I. Problems in Choice of Law- problems in choice of law occur in cases that involve multiple jurisdictions and the laws of those jurisdictions are different. Choice of law describes the process and rules used by a court to determine which law should be applied to the present case. Courts have used a number of approaches to determine which law should be applied considering a variety of factors. Despite the variety of approaches, most courts apply the traditional theory discussed below.

A. Overview- conflict cases involve any number of complicated issues, however the basic pitfalls and judicial policy are similar:

1. Basic Problems- Conflict of law problems arise in three areas that related to the power of the deciding court to make a decision and the decision itself.

   a) Choice of Law- the court must face the issue of under what circumstances the court will set aside its own law to apply the law of another jurisdiction.

   b) Jurisdiction- the court also faces the issue of whether the court has the power to render the decision over the parties (personal jurisdiction) and the dispute itself (subject matter jurisdiction).

   c) Recognition of Judgments- where should a court adopt the judgment of another jurisdiction in a matter and extend it to its own jurisdiction. (Issue Preclusion/Res Judicada).

2. Basic Principles- the answer to these problems is geared to address the following concerns that are basic to political and judicial policy. Any conflicts of law determination should attempt to maximize the following:

   a) Sovereignty- recognizes the states interest in and right to control activity within its borders. Specifically, the actions of it citizens within the state and outside of it and non-residents while within the state or conducting activities that affect the state.

   b) Comity- where a states own interests are not affected by a case, the state should afford deference to the policies of the states who policies are implicated in the matter.

   c) Consistency- the court should always seek to have a consistent result. Outcome should not be dependant on forum – avoid encouraging forum shopping.

B. First Restatement-- Traditional Theory- the original source of choice of law is the first restatement on conflict of laws. This approach is characterized by a strong focus on physical location. Historical choice of law decisions were often justified on territorial sovereignty rights.

1. Place of Wrong- Lex Loci Delecti- for torts and related actions, the law of the place of wrong will govern, this will typically be the place of injury. The law will be applied to all issues of the case, regardless where other events took place.

   a) Determining Place of Injury- the place of injury will be considered to wear the actual damage occurs, even if the conduct resulting in the injury occurred in another state. (AL South RR v. Carroll) For poisoning, where the poison takes effect.

   b) Place of Conduct- the place of conduct may be used in situations where the standard of care is at issue or for claims of privilege/immunity.
2. **Place of Contract- Lex Loci Contractus**- under the traditional approach all disputes over a contract were to be settled based on the law of the place where the contract was made. (Milliken v. Pratt) Courts will often use to law of the forum to define where the contract is made.

   a) *Place of Making*—many times the place of the contract is determined by where the ‘meeting of the minds’ occurred. This is law will be applied to issues of validity.

   b) *Place of Performance*—the court will use the law of the place of performance where the issue arises out of an issue of performance (nonperformance, breach, damages, etc.).

3. **Physical Location- Lex Loci Situ**—under the first restatement, state sovereignty is recognized as a primary issue in choice of law. As a result, where property or persons are located within the states borders, the restatement applied the law of that state.

   a) *Situs of Real Property*—real property will be governed by the law of its location. Local law preference in matters regarding local property is so strong that laws regarding

   b) *Moveable v. Immovable*—where property is movable (as determined by forum law) the choice of law issue becomes more complex.

   1) **Wills/Intestate**—moveable items are governed by the domicile of the testator at death.

   2) **Situs rule**—for other transactions the law of the location the chattel is to be applied under the traditional approach.

   c) **Domicile**—domicile is a legal fiction designed to attach a person to a specific states jurisdiction. A domiciliary will be subject to general jurisdiction in the state of his domicile. The domicile of a person is typically determined by the law of the forum.

      1) **Types of Domicile**—domicile is different than residence, a person may have more than one residence, but can only have one domicile. There are three basic manners that a person can acquire or change a domicile:

         ⇒ Domicile of Origin—a person who is born takes the domicile of his/her parents at birth. This will continue until the person is legally capable of establishing their own domicile.

         ⇒ Domicile of Choice—this is a person’s legal home and is characterized by presence with intent to remain indefinitely.

         ⇒ Domicile by Operation of Law—historically, a married woman would take the domicile of her husband upon marriage, although not today. Also minors and incompetent persons may have their domicile legally determined.
2) **Changing Domicile** - a person must have a domicile, the domicile may be changed, but until changed, the person will be considered to keep their past domicile.

⇒ Must Arrive at New Domicile - in order to establish a new domicile, a person must have been physically present at the new domicile at some point. (White v. Tennant)

⇒ Change Cannot be Compelled - a person cannot be compelled to change his domicile even where compelled to change residence, this is often an issue with prisoners and persons who are in military service.

d) **Marriage** - typically a marriage will be considered to be valid wherever it was valid within the laws of the place of celebration. There may be some exceptions discussed infra regarding same-sex, incestuous, or bigamous marriages based on the public policy exception.

C. **Escape Devices- Avoidance of Foreign Law** - in order to avoid applying a law the court may find unjust (typically a foreign jurisdictions, but occasionally their own law), under the traditionally systems have used a number of “escape devises” to apply a different law than what may seem to be plainly compelled by the restatement.

1. **Characterization** - the most common escape device is in the characterization of what area of law a case is (e.g. property, contract, tort, family etc.) which directly determines which law will apply. This is largely a necessary evil under any conflict of law rules and cannot really be avoided.

2. **Substance/Procedural** - a second form of characterization issue is the distinction between substantive and procedural issues. This is important because a court will apply the *procedure of the forum* and the *substantive law based on choice of law*. Generally, procedural issues are considered to be an inconvenience for the forum to follow and not to outcome determinative, however is some situations they have a noticeable effect on the outcome.

a) **Statute of Limitations** - traditionally, the statute of limitations on an action was considered to be a procedural matter that was controlled by the forum of the litigation. This has the effect of encouraging forum shopping, as a result may forums have adopted borrowing statutes that are discussed below.

b) **Limits on Damages** - traditionally limits on punitive or other damages have also been treated as substantive rather than procedural. However that rule has not always been followed by courts:

1) **Right v. Remedy** - some courts have held that the amount of damages is a matter of remedy that should be determined by the forum rather than a matter of right which is governed by substantive law.

2) **Public Policy Exception** - some jurisdictions have set aside limits on damages of another jurisdiction on a public policy basis – that it is against the forum states public policy to limit remedy in such a way.

