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International Choice of Law: A Proposal for a New “Enclave” of Federal Common Law

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International Choice of Law: A Proposal for a New “Enclave” of Federal Common Law

Yvonne Marcuse

Abstract

This Comment examines the need and authorization for federal common law of international choice of law in view of current conflicts law and theory. Part I reviews the types of conflicts laws in use today. Part II discusses federal common law as it has developed in the area of international relations and as it might apply to conflict of laws. Part III proposes the adoption of federal common law in international conflict of laws and also discusses the option of legislative implementation of the federal full faith and credit statute. A model is introduced for the proposed federal common law of international conflicts; Part IV reexamines the recent case of *Kunstsammlungen zu Wemar v. Elicofon* in light of the model.

COMMENTS

INTERNATIONAL CHOICE OF LAW: A PROPOSAL FOR A NEW “ENCLAVE” OF FEDERAL COMMON LAW

INTRODUCTION

The conduct of United States foreign relations is the exclusive province of the federal government.¹ State laws which encroach upon federal pre-eminence in this area are invalid under the supremacy clause² of the Constitution. Foreign policy considerations such as comity³ and reciprocity⁴ are present in international litigation whenever a foreign country's law is an element in a case.⁵ Yet

1. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424-27 (1964). “[O]rdering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.” *Id.* at 425 (footnote omitted). *See also* *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968); *Kolovrat v. Oregon*, 366 U.S. 187, 190 (1961); *United States v. Pink*, 315 U.S. 203, 230-31 (1942); *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941); *United States v. Belmont*, 301 U.S. 324, 331-32 (1937).

Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the [states do] not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, *state constitutions, state laws, and state policies are irrelevant* to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power.

Id. (emphasis added).

2. U.S. CONST. art. VI, § 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. “Comity is defined as that reciprocal courtesy which one member of the family of nations owes to the others; it presupposes friendship, and assumes the prevalence of equity and justice.” 45 AM. JUR. 2d *International Law* § 7 (1969).

4. “‘Reciprocity’ is the term employed in international law to describe the relation between states when each of them extends privileges and special advantages to the subjects of the other upon the condition that its own subjects be granted mutual and similar privileges and advantages. . . .” *Id.*

5. *See, e.g.,* Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581, 588 (1953) (“It may well be thought that federal control is particularly appropriate in conflict of laws, which by its nature involves interstate and international matters and not matters of merely local concern.” *Id.*); Comment, *The Act of State Doctrine: International Consensus and Public Policy Considerations*, 8 N.Y.U. J. INT’L L. & POL. 283, 291 (1975). “In an

unless the case is governed by federal statute or treaty the applicable law in an international case⁶ is chosen according to state, not federal, conflict of laws principles.⁷ Because state conflicts laws treat international cases exactly as they treat interstate cases,⁸ and thus ignore foreign policy,⁹ these laws may violate the supremacy of federal control over foreign affairs when applied in the international context.

ordinary choice of law situation, foreign law is not applied if it is offensive to the strong public policy of the forum." *Id.* (footnote omitted). See also RESTATEMENT (SECOND) CONFLICT OF LAWS § 90 (1971). "No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum." *Id.*

6. "International case" is used in the text to denote litigation in which choice of law issues are raised which involve the law of foreign countries. Cases to which aliens or foreign citizens are parties are not considered unless a foreign law conflicts problem is presented. See Yiannopoulos, *Wills of Movables in American International Conflicts Law: A Critique of the Domiciliary "Rule,"* 46 CAL. L. REV. 185, 186 n.12 (1958).

7. The Rules of Decision Act, 28 U.S.C. § 1652 (1976) provides:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

See also Cheatham, *Some Developments in Conflict of Laws*, 17 VAND. L. REV. 193, 200 (1963). "It has been widely assumed that except for treaties and federal statutes [international] conflict of laws is governed by state law . . ." *Id.*

8. See Du Bois, *The Significance in Conflict of Laws of the Distinction between Interstate and International Transactions*, 17 MINN. L. REV. 361 (1933); A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* (1974). Ehrenzweig, probably the most persistent advocate of separate treatment of interstate and international conflicts, says that "American doctrine, despite its continuing internationalist ambition, has in effect been limited to interstate law. . . . An interstate law in international garb has thus produced the image of a unitary American conflicts law applicable to both types of conflicts." *Id.* at 20.

9. *Banco do Brasil, S.A. v. A.C. Israel Commodity Co.*, 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872 (1963), *cert. denied*, 376 U.S. 906 (1964), is an example of an international case in which narrow application of state law, developed in the context of interstate litigation (in this case a nonenforcement provision which allowed the New York court to circumvent the Brazilian currency exchange regulations), compromises federal foreign policy interests. Critics of the case point out that

the decision revealed a total lack of concern for the interests of international comity and present-day foreign relations by not addressing the question of the continued relevance or propriety of the nonenforcement rule. . . . [I]t seems that this narrow focus followed from the interstate development of the rule. . . . [N]either the presence of the foreign sovereign nor the existence of a multilateral agreement evidencing an international concern for cooperation in currency controls evoked any expression from the majority that the rationale of their interstate precedent might be inapplicable.

Cohen, *Nonenforcement of Foreign Tax Laws and the Act of State Doctrine: A Conflict in Judicial Foreign Policy*, 11 HARV. INT'L L.J. 1, 12-13 (1970) (footnote omitted).

Modern policy-centered conflict of laws theory¹⁰ calls for analysis of both federal and state interests in international cases. State conflicts law, however, fails effectively to analyze federal interests. Not all states have adopted the modern theory,¹¹ and in those that have done so the approach has been somewhat parochial, giving primary consideration to local rather than federal policies.¹² Ap-

10. The use of the term "policy" in conflict of laws may be confusing because it is applied in at least two different contexts. In theory, conflicts decisions are influenced by a number of policy factors which relate only to the decision-making process itself, not to the legal or social foundations of particular laws. The following list exemplifies the type of policy factors which are considered analytically in modern conflicts theory:

1. The needs of the interstate and international systems;
2. A court should apply its own local law unless there is good reason for not doing so;
3. A court should seek to effectuate the purpose of its relevant local law rule in determining a question of choice of law;
4. Certainty, predictability, uniformity of result;
5. Protection of justified expectations;
6. Application of the law of the state of dominant interest;
7. Ease in determination of applicable law; convenience of the court;
8. The fundamental policy underlying the broad local law field involved;
9. Justice in the individual case.

Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 962-81 (1952). Similar formulations have been compiled by Professor Yntema (*see Yntema, The Objectives of Private International Law*, 35 CAN. B. REV. 721, 734-35 (1957)), Professor Cavers (*see D. CAVERS, THE CHOICE-OF-LAW PROCESS* 139-203 (1965)), and Professor Leflar (*see Leflar, Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282 (1966)).

The second use of "policy" is to denote the social, legal or political justification for a law within a particular governmental system. In this sense, policy is used to mean "governmental interest," which forms the core of Professor Currie's governmental interest analysis. *See generally* B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

11. Within the last twenty years, conflict of laws theory based upon reasoned assessment of each state's claim to apply its own law has been recognized in many states as preferable to traditional approaches in which territorial rules were mechanically applied. The new approaches are discussed in greater detail in section I below. Fifteen states still adhere to the traditional approaches. These states are: Alabama, Connecticut, Delaware, Florida, Georgia, Kansas, Maryland, Nebraska, New Mexico, North Carolina, South Carolina, South Dakota, Tennessee, Virginia, and Wyoming. These jurisdictions retain the rule of *lex loci delicti* in torts. In other areas of law, less affected by the new conflicts methodologies, the states have been slower to abandon the traditional rules. *See Note, Tort Remedies for Servicemen Injured by Military Equipment: A Case for Federal Common Law*, 55 N.Y.U. L. REV. 601, 605 n.29 (1980).

12.

Many of the suggestions for a separate treatment of interstate and international conflicts problems reflect an assumption that courts will either apply fixed doctrinal rules or will not adequately consider the variations in policy applicable in international cases. Unfortunately, there have been sufficient instances in the past in which the courts and the parties have appeared to do this to warrant serious concern.

plication of state conflicts law adversely affects federal interests in two ways: it results in lack of uniformity¹³ among the states in an area which affects foreign policy, international choice of law, and it prevents full consideration of federal interests in the choice of law decision-making process. Moreover, in federal courts, the *Erie* doctrine¹⁴ dictates the use of state conflicts rules, thereby precluding

Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CALIF. L. REV. 1599, 1599 (1966) (footnote omitted). See also Cheatham, *supra* note 5 at 588. "[Federal control of conflicts law] would . . . prevent the harmful results of state provincialism and jealousy [sic], which was a primary purpose of the Constitution." *Id.*

13. See, e.g., Scoles, *supra* note 12, at 1604. "The strong force of the policies calling for a single national law which are reflected in the *Belmont* [United States v. Belmont, 301 U.S. 324 (1937)] and *Kolovrat* [Kolovrat v. Oregon, 366 U.S. 187 (1961)] cases suggest the possibility of a federal conflicts law covering all aspects of international transactions." See also *infra* notes 112-20 and accompanying text.

In *Belmont*, the New York courts had denied the United States' claim to assets of a Russian corporation held in New York, which had been nationalized by the Soviet Union and then made subject to the Litvinov Assignment, by which the newly recognized Soviet Union released its claims to Russian assets and debts, and assigned them to the United States. The Supreme Court reversed, granting the claim on the ground that recognition of the Litvinov Assignment was exclusively within the federal foreign affairs power. 301 U.S. at 331-32.

In *Kolovrat*, the Supreme Court invalidated an Oregon escheat statute which prohibited inheritance by a nonresident alien unless the alien's country extended a reciprocal right of inheritance to United States citizens and the alien could prove that the estate would not be confiscated by his government. The Oregon court withheld estate funds from Yugoslavian heirs because Yugoslavia did not provide reciprocity of inheritance. The Supreme Court reversed and upheld an 1881 treaty with Serbia, now part of Yugoslavia, which allowed Yugoslavians to inherit as if they were citizens of the United States. The decision suggests that even in a matter usually reserved to the states, such as succession, the presence of a treaty may limit the forum's application of its own law. 366 U.S. at 190-91.

Zschernig v. Miller, 389 U.S. 429 (1968), involved the same Oregon statute. The Court held that personalty could be inherited by East German nationals under the terms of the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany. 389 U.S. at 440-41. The Court made it clear that state interference in foreign policy matters would not be tolerated:

It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. [State] regulations must give way if they impair the effective exercise of the Nation's foreign policy. Where those laws conflict with a treaty, they must bow to the superior federal policy. Yet even in the absence of a treaty, a State's policy may disturb foreign relations. . . .

The Oregon law does, indeed, illustrate the dangers which are involved if each state . . . is permitted to establish its own foreign policy.

Id. at 440-41 (citations omitted).

14. In *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court held that in the absence of controlling federal provisions, a federal court whose jurisdiction rests solely on diversity must apply the common law, as well as the statutes and constitution, of the state in which it sits. *Id.* at 78. Although the decision in *Erie* did not specify areas in which state common law would take precedence over federal general common law, the Court held in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), that conflict of laws was such an

the federal judiciary from developing better procedures for international conflicts than those of the states where they sit.¹⁵

The presence of a significant foreign policy element in international choice of law, coupled with inadequate protection of federal interests,¹⁶ suggests that federal solutions may be appropriate despite the strictures of the *Erie* doctrine.¹⁷ Although the Constitution grants control of foreign relations to the executive branch¹⁸ and gives Congress the power to make laws necessary and proper for the execution of United States foreign policy,¹⁹ the courts, too, may²⁰

area. *Id.* at 496. If federal courts were not obliged to follow state conflicts law, the Court said in *Klaxon*, "the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side." *Id.*

15. A federal court must attempt to apply state law exactly as the highest court of the state would apply it. Ascertaining state conflicts law may be extremely difficult because the law is changing rapidly in many states (see *infra* note 210 for a description of the unsettled condition of conflicts case law in New York). A federal court is not irrevocably bound to uphold an obsolete state decision, but it may overrule a state holding only if there is evidence that the state's highest court would also do so if confronted with the same case. See *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 204-05 (1956). The federal court must not overrule state law in favor of what it considers to be a better rule if the state court would not reach the same decision. *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (per curiam). "A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." *Id.*

16. Where federal interests are derived from a federal statute, the federal courts will strike down a state law if satisfied that its enforcement interferes with the execution of congressional purposes and objectives. See *United States v. Yazell*, 382 U.S. 341, 352 (1966). Federal interests may also justify the imposition of federal law in nonstatutory areas such as foreign affairs. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-27 (1964). See also cases cited *supra* note 1.

17. See Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939).

Mr. Justice Brandeis [in *Erie*] was surely not thinking of international law when he wrote his dictum. Any question of applying international law in our courts involves the foreign relations of the United States and can thus be brought within a federal power. . . . It would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law.

Id.

18. U.S. CONST. art. II, § 2.

19. U.S. CONST. art I, § 8, cl. 18. See also *id.* cl. 3 (regulation of foreign commerce); *id.* cl. 4 (establishment of uniform rule of naturalization); *id.* cl. 10 (power to define and punish crimes on the high seas and offenses against the law of nations); *id.* cl. 11 (power to declare war); *id.* cls. 12-14 (power to provide, support, maintain and regulate the armed forces). In *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918), the Court stated: "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government. . . ." *Id.*

20. "[N]either Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal

fashion federal common law²¹ to implement or express a federal interest²² when Congress has not occupied the field.²³

authority contained in . . . the Constitution; in such areas state law must govern because there can be no other law." *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965). Constitutional authority for federal common law in the areas of conflict of laws, international relations, and international conflicts is discussed in sections II-B, II-C, III-A-3 and III-B of the text and accompanying notes.

21. Common law includes "those principles, usages, and rules of action applicable to the government and security of persons and property which do not rest for their authority upon any express or positive statute or other written declaration, but upon statements of principles found in the decisions of the courts." 15A AM. JUR. 2D *Common Law* § 1 (1979) (footnotes omitted). *Erie* abolished the concept of federal common law as an alternative to state common law in federal diversity cases. The "twin aims" of *Erie* were "discouragement of forum-shopping and avoidance of inequitable administration of the laws," by which was meant discrimination against resident defendants by plaintiffs who could choose the forum more favorable to their own position. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). *Erie* sought to achieve these goals by eliminating federal common law in areas also governed by state common law in order to promote uniformity between federal and state courts in the same jurisdiction. This purpose is not jeopardized by permitting federal courts to create common law in specific areas of exclusively federal authority. "There is no federal *general* common law." *Erie R.R. v. Tompkins*, 304 U.S. at 78 (1938) (emphasis added). See generally Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957); Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969).

22. A strong federal interest is presumed to be present in federal question cases arising "under the Constitution, laws or treaties of the United States," 28 U.S.C. § 1331(a) (1976). In diversity cases, federal common law may be recognized if a federal issue is raised in a defense (see *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 175 (1942)), if significant federal interests will suffer major damage by the application of conflicting state law (see *United States v. Yazell*, 382 U.S. 341, 352 (1966)), or if the federal government has an overriding need for uniformity in an area subject to federal law (see *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)).

Until relatively recently the courts freely and willingly recognized federal common law. "Over the last thirty years . . . the federal courts have increasingly asserted the power to lay down rules of 'federal common law' in new and often strange situations." Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1512 (1969) (footnote omitted). See also *supra* note 21. Recent decisions by the Burger Court, however, show a new reticence to fashion common law in areas governed by federal statutes. See *infra* notes 156-65 and accompanying text.

