwork agreeing to (1) appoint a state official to serve as the company's agent for service of process, and (2) accept service on that official as valid in any suit. . . . For more than a decade, Pennsylvania Fire had complied with the law, as it had "desir[ed] to transact business" in Missouri "pursuant to the laws thereof." . . . And Gold Issue Mining had served process on the appropriate state official, just as the law required. . . .

As to the law's constitutionality, the Missouri Supreme Court carefully reviewed this Court's precedents and found they "clearly" supported "sustain[ing] the proceeding." . . . . The Missouri Supreme Court explained that its decision was also supported by "the origin, growth, and history of transitory actions in England, and their importation, adoption, and expansion" in America. . . . It stressed, too, that the law had long permitted suits against individuals in any jurisdiction where they could be found, no matter where the underlying cause of action happened to arise. What sense would it make to treat a fictitious corporate person differently? . . . For all these reasons, the court concluded, Pennsylvania Fire "ha[d] due process of law, regardless of the place, state or nation where the cause of action arose." . . .

Dissatisfied with this answer, Pennsylvania Fire turned here. Writing for a unanimous Court, Justice Holmes had little trouble dispatching the company's due process argument. Under this Court's precedents, there was "no doubt" Pennsylvania Fire could be sued in Missouri by an out-of-state plaintiff on an out-of-state contract because it had agreed to accept service of process in Missouri on any suit as a condition of doing business there. *Pennsylvania Fire*, 243 U. S., at 95. Indeed, the Court thought the matter so settled by existing law that the case "hardly" presented an "open" question. *Ibid*. The Court acknowledged that the outcome might have been different if the corporation had never appointed an agent for service of process in Missouri, given this Court's earlier decision in *Old Wayne Mut. Life Assn. of Indianapolis v.*

McDonough, 204 U. S. 8 (1907). But the Court thought that *Old Wayne* had "left untouched" the principle that due process allows a corporation to be sued on any claim in a State where it has appointed an agent to receive whatever suits may come. 243 U. S., at 95–96. The Court found it unnecessary to say more because the company's objections had been resolved "at length in the judgment of the court below." *Id*., at 95.

That assessment was understandable. Not only had the Missouri Supreme Court issued a thoughtful opinion. Not only did a similar rule apply to transitory actions against individuals. Other leading judges, including Learned Hand and Benjamin Cardozo, had reached similar conclusions in similar cases in the years leading up to *Pennsylvania Fire*. . . . In the years following *Pennsylvania Fire*, too, this Court reaffirmed its holding as often as the issue arose. . . .

B

Pennsylvania Fire controls this case. Much like the Missouri law at issue there, the Pennsylvania law at issue here provides that an out-of-state corporation "may not do business in this Commonwealth until it registers with" the Department of State. 15 Pa. Cons. Stat. §411(a). As part of the registration process, a corporation must identify an "office" it will "continuously maintain" in the Commonwealth. §411(f); see also §412(a)(5). Upon completing these requirements, the corporation "shall enjoy the same rights and privileges as a domestic entity and shall be subject to the same liabilities, restrictions, duties and penalties . . . imposed on domestic entities." §402(d). Among other things, Pennsylvania law is explicit that "qualification as a foreign corporation" shall permit state courts to "exercise general personal jurisdiction" over a registered foreign corporation, just as they can over domestic corporations. 42 Pa. Cons. Stat. §5301(a)(2)(i).

Norfolk Southern has complied with this law for many years. In 1998, the company registered to do business in Pennsylvania. Acting through its Corporate Secretary as a "duly authorized officer," the company completed an "Application for Certificate of Authority" from the Commonwealth "[i]n compliance with" state law. . . . As part of that process, the company named a "Commercial Registered Office Provider" in Philadelphia County, agreeing that this was where it "shall be deemed . . . located." . . . The Secretary of the Commonwealth approved the application, conferring on Norfolk Southern both the benefits and burdens shared by domestic corporations—including amenability to suit in state court on any claim. . . . Since 1998, Norfolk Southern has regularly updated its information on file with the Secretary. In 2009, for example, the company advised that it had changed its Registered Office Provider and would now be deemed located in Dauphin County. . . . All told, then, Norfolk Southern has agreed to be found in Pennsylvania and answer any suit there for more than 20 years.

Pennsylvania Fire held that suits premised on these grounds do not deny a defendant due process of law. Even Norfolk Southern does not seriously dispute that much. It concedes that it registered to do business in Pennsylvania, that it established an office there to receive service of process, and that in doing so it understood it would be amenable to suit on any claim. . . . Of course, Mr. Mallory no longer lives in Pennsylvania and his cause of action did not accrue there. But none of that makes any more difference than the fact that Gold Issue Mining was not from Missouri (but from Arizona) and its claim did not arise there (but in Colorado). . . . To decide this case, we need not speculate whether any other statutory scheme and set of facts would suffice to establish consent to suit. It is enough to acknowledge that the state law and facts before us fall squarely within *Pennsylvania Fire*'s rule. . . .

In the proceedings below, the Pennsylvania Supreme Court seemed to recognize that *Pennsylvania Fire* dictated an answer in Mr. Mallory's favor. Still, it ruled for Norfolk Southern anyway. It did so because, in its view, intervening decisions from this Court had "implicitly overruled" *Pennsylvania Fire*. . . . But in following that course, the Pennsylvania Supreme Court clearly erred. As this Court has explained: "If a precedent of this Court has direct application in a case," as *Pennsylvania Fire* does here, a lower court "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989). This is true even if the lower court thinks the precedent is in tension with "some other line of decisions." *Ibid*.

IV

Now before us, Norfolk Southern candidly asks us to do what the Pennsylvania Supreme Court could not—overrule *Pennsylvania Fire*. . . . To smooth the way, Norfolk Southern suggests that this Court's decision in *International Shoe Co. v. Washington*, 326 U. S. 310 (1945), has already done much of the hard work for us. That decision, the company insists, seriously undermined *Pennsylvania Fire*'s foundations. . . . We disagree. The two precedents sit comfortably side by side. . . .

A

Start with how Norfolk Southern sees things. On the company's telling, echoed by the dissent, *International Shoe* held that the Due Process Clause tolerates two (and only two) types of personal jurisdiction over a corporate defendant. First, "specific jurisdiction" permits suits that "'arise out of or relate to'" a corporate defendant's activities in the forum State. . . . Second, "general jurisdiction" allows all kinds of suits against a corporation, but only in States where the corporation is incorporated or has its "principal place of business." . . . After *International Shoe*, Norfolk Southern insists, no other bases for personal jurisdiction over a corporate defendant are permissible. . . .

But if this account might seem a plausible summary of some of our *International Shoe* jurisprudence, it oversimplifies matters. Here is what really happened in *International Shoe*. The State of Washington sued a corporate defendant in state court for claims based on its in-state activities even though the defendant had not registered to do business in Washington and had not agreed to be present and accept service of process there. . . . Despite this, the Court held that the suit against the company comported with due process. In doing so, the Court reasoned that the Fourteenth Amendment "permit[s]" suits against a corporate defendant that has not agreed to be "presen[t] within the territorial jurisdiction of a court," so long as "the quality and nature of the [company's] activity" in the State "make it reasonable and just" to maintain suit there. . . . Put simply, even without agreeing to be present, the out-of-state corporation was still amenable to suit in Washington consistent with "'fair play and substantial justice'"—terms the Court borrowed from Justice Holmes, the author of *Pennsylvania Fire*. . . .

In reality, then, all *International Shoe* did was stake out an additional road to jurisdiction over out-of-state corporations. *Pennsylvania Fire* held that an out-of-state corporation that has consented to in-state suits in order to do business in the forum is susceptible to suit there. *International Shoe* held that an out-of-state corporation that has not consented to in-state suits may also be susceptible to claims in the forum State based on "the quality and nature of [its] activity" in the forum. 326 U. S., at 319. Consistent with all this, our precedents applying *International Shoe* have long spoken of the decision as asking whether a state court may exercise jurisdiction over a corporate defendant "'that has not consented to suit in the forum.'" . . . Our precedents have recognized, too, that "express or implied consent" can

continue to ground personal jurisdiction—and consent may be manifested in various ways by word or deed. . . .

That Norfolk Southern overreads *International Shoe* finds confirmation in that decision's emphasis on "'fair play and substantial justice.'" [The plurality here reviewed the concepts of specific and general jurisdiction that eventually grew out of *International Shoe*.] But the fact remains that *International Shoe* itself eschewed any "mechanical or quantitative" test and instead endorsed a flexible approach focused on "the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." 326 U. S., at 319. Unquestionably, too, *International Shoe* saw this flexible standard as expanding—not contracting—state court jurisdiction. . . . As we later put the point: "The immediate effect of [*International Shoe*] was to increase the ability of the state courts to obtain personal jurisdiction over nonresident defendants." *Shaffer v. Heitner*, 433 U. S. 186, 204 (1977).

Given all this, it is no wonder that we have already turned aside arguments very much like Norfolk Southern's. In *Burnham*, the defendant contended that *International Shoe* implicitly overruled the traditional tag rule holding that individuals physically served in a State are subject to suit there for claims of any kind. 495 U. S., at 616 (plurality opinion). This Court rejected that submission. Instead, as Justice Scalia explained, *International Shoe* simply provided a "novel" way to secure personal jurisdiction that did nothing to displace other "traditional ones." *Id.*, at 619. What held true there must hold true here. Indeed, seven years after deciding *International Shoe*, the Court cited *Pennsylvania Fire* approvingly.

B

Norfolk Southern offers several replies, but none persuades. The company begins by pointing to this Court's decision in *Shaffer*. There, as the company stresses, the Court indicated that "'prior decisions . . . inconsistent with'" *International Shoe* "'are overruled.'" . . . . True as that statement may be, however, it only poses the question whether *Pennsylvania Fire* is "inconsistent with" *International Shoe*. And, as we have seen, it is not. Instead, the latter decision expanded upon the traditional grounds of personal jurisdiction recognized by the former. This Court has previously cautioned litigants and lower courts against (mis)reading *Shaffer* as suggesting that *International Shoe* discarded every traditional method for securing personal jurisdiction that came before. See *Burnham* . . . . We find ourselves repeating the admonition today.