3. **Renvoi** - is a concept describing the use of a foreign jurisdiction’s “whole” law, including its choice of law rules. Applying the state’s choice of law rules is
referred to as accepting the renvoi, not is considered rejecting the renvoi. A primary reason for the use of renvoi is to avoid a situation where State A is applying State B’s law to a case, even though State B would apply State A’s law under its choice of law rules.

a) **Real Property = Renvoi** - the only area in which renvoi has gained acceptance on a wide scale is in matters regarding real property. This based on the strength of interest of the forum in applying its whole law to property located within its jurisdiction.

b) **The “Endless Circle” Problem** - one problem of Renvoi has been the potential for an endless circle in a situation where State A says look to the whole law of State B and State B’s law says to use State A. This is prevented by stopping the ‘bounce’ between the two states after either after the initial reference or after the reference back to the forum state. This solution as criticized as an arbitrary determination to stop (i.e. why stop after one or two bounces? Why not 3, 6, 73, etc.?)

1) **One Bounce** - If State A’s applies B’s ‘whole’ law and state B’s law bounces back to state A. Then State A applies its law.

2) **Two Bounce** - If State A applies B’s ‘whole’ law and state B’s law bounces back to state A, then A’s law bounces back to B’s ‘whole’ law, State B’s law is applied.

c) **Majority Rejects** - the result of this problem is that a majority of jurisdictions reject the French concept of renvoi and do not apply the “whole” law of a jurisdiction when told to look there by conflict rules.

4. **Depeçage** - is where a court applied different jurisdictions substantive law to different issues in a particular court (i.e. state A for standard of care and state B for vicarious liability, etc.). This theory is also frequently rejected based on the fact its application results in a decision that would not have been possible under any one state’s law.

5. **Public Policy Exception** - The first restatement provides that state courts can refuse to enforce foreign law where the court deems that such enforcement would violated a public policy of the forum state. The exception is often narrowly defined as one that must be made on fundamental justice or good morals objection. The policy exception is not triggered merely because the policy of the forum is different or dissimilar.

a) **Proving Public Policy** - the clearest example of a violation of public policy is where there is a statute that against the other forum’s law. The mere difference in schemes or lack of a law will not be sufficient.

b) **Penal Laws** - historically, one state will not enforce the criminal laws or civil laws of another state that have a “punitive effect”.

1) **Most Civil Excluded** - as a practical matter, most state statutes imputing civil liability on a person are considered **not** to be penal.
2) **Punitive Damages** - most state courts have found that punitive damages awarded under the statute of another state are not punitive within the defined exception and the court will allow them to be awarded.
c) **Tax Laws**— traditionally, courts will not enforce the tax/revenue laws of another jurisdiction. However, full faith and credit will be accorded foreign judgments of tax liability. Also, in recent years, states have adopted reciprocal statutes that provided that one state will entertain suits to collect the taxes of another.

d) **Foreign Laws**— where foreign countries don’t recognize a cause of action, the forum cannot impute liability because failure to recognize the cause of action would offend the forum’s public policy.

6. **Proving Foreign Law**— where courts are asked to apply foreign law the obvious problem exist of demonstrating what that law is. *The burden of proving foreign law is put on the party who is seeking to apply it.* Some courts have treated foreign law as an issue of fact that is decided by the jury (and therefore unreviewable on appeal), the modern trend is to see it as an issue of law that the judge may take judicial notice of. Where foreign law is not provided the court may take the following actions:

a) **Dismiss the Suit**— the court may dismiss the case based on a failure to allege facts essential to the claim— namely the applicable law that was offended.

b) **Apply Presumption**— the court may presume that the foreign law is similar to its own based on “rudimentary principles of justice”

c) **Apply Law of Forum**— the court may also simply presume to apply the forum’s own law where not other law has been established to displace it.

II. **Modern Choice of Law**— modern times have scene the advent of more conflict cases and as a result more attempts to assure consistent and just outcomes. The static and territorial based rules of the original restatement have been replaced by new schemes that attempt to make the rules of conflict more adaptable to assure a just result.

A. **Statutory Solutions**— many state legislatures have attempted to remove the problem of determining which law to apply from the courts by adopting laws that dictate which law should be applied in specific circumstances.

1. **Uniform Statutes**— one effort has led states to eliminate a need for conflict rules by adopting uniform statutes in different jurisdictions thereby eliminating the conflict between the jurisdictions.

a) **Federal Tort Claims Act (FTCA)**— provides that the “whole” law of the state where defendant breaches his duty of care will apply.

b) **Foreign Executed Wills**— the Uniform Probate Code (UPC) many states have enacted laws that will accept as valid any will that was valid where it was executed, even if it falls short of requirements of the forum.

c) **Uniform Commercial Code (UCC)**— the most successful uniform statute has been adopted in 49 states (Louisiana is always the red headed stepchild). The statute provides uniform remedies, etc. and has choice of law provisions.

1) **General Provision 1-105**— the UCC allows parties to chose the law of any state “bearing a reasonable relation” to the contract as the governing the contract. Note that this does not avoid the problem of Characterization as an escape device discussed *supra.*
2) **Specific Provisions** - the code also contains specific provisions that direct which states law should govern.

d) **No Fault Insurance** - many states also have no fault insurance provisions that purport to bind parties even where the accident occurs outside the state.

2. **Borrowing Statutes** - in an effort to prevent forum shopping based on procedural rules, jurisdictions have adopted borrowing provisions that "borrow" the statute of limitations from the jurisdiction where the cause of action originated, avoiding the ability of a party to file an action in State B that expired under the statute of limitations of State A.

3. **Tolling Statutes** - a related form of statutes is tolling provisions that prevent the statute of limitations from expiring on a cause of action while the potential defendant is beyond the reach of process. This often creates a Renvoi issue where actions would be precluded by a borrowing statute.

**B. Party Autonomy** - jurisdictions have given increasing deference to private agreements between parties as to what law will govern their conduct. This is popular with contract cases, but not in tort, since parties typically don't contemplate becoming the victim of a malfeasant tortfeasor!