23. See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943). "In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." *Id.* In *New Jersey v. New York*, 283 U.S. 336 (1931), the Court said that federal common law is "subject to the paramount authority of Congress." *Id.* at 348. In *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 317 (1981), the Court held that the federal common law of nuisance abatement had been supplanted and rendered ineffective in the area of interstate water pollution by the Federal Water Pollution Control Act amendments of 1972, 33 U.S.C. §§ 1251-1376 (1976). The test for congressional preemption of federal common law is that "comprehensive" legislation must be enacted. *Texas v. Pankey*, 441 F.2d 236, 241 (10th Cir. 1971). See also *infra* notes 165-66 and accompanying text.

This Comment examines the need and authorization for federal common law of international choice of law in view of current conflicts law and theory. Part I reviews the types of conflicts laws in use today. Part II discusses federal common law as it has developed in the area of international relations and as it might apply to conflict of laws. Part III proposes the adoption of federal common law in international conflict of laws and also discusses the option of legislative implementation of the federal full faith and credit statute.²⁴ A model is introduced for the proposed federal common law of international conflicts; Part IV reexamines the recent case of *Kunstsammlungen zu Weimar v. Elicofon*²⁵ in light of the model.

I. APPROACHES TO CONFLICT OF LAWS

The types of conflicts methodologies currently used in the state and federal courts fall into three general categories:²⁶ law of the situs, significant contacts and ad hoc approaches which will be designated interest analysis and functional analysis.

A. *The Law of the Situs*

All conflicts of law²⁷ were traditionally resolved by mechanical rules based on the location, i.e., the situs, of a pertinent thing or event in the controversy.²⁸ In tort cases the standard conflicts rule

24. 28 U.S.C. § 1738 (1976).

25. No. 69 Civ. 93 (E.D.N.Y. June 25, 1981), published in 20 I.L.M. 1122 (1982), *aff'd*, No. 81-7544, slip. op. (2d Cir. May 5, 1982) [hereinafter cited as *Elicofon*].

26. Commentators use different categories to describe the various theories of conflict of laws found in the literature. Groupings such as those used in the text have heuristic value, but in practice they tend to be confounded and used inconsistently. In general, the three categories listed are set out in increasing order of flexibility and amount of information considered in the choice of law analysis. See, e.g., Recent Development, *Conflicts—Change in Texas Law—Implications for International Litigation*, 15 TEX. INT'L L.J. 379, 380-84 (1980).

27. Traditionally, the field of "Conflict of Laws" addresses three types of problems: choice of law, jurisdiction of courts and recognition of foreign judgments. "Conflict of Laws" is used in this Comment to mean choice of law. See Cheatham, *Some Developments in Conflict of Laws*, 17 VAND. L. REV. 193, 194 (1963).

28. The concept that the location of a single significant factor in a transaction determines the place whose law governs the transaction is an old one in conflicts law (see Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15, 15-19 (1934)) but was fully developed in the first Restatement by Professor Joseph Beale. Beale's territorial theory of conflicts was based on the premise that in every transaction the rights and duties of the parties vested at a particular time and place which

was the law of the place of injury (*lex loci delicti*).²⁹ In contracts cases, courts looked to the law of the place where the contract was made (*lex loci contractus*)³⁰ or performed (*lex loci solutionis*).³¹ In cases involving transfer of title to chattels the rule of decision was the law of the place where the property was located at the time of transfer (*lex loci rei sitae*).³²

Although the "modern" methods described below have recently gained acceptance, situs law is still in widespread use.³³ Its advantages are ease of application and predictability of result.³⁴

were determined in advance by the nature of the transaction, not by the facts of the case. In tort law, for example, the place of vesting was always the place where the injury occurred.

Rights being created by law alone, . . . it is necessary in every case to determine the law by which a right is created. The creation of a personal obligation, which has no situs and results from some act of the party bound, is a matter for the law which has to do with those acts. A personal obligation, then, is created by the law of the place where the acts are done out of which the obligation arises.

3 J. BEALE, *CASES ON THE CONFLICT OF LAWS, Summary*, § 41, at 515 (1935).

29. See, e.g., *Dawson v. Dawson*, 224 Ala. 13, 15, 138 So. 414, 415 (1931); *Landers v. Landers*, 153 Conn. 303, 304, 216 A.2d 183, 184 (1966) (wife prevented from bringing suit in home state against husband because law of the state where accident occurred does not allow a wife to sue her husband in tort); *Sharp v. Johnson*, 248 Minn. 518, 80 N.W.2d 650, 652-55 (1957); *Johnson v. St. Paul Mercury Ins. Co.*, 256 La. 289, 306, 236 So.2d 216, 222 (1970) (auto guest statute of state where accident occurred enforced when host-driver and guest-passenger are both residents of forum state).

30. See, e.g., *Milliken v. Pratt*, 125 Mass. 374, 375 (1878) (surety contract upheld under law of state of contracting when forum state's law would render resident party to contract incapable of entering into valid contract); *United States Fidelity & Guar. Co. v. Slifkin*, 200 F. Supp. 563, 566, 571 (N.D. Ala. 1961); *New Hampshire Fire Ins. Co. v. Curtis*, 264 Ala. 137, 142, 85 So. 2d 441, 445-46 (1955) (law of place of signing applied to validate insurance contract); *Ideal Structures Corp. v. Levine Huntsville Dev. Corp.*, 396 F.2d 917, 921-22 (5th Cir. 1968) (law of place of contracting applied to validate contract against statute of frauds objection, although the court said that "the rule in . . . [*Klaxon*] may not bind jet-age courts to horse-and-buggy concepts." *Id.* at 922); *Goulet v. Goulet*, 105 N.H. 51, 52, 192 A.2d 626, 627 (1963) (law of place of signing covenant applied to determine whether seal sufficient to make covenant enforceable).

31. See, e.g., *Pritchard v. Norton*, 106 U.S. 124, 136-41 (1882) (surety contract signed and delivered in New York validated under law of state where liability was to be discharged).

32. See, e.g., *Clarke v. Clarke*, 178 U.S. 186, 190 (1900); *Sinclair v. Sinclair*, 99 N.H. 316, 317, 109 A.2d 851, 852 (1954) (real property); *Hervey v. Rhode Island Locomotive Works*, 93 U.S. 664, 671-72 (1877); *Green v. Van Buskirk*, 72 U.S. (5 Wall.) 307, 311-12 (1866); *Zendman v. Harry Winston, Inc.*, 305 N.Y. 180, 184, 111 N.E.2d 871, 873 (1953) (personal property).

33. See *supra* note 11.

34. The uniformity and predictability of result obtained by use of situs rules may be compromised by the process of characterization. Whether a transaction is characterized as a property or contract matter, for example, would determine the situs if the contract of sale were signed in a state other than the state where property is located. Characterization is not a simple mechanical procedure. If more than one characterization is possible under the law of

The major disadvantages of situs law are its inflexibility and failure to take into account essential policy considerations and objectives of the states.³⁵ Rigid application of situs law may force a court to decide a case under the substantive law of a state which has no contact with the case other than the fortuitous occurrence of the situs-defining event within its boundaries.³⁶ The inherently arbitrary nature of situs law thus creates needless inconvenience and a risk of unjust adjudication through the court's lack of familiarity with foreign law. These problems are seriously exacerbated when the nonforum state is a foreign country.³⁷

B. Significant Contacts

The Restatement (Second) of Conflict of Laws (Restatement) takes the position that the substantive law governing a particular issue in a case is that of the state having the "most significant relationship"³⁸ to the case. A state's relationship to the case is

the forum, the choice may be influenced by public policy considerations, the court's preference for forum law or desire to bring about a fair result, or the plaintiff's pleadings. See R. LEFLAR, *AMERICAN CONFLICTS LAW* 174-78 (3d ed. 1977).

35. For criticisms of situs law, or the theory of vested rights (*supra* note 28), see Cheatham, *supra* note 27, at 197-98; Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 *CORNELL L.Q.* 215, 215-16 (1963).

36. See, e.g., *Challoner v. Day & Zimmermann, Inc.*, 512 F.2d 77, 78-81 (5th Cir.), *rev'd*, 423 U.S. 3 (1975). The *Challoner* case was a suit by United States military personnel against the American manufacturer of defective equipment, which had caused an injury in Cambodia. The Supreme Court held that Texas conflict of laws principles must be strictly applied. 423 U.S. at 4. On remand the Fifth Circuit determined that Texas conflicts law required the application of Cambodian tort law. 546 F.2d 26, 26-27 (5th Cir. 1977). See also *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541, 542, 544-46 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956). In *Walton*, an Arkansas plaintiff sued a Delaware corporation in federal court in New York to recover for injuries sustained in Saudi Arabia in a collision with defendant's truck. 233 F.2d at 542. The court of appeals held that Saudi Arabian tort law governed, and because plaintiff had failed to plead and prove this essential element of his case, the case was dismissed. *Id.* at 544-45.

37. Courts which adhere to situs rules have developed several techniques which serve to relieve them of the burden of trying a case under the law of a foreign country. One is the "dismissal for failure to prove" approach used in *Walton*. 233 F.2d at 545-46. Another is to apply the law of the forum upon creation of a legal fiction, i.e., that the foreign law is identical to the *lex fori*, or to assume that the matter in question is so fundamental that it would be treated similarly in all civilized nations. "[I]n dealing with rudimentary contracts or torts made or committed abroad, such as promises to pay money for goods or services, or battery of the person or conversion of goods, courts would assume a liability to exist if nothing to the contrary appeared." *Cuba R.R. v. Crosby*, 222 U.S. 473, 478 (1912).

38. The principle of significant relationship is stated with respect to torts in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971) [hereinafter cited as RESTATEMENT]. "The rights and liabilities of the parties with respect to an issue in tort are determined by the

determined by evaluating specific contacts³⁹ in light of the principles of choice listed in section 6 of the Restatement:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.⁴⁰

The Restatement recommends situs rules for specific causes of action.⁴¹ These rules are presumed to identify the state having the

local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6." *Id.*

39. *See id.* § 145(2).

Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id.

40. *Id.* § 6(2).

41. With respect to personal injury actions, § 146 provides:

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Id. § 146.

With respect to transfers of chattels § 245(1) provides:

The effect of a conveyance upon a pre-existing interest in a chattel of a person who was not a party to the conveyance will usually be determined by the law that would be applied by the courts of the state where the chattel was at the time of the conveyance.

Id. § 245(1).

§ 246 provides:

most significant relationship to the case unless the principles of section 6 point to a state other than the situs state. The inclusion in section 6 of considerations favoring situs rules,⁴² policy analysis,⁴³ and also a "super-policy" analysis⁴⁴ gives the court extreme flexibility without providing guidelines for balancing the seven factors. In the absence of such guidelines, courts are prone to rely upon the presumption in favor of situs law⁴⁵ or to use section 6 to justify some other formulation while paying lip service to the Restatement's balancing test.⁴⁶

Whether there has been a transfer of an interest in a chattel by adverse possession or by prescription and the nature of the interest transferred are determined by the local law of the state where the chattel was at the time the transfer is claimed to have taken place.

Id. § 246.

42. RESTATEMENT § 6(2)(f)-(g).

43. *Id.* § 6(2)(b)-(e).

44. *Id.* § 6(2)(a).

45. In *Elicofon*, *supra* note 25, the district court justified its application of the *lex rei sitae* by reference to § 246 of the Restatement (reproduced in full *supra* note 41).

46. The approach taken by the Restatement has been criticized on four general grounds:

1. It promotes uneven application and disparate evaluation of contacts among the states, thus causing forum shopping. See LaBrum, *The Fruits of Babcock and Seider: Injustice, Uncertainty and Forum Shopping*, 54 A.B.A.J. 747, 750 (1968).

2. It is unfairly biased toward plaintiffs. See Reese, *Recent Development in Torts Choice of Law Thinking in the United States*, 8 COLUM. J. TRANSNAT'L L. 181, 189-90 (1969).

3. Its emphasis on physical, territorial contacts promotes contact counting, which is equally mechanical and rigid as simple situs law. See R. LEFLAR, *AMERICAN CONFLICTS LAW* 173-74 (3d ed. 1977); LaBrum, *supra*, at 748.

4. It provides no guidelines for evaluating contacts. See Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230, 1236 (1965); Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, 1964 SUP. CT. REV. 89, 95; LaBrum, *supra*, at 748-49.

Professor David Cavers has attempted to compensate for the Restatement's lack of guidelines by developing "principles of preference" to help the courts make conflicts decisions in specific areas. In the limited situations to which they are addressed, Cavers' principles do supply practical guidelines which the courts can easily apply. For example, the first principle reads:

Where the liability laws of the state of injury set a higher standard of conduct or of financial protection against injury than do the laws of the state where the person causing the injury has acted or had his home, the laws of the state of injury should determine the standard and the protection applicable to the case, at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing their relationship.

D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 139 (1965). The rule states that situs law (the state of injury) is to be applied, but prescribes specific factual situations in which the application of situs law is justified by policy considerations.

*C. Interest Analysis and Functional Analysis
(Ad Hoc Approaches)*

Whereas situs law and significant contacts analysis strive to simplify the choice of law process, the ad hoc approaches attempt "to understand, harmonize, and weigh competing interests,"⁴⁷ which are assumed to vary from case to case and thus to defy the application of general rules.⁴⁸ Currie's "governmental interests analysis" is the foundation of this theoretical school.⁴⁹ Currie's method comprises the following steps:⁵⁰

1. Identification of the applicable law of the forum state and the governmental policy expressed by the law.

47. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1235-36 (1946).

48. Although policy must be carefully studied in relation to the facts of each case initially, it is likely that rules may eventually be derived from repeated experience with similar cases. For example, former Chief Judge Fuld of the New York Court of Appeals formulated a set of rules based upon the court's experience with a series of cases involving automobile guest statutes. See *Tooker v. Lopez*, 24 N.Y.2d 569, 585, 249 N.E.2d 394, 404 (1969) (Fuld, C. J., concurring). The cases which preceded Fuld's introduction of the three rules were *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); and *Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966). The rules were later applied in *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). Most commentators feel that the concept of condensing the experience of many cases into guidelines for future decisions is sound, but that the Fuld rules were not adequate to the task of deciding *Neumeier*. See Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 561-62 (1971). "It is not suggested that . . . [Judge Fuld's] rules are ideal or that other rules should not be drafted more broadly or more narrowly. What is suggested is that these are the sort of rules at which the courts should aim." *Id.* at 562; Trautman, *Rule or Reason in Choice of Law: A Comment on Neumeier*, 1 VT. L. REV. 1, 3 (1976). "In my view . . . [Judge Fuld's] suggested rules are unworkable because reason and rationality have not yet succeeded in opening up all the dimensions of the problem." *Id.* at 3. See also Hancock, *Some Choice-of-Law Problems Posed by Anti-Guest Statutes: Realism in Wisconsin and Rule-Fetishism in New York*, 27 STAN. L. REV. 775, 775-76 (1975); Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. No. 2 at 10, 20 (Spring 1977). For a more sympathetic discussion of *Neumeier*, pointing out that the Fuld rules were intended to be specific to guest statute cases, see Rosenberg, *A Comment on Neumeier*, 31 S.C. L. REV. 443, 450 (1980). See also *infra* notes 215, 232 and accompanying text.