Next, Norfolk Southern appeals to the spirit of our age. After *International Shoe*, it says, the "primary concern" of the personal jurisdiction analysis is "[t]reating defendants fairly." . . . And on the company's telling, it would be "unfair" to allow Mr. Mallory's suit to proceed in Pennsylvania because doing so would risk unleashing "'local prejudice'" against a company that is "not 'local' in the eyes of the community." . . .

But if fairness is what Norfolk Southern seeks, pause for a moment to measure this suit against that standard. [Here, the plurality outlined Norfolk Southern's extensive business operations in Pennsylvania, including by reprinting a fact sheet from the company highlighting its role in "the Pennsylvania Community."]

. . . . Given all this, on what plausible account could *International Shoe*'s concerns with "fair play and substantial justice" require a Pennsylvania court to turn aside Mr. Mallory's suit? . . .

Perhaps sensing its arguments from fairness meet a dead end, Norfolk Southern ultimately heads in another direction altogether. It suggests the Due Process Clause separately prohibits one State from infringing on the sovereignty of another State through exorbitant claims of personal jurisdiction. . . . . And, in candor, the company is half right. Some of our personal jurisdiction cases have discussed the federalism implications of one State's assertion of jurisdiction over the corporate residents of another. See*, e.g., Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 582 U. S. 255, 263 (2017). But that neglects an important part of the story. To date, our personal jurisdiction cases have never found a Due Process Clause problem sounding in federalism when an out-of-state defendant submits to suit in the forum State. After all, personal jurisdiction is a personal defense that may be waived or forfeited. . . .

That leaves Norfolk Southern one final stand. It argues that it has not really submitted to proceedings in Pennsylvania. . . . The company does not dispute that it has filed paperwork with Pennsylvania seeking the right to do business there. It does not dispute that it has established an office in the Commonwealth to receive service of process on any claim. It does not dispute that it appreciated the jurisdictional consequences attending these actions and proceeded anyway, presumably because it thought the benefits outweighed the costs. But, in the name of the Due Process Clause, Norfolk Southern insists we should dismiss all that as a raft of meaningless formalities.

Taken seriously, this argument would have us undo not just *Pennsylvania Fire* but a legion of precedents that attach jurisdictional consequences to what some might dismiss as mere formalities. [Here, the plurality cited instances where jurisdiction hinges upon a certificate of incorporation, the crossing of state lines, a defendant who forgets to specially appear, failure to comply with certain pre-trial orders, signing a contract with a forum selection clause, and accepting certain in-state benefits.]

The truth is, under our precedents a variety of "actions of the defendant" that may seem like technicalities nonetheless can "amount to a legal submission to the jurisdiction of a court." . . . That was so before *International Shoe*, and it remains so today. Should we overrule them all? Taking Norfolk Southern's argument seriously would require just that. But, tellingly, the company does not follow where its argument leads or even acknowledge its implications. Instead, Norfolk Southern asks us to pluck out and overrule just one longstanding precedent that it happens to dislike. We decline the invitation. . . . There is no fair play or substantial justice in that.

***

Not every case poses a new question. This case poses a very old question indeed—one this Court resolved more than a century ago in *Pennsylvania Fire*. Because that decision remains the law, the judgment of the Supreme Court of Pennsylvania is vacated, and the case is remanded.

JUSTICE JACKSON, concurring.

I agree with the Court that this case is straightforward under our precedents. I write separately to say that, for me, what makes it so is not just our ruling in *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U. S. 93 (1917). I also consider our ruling in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U. S. 694 (1982), to be particularly instructive.

In *Insurance Corp. of Ireland*, this Court confirmed a simple truth: The due process "requirement of personal jurisdiction" is an individual, waivable right. *Id.*, at 703. . . . We noted further that the interstate federalism concerns informing that right are "ultimately a function of the individual liberty interest" that this due process right preserves. . . . Because the personal-jurisdiction right belongs to the defendant, however, we explained that a defendant can choose to "subject [itself] to powers from which [it] may otherwise be protected." *Ibid*. When that happens, a State can exercise jurisdiction over the defendant consistent with the Due Process Clause, even if our personal-jurisdiction cases would normally preclude the State from subjecting a defendant to its authority under the circumstances presented. *Ibid.*

Waiver is thus a critical feature of the personal-jurisdiction analysis. And there is more than one way to waive personal-jurisdiction rights, as *Insurance Corp. of Ireland* also clarified. A defendant can waive its rights by explicitly or implicitly consenting to litigate future disputes in a particular State's courts. *Id*., at 703–704. A defendant might also fail to follow specific procedural rules, and end up waiving the right to object to personal jurisdiction as a consequence. *Id.*, at 705–706. Or a defendant can voluntarily invoke certain benefits from a State that are conditioned on submitting to the State's jurisdiction. *Id.*, at 704 (citing Adam v. Saenger, 303 U. S. 59, 67–68 (1938)).

Regardless of whether a defendant relinquishes its personal-jurisdiction rights expressly or constructively, the basic teaching of *Insurance Corp. of Ireland* is the same: When a defendant chooses to engage in behavior that "amount[s] to a legal submission to the jurisdiction of the court," the Due Process Clause poses no barrier to the court's exercise of personal jurisdiction. 456 U. S., at 704–705.

In my view, there is no question that Norfolk Southern waived its personal-jurisdiction rights here. As the Court ably explains, Norfolk Southern agreed to register as a foreign corporation in Pennsylvania in exchange for the ability to conduct business within the Commonwealth and receive associated benefits. . . . Moreover, when Norfolk Southern made that decision, the jurisdictional consequences of registration were clear. . . .

Nor was Norfolk Southern compelled to register and submit itself to the general jurisdiction of Pennsylvania courts simply because its trains passed through the Commonwealth. . . . Registration is required when corporations seek to conduct local business in a "regular, systematic, or extensive" way. . . . Norfolk Southern apparently deemed registration worthwhile and opted in. . . . Whether Pennsylvania could have asserted general jurisdiction over Norfolk Southern absent any waiver . . . is beside the point.

In other areas of the law, we permit States to ask defendants to waive individual rights and safeguards. . . . In short, *Insurance Corp. of Ireland* makes clear that the personal-jurisdiction requirement is an individual, waivable right, and I agree with the Court that Norfolk Southern waived that right by choosing to register as a foreign corporation under the circumstances presented in this case. Therefore, I perceive no due process problem with the registration statute at issue here.

JUSTICE ALITO, concurring in part and concurring in the judgment.

The sole question before us is whether the Due Process Clause of the Fourteenth Amendment is violated when a large out-of-state corporation with substantial operations in a State complies with a registration requirement that conditions the right to do business in that State on the registrant's submission to personal jurisdiction in any suits that are brought there. I agree with the Court that the

answer to this question is no. *Assuming* that the Constitution allows a State to impose such a registration requirement, I see no reason to conclude that such suits violate the corporation's right to "'fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U. S. 310, 316 (1945)

I am not convinced, however, that the Constitution permits a State to impose such a submission-to-jurisdiction requirement. A State's assertion of jurisdiction over lawsuits with no real connection to the State may violate fundamental principles that are protected by one or more constitutional provisions or by the very structure of the federal system that the Constitution created. At this point in the development of our constitutional case law, the most appropriate home for these principles is the so-called dormant Commerce Clause. Norfolk Southern appears to have asserted a Commerce Clause claim below, but the Pennsylvania Supreme Court did not address it. . . . Presumably, Norfolk Southern can renew the challenge on remand. I therefore agree that we should vacate the Pennsylvania Supreme Court's judgment and remand the case for further proceedings.

I

[Here, Justice Alito reiterated that Norfolk Southern's due process argument was foreclosed by *Pennsylvania Fire*, that *International Shoe* had not impliedly overruled it since "[c]onsent is a separate basis for personal jurisdiction," and that the company's Pennsylvania connections were sufficient that jurisdiction was reasonably predictable and not "deeply unfair" in a manner requiring *Pennsylvania Fire* to now be overruled.]

II

A

While that is the end of the case before us, it is not the end of the story for registration-based jurisdiction. We have long recognized that the Constitution restricts a State's power to reach out and regulate conduct that has little if any connection with the State's legitimate interests. This principle, an "obviou[s]" and "necessary result" of our constitutional order, is not confined to any one clause or section, but is expressed in the very nature of the federal system that the Constitution created and in numerous provisions that bear on States' interactions with one another. . . .

The dissent suggests that we apply this principle through the Due Process Clause of the Fourteenth Amendment . . . and there is support for this argument in our case law, if not in the ordinary meaning of the provision's wording. [Justice Alito here acknowledged the Court's opinions suggesting that the due process test guards federalism interests, but reasserted due process as an individual right, and therefore one the party can waive. In the subsequent portions of the opinion, he then developed the argument that the Pennsylvania statute can be construed to violate the dormant Commerce Clause.]

JUSTICE BARRETT, with whom THE CHIEF JUSTICE, JUSTICE KAGAN, and JUSTICE KAVANAUGH join, dissenting.

For 75 years, we have held that the Due Process Clause does not allow state courts to assert general jurisdiction over foreign defendants merely because they do business in the State. *International Shoe Co. v. Washington*, 326 U. S. 310, 317 (1945). Pennsylvania nevertheless claims general jurisdiction over all corporations that lawfully do business within its borders. As the Commonwealth's own courts

recognized, that flies in the face of our precedent. See *Daimler AG v. Bauman*, 571 U. S. 117, 139–140 (2014).