1. **Choice of Law Provisions** - Where the party's agreement purports to choose which law will apply in a dispute, the court will defer to the parties where the law is a possible choice based on the following limitations:

a) **Must Have Connection** - the chosen law must have some connection with transaction – the parties cannot become a substitute legislature and bootstrap validation by choosing a state without any relation to the deal.

b) **Must be Made in Good Faith** - choice must be made in good faith by parties – not an adhesion provision.

c) **2nd Restatement** - the restatement recognizes this deference to party preference in §187 that allows parties to choose the law unless one of the following:

1) **No Relation** - the chosen forum bears no relation to the contract. Note that choosing a forum because of its well developed body of law may be valid. (i.e. DE for corporations).

2) **Violates Public Policy** - the application of the chosen law would violate public policy, for example enforcing a boilerplate provision choosing law.

3) **Contrary to Local Law** - the application of the chosen law is directly opposed to local law.

2. **Rule of Validation** - the rule of validation is based on a presumption where a parties agreement is between two states, one which would recognize the contract and one that will not – the parties will be assumed to have contracted under the laws of the state that would recognize the agreement.

**C. “Center of Gravity” Analysis** - this theory of conflict of law focuses on a holistic view of contacts with a state rather than looking at any specific contact. The law of the state with the prominent conduct or contact should be used. It was
adopted by New York in *Babcock v. Johnson*, but has never has a scholar supporting the theory. Most of the parts of the theory have been incorporated into the 2nd restatement.

D. **Interest Analysis – Currie Theory** - Professor Currie was a prominent legal school who later went crazy and killed himself. Before that, he put forward the modern school of thought on conflict of laws referred to as governmental interest analysis. The theory looks to which forum’s government has the greatest interest in adjudicating the dispute.

1. Overview- Where court’s are faced with conflicting statutes, the policies behind the statutes are to be determined and applied based on the following test:

   a) Default = Apply Forum Law- the forum should always apply its own law as a default until one of the parties attempts to displace forum law with the law of another jurisdiction.

   b) Where asked to Apply foreign law = Look to interest of States- if a party attempts to apply to law of a different jurisdiction the court will look to the governmental policies underling the respective laws. The court will determine the if those interests are furthered by applying the state’s law.

   c) If only one state has interest = Apply that State’s Law- if the interest of only one state is furthered, and the other’s interest is not subjugated, then that states law should be applied. This the proverbial false conflict.

   d) If Both, look deeper at policy if conflict still exists- if a true conflict appears to exist, that is to say both states have interests in adjudicating the dispute, the court should look deeper at the policy interests it is attributing to the states.

   1) **Restrained interpretation**- The court should use a restrained interpretation of the interests. Specifically, courts should not exploit every possible conflict to constitutional limits and should provided discretion to true policies instead of hypothetical interests.

   2) **Use Domestic Precedent**- the court should use precedent of wholly domestic cases to determine the state interest and intent in enacting a statute in the case.
e) If Conflict unresolved = Apply Forum’s Law- where a true conflict is determined to exist, Currie would have the forum court apply its own law. Based in part on the fact that courts are the instruments of state policy and it is valid for them to prefer that policy. This may increase the incidence of forum shopping.

2. “False Conflicts” - the primary benefit of interest analysis is the elimination of “false conflicts” that are cause by static rules that insist a states law even where it has no interest in the case. The typical example is where the motorist and guest involved in an accident are both from the same state, but not the state where the accident took place. This also prevents forum shopping.

3. The Unprovided for Case- one hypothetical problem in the Currie theory is the “unprovided for case” where the neither the forum nor other states have policy interests in using their law. For example, State A has guest statute, State B doesn’t, Driver is from State B, Injured party is from State A. Currie proposed the following solutions:

   a) Better Law- apply the law of the state that provides the better solution to the underlying social and economic problems.

   b) Apply own law- the state could also apply its own law based on the courts natural preference and aiding the local resident.

   c) Apply foreign law to foreign claimants- essentially having the same effect as (b) from a different point of view.

4. Disinterested Forum- another hypothetical problem in Currie analysis based on interest appears when the forum has no interest in the case and no policies to be advanced or impaired. Currie suggested the following solutions:

   a) Dismiss- Forum Non-Conveniens- in an ideal situation Currie would have the forum dismiss the case on forum non-coveniens grounds.

   b) Apply own law- the state could also apply its own law based on the courts natural preference.

   c) Apply Best Law- the court could also weight the competing policies of the interested states and apply the “best” law perhaps based on soundness or similarity to its own policies.

5. True Conflicts- the theory really provides no remedy for true conflicts other that prefer the law of the forum based on the courts role as an instrument of state policy. This may have the adverse consequence of increasing forum shopping.

6. Comparative Impairment – the reverse of normal interest analysis, comparative impairment is used by California courts – instead of apply the law that furthers one states policy the most, apply the law of the state whose policy would be hurt most by not being applied.

E. Second Restatement- Most Significant Relationship- the second restatement was to be an update of the principles firsts adopted in the original restatement, but due in large part to the work of Currie, the work was modified to reflect some of the principles of interest analysis.
1. **Overview**- the 2nd restatement is a noticeable departure from the static rules of the 1st restatement. The restatement focuses on the application of the law of the state with the *most significant relationship* to the litigation. This is embodied in the two part test that is common to most types of cases regardless of characterization:

   - **Presumptively Applicable Law**- the restatement still establishes rules similar to the 1st restatement that is presumed to apply unless displaced by part b.

   - **Principles of Section 6**- the presumption is then compared to the factors listed under section 6. In light of the relevant contacts identified under the general provisions, the choice of law may be changed.

2. **Section 6 Factors**- this section provides the following general considerations for choice of law:

   - **Follow Statutory Directive**- where the forum state has a statute directing the court in the choice of law, the court should follow the statute subject only to constitutional limitations.

   - **Factors relevant to Choice of Law**- where no statute directs the court, it should consider the following factors in its determination:

     1) Needs of interstate & international systems

     2) Relevant policies of the forum

     3) Relevant policies of other interested states

     4) Protection of justified expectations

     5) Basis policies in the field of law

     6) Certainty, Predictability & Uniformity of Result

     7) Ease in determination of applicable law
3. **Torts - §145** - directs that tort cases are to be governed by the local of the state with the *most significant relationship to the occurrence and the parties*. Contacts to be taken into account under the principles and factors of §6 include:

   a) *Place of Injury*

   b) *Place of Injury Causing Conduct*

   c) *Domicile of Parties*

   d) *Place of center of relationship between parties*

4. **Contracts - §186 - §188** - under §187, parties to a contact may choose their own applicable law. Otherwise law is selected under §188. It provides that contract cases are to be governed by the local of the state with the *most significant relationship to the occurrence and the parties*. Contacts to be taken into account under the principles and factors of §6 include:

   a) *Place of Contracting*

   b) *Place of Negotiation*

   c) *Place of Performance*

   d) *Location of the Subject Matter*

   e) *Domicile of Parties*

**F. Choice-Influencing Considerations – Lefflar Theory** - the Lefflar theory looks at what factors a court should be considering in choice of law situations. The theory specifically rejects formal rules or formulas in determining the choice of law. The goal is the most just outcome, he reduced this considerations to the following list:

1. **Predictability of results** - choice of law rules should not make outcome determinative upon the forum.