49. See generally Currie, *Comments on Babcock v. Jackson, a Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233 (1963); Currie, *Notes on Methods and Objectives in the Conflicts of Laws*, 1959 DUKE L.J. 171; Currie, *Married Women's Contracts: A Study in Conflicts-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958). Currie's major works are collected in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

50. See Currie, *Notes on Methods and Objectives in the Conflicts of Laws*, 1959 DUKE L.J. 171, 178-79.

2. Examination of the relationship of the forum state to the case in order to determine whether forum policy would be served by applying forum law.

3. Analysis of the foreign law by steps 1 and 2.

4. Evaluation of the forum's interest relative to the foreign state's interest:

(a) If the forum state has no interest in applying its law but the foreign state has such an interest, the court should apply foreign law. This result is known as a "false conflict" because the policy underlying forum law is not relevant to the case. Therefore, the forum state's interest is not violated by application of the other state's law.⁵¹

(b) If the forum has an interest in applying its law, a "true conflict" exists if the foreign state also has such an interest, and "no conflict" exists if the foreign state has no interest. Currie recommends applying forum law in both situations.⁵²

(c) The situation where neither state has an interest in the application of its law is called the "unprovided-for" case because Currie does not analyze it thoroughly. In different publications Currie suggests the choice of forum law⁵³ or a solution based on common policy interests of the two states.⁵⁴

Currie's interest analysis considers only local policies directly related to the specific conflicting laws. Other authors⁵⁵ advocate a

51. *See id.* at 174. "[T]he false problems created by . . . [situs] rules may be solved in a quite irrational way—*e.g.*, by defeating the interest of one state without advancing the interest of another." *Id.*

52. *Id.* at 178.

53. *Id.* at 179.

54. Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 *STAN. L. REV.* 205, 229 (1958).

It may be that the laws of neither state, nor of both states together, purport to dispose of the entire universe of possible cases. Identical laws do not necessarily mean identical policies, and different laws do not necessarily mean conflicting policies, when it is remembered that the scope of policy is limited by the legitimate interests of the respective states.

Id. at 229.

55. *See, e.g.*, R. LEFLAR, *AMERICAN CONFLICTS LAW* 197-222 (3d ed. 1977). For expanded development of multistate conflicts issues, see A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 237-80 (1965); Von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 *CORNELL L. REV.* 927, 959-63 (1975) (advocating an approach that includes considerations such as strength of regulatory policy, reciprocity, comprehensibility to laymen, invidious distinctions between communities represented in the choice of law problem,

more holistic approach extending the analysis to include policies of the social and political systems within which these laws function. Professor Leflar, for example, lists five considerations to be weighed in making the choice of law, including "maintenance of interstate and international order."⁵⁶ Von Mehren and Trautman⁵⁷ also stress the importance of evaluating policies which are not expressed in legislation but which may affect multistate relations, such as reciprocity and the promotion of trade and other interstate activity.⁵⁸

These authors emphasize that multistate problems (especially those in international rather than interstate disputes) are best solved by attempting to accommodate the diverse interests of the legal systems represented, rather than by selecting one of them as the dominant law in a case. This can only be done by considering policy at a level which supersedes the interests of the individual states and addresses the needs of the "ad hoc communities" consisting of all states involved in the conflict.⁵⁹

reasonable expectations of the parties as to the governing law, and the facilitation of multistate activity). See also Von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974) (recognizing that "where situations or transactions are significantly connected with more than one society . . . a broader range of policies, as well as a greater variety of policy combinations, must frequently be taken into account . . ." *id.* at 349, and suggesting a new approach in which special multistate rules, different from the domestic rules of the concerned states, are devised in order to accommodate the disparate interests of the states involved in the choice of law problem); Trautman, *Rule or Reason in Choice of Law: A Comment on Neumeier*, 1 VT. L. REV. 1, 18-20 (applying multistate analysis to *Neumeier*).

56. LEFLAR, *supra* note 55, at 195, 207-08. Leflar's remaining four choice-influencing considerations are: predictability of results, simplification of the judicial task, advancement of the forum's governmental interests, and application of the better rule of law. *Id.* at 195.

57. See *supra* note 55.

58. A. VON MEHREN & D. TRAUTMAN, *supra* note 55, at 237-80.

59. See Von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 966-67 (1975).

[Multistate] [c]hoice-of-law problems, when fully understood, are inherently more complex than their domestic-law analogues. A greater number and variety of policies must be considered. Some of these are wholly or largely unique to multistate situations, so that there is little or no domestic learning or experience on which to draw. . . . [A]n ultimate source of complexity in choice of law will remain: justice must be administered for ad hoc communities having common elements of social and economic life, but lacking a legislator and an adjudicator who are responsible to, and speak for, the community as a whole. . . . [J]ustice is in the hands of authorities whose first loyalty and basic understanding do not run to the whole community. Yet since that community is an economic and social reality, its unitary claims also influence legislators and adjudicators.

Id.

By broadening the base of information used to determine the balance between competing laws, these functional approaches expand interest analysis to its "logical and ultimate conclusion,"⁶⁰ and offer the possibility of resolving true conflicts and the unprovided-for case without resorting to arbitrary contingency rules such as situs law or forum law. They also take into account national policy considerations which are not present in most interstate cases.

II. FEDERAL COMMON LAW

A. Overview

*Erie Railroad v. Tompkins*⁶¹ established that "there is no federal general common law."⁶² Nevertheless, federal common law survives in specific areas of strong federal interest. *Clearfield Trust Co. v. United States*⁶³ held that the federal courts have authority to make common law concerning the government's rights and liabilities on federally issued commercial paper and bonds.⁶⁴ The Court set forth three clear requirements for the creation of federal common law. There must be a federal interest,⁶⁵ no applicable federal statute,⁶⁶ and existing state law which, if applied, would jeopardize the federal interest.⁶⁷ In *Clearfield*, federal law was justified because application of state law would lead to inconsistent results and "[t]he desirability of a uniform rule [was] plain."⁶⁸

Clearfield's focus on the need for uniformity of result was repeated in *Miree v. DeKalb County*,⁶⁹ wherein the Court said, "federal common law may govern even in diversity cases where a uniform national rule is necessary to further the interests of the

60. Reese, *American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases*, 33 VAND. L. REV. 717, 726 (1980).

61. 304 U.S. 64 (1938).

62. *Id.* at 78.

63. 318 U.S. 363 (1943).

64. *Id.* at 366.

65. The federal government must be "exercising a constitutional function or power." *Id.*

66. "In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." *Id.* at 367.

67. "The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty." *Id.*

68. The Court said that "[application of state law] would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states." *Id.*

69. 433 U.S. 25 (1977).

Federal Government”⁷⁰ In his concurrence to *Miree*, Chief Justice Burger emphasized that in addition to furthering the federal government’s interests, federal common law may be applied to protect the interests of private parties when they depend upon the exercise of federal regulatory power and when specific legislation is lacking. “[T]here must be ‘federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation.’ ”⁷¹

Over the years the courts have held that federal common law is appropriate in two contexts.⁷² First, the federal courts may exercise their lawmaking power when “uniquely federal interests”⁷³ are at stake and would be compromised by application of state law. This category contains cases involving interstate water rights,⁷⁴

70. *Id.* at 29 (footnote omitted).

71. *Id.* at 35 (Burger, C.J., concurring) (quoting *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973), quoting Mishkin, *The Variousness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957)).

72. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

73. *Id.* (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1974)). See also R. LEFLAR, *AMERICAN CONFLICTS LAW* 130 (3d ed. 1977).

If a “federal question” is the basis of the [federal court’s] jurisdiction a federal common law rule may still be formulated, if it does not exist already, to aid in the decision of it. . . . And the same will be true even in the absence of a federal statute if the case so involves federal rights that a “federal common law” governing them can be spelled out.

Id.

The federal court’s authority and the need to apply federal common law are apparent when the court has federal question jurisdiction, because federal questions arise “under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331(a) (1976). The *Klaxon* Court guaranteed the superiority of federal common law in resolving conflicts of laws arising from federal questions. “*Subject only to review by this Court on any federal question that may arise, [a state] is free to determine whether a given matter is to be governed by the law of the forum or some other law.*” *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941) (emphasis added).

74. On the same day that the Court decided *Erie*, its ruling in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), established that federal common law governs disputes over interstate water rights because this area is one of overriding national concern.

[W]hether the water of an interstate stream must be apportioned between the two States is a question of “federal common law” upon which neither the statutes nor the decisions of either State can be conclusive. . . . Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions.

Id. at 110 (citations omitted) (footnote omitted). See also *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-27 (1964).

interstate boundary disputes,⁷⁵ escheat rights to property claimed by two states,⁷⁶ condemnation proceedings under the power of eminent domain,⁷⁷ rights and liabilities under federal government contracts,⁷⁸ claims by the federal government against private parties,⁷⁹ government commercial paper,⁸⁰ and admiralty.⁸¹

In the second category of federal common law, federal interest is derived from a federal statute. The courts either have been granted express statutory jurisdiction to create governing rules of law⁸² or they have made interstitial rules to supplement the provisions of the statute.⁸³ A prominent example of the Court's fashioning of federal common law by statutory jurisdiction is *Textile Workers Union v. Lincoln Mills*.⁸⁴ In *Lincoln Mills* the Court interpreted section 301(a) of the Labor Management Relations Act to grant the courts power to develop a body of common law for labor-management relations.⁸⁵ An example of interstitial common

75. See *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370 (1977); *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973); *Howard v. Ingersoll*, 54 U.S. (13 How.) 380 (1851). See also *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (see material quoted *supra* note 74).

76. See, e.g., *Texas v. New Jersey*, 379 U.S. 674, 677 (1965).

77. See, e.g., *United States v. 93.970 Acres of Land*, 360 U.S. 328, 332-33 (1959); *United States v. Miller*, 317 U.S. 369, 379-80 (1943).

78. See, e.g., *United States v. Seckinger*, 397 U.S. 203, 209-10 (1970); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 289 (1958); *United States v. County of Allegheny*, 322 U.S. 174, 182-83 (1944); *United States v. Standard Rice Co.*, 323 U.S. 106, 110-11 (1944). *But cf.* *United States v. Yazell*, 382 U.S. 341, 353 (1966), in which the Supreme Court declined to apply federal common law in a suit to collect a government loan from a married woman. The Court applied the Texas law of coverture that a married woman could not bind her separate property without obtaining a court decree removing her incapacity to enter into a contract. The Court held that the federal interest in collecting its loans was no greater than that of any other creditor and was therefore insufficient to override state law. *Id.*

79. See, e.g., *United States v. Standard Oil Co.*, 332 U.S. 301, 305-09 (1947).

80. See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *National Metropolitan Bank v. United States*, 323 U.S. 454, 456 (1945). *But cf.* *Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29 (1956), in which the Court held that a claim for conversion of a federally guaranteed bond was governed by state law.

81. See *Levinson v. Deupree*, 345 U.S. 648, 652 (1953); *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189, 193 (2d Cir. 1955). "[T]he claim here is for a tort committed on the high seas, and the federal choice-of-law rule might well be binding on the state courts, if either rule is to be binding in both sets of courts." *Id.* See also *Jansson v. Swedish Am. Line*, 185 F.2d 212, 217 (1st Cir. 1950).

82. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 213 (1944).

83. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973). "[T]he inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts." *Id.*

84. 353 U.S. 448 (1957).

85. *Id.* at 456-57.

law is the judicial development of the Sherman Act; the statute's sweeping prohibitions against restraints of trade and monopolies have been shaped by the courts on a case by case basis for nearly one hundred years.⁸⁶

B. Federal Common Law in International Affairs

The Supreme Court has recognized that foreign affairs constitutes a legitimate sphere of federal common law. *Banco Nacional de Cuba v. Sabbatino*⁸⁷ established that federal courts may give priority to national foreign policy considerations in an adjudication between a United States citizen and an instrumentality of a foreign government.⁸⁸ The main issue in the case was whether the act of state doctrine,⁸⁹ an executive policy of long standing, required the Court to recognize the Cuban government's title to property expropriated from private citizens or whether the Court had the power to judge the acts of a foreign government by the standards of interna-

86. See generally *Partmar Corp. v. Paramount Pictures Theaters Corp.*, 347 U.S. 89 (1954); *Kelly v. Kosuga*, 358 U.S. 516 (1959); *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902).

The Supreme Court has recently acted to restrict the interstitial lawmaking power of the courts. See *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304 (1981); *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77 (1981); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981). See generally Kaplan, *The Changing Role of the Federal Courts: Recent Developments in Implied Causes of Action and Federal Common Law*, 2 ALI-ABA RESOURCE MATERIALS: CIVIL PRACTICE AND LITIGATION IN FEDERAL AND STATE COURTS 1037 (1981). For discussion of these cases and their implications for federal common law of international conflicts, see *infra* notes 159-71 and accompanying text.

87. 376 U.S. 398 (1964).

88. In *Sabbatino*, an American commodities broker, Farr, Whitlock, contracted to purchase sugar from C.A.V., a Cuban corporation controlled by Americans. Prior to the loading of the cargo the Cuban Government issued an executive order nationalizing the corporation's assets in retaliation for a reduction in the United States' import quota for Cuban sugar. Farr, Whitlock entered into negotiations with Banco Nacional, a Cuban Government bank, in order to obtain Cuban consent to the purchase. C.A.V. claimed the proceeds of the sale as rightful owner of the sugar. Upon hearing of C.A.V.'s claim, Farr, Whitlock refused to pay Banco Nacional. Sabbatino was appointed by the New York Supreme Court as receiver for C.A.V.'s assets in New York and the funds were transferred from Farr, Whitlock to Sabbatino pending judicial resolution of the dispute in federal district court. *Id.* at 401-06.

89. The act of state doctrine was enunciated by the Supreme Court in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Id.* The doctrine was subsequently reaffirmed in *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918) and *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918).

tional law, as New York law allegedly permitted. The Court held that the effect of the act of state doctrine must be determined by federal common law, not state law,⁹⁰ because:

Whatever considerations are thought to predominate, it is plain that the problems involved are uniquely federal in nature. If federal authority, in this instance this Court, orders the field of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject.⁹¹

The Court said that the area of foreign relations is among those "enclaves of federal judge-made law which bind the States."⁹² It concluded that "[t]he problems surrounding the act of state doctrine are, albeit for different reasons, as intrinsically federal as are those involved in water apportionment or boundary disputes."⁹³ *Sabbatino*, therefore, confirms the inherent power of the federal government in foreign affairs, applies federal common law to a dispute between a private American citizen and a foreign government, and opens the door to a broad range of national solutions, including judicial solutions, to legal problems affecting international relations.⁹⁴

C. Federal Common Law of Conflicts

*Klaxon Co. v. Stentor Electric Manufacturing Co.*⁹⁵ extended the *Erie* doctrine to conflict of laws. Critics of *Klaxon* have suggested that requiring federal courts in diversity cases to resort to local conflicts law is incorrect on constitutional grounds. Their argument is based on the diversity jurisdiction provision of the

90. 376 U.S. at 427.

91. *Id.* at 424.

92. *Id.* at 426.

93. *Id.* at 427.