The Court finds a way around this settled rule. All a State must do is compel a corporation to register to conduct business there (as every State does) and enact a law making registration sufficient for suit on any cause (as every State could do). Then, every company doing business in the State is subject to general jurisdiction based on implied "consent"—not contacts. That includes suits, like this one, with no connection whatsoever to the forum.

Such an approach does not formally overrule our traditional contacts-based approach to jurisdiction, but it might as well. By relabeling their long-arm statutes, States may now manufacture "consent" to personal jurisdiction. Because I would not permit state governments to circumvent constitutional limits so easily, I respectfully dissent.

I

A

[Here, Justice Barrett reviewed the categories of general and specific jurisdiction.]

B

. . . .

. . . . The Pennsylvania statute announces that registering to do business in the Commonwealth "shall constitute a sufficient basis" for general jurisdiction. §5301(a). But as our precedent makes crystal clear, simply doing business is *insufficient*. Absent an exceptional circumstance, a corporation is subject to general jurisdiction only in a State where it is incorporated or has its principal place of business. . . . Adding the antecedent step of registration does not change that conclusion. If it did, "every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*'s ruling would be robbed of meaning by a back-door thief." *Brown v. Lockheed Martin Corp*., 814 F. 3d 619, 640 (CA2 2016).

II

A

The Court short-circuits this precedent by characterizing this case as one about consent rather than contacts-based jurisdiction. Consent is an established basis for personal jurisdiction, which is, after all, a waivable defense. "A variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court," including contract, stipulation, and in-court appearance. *Insurance Corp. of Ireland*, 456 U. S., at 703– 704. Today, the Court adds corporate registration to the list.

This argument begins on shaky ground, because Pennsylvania itself does not treat registration as synonymous with consent. Section 5301(a)(2)(i) baldly asserts that "qualification as a foreign corporation" in the Commonwealth is a sufficient hook for general jurisdiction. The next subsection (invoked by neither Mallory nor the Court) permits the exercise of general jurisdiction over a corporation based on "[c]onsent, to the extent authorized by the consent." §5301(a)(2)(ii). If registration were actual consent, one would expect to see some mention of jurisdiction in Norfolk Southern's registration paperwork—which is instead wholly silent on the matter. . . . What Mallory calls "consent" is what the Pennsylvania Supreme Court

called "compelled submission to general jurisdiction by legislative command." . . . . Corporate registration triggers a statutory repercussion, but that is not "consent" in a conventional sense of the word.

To pull §5301(a)(2)(i) under the umbrella of consent, the Court, following Mallory, casts it as setting the terms of a bargain: In exchange for access to the Pennsylvania market, a corporation must allow the Commonwealth's courts to adjudicate any and all claims against it, even those (like Mallory's) having nothing to do with Pennsylvania. . . . Everyone is charged with knowledge of the law, so corporations are on notice of the deal. By registering, they agree to its terms.

While this is a clever theory, it falls apart on inspection. The Court grounds consent in a corporation's choice to register with knowledge (constructive or actual) of the jurisdictional consequences. . . . But on that logic, *any* long-arm statute could be said to elicit consent. Imagine a law that simply provides, "any corporation doing business in this State is subject to general jurisdiction in our courts." Such a law defies our precedent, which, again, holds that "in-state business . . . does not suffice to permit the assertion of general jurisdiction." *BNSF*, 581 U. S., at 414. Yet this hypothetical law, like the Pennsylvania statute, gives notice that general jurisdiction is the price of doing business. And its "notice" is no less "clear" than Pennsylvania's. . . . So on the Court's reasoning, corporations that choose to do business in the State impliedly consent to general jurisdiction. The result: A State could defeat the Due Process Clause by adopting a law at odds with the Due Process Clause.

That makes no sense. If the hypothetical statute overreaches, then Pennsylvania's does too. . . .

B

While our due process precedent permits States to place reasonable conditions on foreign corporations in exchange for access to their markets, there is nothing reasonable about a State extracting consent in cases where it has "no connection whatsoever." . . . The Due Process Clause protects more than the rights of defendants—it also protects interstate federalism. We have emphasized this principle in case after case. . . . A defendant's ability to waive its objection to personal jurisdiction reflects that the Clause protects, first and foremost, an individual right. But when a State announces a blanket rule that ignores the territorial boundaries on its power, federalism interests are implicated too.

Pennsylvania's effort to assert general jurisdiction over every company doing business within its borders infringes on the sovereignty of its sister States in a way no less "exorbitant" and "grasping" than attempts we have previously rejected. . . . Permitting Pennsylvania to impose a blanket claim of authority over controversies with no connection to the Commonwealth intrudes on the prerogatives of other States—domestic and foreign—to adjudicate the rights of their citizens and enforce their own laws. . . .

The plurality's response is to fall back, yet again, on "consent." . . . In its view, because a defendant can waive its personal jurisdiction right, a State can never overreach in demanding its *relinquishment*. . . . That is not how we treat rights with structural components. The right to remove a case to federal court, for instance, is primarily personal—it secures for a nonresident defendant a federal forum thought to be more impartial. . . . At the same time, however, it serves federal interests by ensuring that federal courts can vindicate federal rights. . . . Recognizing this dual role, we have rejected efforts of States to require defendants to relinquish this (waivable) right to removal as a condition of doing business. . . . The same logic applies here. Pennsylvania's power grab infringes on more than just the rights of defendants—it upsets the proper role of the States in our federal system.

III

A

[Here, Justice Barrett distinguished "tag" jurisdiction by arguing that *Burnham* only preserved jurisdictional tests "firmly approved by tradition" and "still favored," and that consent via registration and appointment of agent satisfies neither.]

B

. . . .

Before *International Shoe*, a state court's power over a person turned strictly on "service of process within the State" (presence) "or [her] voluntary appearance" (consent). . . . In response to changes in interstate business and transportation in the late 19th and early 20th centuries, States deployed new legal fictions designed to secure the presence or consent of nonresident individuals and foreign corporations. For example, state laws required nonresident drivers to give their "implied consent" to be sued for their in-state accidents as a condition of using the road. . . . And foreign corporations, as we have discussed, were required by statute to "consent" to the appointment of a resident agent, so that the company could then be constructively "present" for in-state service. . . .

As Justice Scalia explained [in *Burnham*], such extensions of "consent and presence were purely fictional" and can no longer stand after *International Shoe*. . . . The very point of *International Shoe* was to "cast . . . aside" the legal fictions built on the old territorial approach to personal jurisdiction and replace them with its contacts-based test. *Burnham*, 495 U. S., at 618 (opinion of Scalia, J.); id., at 630 (Brennan, J., concurring in judgment) . . . . In *Burnham*, we upheld tag jurisdiction because it is not one of those fictions—it *is* presence. By contrast, Pennsylvania's registration statute is based on deemed consent. And this kind of legally implied consent is one of the very fictions that our decision in *International Shoe* swept away. . . .

C

. . . .

The Court asserts that *Pennsylvania Fire* controls our decision today. I disagree. The case was "decided before this Court's transformative decision on personal jurisdiction in *International Shoe*," *BNSF*, 581 U. S., at 412, and we have already stated that "prior decisions [that] are inconsistent with this standard . . . are overruled," *Shaffer*, 433 U. S., at 212, n. 39. *Pennsylvania Fire* fits that bill. Time and again, we have reinforced that "'doing business' tests"—like those "framed before specific jurisdiction evolved in the United States"—are not a valid basis for general jurisdiction. *Daimler*, 571 U. S., at 140, n. 20. The only innovation of Pennsylvania's statute is to make "doing business" synonymous with "consent." If *Pennsylvania Fire* endorses that trick, then *Pennsylvania Fire* is no longer good law.

The plurality tries to get around *International Shoe* by claiming that it did no more than expand jurisdiction, affecting nothing that came before it. . . . That is as fictional as the old concept of "corporate presence" on which the plurality relies. We have previously abandoned even "ancient" bases of jurisdiction for incompatibility with *International Shoe*. *Shaffer*, 433 U. S., at 211–212 (repudiating *quasi in rem* jurisdiction). And we have repeatedly reminded litigants not to put much stock in our pre-*International Shoe* decisions. . . . *Daimler* itself reinforces that pre-*International Shoe* decisions "should not attract heavy

reliance today." 571 U. S., at 138, n. 18. Over and over, we have reminded litigants that *International Shoe* is "canonical," "seminal," "pathmarking," and even "momentous"—to give just a few examples. . . . Yet the Court acts as if none of this ever happened.

In any event, I doubt *Pennsylvania Fire* would control this case even if it remained valid. [Here, Justice Barrett suggested that *Pennsylvania Fire* distinguished express from implied consent.]

IV.

[Justice Barrett here noted the plurality's citation of Norfolk Southern's various Pennsylvania connections.] In *Daimler*, however, we roundly rejected the plaintiff 's request that we "approve the exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business.'" 571 U. S., at 138. The established test—which the plurality barely acknowledges—is whether the corporation is "at home" in the State. . . .

. . . .

Notes and Questions

1. The Court in *Mallory* seems to uphold jurisdiction by registration (when accompanied by a state statute asserting jurisdiction over registering corporations) as a form of consent-based jurisdiction that survived *International Shoe*. However, do you notice places where Justice Gorsuch's opinion blurs this with another prong of pre-*International Shoe* jurisdiction, such as where he describes Norfolk Southern as "agreeing to be present"? How do you think Justice Gorsuch would view Pennsylvania's registration statute if it did not require an agent to be present in state for service of process?

2. In Part IV.B. of its opinion, the plurality considers the issue of "fairness" to Norfolk Southern. Here, it determines that the company's extensive business operations within Pennsylvania comport with "*International Shoe*'s concerns with 'fair play and substantial justice.'" This seems to be an allusion to the "fairness" prong of minimum contacts analysis—a prong that, as you will learn in *infra* subsection 2, was explored in post-*International Shoe* "specific jurisdiction" cases such as *World-Wide Volkswagen*, *Burger King*, and *Asahi*. Does this mean the plurality believes that the "fairness" prong of minimum contacts analysis might apply to consent-based jurisdiction? Is consent not based on its own, competing idea of fairness—one which grounds "fairness" in a party's voluntary submission to (or entrance into agreement with) the state, rather than one's activity-based entanglement with the state? How does Justice Gorsuch's opinion appear to be fitting these ideas together, if at all?