2. **Maintenance of Interstate and International Order** - relations between jurisdictions should be preserved as much as possible, specifically a state should refrain from applying its own over another state which clearly has a greater concern in the outcome.

3. **Simplification of the Judicial Task** - abandonment of the procedural/substantive distinctions where the court can easily apply an outcome determinative procedural rule.

4. **Advancement of the Forum's governmental interests** - allow court to use own or other states rule to advance legitimate governmental interests reflecting the total governmental concerns of a justice- dispensing court in a modern American state.

5. **Application of the better rule of law** - the most controversial step. Judge’s should use rule of law that make good sense for the particular case. This step is
intended to eliminate the need for traditional escape mechanisms, discussed *supra*. This is often criticized for stepping on the toes of the legislature.

**G. Continuing Problems** - while the modern era has seen the development of a variety of choice of law theories that are used by a variety of states, the traditional problems and escape devices are still present in the new theories. Additionally, modern society has given rise to new problems - namely large class action suit with no direct connection to any individual forum.

1. **Renvoi** - The concept of renvoi seems dead in a traditional sense – it is not accepted by either the restatement or governmental interest analysis.

   a) *Evidence of Governmental Interest* - while foreign choice of law rules may be informative on policy and interests and in that sense would be used by either party.

   b) *Traditional Approach = Interest?* - one issue is where choice of law rules that are only the traditional approach amount to a conscious policy by the forum state that should be afforded deference or weight in a governmental interest analysis. Several commentators have stated the default nature of the traditional approach means it is not a conscious policy.

2. **Depeçage** - modern courts have almost been more willing to apply the principles of depeçage in conflicts cases. Such analysis may even be implied by the restatement 2nd. However, Currie would explicitly reject the theory on the basis that the outcome is not possible in either of the interest states if the case was wholly domestic.

3. **Rules v. Standards** - one of the confusing issues of choice of law comes from whether choice of law preferences of a forum should be considered rules or an approach. Specifically, rules are not subject to case by case interpretation while standards are.

4. **Complex Litigation** - modern times have seen the advent of mass tort cases where the parties are spread throughout almost all 50 states and the place of injury can also be spread throughout the US or even outside the country. As a result courts are at a loss to determine the most significant contacts under a modern theory and even the place of injury under a traditional theory.

   a) *National Consensus Law* - one court has endorsed the use of “national consensus law” based on the fact that most states have essentially the same law or only one or two variants. This approach would use law much like what is taught in law schools – a conglomerate of jurisdictions.

   b) *ALI Guidelines- Complex Litigation* - the American Law institute has promulgated guidelines for the choice of law by a court in complex litigation cases - §6.01 Mass torts:

      1) **Single State’s Law** - the court should if possible apply a single states law based on the factors in 2.

      2) **Consider the Following Factors** - the court should consider the following factor for the purpose of identifying states with interests that would be further by the application of their law:
3) **More Than One Interested States** - if when using the factor above, more than one state would have an interest in the outcome, the court shall choose the applicable law from among the laws of the interested states under the following rules:

⇒ If the place of injury and conduct are in the same state – that state’s law should be used

⇒ If not, if plaintiffs are residents of the same state as the defendant, then that state’s law should be used. Plaintiff will be considered to live in the same state where the law of any of the states do not materially conflict on the issue.

⇒ If neither of the first two apply, if the plaintiffs all live in the same state, that law will govern.

⇒ For all others, the state where the conduct cause the injury took place will govern, if that is more than one state, then the one of those states with the most significant relationship to the case will govern.

4) **Where necessary court may consider other factors** - the court may also consider other factors than those listed under 2 where it is necessary to prevent unfair surprise or is in the interests of justice.

5) **May use more than one state’s law** - if the court determines that the case is hopelessly complex to apply only one states law, the court may apply more than one states law by dividing the action into subgroups.

### III. Constitutional Limits of on Choice of Law

Courts must have at least some contact with the case in order to be able to apply their own law. This is limited by a number of provisions of the Constitution. Issues in this area include, which law can be applied by a court as well as when a court may choose not hear as case. The question here is when is forum free to make a choice of law?

1. **Limits of Legislative Jurisdiction** - legislative jurisdiction is the courts ability to apply its own law. This is limited by minimum contacts with the jurisdiction that is based on that jurisdiction interest in adjudicating the dispute and its relation to the subject matter.

   a) **Due Process Clause** - this based on any application of law without minimum contacts with the subject matter can be considered depravation of due process.

   b) **Full Faith & Credit Clause** - states must afford complete deference to the judgements in other states. Some deference must be afforded the laws and policies of other
states – specifically a state may be compelled to entertain a suit under another state’s law, and may generally not be prevented from hearing such a suit by the state’s law.

c) **Privileges & Immunities Clause** - a state may not discriminate between the citizens of another state in the application of its laws etc. unless compelling justifications exist for doing so.

d) **Equal Protection Clause** - state must treat citizens equally with the availability of remedy etc.