94. Objections to *Sabbatino's* treatment of the act of state doctrine have focused on the limits which the case imposes on the courts' ability to rule on matters of international law; its emphatic endorsement of federal law in this area has not met with serious criticism. See Folsom, *The Sabbatino Case: Rule of Law or Rule of "No Law"?*, 51 A.B.A.J. 725 (1965). "The tragedy of *Sabbatino* is that it casts grave doubts on the existence of a rule of international law that would protect property rights. . . . In effect, the Court washed its hands of international law and thus made possible the plausible argument that the decision sanctions confiscation." *Id.* at 726. See also Paul, *The Act of State Doctrine: Revived but Suspended*, 113 U. Pa. L. Rev. 691, 697-705 (1965).

95. 313 U.S. 487 (1941).

Constitution.⁹⁶ Choice of law is said to be essentially federal in nature⁹⁷ because diversity jurisdiction places the federal courts in a disinterested position from which they may arbitrate between competing laws of the states.⁹⁸ Resolving conflict of laws is regarded as a process of "allocating spheres of legal control among states,"⁹⁹ a responsibility which is best discharged at the federal level.¹⁰⁰ Given that current choice of law methods require a balancing of government policies,¹⁰¹ federal law is considered to be a more appropriate vehicle than state law for determining the balance because it is more capable of taking unbiased account of multistate considerations.¹⁰²

96. U.S. CONST. art. III, § 2 (codified at 28 U.S.C. § 1332(a) (1976)).

97. See Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581, 588 (1953). "[F]ederal control is particularly appropriate in conflict of laws, which by its nature involves interstate and international matters and not matters of merely local concern." *Id.*

98. See Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513-15 (1954). "[Conflicts] questions are essentially federal, in the sense that they involve, by hypothesis, more than one state. To the solution of no other type of controversy is the diversity jurisdiction better adapted." *Id.* at 514 (footnote omitted). See also C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 266 (1976). "[T]he federal courts are likely to be disinterested in questions of conflicts of laws, and are in a uniquely favorable position to develop a rational body of doctrine for that branch of law. Klaxon deprives them of this power." *Id.* (footnote omitted).

99. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 22 (1963).

100. See *id.* at 23. "Responsibility for allocating spheres of legal control among member states of a federal system cannot sensibly be placed elsewhere than with the federal government." *Id.* See also Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 U.C.L.A. L. REV. 1191, 1194 (1967).

Klaxon was wrongly decided not because federal courts should be free to make independent conflict-of-laws decisions while states concurrently have their own bodies of conflicts doctrine, but because there should be, inherent in the federal system, no autonomy for a state to resolve a problem of conflict of its law with that of another state. Federal courts and state courts should be viewed as participating together in the development of federal choice-of-law principles, with the Supreme Court as the final arbiter as it is in other areas of federal common law.

Id.

101. See *supra* notes 47-60 and accompanying text.

102. See Horowitz, *supra* note 100, at 1198.

[T]o the extent that this type of [multistate] policy is pertinent to resolution of a conflict of laws, federal law should in theory be the source of the doctrine that determines the application of the principle in a specific case. Just as it is federal law (under the commerce clause) which determines whether a state's policy constitutes an unreasonable burden on interstate commerce, federal law should determine which of two conflicting state policies, each with good reason for application in the specific case, should be subordinated so as to facilitate the carrying on of multistate activities.

Id.

Arguments for federal conflicts rules grounded in diversity jurisdiction are appealing. They draw upon the analogy between conflict of laws and disputes between the states, in which federal common law has been upheld.¹⁰³ However, in view of the Supreme Court's recent reaffirmation of *Klaxon* in *Day & Zimmermann, Inc. v. Challoner*,¹⁰⁴ the courts are unlikely to create a general exception to the *Erie* doctrine for all conflict of laws.

III. FEDERAL COMMON LAW OF INTERNATIONAL CONFLICTS

A. Justification

Federal common law may be fashioned by the courts only in areas which satisfy the requirements of *Clearfield Trust Co. v. United States*.¹⁰⁵ There is no federal statute governing international conflict of laws. In the absence of applicable legislation there must be a strong federal interest which would be compromised by application of state law. The following sections of this Comment discuss these elements of justification for federal common law of international conflicts. Constitutional distinctions between interstate and international applications of state conflicts law are also described because they suggest that procedures developed in interstate cases may be inappropriate in the international context.

103. See *supra* notes 74-76 and accompanying text.

104. 423 U.S. 3 (1975). In *Challoner* the plaintiffs were two American soldiers who suffered injury in Cambodia from the explosion of defective artillery shells manufactured in Texas by defendant, a Maryland corporation with its principal place of business in Pennsylvania. Even though Texas' rule of *lex loci delicti* would dictate application of Cambodian tort law, the Fifth Circuit applied Texas' law of strict liability after performing an interest analysis and finding a false conflict. See *Challoner v. Day & Zimmermann, Inc.*, 512 F.2d 77, 79-81, 84-85 (5th Cir. 1975). On the authority of *Lester v. Aetna Life Ins. Co.*, 433 F.2d 884 (5th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971), in which it had rejected Louisiana's rule of *lex loci contractus*, the Fifth Circuit announced an exception to Texas situs law. The exception was limited to cases of false conflict, where application of situs law would be clearly arbitrary and counter to state policy of allowing plaintiffs to recover. 512 F.2d at 84. The Supreme Court, however, rejected the court of appeals' departure from Texas law. 423 U.S. at 4-5. On remand, the Fifth Circuit held that the highest court in Texas would be obliged to apply Cambodian law. 546 F.2d 26, 26-27 (5th Cir. 1977). See also *supra* note 15.

The Texas Supreme Court abandoned *lex loci delicti* four years later in *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979).

105. 318 U.S. 363, 366-67 (1943).

1. The Federal Interest

Foreign policy elements present in international cases are either absent or of lesser relevance in interstate cases.¹⁰⁶ Although state conflicts laws have always resolved international conflicts by the same methods as interstate conflicts,¹⁰⁷ the use of policy-centered choice of law analysis now demands that federal foreign policy interests be acknowledged and included in the analysis. In interstate cases, courts need only weigh the competing interests of coequal states within the United States federal system to determine the appropriate law in a case. In cases involving foreign nations, however, the federal government's interest is superior to that of the states and must have priority in an analysis of government interests.¹⁰⁸

Any international litigation may be affected by United States policies toward foreign nations involved in the case, but the level of government interest will vary from case to case. Automobile tort cases arising in the course of travel between the United States and Canada¹⁰⁹ have only a small foreign policy component, whereas expropriation cases such as *Sabbatino* are dominated by government policy considerations. Cases such as *Kunstsammlungen zu Weimar v. Elicofon*,¹¹⁰ discussed below, fall between these two

106. See R. LEFLAR, *supra* note 55.

[T]he presence of international factors in a set of facts indicates that the relevant choice-influencing considerations to be taken into account in selecting governing law may be different from what they are in other cases. The considerations that are relevant will not always be the same even in cases that are quite similar in their facts. Patterns of relevance that can be given standard weights in interstate cases may not apply internationally.

Id. at 9 (footnote omitted).

107. See Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 *MINN. L. REV.* 717 (1957). "American courts and writers [have] assumed identity between the principles governing international and interstate transactions." *Id.* at 717. Ehrenzweig states that this assumption is based upon two facts that are no longer true: the acceptance of a general common law governing commerce and the lack of developed constitutional theory which distinguishes between interstate and international conflicts. *Id.* at 717-19. Ehrenzweig has called the courts' equating of the two types of cases an "unworkable hybrid" and criticized the Restatement for perpetuating what he considers to be an inappropriate fusion of two distinct choice of law problems. A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* 20 (1974).

108. See *supra* notes 1, 87-94 and accompanying text.

109. *E.g.*, *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

110. See *supra* note 25.

extremes. Their facts must be carefully examined if the choice of law analysis is to reflect government interests accurately and avoid jeopardizing federal policies.¹¹¹

2. Inadequacy of State Conflicts Laws

*Clearfield Trust Co. v. United States*¹¹² established that when uniformity is necessary to protect a strong federal interest, the courts may fashion federal common law. The need for uniformity in the conduct of foreign affairs is unquestionable.¹¹³ It is implicit in the very formation of a "union" of sovereign states. As the Supreme Court recognized in *United States v. Curtiss-Wright Export Corp.*:¹¹⁴

As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs¹¹⁵

The supremacy clause of the Constitution¹¹⁶ accords treaties the status of supreme law and thus establishes the predominance of the

111. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) is a mixed case of public and private interests which must be carefully distinguished on its facts from *Sabbatino*. In *Dunhill* the Court held that a foreign country's repudiation of a purely commercial obligation is not an act of state. *Id.* at 691-94. *Cf. Sabbatino*, where the seizure of property by the same foreign country was held to be an act of state. 376 U.S. at 415.

112. 318 U.S. 363 (1943). *See supra* notes 62-71 and accompanying text.

113. *See Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 50 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966). "It is fundamental to our constitutional scheme that in dealing with other nations the country must speak with a united voice." *Id.* *See also Note, The Federal Common Law*, 82 HARV. L. REV. 1512, 1520 (1969). "The two fundamental requirements of a federal union are that it be able to avoid internal rupture by settling disputes of its component parts and that it be able to act in a unified fashion, as a nation, when it faces abroad." *Id.* In *United States v. Pink*, 315 U.S. 203 (1942) the Supreme Court said:

[T]here are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.

Id. at 233-34.

114. 299 U.S. 304 (1936).

115. *Id.* at 316.

116. U.S. CONST. art. VI, § 2.

federal government in the event of a conflict between federal and state law. In *Hines v. Davidowitz*,¹¹⁷ the Court held that a state's alien registration act must be subordinate to federal law. Justice Black said:

That the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution, was pointed out by the authors of *The Federalist* in 1787, and has since been given continuous recognition by this Court. . . . The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. "For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."¹¹⁸

State conflicts laws are far from uniform. Fifteen states cling to the principle of *lex loci delicti* in torts,¹¹⁹ while the remaining thirty-five states apply their own variations on significant contacts or interest analysis. This "embarrassing idiosyncrasy"¹²⁰ cannot be tolerated when federal foreign policy interests must be considered, as they must be in international conflicts analysis.

In addition to their lack of uniformity, state conflicts laws endanger federal interests because, by failing to distinguish interstate from international cases,¹²¹ they ignore or minimize the for-

117. 312 U.S. 52 (1941).

118. *Id.* at 62-63 (footnotes omitted) (quoting *The Chinese Exclusion Case*. *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889)).

119. *See supra* note 11.

120. Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 819 (1964).

121. *See* A. EHRENZWEIG, *A TREATISE ON THE CONFLICT OF LAWS* § 6 at 16 (1962). "Traditionally, . . . American texts and casebooks in the law of conflict of laws have treated interchangeably cases and principles relating to international and to interstate problems." *Id.* (footnote omitted); Yiannopoulos, *Wills of Movables in American International Conflicts Law: A Critique of the Domiciliary "Rule,"* 46 CALIF. L. REV. 185, 187-88 (1958). "Very little indication of a conscious distinction between interstate and international contacts can be found in American judicial decisions or legal literature." *Id.* at 187 (footnote omitted); Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 MINN. L. REV. 717, 722 (1957). "[I]t may well be that many a leading opinion rendered in cases involving international conflicts would, if in terms limited to such conflicts, have avoided applications in the interstate field which have proved anything but satisfactory." *Id.* *See also* Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 394 (1945).

eign affairs component in international litigation. States which apply situs law do not acknowledge federal concerns at all; they favor ease of application at the risk of an unconstitutional result. As Professor Scoles has stated: "If a court is wedded to dogma, justice may not be served unless the court distinguishes between interstate and international cases. To apply mechanically a rule developed in interstate cases to an international situation without a consideration of its policy relevance is both wrong and dangerous."¹²²

States which have adopted local versions of policy-centered conflicts analysis are almost as poorly equipped to protect federal interests in international cases as states wedded to the "dogma" of situs law. They may be unwilling to consider the requirements of international relations in preference to local interests,¹²³ or they may lack the necessary expertise to evaluate federal foreign policy.¹²⁴ International cases also vary from interstate cases in the types of substantive issues raised,¹²⁵ the magnitude of discrepancies between policies of states in a case,¹²⁶ and the limits imposed on

122. Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CALIF. L. REV. 1599, 1599-1600 (1966) (footnote omitted).

123. See R. LEFLAR, *supra* note 73. "Courts may be quite chary of international accommodations in states where chauvinistic nationalism prevails . . ." *Id.* at 207.

124. See Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1528 (1969). "Federal judges tend to have more familiarity and sympathy with federal policies and their goals than state judges. Judges selected and paid by the national government are more apt to give full scope to the means that government chooses to reach its objectives . . ." *Id.* (footnotes omitted).

125. See Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 MINN. L. REV. 717 (1957).

[P]olicy differences have resulted in the development in each field of large sectors which lack counterparts in the other. Thus, problems prevailingly occupying the courts in interstate relations, such as those concerning the constitutional "jurisdiction" of the judgment court, the applicability of foreign wrongful death statutes, or the manifold problems arising from different statutes of limitations and workmen's compensation, are comparatively rare in international conflicts. On the other hand, problems such as those relating to currency fluctuations, expropriations, or litigation by, against or between aliens, are virtually limited to international transactions as are those arising in bankruptcy, antitrust or admiralty where interstate conflicts are significantly reduced by a national law; or those problems concerning negotiable instruments or the transfer of stock where interstate conflicts are often avoided by uniform legislation.

Id. at 721-22 (footnotes omitted).

126. *Id.* See also Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 197-203 (1933); Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CALIF. L. REV. 1599, 1599-1602 (1966). "In most situations the differences in policy and law between the forum and the other concerned jurisdictions are likely to be greater in international than in interstate cases." *Id.* at 1602 (footnote omitted). Yianno-

choice of law by the Constitution.¹²⁷ All these differences combine to sharpen the sensitivity of state laws and courts to local interests at the expense of federal interests.

3. Differences between Interstate and International Constitutional Restrictions

The Constitution places different limits on state conflicts laws when they are applied in interstate and international cases.¹²⁸ Interstate conflicts are governed by the due process clause of the fourteenth amendment¹²⁹ and by three provisions which serve to protect principles of federalism:¹³⁰ the full faith and credit clause,¹³¹ the privileges and immunities clauses¹³² and the equal

poulos, *Wills of Movables in American International Conflicts Law: A Critique of the Domiciliary "Rule,"* 46 CALIF. L. REV. 185, 186-88 (1958).

127. The main difference in the constitutional limits placed on choice of law rules in interstate and international cases is the lack of full faith and credit strictures on international conflicts decisions. See Cheatham, *supra* note 121, at 371. See generally *infra* notes 128-45 and accompanying text.

128. Ehrenzweig has stated that only one case decided by the Supreme Court specifically defines constitutional restraints on international choice of law. The case is *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). See A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* 34-35 (1974).

129. U.S. CONST. amend. XIV, § 1. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

130. The demands of federalism are irrelevant to a state's choice of law in an international case. The absence of federal considerations is the chief distinction between the constitutional bases of interstate and international conflict of laws. That states need not be concerned about the effect of international conflicts decisions on sister states also suggests that *Klaxon* does not apply to international conflicts. The Court in *Klaxon* intended the decision to enhance the states' power to maintain their individuality within the federal system.

Any other ruling [than that federal courts' conflicts rules conform to those of the local state courts] would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision [*Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)] is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws.