3. Describing the consent evinced in *Mallory*, several opinions note the reciprocal bargain that seems to have tacitly occurred: Norfolk Southern wanted the benefits of conducting in-state business, and in pursuit of those benefits, it took actions it presumably knew subjected it to reciprocal burdens to appear in Pennsylvania courts. Recall that, in *International Shoe*, the Court had suggested that the notion of consent was unnecessary to this equation: receipt of benefits fairly entailed imposition of reciprocal burdens, regardless of party consent. Does the *Shoe* approach avoid an unnecessary fiction, or does it skip an essential check for voluntary agreement? Do you find one approach to be more fair than the other?

4. Several opinions in *Mallory* reference the ideas of "general" and "specific" jurisdiction that emerged from *International Shoe*. In *infra* Subsection b, cases are provided that show the continuing

evolution of those two prongs of jurisdiction. As you read those cases, notice the trends in their development. In recent cases, does the Court seem to be expanding the jurisdiction available under those prongs, contracting it, or neither? How might those changes interact with the Court's recognition in *Mallory* of a potentially lax jurisdictional test under the consent-based prong? (Or might Justice Alito's theory in his concurrence eventually persuade his colleagues, thereby narrowing this prong?) In the years ahead, what path to jurisdiction over out-of-state corporations do you think lawyers will view as most promising?

5. In her concurrence, Justice Jackson underscored the idea that the jurisdictional protection of the Due Process Clause is aimed at safeguarding individuals—an approach in tension with the dissent's view of the protection as more significantly focused on enforcing federalism limits, regardless of what an individual wants. As you read the cases in *infra* Subsection b, ask yourself: which view seems better aligned with the ways the Court has tended to describe this protection?

6. In his concurrence, Justice Alito suggests that statutes such as Pennsylvania's might violate the dormant Commerce Clause. Recall the test for the dormant Commerce Clause outlined in Chapter 3. Do you agree with him that Pennsylvania's registration and jurisdiction statutes fail that test? More fundamentally, do you agree that state laws requiring registration and submission to in-state jurisdiction interfere with Congress's ability to regulate commerce in a uniform manner for the nation, and to thereby help make the United States into a single economic unit?

7. In her dissent, Justice Barrett was unconvinced (for multiple reasons) that the particular prong of consent-based jurisdiction at issue did, and should, survive *International Shoe*. Justice Barrett leads with one such reason, which arguably pervades the others: she is unpersuaded that the "consent" involved is much more than a formality—one that should not alter the analysis of whether a state can exercise jurisdiction. Do you agree? Do you think the consent obtained from Norfolk Southern is hollow or meaningful?

8. How broad is the power of governments to enact statutes deeming future actions by specified actors to constitute consent to suit by such actor? Is it limited to corporate actors seeking access to in-state markets? Consider the Promoting Security and Justice for Victims of Terrorism Act of 2019, a federal statute in which Congress provided that the Palestine Liberation Organization and Palestinian Authority "shall be deemed to have consented to personal jurisdiction" in any civil action under the Anti-Terrorism Act upon: (1) making payments (including indirectly) to the designees or families of incarcerated or deceased terrorists whose acts of terror injured or killed a United States national, or (2) undertaking any activities within the United States (subject to specified exceptions). Is this approach in accordance with the 5th Amendment, and with *Mallory*? To date, courts have answered to the contrary: this approach is impermissible. *See Fuld v. Palestine Liberation Org.*, 101 F.4th 190 (2d Cir. 2024).

9. For early discussion and application of *Mallory*, see *K&C Logistics, LLC v. Old Dominion Freight Line, Inc.*, 374 So.3d 515 (Miss. 2023) (discussing *Mallory* before concluding that "there is no state law basis for the Court to find that [the party] has either impliedly or explicitly consented to the jurisdiction of the courts by simply registering to do business").

b. General and Specific Jurisdiction

[Add at the end of Note 1 on page 931.]

See also Evans-Freke v. Evans-Freke, 75 V.I. 407 (V.I. 2021) (accepting support payments from husband and communications about the payments constitutes purposeful acts with regard to Virgin Islands).

[Add in Note 9 on page 941, after "over corporation within the state);"]

Aybar v. Aybar, 37 N.Y.3d 274 (N.Y. 2021) (same);

[Add at the end of Note 9 on page 942.]

See also Chufen Chen v. Dunkin' Brands, Inc., 954 F.3d 492 (2d Cir. 2020) (revising past interpretation of state registration statute, which had interpreted registration as consent to general jurisdiction, in light of Daimler).

[Add at the end of Note 3 on page 983.]

See also Jesse M. Cross, *Rethinking the Conflicts Revolution in Personal Jurisdiction*, 105 MINN. L. REV. 679 (2020) (arguing that minimum contacts test is grounded in sovereignty considerations, not fairness considerations, but with sovereignty understood as power to protect state's community).

[Add at the end of Note 4(a) on page 984.]

As of 2021, however, it no longer is true that the Court has not addressed this question of what it means for a claim to "relate to" the defendant's contacts with the state. *See Ford Motor Company v. Montana Eighth Judicial District Court*, 592 U.S. 351 (2021), as addressed later in this Supplement.

[Add at the end of Note 5(c) on page 986.]

See also Patrick Wooley, *Personal Jurisdiction in Negative-Value Class Suits*, 84 U. PITT. L. REV. 493 (Winter 2022) (discussing the relevance of *Bristol-Meyers* to class actions suits).

[Add at the end of Note 6 on page 986.]

See also Glob. Commodities Trading Grp., Inc. v. Beneficio de Arroz Choloma, S.A., 972 F.3d 1101 (9th Cir. 2020) (discussing relationship of tort and contract tests, and defending tests that look to "the parties' entire course of dealing, not solely the particular contract or tortious conduct giving rise to the claim").

[Add at the end of Note 3 on page 995.]

See also Curry v. Revolution Lab'ys, LLC, 949 F.3d 385 (7th Cir. 2020) (sales of product via interactive website, including in Illinois, that allegedly infringe trademark sufficient for jurisdiction); *XMission, L.C. v. Fluent LLC*, 955 F.3d 833 (10th Cir. 2020) (emails sent to over one thousand Utah residents did not create personal jurisdiction in Utah over sending company); *Will Co., Ltd. v. Lee*, 47 F.4th 917 (9th Cir. 2022)

(specific jurisdiction proper in copyright infringement case because defendant actively targeted the United States with adult website); *Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th 1085 (9th Cir. 2023) (non-resident defendant expressly aimed its conduct at forum, so personal jurisdiction appropriate, if in its regular course of business it sells physical products via an interactive website and causes that product to be delivered in state), *cert. denied*, 144 S. Ct. 693 (2024); *Johnson v. Griffin*, 85 F.4th 429 (6th Cir. 2023) (tweets by California celebrity defendant about Tennessee plaintiff sufficient for personal jurisdiction on tortious interference with employment claim); *Doe v. WebGroup Czech Republic, a.s.,* 93 F.4th 442 (9th Cir. 2024) (applying *Calder* test to find jurisdiction permissible under 5th Amendment for federal sex trafficking and child pornography claims against foreign-based pornography websites).

[Add in Note 3 on page 1021, after "*See also*"]

Pine Tree Capital, LLC v. Bokf, N.A., ___ F.4th ___, 2021 WL 4521352 (10th Cir. Oct. 4, 2021) (applying *Walden* to find no jurisdiction where only Wyoming connection was plaintiffs incorporated, organized, and had assets there))**; *SnapPower v. Lighting Def. Grp.*, 100 F.4th 1371 (Fed. Cir. 2024) (finding purposeful availment in Utah—and consistency with *Walden* and *Calder*—when out-of-state patent-holding company submitted to Amazon.com a patent infringement allegation against Utah company, because knew it could lead to product removal from Amazon.com and so "the intended effect would necessarily affect marketing, sales, and other activities within Utah")**.

[Add at the end of Note 4(b) on page 1022.]

On the complex relationship between notice and personal jurisdiction in the Court's jurisprudence since *Pennoyer*, see Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. L. 23 (2018).

[Add after Note 5 on page 1022.]

6. In *Walden*, the Court emphasizes that the relationship among the defendant, the forum, and the litigation must be grounded in "contacts that the defendant himself" has with the forum. Under this standard, if one participant in a conspiracy has such contacts with the forum, is that sufficient for an assertion of jurisdiction over the participant's co-conspirators as well? For state supreme courts concluding that it is, see, *e.g.*, *Raser Techs., Inc. by & through Houston Phoenix Grp., LLC v. Morgan Stanley & Co., LLC*, 2019 UT 44, 449 P.3d 150 (2019); *Tricarichi v. Coop. Rabobank, U.A.*, 440 P.3d 645 (Nev. 2019). [Add to end of paragraph ending "defendant located abroad." on page 1023.]

But see Waters v. Day & Zimmermann NPS, Inc., 23 F.4th 84 (1st Cir. 2022) (finding, contrary to Sixth and Eighth Circuits, that Rule 4(k)(1) governs only service of summons, so Fourteenth Amendment limits under *Bristol-Myers* on opt-in plaintiffs inapplicable), *cert. denied*, 142 S. Ct. 2777 (2022).

[Add after Problem 10.12 on page 1023.]

Ford Motor Company v. Montana Eighth Judicial District Court

Supreme Court of the United States

592 U.S. 351 (2021)

JUSTICE KAGAN delivered the opinion of the Court.