2. **Due Process** - there must be at least some *minimum connection* between the state and the subject of the lawsuit. This is not the International Shoe test. This test governs if a forum is free to apply any law – i.e. can it even make a choice of law? (Dick)

3. **Full Faith and Credit** - the full faith and credit clause of the constitution requires other states to recognize the judicial proceedings of another state. Issue here are when a state may be compelled to recognize the law of another jurisdiction or may ignore it.

   a) **Must Apply State Defenses if take cause of Action** - where a state applies another’s cause of action, that state must also allow all defenses that would be afforded to party in the forum who’s law is being used.

   b) **Any State with Interest May Adjudicate** - a state must have *some connection not necessarily the best connection* to be allowed to adjudicate the case. If the state who adjudicated the dispute had a connection with it, the judgment is protected by the Full Faith and Credit Clause. (Alaska Packers)

   c) **Statute to Preclude Jurisdiction Not Protected** - where a state has enacted a statute saying it has sole jurisdiction to remedy a dispute under its law. A state typically *will not have to respect such a statute* and may adjudicate the dispute under its own law where constitutional requirements are met. Such a judgment is protected by the full faith and credit clause. (Pacific)

4. **Convergence** - the doctrines of full faith and credit have largely been merged together on the basis that where a judgment meets due process requirements it is subject to full faith and credit.

   a) **Aggregation of Contacts** - some aggregation of contact will add up to a court’s ability to apply its own law.

   b) **Court May only Review for Ability to Make Choice** - where a case presents an issue committed to state discretion - the Supreme court would only look to if the court was competent to make a choice of law issue and not the correctness of the choice, so long as due process is not offended full faith and credit must be accorded. (Allstate v. Hague)

   c) **Jurisdiction Doesn’t Guarantee Ability to Own Apply Law** - a court with competence jurisdiction may still not have competence to apply its own law if there are not minimum connections between the state and the litigation. Such a judgment need not be afforded full faith and credit.
B. **Obligation to Provide a Forum** - A court is not free to refuse to hear a case arising under foreign law unless to enforce it would violate some “fundamental principle of justice, good morals or a deep rooted tradition.” This duty arises under the full faith and credit clause.

1. **Cannot Generally Preclude Hearing Other State Cases** - State statues which preclude the enforcement of other state claims within the borders of the state where the sole basis is that the matter is foreign. Such an action is in violation of FFC. (Hughes v. Fetter).

2. **States may discriminate where** - States may refuse to hear cases in limited circumstances, specifically the state must show:
   
   a) **Sufficient Justification** - This is often that application would violate the forms public policy.
   
   b) **Tailors Discrimination to Justification** - The forum’s refusal to hear cases must be narrowly construed to the justification in order to comply with the full faith and credit clause.

3. **Cannot Generally Preclude Other States from Hearing Cases** - States may attempt to localize jurisdiction through statutes the purport to limit the courts that a cause of action may be brought in – such statutes need not be respected by other states.
   
   a) **Sole Jurisdiction Statutes Illegitimate** - Where a state has a statute that purports to give that state’s sole jurisdiction of matters arising under it, that statute is ineffective not be afforded full faith and credit by another state’s court. (Broderick v. Rosner)
   
   b) **Venue Limiting Statutes Illegitimate** - Venue is not considered part of the right of action and may not be limited by a statute. (Tennessee Coal v. George).

4. **Forum non-conveniens** - Courts may still dismissed based on forum non-conveniens. I.e. a court will not be compelled to accept litigation in circumstances where jurisdiction and due process requirements are met if there is another forum available.

C. **Limits on Discrimination - Privileges and Immunities Clause** - Discrimination between residents of states in only allowable by law in limited situations because of the P&I clause. In order to be sustained, such discrimination must be based on a substantial reason for different treatment and discrimination practiced against nonresidents that bears a substantial relationship to the objective.

IV. **Jurisdictional Limits and Choice of Law** - Jurisdiction is a separate issue than choice of law, but is important because proper jurisdiction is necessary to satisfy due process and to trigger the full faith and credit clause. Additionally, the jurisdiction requirements also prevent pervasive forum shopping.

A. **Overview** - Of primary concern in jurisdiction is personal jurisdiction over the parties. Without it, no valid judgment can be issued by a court, preventing the application of the full faith and credit effect normally afforded judgments.

1. **Basis for Jurisdictions** - A state’s power to exercise jurisdiction over persons is based on two different theories depending on the nature of their contact with the state:
a) **General Jurisdiction**- is allowed where contacts with state are “continuous and systematic” this is based on a state’s power to exercise authority over members of its political community.

b) **Specific Jurisdiction**- is allowed where lawsuit “arises out of” or “related to” contacts with the state, this is based on power of a state to govern what occurs or has effects within its territory.

2. **Jurisdiction over persons**- jurisdiction over persons arises in the following manner:

   a) **Presence**- a person’s presence within a state is enough to grant general jurisdiction – traditionally, however minimum contacts may eventually be interpreted not to grant jurisdiction for sure (Burnham)

   b) **Domicile**- the state of a person’s domicile will have general jurisdiction.

   c) **Consent** – where ever the person has filled suit or made a general answer will be subject to specific jurisdiction.

   d) **Minimum Contacts**- wherever there are minimum contacts the court will have specific jurisdiction at least.

3. **Jurisdiction over corporations**- corporations jurisdiction for the most part parallel jurisdiction over persons:

   a) **Principle Place of Business**- a corporation is subject to general jurisdiction in the state where its principle place of business is located.

   b) **State of Incorporation**- a corporation is also subject to general jurisdiction in the state of its incorporation.

   c) **Minimum Contacts**- a corporation is also subject to at least specific jurisdiction in any jurisdiction with which it has minimum contacts.

4. **Long Arm Statutes**- a courts jurisdiction may be limited to less than what is allowed by the constitution by the state’s statute governing the jurisdiction of persons located outside the state, often termed a “long arm” statute. There are two varieties:

   a) **Enumerated Statutes (Illinois)**- some statutes specifically list which contacts will be considered power under the long arm statute.

   b) **Blanket (California)**- other states statutes merely provide that the court may exercises jurisdiction over persons to the extent permissible under the constitution.

**B. Jurisdiction Based on Relationship to the Forum**- to some extent all jurisdiction is based on a relation between the forum and the litigant. The following are based on actions taken within or affecting the forum.

1. **Minimum Contacts (International Shoe)** – the modern test is for “minimum contacts” -
a) **Systematic and Continuous**- these type of contacts may subject a party to general jurisdiction.

b) **Fair Play and Substantial Justice**- contact must be such that the court’s action does not offend traditional notions of fair play and substantial justice.

2. **Purposeful Availment** - (WW Volkswagen) – the contact must be such that a person purposefully availed themselves of the privilege and protections of the laws of the forum. The test is essentially two parts:

   a) **Minimum Contacts**- contact must be such that person purposefully availed themselves of the laws of the forum.

   b) **Reasonableness** – the contacts must be such that party could reasonably expect to be haled into court in the forum. May also look to hardship to the defendant to appear.