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

131. U.S. CONST. art. IV, § 1. "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

132. U.S. CONST. art. IV, § 2. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

protection clause.¹³³ Only the due process clause is applicable to international conflicts;¹³⁴ the three "federal" clauses are not relevant. States are not required to give full faith and credit to the "public acts, records, and judicial proceedings" of foreign countries;¹³⁵ privileges and immunities protection is available only to United States citizens;¹³⁶ and equal protection extends to aliens only if they are within the jurisdiction of the state.¹³⁷

The Supreme Court's rulings on constitutional validity of state choice of law rules under the due process clause have evolved in parallel with conflicts theory.¹³⁸ In its early due process decisions

133. U.S. CONST. amend. XIV, § 1 (text reproduced *supra* note 129).

134. E. SCOLES & R. WEINTRAUB, *CONFLICT OF LAWS* (1972). "Insofar as the full faith and credit clause acts as a limitation on a state's preference for its own law over the law of a sister state, . . . this limitation is not present when the foreign law is that of another country. . . . The fact that the non-forum law is that of a foreign country, does not, however, mean that none of the United States constitutional limitations on choice of law are operative to guarantee minimum standards of fairness and justice in choice of law. The basic protection of due process, for example, is still available." *Id.* at 904.

135. See R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* (1980).

The full faith and credit clause articulates one respect in which national uniformity is required: one state is not free to ignore the public acts, records, or judicial proceedings of another, nor to subject them to the gantlet of local "public policy," as it may the acts, records, and judicial proceedings of a sovereign with which it is not combined in a federation.

Id. at 528. Recognition of foreign judgments is governed by common law. United States courts are free to deny effect to foreign judgments for any reason they deem appropriate. It has been suggested, however, that United States courts should give effect to any judgment rendered by a court meeting the minimal jurisdictional requirements of due process. See *Cherun v. Frishman*, 236 F. Supp. 292, 298-99 (D.D.C. 1964). See also *Her Majesty the Queen v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979). "[T]here is no provision similar to the full faith and credit clause in the Constitution which would require that the courts of this country extend full faith and credit to the judgments of a foreign country." *Id.* at 1164-65 n.8.

136. See generally *Currie & Schreter, Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 *YALE L. J.* 1323 (1960).

137. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The Court said that the guarantees of equal protection "are universal in their application, to all persons *within the territorial jurisdiction* . . ." *Id.* at 369 (emphasis added). See generally *Currie & Schreter, Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 *U. CHI. L. REV.* 1 (1960).

138. The Supreme Court's constitutional holdings in the area of conflict of laws are confined to interpretations of the due process and full faith and credit clauses. The privileges and immunities and equal protection provisions are rarely invoked to define constitutional limitations on interstate conflicts law. They add very little to the full faith and credit clause, which has proved adequate to serve the needs of the federal system for uniformity in the areas in which it is required. For example, in a series of cases involving national fraternal organizations, the Supreme Court held that in disputes between an organization and its members the forum state must give full faith and credit to the law of the state where the organization is

in choice of law, the Court usually held that the proper law in a conflict was that of the situs.¹³⁹ Application of forum law was considered to be an unconstitutional infringement of due process if the situs were elsewhere, even when the situs state's relationship to the case was merely fortuitous. Later the Court began to consider the contacts of the competing states.¹⁴⁰ In *Richards v. United States*,¹⁴¹ the Court expressly sanctioned an interest-oriented approach:

Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity.¹⁴²

The minimum contacts sufficient to support the forum's choice of its own law are defined on a case by case basis. At the very least, contacts must be more substantial than those rejected by the Court

incorporated. The necessity of uniform treatment of all members was held to supersede the individual laws of the states where those members resided. *See, e.g.*, *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586 (1947). "If full faith and credit are not given to these provisions, the mutual rights and obligations of the members of such societies are left subject to the control of each state. They become unpredictable and almost inevitably unequal." *Id.* at 592. For the Supreme Court's most recent ruling on the limits imposed by the full faith and credit clause, see *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981). *See also infra* note 145.

139. *See, e.g.*, *Mutual Life Ins. Co. v. Liebong*, 259 U.S. 209, 214 (1922); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357, 376-77 (1918).

140. *See, e.g.*, *Hoopston Canning Co. v. Cullen*, 318 U.S. 313, 316-19 (1943). "In determining the power of a state to apply its own regulatory laws to insurance business activities, the question in earlier cases became involved by conceptualistic discussion of theories of the place of contracting or of performance. More recently it has been recognized that a state may have substantial interests in the business of insurance of its people or property regardless of these isolated factors." *Id.* at 316 (footnote omitted). *See also* *Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66, 71-73 (1954). "[T]his Court has in a series of cases held that more states than one may seize hold of local activities which are part of multistate transactions . . ." *Id.* at 72.

141. 369 U.S. 1 (1962). In *Richards* the Court interpreted the language of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1976), "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," *id.* § 2672, to mean the *whole law* of that place, including its conflict of laws rules. The Court wished to permit the federal courts to incorporate the flexible, rational choice of law methods that state courts were then introducing. 369 U.S. at 12-13.

142. *Id.* at 15 (footnote omitted).

in *Home Insurance Co. v. Dick*.¹⁴³ *Dick* established that the due process clause does not permit a court to choose the law of a state having only a single nonsignificant contact with the transaction.¹⁴⁴

The Supreme Court's current view of due process¹⁴⁵ sets very generous limits on the types of contacts which satisfy the Constitution for purposes of both interstate and international conflict of laws. Within these due process limits there is ample room for a national law prescribing guidelines for conflicts in international cases.

B. Constitutional Authority

1. Analysis of *Sabbatino*

The federal courts' jurisdiction to fashion federal common law in the specific area of international conflicts rests on the supremacy clause and the holding in *Sabbatino*. The supremacy clause places control over foreign relations exclusively in the hands of the federal government.¹⁴⁶ *Sabbatino* defined the role of the judicial branch in

143. 281 U.S. 397 (1930). In *Dick* a Texas court was forbidden to apply forum law to an insurance policy issued in Mexico by a Mexican insurance company to a Mexican citizen who later assigned it to a Texan. The assignee was a Mexican domiciliary, however, who was physically residing in Mexico and maintained only nominal residence in Texas. He sued a New York reinsurer in Texas. Neither the Mexican insurer nor the New York reinsurer had any contact with Texas. The Court held that Texas' contacts with the case were insufficient to permit the application of Texas law to invalidate the insurance contract. *Id.* at 408.

144. See also *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936), in which the Court reached a similar conclusion in an interstate case, holding that a post-accident change of residence to the forum was not by itself sufficient contact to justify application of forum law.

145. The Supreme Court's current view of due process restrictions on state choice of law rules is given in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). In *Hague* the holder of an automobile insurance policy, a Wisconsin resident, was killed in an accident covered by the policy. His widow brought suit in Minnesota, where she had moved after the accident. Minnesota law permitted aggregation of the policy's coverage of three different cars ("stacking"), while Wisconsin law did not. Although the deceased had lived in Wisconsin, received the insurance policy there, and the accident occurred there, he had commuted to work in Minnesota. The Court held that his employment in Minnesota, the widow's residence there, and the fact that the insurance company did business in Minnesota and could expect to be sued under Minnesota law, constituted sufficient contacts to satisfy due process requirements. The Court also held that the choice of Minnesota law did not violate the full faith and credit clause. "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 312-13.

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

the conduct of foreign affairs. By analogizing the act of state doctrine to boundary disputes and apportionment of interstate waters,¹⁴⁷ areas where federal common law is recognized in the absence of federal statutes or treaties, the Court established that the judiciary may exercise its common law legislative function to protect federal foreign policy interests. Foreign affairs thus joins the other "enclaves of federal judge-made law."¹⁴⁸

The Supreme Court in *Sabbatino* was not making a foreign policy decision; rather it was taking cognizance of an established federal policy, the act of state doctrine, to resolve what was essentially a conflict of laws issue.¹⁴⁹ The Court was asked to decide whether to give effect to Cuba's expropriation of property or to New York's law, which would judge Cuba's taking by the standards of international law.¹⁵⁰ Federal policy, in the form of the act of state doctrine, favored recognition of the expropriation, but the *Erie* doctrine dictated the choice of New York law. The Court's decision recognized that in foreign affairs (at least in expropriation cases) federal interests must predominate. "It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins*."¹⁵¹ The *Sabbatino* Court referred to the act of state doctrine as a "principle of decision binding on federal and state courts alike. . . ."¹⁵² One could also call it a federal choice of law rule for a particular type of international conflict: the foreign expropriation. International conflicts are therefore situated within *Sabbatino's* foreign affairs "enclave."¹⁵³

147. See *supra* text accompanying note 93.

148. 376 U.S. at 426.

149. See Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826, 837, 844 (1959). More recently, the Fifth Circuit said in *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), that "[t]here is some authority that the doctrine still reflects conflicts of laws principles. This position assumes the validity of a foreign state's acts under the laws of that state. Applying the foreign laws to those acts, therefore, precludes an inquiry by American courts into their validity." *Id.* at 51 n.6.

150. 376 U.S. at 424.

151. *Id.* at 425.

152. *Id.* at 427.

153. Professor Henkin agrees that the act of state doctrine may be viewed as a principle governing choice of law. He suggests, however, that the courts may create federal common law in foreign affairs, if the need for uniformity is strong enough, even without the approval of Congress and the Executive.

[O]ne can suggest a basis for the Court's power in *Sabbatino*, not in the special character of foreign relations, or in that alone, but in the special character of Act of

Sabbatino also discussed the circumstances in which courts may act on foreign policy matters without infringing on the political powers of Congress and the President. The Court concluded that judicial action is appropriate if the policy in question is either very well entrenched or very minor and inconsequential,¹⁵⁴ but declined to give specific rules to cover less clear-cut cases. In view of the flexible position taken by the Court in *Sabbatino*, it appears that federal courts may create federal common law except in situations which are extremely sensitive politically.¹⁵⁵

2. Restrictions on Federal Common Law: *Challoner* and the "Interstitial Law" Cases

The Supreme Court recently rendered several decisions which are relevant to a discussion of federal common law in the area of

State. Act of State, one might say, is a doctrine particularly for the guidance of courts, and is related to principles of conflicts which are usually developed by the courts themselves. It may perhaps even follow that in this area "intrinsically federal," where the state interest was relatively secondary, where law was essential to maintain uniformity and to prevent embarrassing idiosyncrasy by the states, the courts did not have to wait on the political branches and could make law that should also bind the states and the state courts.

Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 819 (1964) (footnote omitted). This approach seems to put the courts in the position of determining foreign policy independently of the political branches of the federal government, and thus of violating the separation of powers required by the Constitution.

154. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, . . . for the political interest of this country may, as a result, be measurably altered.

Id.

155. The Court regarded foreign expropriation as just such a situation. "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens." 376 U.S. at 428. The act of state doctrine therefore requires the Court to defer to the Executive in cases of expropriation. Many international conflicts cases involve policy issues less crucial to the national interest than those at stake in *Sabbatino*. Most can be resolved under local decisional law without the imposition of federal policies. But in deciding what local law to apply, i.e., the

international conflict of laws. In *Day & Zimmermann, Inc. v. Challoner*,¹⁵⁶ the Court reaffirmed *Klaxon*.¹⁵⁷ Although its decision precludes development of a *general* federal common law of conflicts, the Supreme Court did not rule out the possibility of federal common law specifically directed toward *international* conflicts. The Court in *Challoner* did not address the unique features of international conflicts and the case was not itself an international diversity case.¹⁵⁸

In *City of Milwaukee v. Illinois*,¹⁵⁹ *Northwest Airlines v. Transport Workers Union*¹⁶⁰ and *Texas Industries, Inc., v. Radcliff Materials, Inc.*,¹⁶¹ all decided in the 1981 term, the Supreme Court restricted the scope of *interstitial* common law in two contexts: contribution rights of defendants under comprehensive federal statutes¹⁶² and interstate pollution abatement.¹⁶³ The issue in all three cases was whether Congress intended for the courts to devise com-

law of the forum or that of another nation in the case, federal policy interests must not be ignored without first being assessed. Determining the degree of federal interest is the province of federal, not state courts.

156. 423 U.S. 3 (1975).

157. *Id.* at 4 (reaffirming *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)).

158. See *Challoner v. Day & Zimmermann, Inc.*, 512 F.2d 77, 78-79 (5th Cir. 1975).

The litigants were in federal court on the basis of interstate diversity only; all were United States citizens. The case did not include foreign nations or their citizens as litigants, nor did the Court consider any questions of national interest or policy. It was an "international" case only in the sense that the injury took place abroad and the application of foreign law was an issue.

The Ninth Circuit suggested in *Her Majesty the Queen v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979), that foreign policy considerations may dictate an exception to *Klaxon* in international litigation even when the issues are less obviously federal in nature than the act of state doctrine. The case was a diversity action in Oregon district court in which the Canadian Province of British Columbia sued to recover on a Canadian tax judgment. The court of appeals stated: "Normally, . . . [*Klaxon*] would automatically limit our analysis to the law of Oregon since it is the forum state in the present case. However, the question presented here carries foreign relations overtones which may create an inference that this should not be decided merely by reference to Oregon law." *Id.* at 1163 (footnote omitted). The court held that its decision would be the same under federal or state law and so found it unnecessary to choose between them. *Id.*

159. 451 U.S. 304 (1981).

160. 451 U.S. 77 (1981).

161. 451 U.S. 630 (1981).

162. The statutes involved in *Northwest Airlines* were the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq. (1976). 451 U.S. at 79-80. *Texas Industries* was an action for contribution under the Sherman Anti-Trust Act, 15 U.S.C. § 1 (1976), and the Clayton Act, 15 U.S.C. §§ 12, 15(b)-15(g), 16, 26 (1976). 451 U.S. at 632-33.

163. The statutes at issue in *Milwaukee* were the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (1976). 451 U.S. at 307-08.

mon law remedies in the absence of express statutory permission.¹⁶⁴ The Court interpreted each statute's failure to grant jurisdiction as a deliberate omission.¹⁶⁵ The cases imply that absent strong evidence of congressional intent, federal statutes will no longer be deemed to contain interstices to be filled by court-made rules.

The aforementioned "interstitial law" cases are very specific, restricting only the power to imply rules of law under the aegis of a federal statute. They do not limit the courts' lawmaking function in areas of strong federal interest where Congress has not acted or where there is a statutory grant of jurisdiction. All three cases, in fact, reaffirm the necessity of creating federal common law in those areas.¹⁶⁶ In *Texas Industries*, for example, Chief Justice Burger discussed permissible exceptions to the new rule that courts may not fashion federal common law without congressional approval:

164. See *Texas Industries*, 451 U.S. at 639; *Milwaukee*, 451 U.S. at 312-19, 327-29; *Northwest Airlines*, 451 U.S. at 97. Before reaching the issue of whether the statutes in *Texas Industries* and *Northwest Airlines* permitted the courts to fashion interstitial common law, the Court considered and rejected the possibility that the statutes themselves implied a private right of action for contribution. "The ultimate question in cases such as this is whether Congress intended to create the private remedy—for example, a right to contribution—that the plaintiff seeks to invoke." *Northwest Airlines*, 451 U.S. at 91. In *Northwest Airlines*, the airline had been held liable to female employees for back pay because collectively bargained wage differentials were found to violate the Equal Pay Act and Title VII (statutes cited *supra* note 162). The airline sought contribution from the union. The Court construed the statutes to exclude an implied right of action on the basis of their language (expressly directed against employers), 451 U.S. at 91-93; their structure (containing express provisions for private enforcement in other situations), *id.* at 93-94; and their legislative histories (lacking in evidence of congressional intent to create a private right of action), *id.* at 94-95.