In each of these two cases, a state court held that it had jurisdiction over Ford Motor Company in a products-liability suit stemming from a car accident. The accident happened in the State where suit was brought. The victim was one of the State's residents. And Ford did substantial business in the State—among other things, advertising, selling, and servicing the model of vehicle the suit claims is defective. Still, Ford contends that jurisdiction is improper because the particular car involved in the crash was not first sold in the forum State, nor was it designed or manufactured there. We reject that argument. When a company like Ford serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit.

I

Ford is a global auto company. It is incorporated in Delaware and headquartered in Michigan. But its business is everywhere. Ford markets, sells, and services its products across the United States and overseas. In this country alone, the company annually distributes over 2.5 million new cars, trucks, and SUVs to over 3,200 licensed dealerships. . . . Ford also encourages a resale market for its products: Almost all its dealerships buy and sell used Fords, as well as selling new ones. To enhance its brand and increase its sales, Ford engages in wide-ranging promotional activities, including television, print, online, and direct-mail advertisements. No matter where you live, you've seen them: "Have you driven a Ford lately?" or "Built Ford Tough." Ford also ensures that consumers can keep their vehicles running long past the date of sale. The company provides original parts to auto supply stores and repair shops across the country. (Goes another slogan: "Keep your Ford a Ford.") And Ford's own network of dealers offers an array of maintenance and repair services, thus fostering an ongoing relationship between Ford and its customers.

Accidents involving two of Ford's vehicles—a 1996 Explorer and a 1994 Crown Victoria—are at the heart of the suits before us. One case comes from Montana. Markkaya Gullett was driving her Explorer near her home in the State when the tread separated from a rear tire. The vehicle spun out, rolled into a ditch, and came to rest upside down. Gullett died at the scene of the crash. The representative of her estate sued Ford in Montana state court, bringing claims for a design defect, failure to warn, and negligence. The second case comes from Minnesota. Adam Bandemer was a passenger in his friend's Crown Victoria, traveling on a rural road in the State to a favorite ice-fishing spot. When his friend rearended a snowplow, this car too landed in a ditch. Bandemer's air bag failed to deploy, and he suffered serious brain damage. He sued Ford in Minnesota state court, asserting products-liability, negligence, and breach-of-warranty claims.

Ford moved to dismiss the two suits for lack of personal jurisdiction, on basically identical grounds. According to Ford, the state court (whether in Montana or Minnesota) had jurisdiction only if the company's conduct in the State had given rise to the plaintiff's claims. And that causal link existed, Ford continued, only if the company had designed, manufactured, or—most likely—sold in the State the particular vehicle involved in the accident. In neither suit could the plaintiff make that showing. Ford had designed the Explorer and Crown Victoria in Michigan, and it had manufactured the cars in (respectively) Kentucky and Canada. Still more, the company had originally sold the cars at issue outside the forum States—the Explorer in Washington, the Crown Victoria in North Dakota. Only later resales and relocations by consumers had brought the vehicles to Montana and Minnesota. That meant, in Ford's view, that the courts of those States could not decide the suits.

Both the Montana and the Minnesota Supreme Courts (affirming lower court decisions) rejected Ford's argument . . . .

We granted certiorari to consider if Ford is subject to jurisdiction in these cases. We hold that it is.

II

A

The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant. The canonical decision in this area remains *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). There, the Court held that a tribunal's authority depends on the defendant's having such "contacts" with the forum State that "the maintenance of the suit" is "reasonable, in the context of our federal system of government," and "does not offend traditional notions of fair play and substantial justice." Id., at 316–317 (internal quotation marks omitted). In giving content to that formulation, the Court has long focused on the nature and extent of "the defendant's relationship to the forum State." *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty*., 137 S.Ct. 1773, 1779 (2017) (citing cases). That focus led to our recognizing two kinds of personal jurisdiction: general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction. See *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915, 919 (2011).

A state court may exercise general jurisdiction only when a defendant is "essentially at home" in the State. *Ibid*. General jurisdiction, as its name implies, extends to "any and all claims" brought against a defendant. *Ibid*. Those claims need not relate to the forum State or the defendant's activity there; they may concern events and conduct anywhere in the world. But that breadth imposes a correlative limit: Only a select "set of affiliations with a forum" will expose a defendant to such sweeping jurisdiction. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). In what we have called the "paradigm" case, an individual is subject to general jurisdiction in her place of domicile. *Ibid*. (internal quotation marks omitted). And the "equivalent" forums for a corporation are its place of incorporation and principal place of business. *Ibid*. (internal quotation marks omitted) . . . . So general jurisdiction over Ford (as all parties agree) attaches in Delaware and Michigan—not in Montana and Minnesota. . . .

Specific jurisdiction is different: It covers defendants less intimately connected with a State, but only as to a narrower class of claims. The contacts needed for this kind of jurisdiction often go by the name "purposeful availment." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). The defendant, we have said, must take "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The contacts must be the defendant's own choice and not "random, isolated, or fortuitous." *Keeton v. Hustler Magazine, Inc*., 465 U.S. 770, 774 (1984). They must show that the defendant deliberately "reached out beyond" its home—by, for example, "exploi[ting] a market" in the forum State or entering a contractual relationship centered there. *Walden v. Fiore*, 571 U.S. 277, 285 (2014) (internal quotation marks and alterations omitted). Yet even then—because the defendant is not "at home"—the forum State may exercise jurisdiction in only certain cases. The plaintiff's claims, we have often stated, "must arise out of or relate to the defendant's contacts" with the forum. *Bristol-Myers*, 137 S.Ct., 1780 (quoting *Daimler*, 571 U.S., at 127, 134 S.Ct. 746; alterations omitted) . . . . Or put just a bit differently, "there must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State

and is therefore subject to the State's regulation.'" *Bristol-Myers*, 137 S.Ct., at 1780 (quoting *Goodyear*, 564 U.S., at 919).

These rules derive from and reflect two sets of values—treating defendants fairly and protecting "interstate federalism." *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 293 (1980) . . . . Our decision in *International Shoe* founded specific jurisdiction on an idea of reciprocity between a defendant and a State: When (but only when) a company "exercises the privilege of conducting activities within a state"—thus "enjoy[ing] the benefits and protection of [its] laws"—the State may hold the company to account for related misconduct. 326 U.S., at 319 . . . . Later decisions have added that our doctrine similarly provides defendants with "fair warning"—knowledge that "a particular activity may subject [it] to the jurisdiction of a foreign sovereign." Id. at 472 (internal quotation marks omitted); *World-Wide Volkswagen*, 444 U.S., at 297 (likewise referring to "clear notice"). A defendant can thus "structure [its] primary conduct" to lessen or avoid exposure to a given State's courts. *Id*., at 297. And this Court has considered alongside defendants' interests those of the States in relation to each other. One State's "sovereign power to try" a suit, we have recognized, may prevent "sister States" from exercising their like authority. *Id*., at 293. The law of specific jurisdiction thus seeks to ensure that States with "little legitimate interest" in a suit do not encroach on States more affected by the controversy. *Bristol-Myers*, 137 S.Ct., at 1780.

B

Ford contends that our jurisdictional rules prevent Montana's and Minnesota's courts from deciding these two suits. In making that argument, Ford does not contest that it does substantial business in Montana and Minnesota—that it actively seeks to serve the market for automobiles and related products in those States. . . . Or to put that concession in more doctrinal terms, Ford agrees that it has "purposefully avail[ed] itself of the privilege of conducting activities" in both places. *Hanson*, 357 U.S., at 253 . . . . Ford's claim is instead that those activities do not sufficiently connect to the suits, even though the resident-plaintiffs allege that Ford cars malfunctioned in the forum States. In Ford's view, the needed link must be causal in nature: Jurisdiction attaches "only if the defendant's forum conduct gave rise to the plaintiff 's claims." . . . . And that rule reduces, Ford thinks, to locating specific jurisdiction in the State where Ford sold the car in question, or else the States where Ford designed and manufactured the vehicle. . . . . On that view, the place of accident and injury is immaterial. So (Ford says) Montana's and Minnesota's courts have no power over these cases.

But Ford's causation-only approach finds no support in this Court's requirement of a "connection" between a plaintiff's suit and a defendant's activities. *Bristol-Myers*, 137 S.Ct., at 1776. That rule indeed serves to narrow the class of claims over which a state court may exercise specific jurisdiction. But not quite so far as Ford wants. None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do. As just noted, our most common formulation of the rule demands that the suit "arise out of or relate to the defendant's contacts with the forum." *Id*., 137 S.Ct., at 1780 (quoting *Daimler*, 571 U.S., at 127; emphasis added; alterations omitted). . . . The first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a causal showing. That does not mean anything goes. In the sphere of specific jurisdiction, the phrase "relate to" incorporates real limits, as it must to adequately protect defendants foreign to a forum. But again, we have never framed the specific jurisdiction inquiry as always requiring proof of causation—i.e., proof that the plaintiff's claim came about because of the defendant's in-state conduct. See also *Bristol-Myers*, 137 S.Ct., at 1779–1780, 1780–1781 (quoting

Goodyear, 564 U.S., at 919) . . . . So the case is not over even if, as Ford argues, a causal test would put jurisdiction in only the States of first sale, manufacture, and design. A different State's courts may yet have jurisdiction, because of another "activity [or] occurrence" involving the defendant that takes place in the State. *Bristol-Myers*, 137 S.Ct., 1780, 1780–1781 (quoting Goodyear, 564 U.S., at 919).

And indeed, this Court has stated that specific jurisdiction attaches in cases identical to the ones here—when a company like Ford serves a market for a product in the forum State and the product malfunctions there. In *World-Wide Volkswagen*, the Court held that an Oklahoma court could not assert jurisdiction over a New York car dealer just because a car it sold later caught fire in Oklahoma. 444 U.S., at 295. But in so doing, we contrasted the dealer's position to that of two other defendants—Audi, the car's manufacturer, and Volkswagen, the car's nationwide importer (neither of which contested jurisdiction):

> "[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in [several or all] other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others." Id. at 297.