3. **Choice of Law Clause** – (Burger King)- where a contract contains a choice of law provision, it may not be conclusive on the court finding personal jurisdiction (constitutional limits and adhesion tests), but it will be considered significant evidence of minimum contacts.

4. **Stream of Commerce** – (Asahi)- the mere injection of good into the stream of commerce will probably not be considered sufficient to give rise to personal jurisdiction in any forum with the goods (portable tort theory). However it is unclear if such action is not enough because it violates the reasonableness or minimum contacts grounds.

**C. Other Types of Jurisdiction**- beyond action within the forum, there are several other ways in which a forum may acquire personal jurisdiction:

1. **Transitory Jurisdiction** (Burnham)- mere presence alone is enough to confirm jurisdiction on a court.

2. **Attachment Jurisdiction – Quasi-In-rem**- Shaffer v. Heitner signaled the end of quasi in rem jurisdiction – requiring that all jurisdictions meet the International shoe test. The case seemed to required a nexus of the following to meet a minimum contacts standard – between forum, defendant, litigation. There were two categories:

   a) **Type 1 – dispute over property itself**- these actions will typically meet the minimum contacts test on international shoe and probably survive Shaffer.

   b) **Type 2 – dispute not over property – attached for jurisdiction**- this is the type of jurisdiction that was essentially eliminated by Shaffer, unless the property demonstrated enough contact with the state to be meet a general jurisdiction under minimum contacts (systematic and continuos).

3. **In Rem Jurisdiction**- these are actions for property itself – they are always upheld where brought in the situs under classic choice of law and sovereignty principles.

4. **General Jurisdiction**- (Helicopteros)- this is where a person has continuos and systematic contacts with a forum so a person can be sued for any claim within
the jurisdiction regardless of if it arises out of the claim. Reasons for allowing this is:

a) *Always have one forum* – general jurisdiction based on domicile assures that person will be subject to jurisdiction in at least one jurisdiction.

b) *State Interest in Actors within border* - state has governmental interest in any person who acts within their borders on a continuing basis.

5. **Jurisdiction by Necessity- Mulane Rule** - where personal services is going to be impossible, or extremely difficult, the court may allow jurisdiction through constructive service that is *reasonably calculated* to notify parties of the lawsuit.

V. **Recognition of Judgements** - a judgement may not be worth the paper it is written on if it is not equally enforceable in any court in the land. To prevent such problems the Constitution includes the Full Faith and Credit clause requiring other courts to enforce the judgments of sister states and even federal courts to recognize the judgments of state courts. This is important for issues of claim or issue preclusion.

A. **Requirement to Give Full Faith and Credit** - requirement to recognize the judgment is compelled by Article IV, section 1 of the constitution. The second forum must accord the judgment *the same effect it would be accorded in the original jurisdiction*. The goal was to achieve national judicial uniformity.

1. **Cannot Look Behind Judgment** - a state is precluded from looking behind judgment to see if the determination was against own policies by looking at the adjudicated facts. The judgment must be accorded the same weight it would be in its original jurisdiction. *The policy of finality trumps public policy concerns.* (Fauntleroy v. Lum)

2. **Determinations of Jurisdiction** - a traditional exception to exception is to attack jurisdiction in a later proceeding, either *personal or subject matter*. However where the issue of jurisdiction has been *fully and fairly litigated* it cannot be overturned by another court. (Durfee v. Duke)

   a) *Opportunity to Litigate may be enough* - where a party doesn’t raise subject matter jurisdiction in an initial action and subsequently attacks jurisdiction, forum 2 will still have to follow because party had opportunity to litigate. (Chicot county Drainage v. Baxter)

3. **Giving Greater Effect to Judgment** - the FFC clause requires that judgment be afforded the same respect they would in the rendering state, but what if the 2nd forum seeks to give the judgment greater effect than forum 1 would. Courts are split, but most will allow for issue preclusion, etc. arising out of same facts, etc.

4. **Inconsistent Judgments = Last in Time Rule** - where inconsistent judgments are issued in a case, it is the later and not the former that governs the dispute under the restatement of judgments.

5. **Congress May Enact Legislation to Regulate** - congress is empowered by the full faith and credit provision to enact legislation that *prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.*
28 USC §1738 – this statute requires federal court afford full faith and credit to state court judgments.

Administrative Awards Treated as judgments- awards under workers’ comp or other administrative structures are treated as judgments under the FFC Clause.

Procedural Dismissal- federal claims may be precluded by a state court ruling (here a settlement) so long as such claims were not addressed on the merits, but were only procedurally dealt with. (Matsushita v. Epstein)

Limits on Full Faith and Credit- there are some exceptions to where a court must accord full faith and credit to the judgment of a sister state. Primarily this is where the 2nd forum state has a compelling interest in the judgment or where the judgment may be questioned in the issuing jurisdiction.

Interests of the Forum- the dissent in Yarborough and the 2nd Restatement recognize that there may be extremely rare occasions where the recognition of a sister state judgment would require too large a sacrifice by a state of its interests in a matter with which it is primarily concerned. Particular a court may refuse on forum non-conveins grounds and in some custody situations.

Fraud – a judgment may be attacked on the basis it was obtained through fraud in a second forum where the first forum would also allow such a subsequent attack.

Workers’ Compensation- a state will not be precluded from making a supplemental award in the workers’ comp field unless forum one’s law states that its remedy is exclusive, in such a situation, a state is considered to have a legitimate interest in limiting liability to the employer. (Thomas v. Washington Light Co.)

Real Estate- in cases involving the adjudication of rights to land the situs of the land’s interest in regulating its own territory that it will not be obligated to accord full faith and credit to a sister states judgment. (Clarke v. Clarke)

May Recognize Judgment- there is nothing that prevents the situs from according full faith and credit to the judgment of F1 if it wants too. This may be based on comity, whatever.

May Order Sale, but cannot deed- a court may order the sale of property in another state, however, it cannot force the sale other than holding a party in contempt for failing to do so. (Fall v. Eastin)

Modifiable and Equity Decrees- another limit on full faith and credit is the limit that decree will be enforceable in other states when it was not permanent in its original state. The FFC Clause maybe refused to be extended by a court where the original decree was not final.