In *Texas Industries*, the defendant was accused of engaging in an antitrust conspiracy. He attempted to plead his alleged coconspirators in order to seek contribution. The Court held that Congress, in providing treble damages for antitrust offenses, demonstrated its intent not to allow antitrust violators to distribute their penalties. Therefore, the Court said, the statute did not imply a private right of action. 451 U.S. at 639-40.

Prior to the recent *Milwaukee* case, the Court had applied federal common law to resolve an interstate dispute arising from a claim by the state of Illinois against Milwaukee for discharging sewage into Lake Michigan. *Illinois v. City of Milwaukee*, 406 U.S. 91, 105-07 (1972). When Congress enacted the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (1976), it became illegal to discharge pollutants into the nation's waters without a permit from the Environmental Protection Agency. The issue in the recent case was whether Illinois' common law right of action for abatement of the nuisance survived the enactment of the new legislation. 451 U.S. at 307-08. The Court held that it did not. *Id.* at 332.

165. In all three cases the Court concluded that the statutes were comprehensive and thus allowed no room for common law embellishments. "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive

[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or *our relations with foreign nations*, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.¹⁶⁷

Justice Burger singled out *Sabbatino*¹⁶⁸ as an example of a case in which "a federal rule of decision is 'necessary to protect uniquely federal interests,'" ¹⁶⁹ because it affects "our relations with foreign nations."¹⁷⁰ It appears that "*Sabbatino* remains unblemished."¹⁷¹

C. Federal Common Law of International Conflicts: A Model

The major advantage to be gained from a federal common law of international conflicts is the flexibility it affords courts in introducing policy considerations to the process of resolving conflicts of law. In order to insure that courts will have the flexibility to reach the most practical solutions, the broadest, most inclusive forms of interest analysis must be available. The functional approach of Von

legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines*, 451 U.S. at 97. This interpretation was adopted in *Texas Industries*, 451 U.S. at 645. In *Milwaukee*, the Court said that "[t]he establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when *Illinois v. Milwaukee* was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." *Milwaukee*, 451 U.S. at 319.

166. "When Congress has not spoken to a particular issue, however, and when there exists a 'significant conflict between some federal policy or interest and the use of state law' . . . the Court has found it necessary . . . to develop federal common law." *Milwaukee*, 451 U.S. at 313 (citation omitted). "The Court also has recognized a responsibility, in the absence of legislation, to fashion federal common law in cases raising issues of uniquely federal concern, such as the definition of rights or duties of the United States, or the resolution of interstate controversies." *Northwest Airlines*, 451 U.S. at 95 (footnote omitted). See also *Texas Industries*, 451 U.S. at 640-41 (footnote omitted).

167. *Texas Industries*, 451 U.S. at 641 (footnotes omitted) (emphasis added).

168. 376 U.S. 398 (1964).

169. *Texas Industries*, 451 U.S. at 640 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)).

170. *Texas Industries*, 451 U.S. at 641 (footnote omitted).

171. *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 79 (2d Cir.), cert. denied, 434 U.S. 984 (1977).

Mehren and Trautman¹⁷² permits consideration of policy interests at the international level and would provide an appropriate framework for analyzing the multistate implications and effects of international conflicts. It should not be necessary, however, to resort to multistate considerations in order to decide every conflict. Many apparent conflicts, upon closer examination, would be identified as false conflicts and easily disposed of by means of local law policy analysis. To promote efficient decision-making in international conflicts, the following hierarchical analysis might be adopted:

Step 1. Treaties. Provisions of relevant United States treaties are given effect in preference to state law or the law of another signatory country.¹⁷³

Step 2. Contacts Analysis. If contacts with one state are insufficient to satisfy Supreme Court standards regarding choice of law due process,¹⁷⁴ then no conflict is present. Choice of law is only an issue when more than one state has reasonable contacts with the parties or the controversy, i.e., contacts within constitutional due process limits.¹⁷⁵

Step 3. Interest Analysis of Local Law Policies. If no overriding federal treaty, statute or other rule of decision requires federal substantive law to be applied, then the forum's interest in applying local law may be analyzed in competition with the foreign state's preference for its own law.¹⁷⁶ If a false conflict is identified the choice of law may be made at this step without reference to nonlocal interests.

Step 4. Functional Analysis. If examination of local law policies reveals a true conflict or a no-interest situation (the unprovided-for case), the choice may be made by recourse to nonlocal considerations. Many of these considerations would favor the use of forum law, e.g., efficiency of adjudication and enforceability of the judgment. Others would shift the balance toward foreign law, e.g., international comity, reciprocity and facilitation of multistate activity. The court might consider such information as the similarity of the foreign law to that of the forum, the presence of common

172. See *supra* notes 55 & 59 and accompanying text.

173. U.S. CONST. art. VI, § 2 (text reproduced *supra* note 2).

174. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981); *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930).

175. See *supra* notes 138-45 and accompanying text.

176. Step 3 of the analysis calls for a classic Currie-style governmental interest analysis,

policy interests which might permit accommodation, and the ease of explicating foreign law within the judicial setting.¹⁷⁷ Federal political interests with respect to the government involved would constitute only one factor in a matrix of multistate considerations.¹⁷⁸

D. Procedural Effects

Using federal common law to resolve international conflicts of law would have substantial effects on federal and state court procedure in two areas.¹⁷⁹ First, under the supremacy clause,¹⁸⁰ federal

see supra notes 49-53 and accompanying text, but with the sole objective of identifying false conflicts. Any other result requires continuing to the next step.

177. Functional analysis resembles the balancing test used in international antitrust litigation to resolve conflicts between United States discovery rules and foreign nondisclosure statutes. Courts using the balancing test attempt to assess the competing interests of the countries involved, taking into account principles of international comity. *See, e.g., In re Westinghouse Electric Corp. Uranium Contracts*, 563 F.2d 992 (10th Cir. 1977). The test is not universally accepted, however, and has provoked criticisms which may also apply to functional analysis in international choice of law. Objections to the balancing test center on the practical difficulties of weighing the competing economic and social policies and of using them to resolve a legal deadlock. *See Note, The Protection of Trading Interests Act of 1980—Britain's Latest Weapon in the Fight Against United States Antitrust Laws*, 4 FORDHAM INT'L L. J. 341, 361-65 (1981).

178. A federal court deciding an issue governed by federal common law may incorporate state law into the body of federal common law which it applies to the case. *See Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (citation omitted). "In our choice of the applicable federal rule we have occasionally selected state law." *Id.* In *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956), the Court said "[t]he scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law." *See also* Mishkin, *supra* note 71, at 804, to the effect that a federal court, having incorporated state law into the federal common law, is not constrained by *Erie* to apply that law as the state would.

State law is frequently applied as part of federal common law when the state has developed a comprehensive body of law in an area where federal law is incomplete. *See, e.g., De Sylva v. Ballentine*, 351 U.S. 570, 580-81 (1956), where state law was applied to determine whether an illegitimate child of a copyright owner met the requirements of the term "children" within the meaning of the federal copyright statute.

At any point in the four-step analysis, therefore, the court would be free to make use of established state conflicts procedures. States which now employ interest analysis may have adopted rules for particular situations which, at the federal court's discretion, could be applied under the federal common law in *Step 3*.

179. The use of federal common law to decide choice of law issues in diversity cases would *not* affect the *Erie* requirement that state law be used to adjudicate the state claim which is the subject of litigation. In *Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29, 34 (1956) the Supreme Court ruled that it is proper for a federal court in a diversity case to decide federal issues by federal common law, even when a case is governed by state law in keeping with the requirements of the *Erie* doctrine. *Parnell* was a diversity suit between private parties for conversion of federally guaranteed bonds. The Court held that the issues

common law would preempt the states' statutory and constitutional law of conflicts as well as their common law.¹⁸¹ Statutes may include choice of law provisions, usually simple situs formulas.¹⁸² Under the proposed federal common law, these statutory rules would be subject to federal review in cases involving foreign countries. If no substantial federal interest is present, state conflicts law may be adopted without change.¹⁸³ Subject to congressional preemption,¹⁸⁴ the final authority on conflicts rules developed by the federal courts would be the Supreme Court, rather than the highest state courts, as is currently true under *Erie* and *Klaxon*.

The second effect of federal common law in the area of international conflicts would be to make the federal law applicable in both state and federal courts. State courts have concurrent jurisdiction over federal questions and must apply federal common law if it

relating to the claim of conversion, i.e., the defendant's good faith and the burden of proof, were governed by state law but that "[f]ederal law of course governs the interpretation of the nature of the rights and obligations created by the Government bonds themselves. A decision with respect to the 'overdue-ness' of the bonds is therefore a matter of federal law." *Id.* Thus, in this diversity case, some issues were controlled by state law and others were of sufficient federal interest to be controlled by federal law. *But cf.* *United States v. Yazell*, 382 U.S. 341, 353 (1966), where state law was held to govern the capacity of the defendant in an action by the United States to recover on a note executed under the Small Business Administration; *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63 (1966), where state law was held to govern private claims to federal oil leases under the Mineral Leasing Act of 1920.

180. U.S. CONST. art. VI, § 2 (text reproduced *supra* note 2).

181. *See* Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581, 582 (1953). "[I]nssofar as there is a valid federal law on a subject, there cannot be an opposing state law." *Id.*

182. *See, e.g.*, ARK. STAT. ANN. § 81-1323(b) (1976 replacement), a typical workmen's compensation statute:

The hearing shall be held in the county where the accident occurred, if the same occurred in this State If the accident occurred without the State of Arkansas, and is one for which compensation is payable under this Act . . . , [other venues are prescribed].

Section 1-105(1) of the Uniform Commercial Code is a much more flexible choice of law statute.

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

U.C.C. § 1-105(1)(1978). The Code also provides for substituting the flexible principles of § 1-105 for state law which is inappropriate in a particular transaction. *See* U.C.C. § 1-105 comment 3 (1978).

183. *See supra* note 178 and accompanying text.

184. *See supra* notes 23 & 165 and accompanying text.

would be applied in federal court.¹⁸⁵ The “new federal common law,” after *Erie*, is a *specific* common law¹⁸⁶ which the federal courts may fashion only in areas of exclusive federal authority, but which then becomes law in all courts because it originates in a federal question.¹⁸⁷ The result is uniformity of decision between state and federal courts in the same state as well as among the courts of different states.¹⁸⁸

E. The Legislative Alternative

The Constitution gives Congress the power to implement the full faith and credit clause of article IV by means of appropriate legislation.¹⁸⁹ The portion of the clause requiring faith and credit to sister state judgments has been implemented,¹⁹⁰ but Congress has not yet enacted legislation addressing recognition of “public Acts” (statutes). Federal choice of law legislation could be enacted under the article IV implementation provisions, as suggested by Currie¹⁹¹

185. See C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 45, at 196, § 60, at 282 (3d ed. 1976). “If an issue is controlled by federal common law, this is binding on both state and federal courts.” *Id.* at 250 (footnote omitted). See also *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 281-82 (1969); *Free v. Bland*, 369 U.S. 663, 666 (1962); *Francis v. Southern Pac. Co.*, 333 U.S. 445, 450 (1948).

186. See Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 407 (1964). “By focusing judicial attention on the nature of the right being enforced, *Erie* caused the principle of a specialized federal common law, binding in all courts because of its source, to develop within a quarter century into a powerful unifying force.” *Id.* (footnote omitted).

187. See C. WRIGHT, *supra* note 185, § 60, at 282. “A case ‘arising under’ federal common law is a federal question case, and is within the original jurisdiction of the federal courts as such.” *Id.* (footnote omitted).

188. The new federal common law, therefore, would be as effective as the *Erie* doctrine in discouraging intrastate forum shopping and unfair treatment of resident defendants, and would also eliminate the possibility of interstate forum shopping. See *Henkin*, *supra* note 153, at 814.

[O]n matters in the federal domain the federal will is supreme, whether it be expressed by Congress or by the courts, and the states must follow. As to local issues there will be diversity inherent in federalism; on national issues there will be uniformity implicit in federal supremacy. In regard to all issues the substantive law will be the same in the federal court and in the state court beside it.

Id.

189. U.S. CONST. art. IV, § 1 (text reproduced *supra* note 131).

190. 28 U.S.C. § 1738 (1976).

191. See Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, 1964 SUP. CT. REV. 89, 89-99; Currie, *The Constitution and the “Transitory” Cause of Action* (pts. 1 & 2), 73 HARV. L. REV. 36, 268, at 82 n.162 (1959); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 19 (1958).

and others.¹⁹² Federal legislation could take two forms. It could be comprehensive or it could delegate to the courts the power to develop federal common law. The second option is preferable in light of the continuing evolution of conflicts theory and the superiority of flexible rules in comparison to a rigid codification of conflicts principles.¹⁹³ The disadvantage of federal full faith and credit legislation is that article IV alone is not necessarily sufficient authority for international choice of law rules. The Constitution requires states to extend full faith and credit only to public acts of sister states, not to the laws of other nations.¹⁹⁴

IV. ANALYSIS OF KUNSTSAMMLUNGEN ZU WEIMAR v. ELICOFON¹⁹⁵

In the *Elicofon* case, the government of East Germany (GDR) filed suit to recover possession of two priceless paintings allegedly stolen and removed illegally from Germany during the second World War.¹⁹⁶ The paintings were purchased in 1946 by a United States citizen who had no knowledge of their origin and true value and who displayed them openly in his Brooklyn home for twenty

192. See, e.g., Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 23 (1963). "None would dispute that the Constitution gives the federal government the power necessary to discharge the allocation function. The full-faith-and-credit clause of article IV both sets forth the cryptic substantive standard and expressly confers legislative power to implement it." *Id.* (footnote omitted).

193. The Restatement exemplifies many of the pitfalls of premature codification. See *supra* note 46 for criticisms of the Restatement.

194. See *supra* note 135 and accompanying text.

195. See *supra* note 25.

196. The paintings in question are two portraits by the famous 15th-century German artist Albrecht Durer. They disappeared from their place of safekeeping in the territory of Weimar, now in the German Democratic Republic (GDR) in 1945 during the Allied occupation of Germany. They were discovered in 1966 on display in the Brooklyn home of defendant Elicofon. Elicofon purchased them in 1946 from an American serviceman returning from Germany; he paid \$450 for both portraits.

The events surrounding the disappearance of the paintings are not completely known. During much of the Third Reich they were on exhibit in the Staatliche Kunstsammlungen zu Weimar, a state museum. In 1943 the Director of the museum, a Dr. Scheidig, became fearful that Weimar would be bombarded by the Allies and ordered that the Durers, along with other valuable items from the collection, be removed from the museum for safekeeping. They were taken to a storeroom in a nearby castle, the Schloss Schwartzburg, located in the District of Rudolstadt in the Land of Thuringia. The paintings remained at the castle until their disappearance.