Or said another way, if Audi and Volkswagen's business deliberately extended into Oklahoma (among other States), then Oklahoma's courts could hold the companies accountable for a car's catching fire there—even though the vehicle had been designed and made overseas and sold in New York. For, the Court explained, a company thus "purposefully avail[ing] itself" of the Oklahoma auto market "has clear notice" of its exposure in that State to suits arising from local accidents involving its cars. *Ibid*. And the company could do something about that exposure: It could "act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are [still] too great, severing its connection with the State." *Ibid*.

Our conclusion in *World-Wide Volkswagen*—though, as Ford notes, technically "dicta," . . . —has appeared and reappeared in many cases since . . . .

To see why Ford is subject to jurisdiction in these cases (as Audi, Volkswagen, and Daimler were in their analogues), consider first the business that the company regularly conducts in Montana and Minnesota. . . . Small wonder that Ford has here conceded "purposeful availment" of the two States' markets. . . . By every means imaginable—among them, billboards, TV and radio spots, print ads, and direct mail—Ford urges Montanans and Minnesotans to buy its vehicles, including (at all relevant times) Explorers and Crown Victorias. Ford cars—again including those two models—are available for sale, whether new or used, throughout the States, at 36 dealerships in Montana and 84 in Minnesota. And apart from sales, Ford works hard to foster ongoing connections to its cars' owners. The company's dealers in Montana and Minnesota (as elsewhere) regularly maintain and repair Ford cars, including those whose warranties have long since expired. And the company distributes replacement parts both to its own dealers and to independent auto shops in the two States. Those activities, too, make Ford money. And by making it easier to own a Ford, they encourage Montanans and Minnesotans to become lifelong Ford drivers.

Now turn to how all this Montana- and Minnesota-based conduct relates to the claims in these cases, brought by state residents in Montana's and Minnesota's courts. Each plaintiff's suit, of course, arises from a car accident in one of those States. In each complaint, the resident-plaintiff alleges that a defective Ford vehicle—an Explorer in one, a Crown Victoria in the other—caused the crash and resulting

harm. And as just described, Ford had advertised, sold, and serviced those two car models in both States for many years. (Contrast a case, which we do not address, in which Ford marketed the models in only a different State or region.) In other words, Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States. So there is a strong "relationship among the defendant, the forum, and the litigation"—the "essential foundation" of specific jurisdiction. *Helicopteros*, 466 U.S., at 414 (internal quotation marks omitted). That is why this Court has used this exact fact pattern (a resident-plaintiff sues a global car company, extensively serving the state market in a vehicle, for an in-state accident) as an illustration—even a paradigm example—of how specific jurisdiction works. See *Daimler*, 571 U.S., at 127, n. 5.

The only complication here, pressed by Ford, is that the company sold the specific cars involved in these crashes outside the forum States, with consumers later selling them to the States' residents. Because that is so, Ford argues, the plaintiffs' claims "would be precisely the same if Ford had never done anything in Montana and Minnesota." . . . Of course, that argument merely restates Ford's demand for an exclusively causal test of connection—which we have already shown is inconsistent with our caselaw. . . . And indeed, a similar assertion could have been made in *World-Wide Volkswagen*—yet the Court made clear that systematic contacts in Oklahoma rendered Audi accountable there for an in-state accident, even though it involved a car sold in New York. . . . So too here, and for the same reasons, . . . —even supposing (as Ford does) that without the company's Montana or Minnesota contacts the plaintiffs' claims would be just the same.

But in any event, that assumption is far from clear. For the owners of these cars might never have bought them, and so these suits might never have arisen, except for Ford's contacts with their home States. Those contacts might turn any resident of Montana or Minnesota into a Ford owner—even when he buys his car from out of state. He may make that purchase because he saw ads for the car in local media. And he may take into account a raft of Ford's in-state activities designed to make driving a Ford convenient there: that Ford dealers stand ready to service the car; that other auto shops have ample supplies of Ford parts; and that Ford fosters an active resale market for its old models. The plaintiffs here did not in fact establish, or even allege, such causal links. But cf. post, at 1033–1034 (ALITO, J., concurring in judgment) (nonetheless finding some kind of causation). Nor should jurisdiction in cases like these ride on the exact reasons for an individual plaintiff's purchase, or on his ability to present persuasive evidence about them. But the possibilities listed above—created by the reach of Ford's Montana and Minnesota contacts—underscore the aptness of finding jurisdiction here, even though the cars at issue were first sold out of state.

For related reasons, allowing jurisdiction in these cases treats Ford fairly, as this Court's precedents explain. In conducting so much business in Montana and Minnesota, Ford "enjoys the benefits and protection of [their] laws"—the enforcement of contracts, the defense of property, the resulting formation of effective markets. *International Shoe*, 326 U.S., at 319. All that assistance to Ford's in-state business creates reciprocal obligations—most relevant here, that the car models Ford so extensively markets in Montana and Minnesota be safe for their citizens to use there. Thus our repeated conclusion: A state court's enforcement of that commitment, enmeshed as it is with Ford's government-protected instate business, can "hardly be said to be undue." *Ibid*. . . . And as *World-Wide Volkswagen* described, it cannot be thought surprising either. An automaker regularly marketing a vehicle in a State, the Court said, has "clear notice" that it will be subject to jurisdiction in the State's courts when the product malfunctions there (regardless where it was first sold). 444 U.S., at 297 . . . . Precisely because that exercise of jurisdiction

is so reasonable, it is also predictable—and thus allows Ford to "structure [its] primary conduct" to lessen or even avoid the costs of state-court litigation. *World-Wide Volkswagen*, 444 U.S., at 297.

Finally, principles of "interstate federalism" support jurisdiction over these suits in Montana and Minnesota. *Id*., at 293. Those States have significant interests at stake—"providing [their] residents with a convenient forum for redressing injuries inflicted by out-of-state actors," as well as enforcing their own safety regulations. *Burger King*, 471 U.S., at 473; see *Keeton*, 465 U.S., at 776. Consider, next to those, the interests of the States of first sale (Washington and North Dakota)—which Ford's proposed rule would make the most likely forums. For each of those States, the suit involves all out-of-state parties, an out-of-state accident, and out-of-state injuries; the suit's only connection with the State is that a former owner once (many years earlier) bought the car there. In other words, there is a less significant "relationship among the defendant, the forum, and the litigation." *Walden*, 571 U.S., at 284 (internal quotation marks omitted). So by channeling these suits to Washington and North Dakota, Ford's regime would undermine, rather than promote, what the company calls the Due Process Clause's "jurisdiction-allocating function." . . .

C

[In this portion of the opinion, the Court explained why its decision was consistent with those in *Bristol-Myers* and *Walden*.]

. . . .

Here, resident-plaintiffs allege that they suffered in-state injury because of defective products that Ford extensively promoted, sold, and serviced in Montana and Minnesota. For all the reasons we have given, the connection between the plaintiffs' claims and Ford's activities in those States—or otherwise said, the "relationship among the defendant, the forum[s], and the litigation"—is close enough to support specific jurisdiction. *Walden*, 571 U.S., at 284 (internal quotation marks omitted). The judgments of the Montana and Minnesota Supreme Courts are therefore affirmed.

It is so ordered.

JUSTICE ALITO, concurring in the judgment.

. . . .

. . . . The Court properly rejects [Ford's] argument, and I agree with the main thrust of the Court's opinion. My only quibble is with the new gloss that the Court puts on our case law. Several of our opinions have said that a plaintiff's claims "'must arise out of or relate to the defendant's contacts'" with the forum . . . . The Court parses this phrase "as though we were dealing with language of a statute," *Reiter v. Sonotone Corp*., 442 U.S. 330, 341 (1979), and because this phrase is cast in the disjunctive, the Court recognizes a new category of cases in which personal jurisdiction is permitted: those in which the claims do not "arise out of " (*i.e*., are not caused by) the defendant's contacts but nevertheless sufficiently "relate to" those contacts in some undefined way . . . .

This innovation is unnecessary and, in my view, unwise. To say that the Constitution does not require the kind of proof of causation that Ford would demand—what the majority describes as a "strict

causal relationship," . . . —is not to say that no causal link of any kind is needed. And here, there is a sufficient link. It is reasonable to infer that the vehicles in question here would never have been on the roads in Minnesota and Montana if they were some totally unknown brand that had never been advertised in those States, was not sold in those States, would not be familiar to mechanics in those States, and could not have been easily repaired with parts available in those States. . . . The whole point of those activities was to put more Fords (including those in question here) on Minnesota and Montana roads. The common-sense relationship between Ford's activities and these suits, in other words, is causal in a broad sense of the concept, and personal jurisdiction can rest on this type of link without strict proof of the type Ford would require. When "arise out of" is understood in this way, it is apparent that "arise out of" and "relate to" overlap and are not really two discrete grounds for jurisdiction. The phrase "arise out of or relate to" is simply a way of restating the basic "minimum contacts" standard adopted in *International Shoe*.

[Then he argues that recognizing "relate to" as an independent basis for specific jurisdiction provides little guidance to lower courts about the limits the phrase imposes on jurisdiction, beyond "just the sort of rough causal connection" described above.]

I would leave the law exactly where it stood before we took these cases, and for that reason, I concur in the judgment.

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring in the judgment.

Since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), this Court's cases have sought to divide the world of personal jurisdiction in two. [He here outlines general and specific jurisdiction.]

While our cases have long admonished lower courts to keep these concepts distinct, some of the old guardrails have begun to look a little battered. Take general jurisdiction. If it made sense to speak of a corporation having one or two "homes" in 1945, it seems almost quaint in 2021 when corporations with global reach often have massive operations spread across multiple States. To cope with these changing economic realities, this Court has begun cautiously expanding the old rule in "'exceptional case[s].'" *BNSF R. Co. v. Tyrrell*, 137 S.Ct. 1549, 1558 (2017).