Modifiable in F1 = Modifiable in F2- where a courts decree may be modified proactively and/or retroactively, the second forum may also modify the decree. (Worthley v. Worthley)
b) **Injunctions** - when may a court issue an injunction that is binding on other courts. Injunction typically need not be afforded full faith and credit beyond the jurisdiction of the original court and certainly are only required to be recognized to the point they would in the issuing court. (Baker v. GM)

6. **Statutes of Limitations on Judgments** - a court may not look behind a judgment to see if it offends its own statute of limitations on judgments. However, a person may not take a judgment from F1 to F2 to be renewed where F1 would not allow the renewal. When a judgment may or has expired there are two forms of extending it.

   a) **Renewal** - this is essentially a new judgment that must meet due process requirements

   b) **Revival** - this is an extension of the original judgment, no new process need be accorded to the parties.

   c) **Statute of Limitation is OK** – some states have enacted statutes of limitation limiting the time that a foreign judgment must be brought to the state to a period of years (5 for example); this sort of statute has been upheld.

7. **§1983 Actions** - issue arise if the federal court must give full faith and credit to a state judgment where it is being challenged on §1983 grounds. A party may be collaterally estopped from asserting federal claims where there was a full and fair hearing of the facts. Here, could challenge on basis hearing was not fair, but could not assert §1983 because action has already been adjudicated. (Allen v. McCurry)

VI. **Special Problems in Choice of Law - Family Law** - this area of law creates difficulties because it is a mix of areas of law (such a contact and status) and the laws do very widely between states. Because of this the determination of when Full Faith and Credit protection attaches is particularly important. *Almost exclusively law of the forum will govern in family law matters so jurisdiction is a primary issue.*

A. **Ex Parte Divorce** - these are divorces where only one of the spouses is present in the action or in the state where the action is brought. These may often be migratory divorces – where the spouse has moved to new state for the sole purpose of establishing residence to get divorced under more favorable laws.

   1. **Law of Forum Governs** - as essentially as determination of status and the presence of one of the person affected before the court, the forum will use essentially exclusively its own law in determining the divorce. Most importantly, the forum’s law of domicile will govern.

   2. **Domicile of Plaintiff = Sufficient For Jurisdiction** - courts have held that the domicile of the plaintiff spouse with in the jurisdiction of the court is sufficient to confirm jurisdiction on the court, regardless of the location of the other, potentially innocent spouse. This is because plaintiff spouse brings marriage with them into state. This replaced a requirement that the matrimonial domicile had sole power to divorce. (Williams v. NC I)

   3. **Divisible Divorce – Support/Custody Orders** - while a court may validly dissolve the marriage between two people without in personam jurisdiction of both parties, the court will be unable to grant any relief/ modify orders regarding
rights that would require due process to be afforded (property rights) to the other party. This is frequently called a divisible divorce. (Estin v. Estin)

a) Adoption of Judgment – can F1 adopt F2’s decree and terminate benefits, etc.? probably not since due process must be afforded and still has not been afforded the spouse who lives in F1, not entitled to FFC w/o due process – regardless of if there is jurisdiction.

b) Uniform Acts – URESA- the uniform reciprocal enforcement of support act stipulates that an absent spouse may be ordered to provide for the support of the other spouse and children, even though not subject to the personal jurisdiction of the courts of the state in which the latter are domiciled. This has been enacted by a number of states and eliminates the divisible divorce doctrine.

c) Custody Also Requires Personal Jurisdiction- the court has also required that a court may not issue a valid custody order without personal jurisdiction because violates due process which is necessary to trigger full faith and credit.

4. Determination of Domicile- ex-parte divorces are often attacked on the basis that the court in F2 did not have jurisdiction over the person and the divorce is invalid. The court held that the original courts determination of domicile may be challenged because of the 2nd Forums strong interest of the defendant’s domicile, however there is a larger burden on the attacker to prove that domicile was not proper in the original action. (Williams II)

B. Bilateral Divorces- sometimes migratory divorce may be collusive this creates different issues than ex-parte divorces since the rights of neither party are likely to be offended, therefore concern turns to the interests of the state and 3rd parties.

1. Limits on Collateral Attack – in general a state that is the residence of one of the marital parties may have standing to challenge the determinations of a sister state of domicile because of a strong state interest. (Williams II) However, most other parties will be unable to challenge the determinations of the first court in another state. Specifically, the following parties:

a) Plaintiff Spouse- the petitioner for the first divorce cannot later attempt to claim that it was invalid.

b) Defendant who Participated- where the defendant spouse participated in the original divorce proceeding will be estopped from claiming jurisdiction was invalid – especially where it was fully litigated in the original action. (Sherrer v. Sherrer)

c) Children- are typically considered to be privies to the first divorce and may therefore be estopped from challenging the validity of the first decree. (Johnson v. Muelberger)

d) State- the state of residence of either may attempt to challenge domicile because it was not a party in the first action and may invalidate the findings of the first court (Williams II and Virgin Islands Case)

2. Foreign Divorces- courts will also tend to recognize the divorce that is performed in another country where the procedures of that country are followed (the Mexican Divorce). The recognition of such divorces are based on the principle of comity, and not the full faith and credit clause which only applies to
the judgments of sister states. Therefore recognition of such divorces are probably not compelled by the constitution. (Rosenstiel v. Rosentiel).

3. **Transitory Divorce**- some states have recognized and allowed divorce that is based on contacts other than domicile – specifically where persons are in the military or are students states have allowed divorce based on substantial contacts with the state. These action raise *choice of law* issues that are typically not present in divorce actions.

4. **Residence Requirements**- these requirements up to a year have been upheld by the supreme court (Sosna v. Iowa) and are not considered to be an unconstitutional limit on travel or substantive due process. This is based on a compelling state interest in not being a divorce mill.

**C. Child Custody**- the interests of child custody differ from divorce, specifically the court is concerned with the child’s best interests, fairness to both parents and the stability of any decree issued by the court. Additionally, parental rights are protected by the 14th amendment due process clause, therefore parents must be afforded the necessary opportunity to be heard.