Following Hitler's surrender on May 8, 1945, the Allies assumed supreme control of Germany, which was divided into four zones for the purposes of the occupation. The Land of Thuringia was included in the Soviet Zone of occupation, but American forces had been

years.¹⁹⁷ The case presents a conflict between New York's common law of personal property and the German law of *Ersitzung* (usucap-tion) regarding the rights of a bona fide purchaser for value¹⁹⁸ who takes from a thief.

The issues presented by the case provide ample justification for avoiding a simplistic choice of law solution.¹⁹⁹ As in *Sabbatino*, the plaintiff is an agency of a communist government which has had strained relations with the United States since World War II. The

stationed at Schwartzburg castle since before the surrender. On July 1, 1945 the United States transferred control of Thuringia to the Soviet Armed Forces. Dr. Scheidig dates the disappearance of the paintings from the time of the American withdrawal from the castle.

In June of 1945, while the American troops occupied the castle, the Director made two inspections of the collections stored there. On his first visit he found all in order, but approximately two weeks later he returned to find the storeroom in disarray and the Duerers missing. The identity of the person who removed the paintings remains unknown, and plaintiff and defendant have advanced different theories to account for their disappearance. The Kunstsammlungen relied upon the 1971 deposition of Dr. Scheidig, whose suspicions were aimed at the young American soldier who accompanied him to the storeroom on his first inspection and expressed interest in the collection (Dr. Scheidig identified him only as "a Princeton student.") Elicofon pointed out that a certain architect had been assigned by the Reich to refurbish the castle before the surrender, and that this architect was in charge of the castle when the Americans arrived. He presumably had access to the storeroom and could have absconded with the paintings. Basing its decision largely upon the Director's testimony, the district court held that no triable issues of fact had been presented by the defendant and awarded summary judgment to the Kunstsammlungen. See *Elicofon, supra* note 25, at 1127-30. See also Brief for Defendant, at 3-7; Brief for Plaintiff, at 3-9, Kunstsammlungen zu Weimar v. Elicofon, *supra* note 25 (copies on file at Fordham International Law Journal office) [hereinafter cited as Brief for Defendant and Brief for Plaintiff].

197. Elicofon's innocence as to the origin, identity or true value of the paintings is undisputed. They hung in his home on open display for twenty years until an art dealer acquaintance identified them from a catalog of lost German art works. Elicofon promptly submitted them for examination to the Metropolitan Museum of Art, which confirmed their identity. See *Elicofon, supra* note 25, at 1126.

198. The definition of "good faith" in a commercial transaction is defined negatively by statute in German law. "The acquirer is not in good faith if he knows, or owing to gross negligence does not know, that the thing does not belong to the disposer." BÜRGERLICHES GESETZBUCH [BGB. DDR] § 932(2) (1975) (E. Ger.) (as translated in I. FORRESTER, S. GOREN & H. ILGEN, *THE GERMAN CIVIL CODE* 155-56 (1975). All citations of the *Bürgerliches Gesetzbuch* (BGB.DDR) refer to this translation).

New York has adopted the Uniform Commercial Code (U.C.C.), which defines "good faith" as "honesty in fact in the conduct or transaction concerned." U.C.C. § 1-201(19) (1978).

199. Several issues in the case require analysis of foreign and international law, Allied military law, United States and Allied treaties and declarations, and New York civil law. In addition to the conflict of laws issue, the main issues considered on appeal were:

1. Did plaintiff, a state museum of the German Democratic Republic, acquire title to the paintings through legitimate state succession from the Third Reich so as to have standing to bring suit?

suit involves a transaction which originated at a time when the two countries were at war. The litigation was closely intertwined with diplomatic and political developments between the United States and the GDR.²⁰⁰ Nevertheless the courts applied New York conflicts rules without considering whether the United States had a foreign policy interest in the case.²⁰¹

A. *The Rights of a Bona Fide Purchaser under New York and German Law*

Under New York law a bona fide purchaser (BFP) for value of personal property cannot acquire good title from a thief because the seller of such property can transfer only such title as he himself has or has power to transfer.²⁰² Formerly, at common law, the BFP

2. Were the paintings stolen or is there a genuine question of fact as to whether they were transferred with plaintiff's consent to a legitimate possessor who, under German law, could pass good title to a bona fide purchaser for value?

3. What is the effect of Allied Military Government Law #52, which prohibited the transfer of cultural property during the occupation of Germany after the war?

4. Was the statute of limitations on East Germany's action to recover the paintings tolled by the United States' nonrecognition of the government of that country until 1974? Did the Allied powers recognize a German government which had access to American courts during the period of nonrecognition?

See *Elicofon*, *supra* note 25, at 1125, 1139-42.

200. The story of the paintings appeared in *The New York Times* on May 30, 1966 and, soon thereafter, claims to rightful possession of the paintings and demands for their return were issued by the Federal Republic of Germany (West Germany), the Grand Duchess of Saxony-Weimar (successor to the former territorial sovereign in Weimar), and the Staatliche Kunstsammlungen zu Weimar (now the Kunstsammlungen zu Weimar). The Federal Republic of Germany began litigation in 1969 and the Grand Duchess was allowed to intervene as plaintiff. The Kunstsammlungen was denied permission to intervene because the United States did not recognize the East German government, of which the museum is an arm and instrumentality. *Federal Republic of Germany v. Elicofon*, 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974). On September 4, 1974 the United States extended formal recognition to the GDR and in February 1975 the district court vacated its former order and granted the Kunstsammlungen leave to intervene. The West German government (FRG) withdrew from the case in 1975 and in 1978 the Grand Duchess's complaint and cross-claim against the Kunstsammlungen were dismissed, leaving only the present plaintiff in the suit. See *Elicofon*, *supra* note 25, at 1123-26. See also Brief for Plaintiff, *supra* note 196, at 4-5; Brief for Defendant, *supra* note 196, at 3-4.

201. This is not to suggest that political considerations should govern the choice of law in a case not controlled by treaty or federal statute, but only that it should be possible within the conflicts framework to evaluate them along with other multistate policy factors in an international case.

202. *Stanton Motor Corp. v. Rosetti*, 11 A.D.2d 296, 298, 203 N.Y.S.2d 273, 276 (1960); *Georg Jensen, Inc. v. Schiff*, 81 N.Y.S.2d 565, 566 (N.Y. App. Term. 1948); *Damis v. Barcia*, 266 A.D. 698, 699, 40 N.Y.S.2d 107, 108 (1943); *Fowler v. Firth*, 253 A.D. 146, 149,

was protected when the seller acquired the goods by dishonest means falling short of outright larceny. For example, if the seller acquired the goods by fraud²⁰³ or if the owner entrusted the goods to the seller and conferred indicia of ownership,²⁰⁴ a BFP could acquire better title than his seller had and cut off the original owner's claim. The Uniform Commercial Code incorporates these common law principles and expands upon them, giving the BFP more protection than he enjoyed at common law.²⁰⁵

German law is in general agreement with New York law, but gives additional protection to the BFP. The German doctrine of good faith acquisition²⁰⁶ permits acquisition of title by a BFP who

2 N.Y.S.2d 360, 362 (1938). The Uniform Commercial Code restates the common law: "A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased." U.C.C. § 2-403(1) (1978).

203. See *Phelps v. McQuade*, 220 N.Y. 232, 234, 115 N.E. 441, 442 (1917). "Where the [owner] of personal property intends to sell his goods to the person with whom he deals, then title passes, even though he be deceived as to that person's identity or responsibility. Otherwise it does not." 220 N.Y. at 234, 115 N.E. at 442.

204. See *Zendman v. Harry Winston, Inc.*, 305 N.Y. 180, 191, 111 N.E.2d 871, 877 (1953). "It ill behoves the owner to complain if he is not permitted to rely upon his private and secret agreement [with the vendor], when he himself has failed to require strict adherence to its terms and has thus become responsible for the dealer's apparent authority to sell." 305 N.Y. at 191, 111 N.E.2d at 877.

205. U.C.C. § 2-403(1) (1978) reads in part:

(1) A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

- (a) the transferor was deceived as to the identity of the purchaser, or
- (b) the delivery was in exchange for a check which is later dishonored, or
- (c) it was agreed that the transaction was to be a "cash sale," or
- (d) the delivery was procured through fraud punishable as larcenous under

the criminal law.

Id. Section (2) reads as follows:

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

U.C.C. § 2-403(2) (1978). The Comments indicate that § 2-403 is intended to continue common law policies which were favorable to the buyer and to expand the buyer's rights by resolving in his favor a number of situations which were problematic and inconsistently treated at common law and under the Uniform Sales Act. For example, both sections specify that fraud punishable as larceny under the criminal law is to be construed as fraud capable of embezzling the transferor (i.e., the defrauder) with voidable title, rather than as theft. Furthermore, any entrusting of goods to a merchant dealing in like goods is construed as grounds for estoppel of the owner's right to claim his property from a BFP, without further evidence that indicia of ownership have been bestowed. See U.C.C. § 2-403 comments 1 & 2 (1978).

206. See *BGB.DDR*, *supra* note 198, § 932.

(1) By virtue of a transfer effected in accordance with § 929, the acquirer also becomes the owner when the thing does not belong to the seller, unless he is not in

buys property from one who holds it with the owner's consent, even if the seller disposes of the property in violation of a fiduciary duty to the owner.²⁰⁷ Furthermore, if the seller has stolen the property, the BFP may still perfect his title under the German law of *Ersitzung* (also known as prescription or usucaption) if he holds the property for ten years without notice of a defect in title.²⁰⁸ In *Elicofon* the court refused to consider the substantive issues raised by the defendant's *Ersitzung* argument, even though Elicofon held the paintings for twenty years without knowledge of their source or identity, because it felt that New York's choice of law rules dictated the application of New York property law.²⁰⁹

B. The District Court's Choice of Law Ruling

In *Elicofon*, the district court's decision to apply New York law rather than the German law of *Ersitzung* reflects the unsettled state of New York conflicts theory.²¹⁰ It also illustrates the problems which federal courts face in trying to ascertain and apply state law in this rapidly changing area of law. As if unwilling to speculate on which choice of law method the New York Court of Appeals would be likely to use in the same case, the district court covered all bases,

good faith at the time when, by virtue of these provisions, he would acquire ownership. In case § 929, Sent. 2 applies this, however, is applicable only if the purchaser had obtained possession from the disposer.

(2) The acquirer is not in good faith if he knows, or owing to gross negligence does not know, that the thing does not belong to the disposer.

Id. Section 929 provides that for transfer of ownership to occur, the owner must deliver the property to the acquirer, and both parties must agree that the ownership is transferred.

207. In considering whether a theft had in fact occurred, the district court rejected Elicofon's claim under the doctrine of good faith acquisition, finding insufficient facts to suggest that Elicofon's vendor had taken possession with the owner's consent. *Elicofon*, *supra* note 25, at 1137.

208. See BGB.DDR, *supra* note 198, § 937.

(1) A person, who has a movable thing in his proprietary possession for ten years acquires ownership (usucaption).

(2) Usucaption is excluded, if the acquirer is not in good faith in obtaining possession or if he subsequently learns that he is not entitled to ownership.

Id. See also Brief for Defendant, *supra* note 196, at 50.

209. *Elicofon*, *supra* note 25, at 1142-43.

210. The New York Court of Appeals was a leader in the movement away from mechanical choice of law rules in contracts, *Auten v. Auten*, 308 N.Y. 155, 124 N.E. 2d 99 (1954), and in torts, *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). It was among the first of the state courts to apply the "most significant relationship" test in preference to the *lex loci delicti*, and its decision in *Babcock* is one of the most frequently cited precedents in this area. *Babcock* was a classic false conflict, making it easy for the court to abandon *lex loci* in this case. However, in a series of similar guest statute cases

using three different methods to reach the same result. First, the court applied the traditional situs rule that "questions relating to the validity of a transfer of personal property are governed by the law of the state where the property is located at the time of the alleged transfer."²¹¹ The court then justified the use of situs law under a significant contacts rationale, relying on comment (a) to section 246 of the Restatement.²¹² The district court went on to cite certain tort decisions by the New York Court of Appeals, which now indicate a presumption in favor of situs law that can "be displaced only in extraordinary circumstances,"²¹³ and performed a perfunctory interest analysis to demonstrate that such circumstances are not present in *Elicofon*.

The two main conclusions of the court's interest analysis were that (1) the policy of *Ersitzung* is to protect BFPs in order to promote the security of transactions, but the GDR has no interest in the security of transactions which take place beyond its borders and (2) New York does have an interest in applying its law because its policy of protecting owners is not confined to resident owners, but extends to owners generally "as a means to preserve the integrity of transactions and prevent the state from becoming a marketplace for stolen goods."²¹⁴ The district court, in other words, found a false conflict and so applied the law of the interested state, New York. On appeal, the Second Circuit affirmed the district court's analysis and decision.

with different fact patterns which followed *Babcock*, the court of appeals found that the type of contacts-plus-interest approach used in *Babcock* did not provide easy or consistent solutions. See *supra* note 48 for discussion of guest statute cases. *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972) has been called the "rock on which interest analysis foundered in New York." Sedler, *Interstate Accidents and the Unprovided For Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125, 127 (1973). See also Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. No. 2 at 10, 11-12 (1977). Leflar views New York as being out of step with the majority of courts, which have developed a comfortable mix of modern theoretical approaches to be used in actual practice. "Only states like New York would be so bedeviled by opposing academic theories that, attempting analytical integrity, they would let results be much affected by shifting from one modern approach to another." *Id.* (footnote omitted). But see Rosenberg, *A Comment on Neumeier*, 31 S.C. L. REV. 443 (1980).

211. *Elicofon*, *supra* note 25, at 1142 (citation omitted).

212. *Elicofon*, *supra* note 25, at 1143. See RESTATEMENT § 246 comment (a) (1971). "The state where a chattel is situated has the dominant interest in determining the circumstances under which an interest in the chattel will be transferred by adverse possession or by prescription." *Id.* For text of § 246, see *supra* note 41.

213. *Elicofon*, *supra* note 25, at 1143 (quoting *Cousins v. Instrument Flyers, Inc.*, 44 N.Y.2d 698, 699, 405 N.Y.S.2d 441, 442, 376 N.E.2d 914, 915 (1978)).

214. *Elicofon*, *supra* note 25, at 1143-44.

C. Application of Proposed Federal Common Law

The district court's interest analysis in *Elicofon* was defective in three ways: (1) it misconstrued the policy arguments in the case, (2) it ignored the Court of Appeals' decision in *Neumeier v. Kuehner*,²¹⁵ and (3) it ignored potential foreign policy ramifications of the case. Analysis by the proposed four-part model for federal common law in international conflicts would correct these problems and reach a different result.

Step 1. The United States has very few bilateral agreements with the GDR, and as of February 19, 1981 these included no treaties affecting the recovery of lost or stolen art works.²¹⁶

Step 2. The district court suggested that Germany's contacts with the case were "irrelevant," being limited to the fact that the seller acquired possession there.²¹⁷ If this were so, application of

215. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). *Neumeier* was a difficult case because it was an example of the "unprovided-for case." See *supra* notes 53 & 54 and accompanying text. The driver-defendant was a resident of New York, the guest-passenger was a resident of Ontario, and the accident occurred in Ontario. Ontario had no interest in enforcing its guest statute to deny recovery to its own resident plaintiff, and New York had no interest in applying its law to allow recovery against a New York defendant by a nonresident injured in his home state when that state (Ontario) would deny recovery. The court of appeals applied Ontario law, reasoning that

although New York has a deep interest in protecting its own residents, injured in a foreign state, against unfair or anachronistic statutes of that state, it has no legitimate interest in ignoring the public policy of a foreign jurisdiction . . . and in protecting the plaintiff . . . domiciled and injured there from legislation obviously addressed, at the very least, to a resident . . . within its borders.