Today's case tests the old boundaries from another direction. Until now, many lower courts have proceeded on the premise that specific jurisdiction requires two things. First, the defendant must "purposefully avail" itself of the chance to do business in a State. Second, the plaintiff's suit must "arise out of or relate to" the defendant's in-state activities. Typically, courts have read this second phrase as a unit requiring at least a but-for causal link between the defendant's local activities and the plaintiff's injuries. . . .

Now, though, the Court pivots away from this understanding. . . . The majority admits that "arise out of" may connote causation. But, it argues, "relate to" is an independent clause that does not.

Where this leaves us is far from clear. For a case to "relate to" the defendant's forum contacts, the majority says, it is enough if an "affiliation" or "relationship" or "connection" exists between them. . . . But what does this assortment of nouns mean? Loosed from any causation standard, we are left to guess. The majority promises that its new test "does not mean anything goes," but that hardly tells us what does. . . . In some cases, the new test may prove more forgiving than the old causation rule. But it's hard not to

wonder whether it may also sometimes turn out to be more demanding. Unclear too is whether, in cases like that, the majority would treat causation and "affiliation" as alternative routes to specific jurisdiction, or whether it would deny jurisdiction outright.

. . . .

With the old *International Shoe* dichotomy looking increasingly uncertain, it's hard not to ask how we got here and where we might be headed.

Before *International Shoe*, it seems due process was usually understood to guarantee that only a court of competent jurisdiction could deprive a defendant of his life, liberty, or property. In turn, a court's competency normally depended on the defendant's presence in, or consent to, the sovereign's jurisdiction. . . .

International Shoe's emergence may be attributable to many influences, but at least part of the story seems to involve the rise of corporations and interstate trade . . . .

In many ways, *International Shoe* sought to start over. . . . In place of nearly everything that had come before, the Court sought to build a new test focused on "'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S., at 316.

It was a heady promise. But it is unclear how far it has really taken us. Even today, this Court usually considers corporations "at home" and thus subject to general jurisdiction in only one or two States. All in a world where global conglomerates boast of their many "headquarters." The Court has issued these restrictive rulings, too, even though *individual* defendants remain subject to the old "tag" rule, allowing them to be sued on any claim anywhere they can be found. Burnham, 495 U.S., at 610–611. Nearly 80 years removed from *International Shoe*, it seems corporations continue to receive special jurisdictional protections in the name of the Constitution. Less clear is why.

Maybe, too, *International Shoe* just doesn't work quite as well as it once did. For a period, its specific jurisdiction test might have seemed a reasonable new substitute for assessing corporate "presence," a way to identify those out-of-state corporations that were simply pretending to be absent from jurisdictions where they were really transacting business. When a company "purposefully availed" itself of the benefits of another State's market in the 1940s, it often involved sending in agents, advertising in local media, or developing a network of on-the-ground dealers, much as Ford did in these cases. *E.g.*, *International Shoe*, 326 U.S., at 313–314. But, today, even an individual retiree carving wooden decoys in Maine can "purposefully avail" himself of the chance to do business across the continent after drawing online orders to his e-Bay "store" thanks to Internet advertising with global reach. . . . A test once aimed at keeping corporations honest about their out-of-state operations now seemingly risks hauling individuals to jurisdictions where they have never set foot.

Perhaps this is the real reason why the majority introduces us to the hypothetical decoy salesman. . . . [M]aybe the majority resists that conclusion because the old test no longer seems as reliable a proxy for determining corporate presence as it once did. Maybe *that's* the intuition lying behind the majority's introduction of its new "affiliation" rule. . . .

If that is the logic at play here, I cannot help but wonder if we are destined to return where we began. Perhaps all of this Court's efforts since *International Shoe*, including those of today's majority, might

be understood as seeking to recreate in new terms a jurisprudence about corporate jurisdiction that was developing before this Court's muscular interventions in the early 20th century. Perhaps it was, is, and in the end always will be about trying to assess fairly a corporate defendant's presence or consent. International Shoe may have sought to move past those questions. But maybe all we have done since is struggle for new words to express the old ideas . . . .

None of this is to cast doubt on the outcome of these cases. The parties have not pointed to anything in the Constitution's original meaning or its history that might allow Ford to evade answering the plaintiffs' claims in Montana or Minnesota courts. No one seriously questions that the company, seeking to do business, entered those jurisdictions through the front door. And I cannot see why, when faced with the process server, it should be allowed to escape out the back. Jackson, 5 N. Y. L. Rev., at 439. The real struggle here isn't with settling on the right outcome in these cases, but with making sense of our personal jurisdiction jurisprudence and *International Shoe*'s increasingly doubtful dichotomy. On those scores, I readily admit that I finish these cases with even more questions than I had at the start. Hopefully, future litigants and lower courts will help us face these tangles and sort out a responsible way to address the challenges posed by our changing economy in light of the Constitution's text and the lessons of history.

Notes and Questions

1. *Ford Motor Company* defies what otherwise had been a steady trend in the Court's Fourteenth Amendment jurisprudence of narrowing the instances in which a state court may assert personal jurisdiction over corporate defendants. Why do you think this is so? Do you think the Court's prior cases limiting general jurisdiction heightened the need for the Court to revisit the limits on specific jurisdiction?

2. Both concurrences in *Ford Motor Company* suggest that the Court's jurisdictional test (of whether claims "relate to" a defendant's contacts with a forum) is vague and therefore likely to generate uncertainty and inconsistency in the lower courts. Do you agree? Or do you think that this formulation, by itself or in conjunction with the example application furnished by *Ford Motor Company*, "incorporates real limits" as the Court suggests? If the latter, how would you describe those limits? If the former, do you believe that is a problem, or do you think it is an appropriate way for the Court to allow new standards to percolate up and gradually emerge through the judicial system? *See* Patrick J. Borchers, Richard D. Freer & Thomas C. Arthur, *Ford Motor Company v. Montana Eighth Judicial District Court: Lots of Questions, Some Answers,* 71 EMORY L.J. ONLINE 1 (2021) (noting different possible versions of test); James P. George, *Running on Empty:* Ford v. Montana *and the Folly of Minimum Contacts*, 30 GEO. MASON L. REV. 1 (2022) (describing test as ill-defined and unworkable).

3. In Note 1 to *Walden*, above, it was noted that the case was decided unanimously, in contrast with an earlier era of personal jurisdiction cases in which the Court repeatedly splintered into pluralities. *Ford Motor Company* joins this recent trend of the Court coalescing around a clear majority opinion and unanimously or near-unanimously backing a particular result. Do you think this shift has been intentional? What are the benefits and downsides of the Court aligning on jurisdictional issues in this way?

4. In *Walden*, the Court underscored that the minimum contacts test focuses on the contacts that the defendant, not the plaintiff, has with the forum. By and large, the Court continues this defendant-focused approach to personal jurisdiction in *Ford Motor Company*. Yet do you notice any instances in *Ford Motor*

Company where the Court or the concurrences also place some jurisdictional weight on the plaintiff's forum contacts? If so, how do we square that with cases such as *Walden*?

5. Note that, whenever the Supreme Court effectively expands the constitutional limit of permissible jurisdiction (as it did in *Ford Motor Company*), it can create interesting new questions about the reach of state long-arm statutes. *See, e.g.*, *Yamashita v. LG Chem, LTD*, 518 P.3d 1169 (Haw. 2022) (holding after *Ford Motor Company* that state long-arm statute, rather than being limited to defendant activity in state, extends to limits of due process).

6. *See also Cox v. HP Inc*., 492 P.3d 1245 (Or. 2021) (applying *Ford Motor Company* to hold no specific jurisdiction over a third-party defendant); *Hood v. Am. Auto Care, LLC*, 21 F.4th 1216 (10th Cir. 2021) (discussing *Ford Motor Company* in finding jurisdiction over class action in Colorado against a Florida telemarketing company that contacted plaintiff in Colorado from list of Vermont residents, as company also sold contracts by phone in Colorado); *LNS Enters. LLC v. Cont'l Motors, Inc.*, 22 F.4th 852 (9th Cir. 2022) (discussing *Ford Motor Company* in finding no jurisdiction in plane crash action against manufacturer of aircraft's engine and parent company, regardless of whether companies operated repair centers in state); *Adams v. Aircraft Spruce & Specialty Co*., 284 A.3d 600 (Conn. 2022) (discussing *Ford Motor Company* in finding contacts of aircraft parts dealer in products liability action insufficiently related to case)**; *Capello v. Restaurant Depot*, LLC, 89 F.4th 238 (1st Cir. 2023) (finding lettuce wholesaler failed "related to" test in action to recover damages for personal injuries received from lettuce consumed outside forum state); *Griffith v. LG Chem Am., Inc.*, 1 N.W.3d 899 (Neb. 2024) (in-state activities regarding petrochemical sales insufficiently "related to" its sale of e-cigarette batteries)**.

c. Amenability to Process in Federal Court

[Add after "See Teply & Whitten at 357–58" on page 1025.]

***See also Doe v. WebGroup Czech Republic, a.s.,* 93 F.4th 442 (9th Cir. 2024) (applying *Calder* test, as applied to nation as a whole, to find jurisdiction permissible under 5th Amendment).** *But see In re: Sheehan*, 48 F.4th 513 (7th Cir. 2022) (noting that Congress has authorized broad nationwide personal jurisdiction in bankruptcy cases, which "implicates" the Fifth Amendment, but evaluating specific jurisdiction contacts with Illinois)

[Add at the end of passage, after "56 HOUS. L. REV. 565 (2019)" on page 1026.]

But see Compañía de Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V., 970 F.3d 1269 (10th Cir. 2020) (noting trend since *Swiss Am. Bank* of circuit courts placing initial burden on the defendant under Rule 4(k)(2) to identify a state in which the lawsuit could proceed, and joining that trend).