1. **Basis for Jurisdiction**- the UCCJA (Uniform Child Custody Jurisdiction Act) establishes the basic guidelines for child custody. The act establishes a “home state” for the child. *Jurisdiction is to be deferred to the home state by other states.* This is based on a preference that the state with maximum contacts exercise jurisdiction, rather than one with minimum contacts. Determining if a state can of a child is based on the following 3 factor test: (in re Ben-Yehoshua) 28 USC §1738A (c) 1-3

   a) *Child’s domicile* - the primary desire is that the state where the child has been domiciled for or w/in 6 months prior to the commencement of the proceeding. This is the child’s *home state* and the preferred court of jurisdiction.

   b) *If no Domicile = Substantial Connection* - if no state has jurisdiction under the first part of the act no state would seem to have jurisdiction, the state may exercise jurisdiction if the child or parent have significant contact with state and/or state has ample evidence of child’s best interest.

   c) *Otherwise = Presence* - if no state can be found under the above, mere presence of the child may be enough to convey jurisdiction on the court.

2. **Uniform Acts**- more than any other field, child custody has seen the advent of the use of uniform acts in an effort to control the application of full faith and credit clause and prevent the use of forum shopping.

   a) *Uniform Child Custody Jurisdiction Act (UCCJA)*- discussed above this act was enacted in order to *limit* rather than expand jurisdiction in child custody proceedings in an effort to assure uniformity.

   1) *Deference of Jurisdiction Required* - jurisdiction under the act is almost always *concurrent* initially. However, where custody proceedings are underway in more than one jurisdiction

   2) *Parents must be afforded due process* - parents are required to have reasonable notice which may be though to include valid personal jurisdiction over them in
the adjudication of custody, however, is presence of the child in the state sufficient “minimum contacts”

3) **Foreign Country may be determined to be “home state”** - a court may determine that a foreign country is in fact the home state of the child and refuse to exercise jurisdiction.

4) **Limits on Modification** - jurisdiction to modify the decree is limited to the original issuing court. Unless that court no longer has jurisdiction or declined to exercise jurisdiction, in which case another court may modify the decree.

b) **Parent Kidnapping Prevention Act (PKPA)** - the primary goal of this act enacted under Congress’ power to regulate the full faith and credit of judgments is prevent children being transported to another state in order to find more favorable custody law.

3. **Adoption** - most provision of PKPA and UCCJA are applicable in adoption situations. (BBR)

VII. **International Law** - disputes in the international context have two basic forms – the first deals with the application of US law outside the US and the second is the application of foreign judgments within the US. All these dispute rest on the principle of comity rather than based on the constitution. There are three types of jurisdiction – jurisdiction to prescribe or legislate (regulation of activity), jurisdiction to adjudicate, jurisdiction to enforce.

A. **Limits on Legislative Jurisdiction** - this is the power to regulate activity – specifically to define what rules must be followed, etc. Traditionally, such power was limited by territory concerns. However, principles of international law have allowed application of laws outside the US. Two issues exist here: can the US exercise jurisdiction? and did congress intend to extend jurisdiction?

1. **Types of Jurisdiction Under International Law** - the jurisdiction to legislate conduct in international law must be found under at least one of the following: (US v. Yunis)

   a) **Territorial** - where the offense is committed physically (i.e. within the US) a nation will have jurisdiction.

   b) **National** - where jurisdiction is based on the nationality of the offender (an action taken by an American abroad may subject him to liability at home).

   c) **Protective** - where a national interest is adversely affected by an activity.

   d) **Universal** - where jurisdiction is proper in any forum that obtains physical custody of the perpetrator of certain offenses considered particularly heinous and harmful to humanity.

   e) **Passive Personal** - wherein jurisdiction is based on the nationality of the victim. This is probably the most controversial form of jurisdiction.

2. **Presumption against Foreign Application** - unless Congress specifically provides that a statute is to be given effect outside of the United States, the
presumption is that it is only applicable within the US. Here question is not of if
the US has power, but if Congress intended to exercise (Title VII case).

3. **Comity to Foreign Law**- a dispute may exist as to if there is no explicit foreign
law that is in conflict with the American law, whether the American law can be
applied even if it is arguably against the public policy of the other forum. Court
held that as long as both could be complied with, both could be applied.
(Hartford Fire Insurance Co. v. California)

4. **Extraterritorial Application of the Constitution**- the Constitution certainly
applies to Americans outside of the US and foreigners within the US. A question
exists as to if each piece of the Constitution should be looked at to see if it
applies outside the US, or if there should be a single policy – the fourth
amendment at least does not apply outside the US.

**B. Act of State Doctrine**- simply stated the doctrine requires courts to abstain form
reviewing the official acts of foreign countries within their own territories. This is one
of deference by courts, its use is not regulated by principles of international law or the
constitution directly.

1. **Basis For Doctrine**- this doctrine was originally based in comity, however recent
decision seem to make it a separation of power issue – specifically that such
issues of foreign governments should be deferred to the executive branch.
Courts defer on a variety of reasons:

   a) "Abstention Rule"
   b) Political Question
   c) Sovereign Immunity

2. **Balancing Test**- the court will balance relevant considerations including foreign
relations, political question issues, status of perpetrating government. Burly
states that essentially courts have three choices:

   a) Dismiss for lack of Jurisdiction
   b) Blindingly enforce decree
   c) Review Decree – then enforce or dismiss for lack of Jurisdiction

3. **Limits on Doctrine**- the doctrine is relatively limited in the scope of its
application within the courts.

   a) Congressional Action- the Cuba case is a prime example of where the judicial
application of the act of state doctrine has resulting in legislative direction to the
courts not to apply it.

   b) Foreign Statutes don’t = Acts of state- the laws of a foreign country are not
themselves considered to be acts of state.
c) **Bernstein Letters**- court may receive direct authorization from the executive (called a ‘Bernstein letter’) to proceed in adjudicating the dispute – thereby removing the case as a political question arena. Such letters are not dispositive, but weigh in the balancing test.

C. **Recognition of Judgments**- judgments of foreign countries are afforded different recognition. In rem judgments, such as title to a ship, are recognized by every nation, additionally adjudication of status (such as marriage) is also often accorded universal acceptance. However, the acceptance of other decrees, especially monetary awards may differ significantly.

1. **Full Faith and Credit Doesn’t Apply**- the FFC clause applies only to the judgment of sister states, there is no requirement that the judgments of foreign states be afforded full faith and credit. Such recognition is based solely on comity.

2. **Reciprocity of Judgments = Key** – the American court will look to if the an American judgment would be subject to scrutiny on the merits in the foreign country or would be afforded deference. The court will typically afford the same treatment to the judgment of the foreign country that an American judgment would receive there. A forum may always refuse enforcement based on public policy grounds. Court must also have been competent under its own laws and meet the due process requirement of the 5th/14th amendments.