31 N.Y.2d at 125-26, 286 N.E.2d at 456, 335 N.Y.S.2d at 68.

The court of appeals did not expressly analyze *Neumeier* as an unprovided-for case, but it acknowledged that multi-state considerations affected its evaluation of New York's interests. The fact that the plaintiff was a nonresident who would not recover under the law of his home state led the court to a different conclusion than it would have reached if the plaintiff and defendant were both New York residents. *Id. Cf. Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 300 N.Y.S.2d 817 (1969), where a similar analysis was applied on behalf of New Jersey, showing that New Jersey had no interest in applying its law against its own resident.

216. The United States has entered into the following bilateral agreements with the German Democratic Republic (East Germany): Consular Convention, Sept. 4, 1979, United States-East Germany, ____ U.S.T. ____, T.I.A.S. No. 10061; Parcel Post Agreement, May 4, 1979, United States-East Germany, 30 U.S.T. 5751, T.I.A.S. No. 9522; Agreement Concerning Fisheries, Oct. 5, 1976, United States-East Germany, 28 U.S.T. 1793, T.I.A.S. No. 8527; Minute Establishing Diplomatic Relations, Sept. 4, 1974, United States-East Germany, 25 U.S.T. 2597, T.I.A.S. No. 7937; Protocol Relating to Telecommunications, July 24, 1974, United States-East Germany, 27 U.S.T. 3287, T.I.A.S. No. 8362; Treaty of Friendship, Commerce, and Consular Rights, Dec. 8, 1923, 44 Stat. 2132, T.S. No. 725.

217. See *Elicofon*, *supra* note 25, at 1143.

German law would violate due process under *Home Insurance Co. v. Dick*.²¹⁸ However, Germany's contacts with the paintings and the parties were much more extensive than the court indicated. The paintings were created in Germany and held there for several hundred years by German owners until they became German state property.²¹⁹ The Kunstsammlungen is not only German, but is an entity of the East German government itself. Its claim is based on German law and on events which occurred entirely within German territory. New York's contacts include the sale to Elicofon, which occurred within the state, and the continued presence of the paintings in his Brooklyn home.²²⁰ It seems that both New York and the GDR have sufficient contacts to satisfy due process requirements.

Step 3. In *Sabbatino*,²²¹ federal policy in the form of the act of state doctrine was held to supersede state law. In *Elicofon* there is no comparable overriding national interest in the outcome of the case and thus no justification to preempt state decisional law. The policies behind New York and German law must be considered in relation to the facts of the case in order to determine what government interests are at stake.

New York law, which protects the owner of property, and the German law of *Ersitzung* are at opposite extremes of a policy conflict which permeates the law of personal property.²²² The tension is between social values which place a high priority on private ownership (policies favoring owners) and those which place priority on commerce and negotiability (policies favoring BFPs in order to encourage buyers to enter into commercial transactions). New York's interest is not in "[preserving] the integrity of transactions," as the district court assumed,²²³ but in protecting ownership rights by erecting barriers to converters.²²⁴ A policy recognizing

218. 281 U.S. 397 (1930).

219. See *Elicofon*, *supra* note 25, at 1123-24.

220. See *supra* notes 196 & 197.

221. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

222. See A. CASNER & W. LEACH, *CASES AND TEXT ON PROPERTY* 161 (1969). "O [Owner] and B [Buyer] are demanding protection as individuals. But also they personify important social interests. O represents the demand of owners to be protected in their ownership. B represents the demand of the commercial community for the security of transactions, which in turn requires that an honest, careful purchaser be able to rely upon the appearance of title in buying goods. These demands are often in conflict . . ." *Id.*

223. 31 N.Y.2d at 125-26, 286 N.E.2d at 456, 335 N.Y.S.2d at 68. See also *Elicofon*, *supra* note 25, at 1144.

224. New York's common law policy of deterring thieves was also supported by the former rule that "no title could pass except by the delivery of the specific thing." R. BROWN,

the owner's title over that of the BFP has the effect of making purchasers more cautious in their dealings with sellers and less likely to accept stolen goods. Contrary to the district court's view, New York's primary concern is in meeting the demand of its resident owners to be secure in their ownership,²²⁵ regardless of where their stolen property might eventually come to rest. It is the owner's domicile in the state, not the BFP's, which triggers New York's policy interest. This policy interest is analogous to the interest recognized by the New York Court of Appeals in *Neumeier v. Kuehner*,²²⁶ where the court said that New York has no interest in enforcing its law against a resident defendant when the law of the plaintiff's state would deny recovery. Thus, in *Elicofon*, New York has no strong government interest in applying New York law, and a false conflict will be identified if Germany is found to have a positive interest in applying German law.

Germany's law of *Ersitzung* satisfies the governmental policy of encouraging trade and commerce because favoring the rights of BFPs relative to those of owners provides a secure climate for commercial exchanges of property.²²⁷ Allowing the BFP to acquire title by possession, even when the goods have been stolen from the owner, quiets title and permits the productive use and subsequent resale of goods which might otherwise be immobilized in wasteful litigation.²²⁸ The location of the BFP is immaterial, since com-

LAW OF PERSONAL PROPERTY 190 (1975). See also *Northern Ins. Co. v. Miller*, 256 Iowa 764, 129 N.W.2d 28 (1964); *Slaton v. Lamb*, 260 Ala. 494, 71 So.2d 289 (1954).

225. See *supra* note 222 and accompanying text.

226. See *supra* note 215.

227. See R. BROWN, *supra* note 224, at 193. "The recognition of the original owner's claim as against that of the innocent purchaser is . . . injurious to the interests which society has in fostering trade and commerce. Business will suffer if purchasers cannot be assured of the title to the goods which they buy." *Id.*

228. The doctrine of acquiring title to personal property by means of open and notorious possession for a statutory period of years has as its primary purpose the quieting of title or repose of the property. This policy favoring the purchaser of chattels is analogous to the policy in favor of the adverse possessor of real property, which has as its purpose the beneficial use of the land. See R. BROWN, *supra* note 224, at 34.

Where an individual has for the years prescribed by the statute openly exercised the rights of an owner, thus giving rise to interests in the property affected on the part of vendees, licensees, and creditors, a strong public policy forbids adverse claimants from disturbing the existing situation by the presentation of ancient rights, concerning which proof may be difficult because of faulty recollection and the absence of essential witnesses. Moreover, if the original owner cannot retake the property by the regular processes of law, there is an obvious danger of fomenting litigation and disturbance in permitting him to recapture it by his own hand.

Id. (footnote omitted).

merce is served even by sales of German goods to foreigners. The question here is whether German commerce is advanced by protecting the rights of a foreign BFP who purchases German goods from a non-German seller. If it can be said that German policy goals extend to such transactions, a false conflict exists, i.e., a situation in which the forum has no government interest while the foreign state does. In such a false conflict, German law, not New York law, would be applied.

It may be argued, however, that Germany has no interest at all in promoting transactions involving noncommercial, state-owned cultural property or that it has no interest in the use or resale of German goods which are the subject of a foreign transaction and which remain in foreign territory. If this analysis is valid, the result is an "unprovided-for" case, i.e., a situation where "[n]either state cares what happens."²²⁹

Step 4. To resolve the unprovided-for case, the court must look beyond the governmental interests directly underlying the competing local laws. In terms of efficient adjudication and enforceability by the New York court, New York law is preferable. This factor should not be decisive, however, since German law is easily accessible and not so exotic that an American court would fail to appreciate the historical and philosophical basis of its policies. Reciprocity and comity might be important considerations if the United States entered into extensive litigation with East Germany and thus had a strong interest in promoting the mutual acceptance of judgments and fair treatment of foreign litigants. A federal political purpose might be served by recognizing German law as a gesture of good will to facilitate diplomatic relations under the Consular Convention of 1979, which became effective in 1981.²³⁰ However, because recognition of German law would frustrate the GDR's efforts to recover the paintings, this gesture would probably be politically self-defeating. It is possible that the same political purpose would be served by recognizing New York law in order to justify return of the paintings. The court should evaluate federal political positions to determine whether considerations of comity and reciprocity are strong enough to call for recognition of German law. These findings

229. Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 *STAN. L. REV.* 205, 229 (1958).

230. See *supra* note 216.

will not be dispositive, but will be weighed in the balance with other relevant considerations.

Currie, who described the unprovided-for case, did not develop a complete solution. He believed, however, that it could be worked out within the framework of interest analysis²³¹ by identifying policies held in common by the governments involved and choosing the law consistent with these shared policies.²³² Do New York and the GDR have a common policy which would help to resolve the unprovided-for conflict in *Elicofon*? German law places such a high priority on the security of good faith commercial transactions that it is willing to recognize title in a BFP even if the goods are stolen from the original owner. New York has not gone so far as to concede that a thief may pass title, but it certainly cannot be said that New York is unconcerned with promoting commerce. In its adoption of the Uniform Commercial Code,²³³ New York has endorsed the rights of BFPs in a wide variety of commercial situations and moved far away from its common law interest in the sanctity of ownership.²³⁴ New York's statutory policies under the Uniform Commercial Code are quite similar to those underlying German law.

231. See Currie, *supra* note 229. See also *supra* note 54 and accompanying text.

232. Professor Sedler has refined this approach and applied it to *Neumeier*, finding that both states (i.e., New York with its strict liability rule and Ontario with its guest statute prohibiting recovery unless plaintiff shows gross negligence by the host driver) have an interest in compensating automobile accident victims, but that Ontario chooses to protect insurance companies from collusive suits by restricting the defendant's liability when the victim is a passenger in defendant's car. If the home state does *not* have such a policy, as New York does not, the common policy in favor of compensating plaintiffs should govern, i.e., New York should apply its own law. See Sedler, *supra* note 210, at 137-42.

233. N.Y. U.C.C. §§ 1-101 to 10-105 (McKinney 1972).

234. The U.C.C. enlarges the rights of the BFP over those he enjoyed at common law in the following specific areas:

1. Negotiable instruments. A holder in due course takes free of all claims on the part of any person. See U.C.C. § 3-305 (1978).

2. Voidable titles. Goods obtained by felonious fraud are considered to be under the fraud exception to the common law rule against taking title from a thief. See U.C.C. § 2-403(1) (1978).

3. Estoppel. A BFP who buys from a merchant is protected. See U.C.C. § 2-403(2) (1978).

4. Security interests. A buyer in the ordinary course of business takes free of security interests created by his seller even though the security interest is perfected by filing and even though the buyer knows of the interest.

See U.C.C. § 9-307(1) (1978). For more complete discussion of U.C.C. provisions relating to the rights of BFPs, see BROWN, *supra* note 224, at 194-208.

Furthermore, New York, like Germany, places a time limit on the owner's right of recovery by means of its statute of limitations.²³⁵ *Ersitzung* expresses a preference for the BFP *over time*²³⁶ and an interest in placing constraints on litigation.²³⁷ New York expresses both interests in its statute of limitations.²³⁸ It thus appears that New York law, with the exception of its refusal to honor title passed by a thief, shares with German law policies favoring promotion of commercial transactions, repose of property, and limitation of the owner's right to bring an action. Because *Ersitzung* is more compatible with these common policies than the New York law, the unprovided-for conflict would be resolved in favor of German law.

CONCLUSION

Traditionally, conflict of laws in international litigation have been resolved by forcing them into molds created by the states for resolving interstate conflicts. As long as all conflict of laws were decided by mechanical, territorial rules, the subordination of federal interests to those of the states had little practical effect. With the new emphasis on policy analysis in conflicts theory, however, it is no longer feasible to ignore the foreign policy component in international conflicts of law. Policy-centered conflicts theories, especially those which focus on multistate and multinational ac-

235. See N.Y. CIV. PRAC. LAW § 214(3) (McKinney 1972).

236. See Affidavit of Dr. Ernest C. Stiefel, expert witness on German law for defendant Elicofon: "*Ersitzung* . . . represents the German law's increasing preference over time for the interests of one who possesses property in good faith over the interests of all others It is a means to protect the acquirer's interest in the continuity of his possession 'The main purpose of *Ersitzung* is to cure deficiencies in the original acquisition that prevented an immediate acquisition of title by the good faith acquirer.' . . . *Ersitzung* spares a good faith possessor the burden of tracing the chain of his title at a time when the necessary evidence may no longer be available." *Id.* at A-572-73 (citations omitted).

237. See BLACK'S LAW DICTIONARY 1384 (5th ed. 1979). "*Usucapio constituta est ut aliquis litium finis esset.* (Prescription was instituted that there might be some end to litigation.)"

238. See *Good v. Brown*, 181 A.D. 808, 809, 168 N.Y.S. 1028, 1028 (1918). "The statute of limitations is a protection against claims under ancient grants, where time has made it hard to fix precise boundaries." *Servomation Corp. v. State Tax Comm'n*, 60 A.D.2d 374, 377, 400 N.Y.S.2d 887, 888 (1977). "[S]tatutes of limitation are designed primarily to protect persons from the burden of litigating stale claims." *Myers v. Paulus*, 10 A.D.2d 762, 763, 197 N.Y.S.2d 531, 533 (1960). A statute of limitations is one of repose designed to put an end to stale claims and to be a "terminal for litigation."

commodation, provide an analytic tool for identifying and giving adequate attention to the "uniquely federal" elements in international litigation.

The most serious criticism of current state conflicts law, as it has been applied in the international context, is the lack of uniformity among the states. Federal law provides the most direct, efficient and flexible means of imposing uniform conflict of laws procedures on the states. Recognizing international conflicts as a branch of foreign affairs rather than as an odd variant of interstate conflicts would permit the development of a federal common law of international conflicts.

The hierarchical model suggested in this Comment is only one possible way in which federal common law might develop. Regardless of the form it takes, federal common law for international conflicts would have at least five advantages. It would allow the courts to give proper attention to federal foreign policy concerns in international choice of law decisions and it would create uniformity among the states. Standardizing the methods used by the states in international conflicts would also eliminate the need for federal courts to follow situs rules in the states which still have them and would free the federal courts from the necessity of interpreting state conflicts law. Finally, federal adoption of policy-centered approaches for application in international cases would instruct situs-law states in the use of these methods and encourage them to adopt similar methods for domestic conflicts cases.

The advantages of federal common law in international conflicts outweigh the benefits of conformity to the *Erie* doctrine. The "twin aims of *Erie*,"²³⁹ to discourage forum shopping and the inequitable treatment of resident defendants, would be furthered because federal common law would provide uniformity between state and federal courts within a jurisdiction.

The time has come for the courts to abandon the fiction that international choice of law is no different than its interstate counterpart and to develop more appropriate methods for assessing foreign policy factors in conflicts involving foreign law. *Sabbatino*²⁴⁰ has already carved out an exception to *Erie* for the act of state doctrine. Extending the *Sabbatino* rationale to place interna-

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

240. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

tional conflict of laws within the common law “foreign affairs enclave” is a logical and parsimonious way to overcome problems of state conflicts law and achieve federal control over foreign policy elements in international choice of law.

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