C. Grounds for Declining Jurisdiction

1. Forum Selection Clauses

[Add at the end of Note 1 on page 1034.]

See also Karon v. Elliott Aviation, 937 N.W.2d 334 (Iowa 2020) (same).

[Add at the end of Note 2 on page 1035.]

And what does the Model Act mean by "abuse of economic power"? *See*, *e.g.*, *Castleberry v. Angie's List, Inc.*, 291 So. 3d 37 (Ala. 2019) (declining to find that Angie's List had "overweening bargaining power" in insertion of forum selection clause in membership agreement with father and son).

For another theory of when and why a forum selection clause might not be enforced, see *LFP Consulting, LLC v. Leighton*, 2024 WY 12, 542 P.3d 188 (Wyo. 2024) (asserting plaintiff can unilaterally waive clause when inserted in contract for plaintiff's benefit).

[Add in Note 3 on page 1035, after "(daily ed. Oct. 5, 1992)."]

But see Turner v. Costa Crociere S.p.A., 9 F.4th 1341 (11th Cir. 2021) (forum selection clause in cruise ticket selecting Italy as the forum held valid, and interpretation of § 183c from *Carnival Cruise* relied upon).

[Add at end of note 4(b) on page 1036.]

See also Amyndas Pharmaceuticals, S.A. v. Zealand Pharma A/S, 48 F.4th 18 (1st Cir. 2022) (appropriate enforcement of forum selection clause is via forum non conveniens, but enforcement under Rule 12(b)(6) permissible).

[Add at end of Note 4(d) on page 1036]

King Carpentry, Inc. v. 1345 K Street SE, LLC, 262 A.3d 1105 (D.C. 2021) (forum selection clause interpreted to be permissive, so action could proceed).

[Add new Note after Note 4(d) on page 1036]

(e) Note also that forum selection clauses can keep cases out of federal courts altogether. *See Dynamic CRM Recruiting Sol., L.L.C.*, 31 F.4th 914 (5th Cir. 2022) (noting that parties have contractual power to waive removal rights, so issue is whether contract shows intent to waive).

[Add at the end of Note 5 on page 1037.]

See also Northland Cap. Fin. Servs., LLC v. Robinson, 976 N.W.2d 252 (S.D. 2022) (issue of waiver of right to enforce forum selection clause is properly characterized as an issue of procedure, so not governed by choice-of-law provision); *Lakeside Surfaces, Inc. v. Cambria Co.,* 16 F.4th 209 (6th Cir. 2021) (forum selection clause invalid under Michigan public policy as expressed in Michigan's franchise act, but court

indicates a choice-of-law clause selecting Minnesota law could be applied when applicable); *Germaninvestments AG v. Allomet Corp*., 225 A.3d 316 (Del. 2020) (court must interpret forum selection clause in accordance with law selected by choice-of-law provision if such selection bears material relationship to transaction, but party did not meet burden of establishing content of foreign law); *DeSage v. AW Fin. Grp., LLC*, 461 P.3d 162 (Nev. 2020) (following "imperialistic" rule that forum law governs interpretation regardless of an expressed choice of law); Kevin M. Clermont, *Reconciling Forum-Selection and Choice-of-Law Clauses*, 69 AM. U.L. REV. F. 171 (2020); Tanya J. Monestier, *When Forum Selection Clauses Meet Choice of Law Clauses*, 69 AM. U. L. REV. 325 (2019).

[Add at the end of Note 6 on page 1038.]

See also Rabinowitz v. Kelman, 75 F.4th 73 (2d Cir. 2023) (forum selection clause should be enforced through "substantially modifie[d]" version of *forum non conveniens*, not as lack of subject-matter jurisdiction); *Flextronics Da Amozonia LTDA v. CRW Plastics USA, Inc*., ___ F.4th ___, 2023 WL 8270818 (2d Cir. 2023) (forum selection clause waiving objections to the convenience of the chosen forum is mandatory); *Pac. Lutheran Univ. v. Certain Underwriters at Lloyd's . . .*, 541 P.3d 358, 364 (Wash. 2024) (forum selection clause prohibited moving to dismiss on *forum non conveniens* grounds); *N. Nat. Gas Co. v. Centennial Res. Prod., LLC*, 4 N.W.3d 185 (Neb. 2024) (agreement to forum selection clause waives right to challenge private interest factors), *petition for cert. docketed* (U.S. June 1, 2024) (No. 23-1334). On the similar question of the extent to which a forum selection clause should alter a court's application of its abstention doctrines, see *Mueller v. Peetz*, 983 N.W.2d 503 (Neb. 2023).

[Add after Note 8 on page 1038.]

9. Can a non-party to a contract can be bound by a forum selection clause in that contract? Under the "closely related" doctrine, endorsed by numerous federal courts of appeals, they can if closely related to the contract, claims, and parties in a way that makes it foreseeable that the clause would apply to them. For discussion, *see Firexo, Inc. v. Firexo Grp. Ltd*, 99 F.4th 304 (6th Cir. 2024).

2. Forum Non Conveniens

[Add at the end of Note 2 on page 1044.]

See also Prevent USA Corp. v. Volkswagen AG, 17 F.4th 653 (6th Cir. 2021) (antitrust suit dismissed on grounds of forum non conveniens); *Curtis v. Galakatos*, 19 F.4th 41 (1st Cir. 2021) (district court abused discretion in dismissing because, when considering factors, it did not require evidence that witnesses resided in Greece or properly assess burdens on plaintiff); *Lund v. Lund*, 2022 WY 2 (Wyo. 2022) (analyzing *Gulf Oil* factors in affirming dismissal on forum non conveniens grounds in favor of California forum in trust case in which some property located in Wyoming); *Instituto Mexicano Del Seguro Social v. Zimmer Biomet Holdings, Inc*., 29 F.4th 351 (7th Cir. 2022) (analyzing same to uphold dismissal on forum non conveniens grounds); *Guh-Siesel v. Siesel*, 2024 WY 54, 548 P.3d 585 (Wyo. 2024) (reversing dismissal of wife's divorce action because husband did not demonstrate that public and private interest factors justified dismissal).

[Add at the end of Note 4(a) on page 1045.]

See also In re Air Crash over the S. Indian Ocean on Mar. 8, 2014, 946 F.3d 607 (D.C. Cir. 2020) (alternative forum is adequate if would provide at least some remedy).

[Add at the end of Note 4(b) on page 1046.]

See also Imamura v. Gen. Elec. Co., 957 F.3d 98, 107 (1st Cir. 2020) (in class action against General Electric for nuclear reactor design leading to disaster in tsunami at Fukushima power plant, adequate alternative forum exists in Japan even though remedy in Japanese law is administrative compensation scheme, and one that places liability solely on third party).

[Add at the end of Note 5 on page 1047.]

See also In re Air Crash over the S. Indian Ocean on Mar. 8, 2014, 946 F.3d 607 (D.C. Cir. 2020) ("precise degree of deference afforded a plaintiff's forum choice varies depending on the plaintiff's connection to the forum," with home receiving strongest presumption); *Otto Candies, LLC v. Citigroup, Inc.*, 963 F.3d 1331 (11th Cir. 2020) (concluding home-state deference applies in case with two American plaintiffs and thirty-seven foreign plaintiffs, though noting need to police "blatant gamesmanship" and fact that some courts split two groups for separate deference level analysis); *Pepper v. C.R. England*, 528 P.3d 587 (Nev. 2023) (plaintiff from another state is a "foreign" plaintiff, so choice of a Nevada forum should receive less deference).

[Add new notes after Note 6 on page 1047; renumber existing Note 7 to make it Note 9.]

7. Does the availability of forum non conveniens change when a suit is against a foreign state? In *Aenergy, S.A. v. Republic of Angola*, the Second Circuit said it does not. There, plaintiffs argued that Congress had enacted a statute (the Foreign Sovereign Immunities Act) that outlined the proper balance of factors for federal courts to consider to determine whether to adjudicate cases against foreign states, and thereby had displaced the typical forum non conveniens doctrine. The Second Circuit disagreed, finding that the statute protected different goals than the doctrine, and that both could and should separately apply. *See Aenergy, S.A. v. Republic of Angola*, 31 F.4th 119 (2d Cir. 2022).

8. It is often a foreign party that requests a forum non conveniens dismissal. In other areas of law (such as diversity jurisdiction), we sometimes see a concern about the ability of courts to make even-handed decisions about foreign parties. Is this a concern with forum non conveniens determinations? A study of transnational litigation suggests so. *See* Christopher Whytock, *Sticky Beliefs About Transnational Litigation*, 28 SW. J. INT'L L. 12 (2023) (empirical analysis finding some bias against foreign parties in forum non conveniens determinations).

6. Comity

[Add after second sentence of Note 5 on page 1067.]

See also State v. Great Lakes Mins., LLC, 597 S.W.3d 169 (Ky. 2019) (42 U.S.C. § 1983 claim for alleged forced collection of taxes not owed would ultimately turn on Ohio law, and Ohio better suited to settle

claim while determination by Kentucky court would be intrusive and could disrupt Ohio state tax administration, so dismissed on comity grounds); *Nijensohn v. Ring*, 2022 VT 16, 216 Vt. 329, 278 A.3d 1008 (deferring proceeding on power of special master appointed by Massachusetts divorce court to sell realty in Vermont on basis of comity); *Kainz v. Jacam Chemical Company 2013, LLC*, 987 N.W.2d 320 (N.D. 2023) (holding that, while abatement did not apply, district court could determine whether to stay action in its discretion as a matter of comity).

D. Injunctions Against Extrastate Actions

[Add at the end of Note 4 on page 1077.]

See also In Re: Bair Hugger Forced Air Warming Devices Products Liab. Litig., 999 F.3d 534 (8th Cir. 2021) (applying relitigation exception of Anti-Injunction Act, which allows injunctions to prevent state litigation of a claim or issue previously decided by federal court).

End of Supplement