Equal Protection Limitations on Choice of Law Decisions

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EQUAL PROTECTION LIMITATIONS ON
CHOICE OF LAW DECISIONS

by

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## TABLE OF CONTENTS

### EQUAL PROTECTION LIMITATIONS ON CHOICE OF LAW DECISIONS

<table>
<thead>
<tr>
<th>Part I. The Equal Protection Clause of the United States Constitution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter A: Introduction to Equal Protection</td>
</tr>
<tr>
<td>Notes for Chapter A</td>
</tr>
<tr>
<td>Chapter B. The Intent of the Framers</td>
</tr>
<tr>
<td>Notes for Chapter B</td>
</tr>
<tr>
<td>Chapter C. Judicial Supervision of Legislative Classifications</td>
</tr>
<tr>
<td>Notes for Chapter C</td>
</tr>
<tr>
<td>Chapter D. Application of Classifications Under the Equal Protection Clause</td>
</tr>
<tr>
<td>Notes for Chapter D</td>
</tr>
<tr>
<td>Chapter E. Discrimination against Non-Residents</td>
</tr>
<tr>
<td>Notes for Chapter E</td>
</tr>
<tr>
<td>Chapter F. The Right to Interstate Travel</td>
</tr>
<tr>
<td>Notes for Chapter F</td>
</tr>
<tr>
<td>Chapter G. Conclusion: Towards a Theory of Constitutional Equality</td>
</tr>
<tr>
<td>Notes for Conclusion</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Part II. Equal Protection and Choice of Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter A. Introduction</td>
</tr>
<tr>
<td>Setting the Stage</td>
</tr>
<tr>
<td>Notes for Chapter A</td>
</tr>
<tr>
<td>Chapter B. Revolution and Counterrevolution in Choice of Law</td>
</tr>
<tr>
<td>Notes for Chapter B</td>
</tr>
<tr>
<td>Chapter C. Choice of Law and Constitutional Law</td>
</tr>
<tr>
<td>Notes for Chapter C</td>
</tr>
<tr>
<td>Chapter D. Historical Overview of Federal Control on Choice of Law</td>
</tr>
<tr>
<td>Notes for Chapter D</td>
</tr>
<tr>
<td>Chapter E. Equal Protection Limitations on Choice of Law</td>
</tr>
<tr>
<td>Notes for Chapter E</td>
</tr>
<tr>
<td>Chapter F. Conclusion</td>
</tr>
<tr>
<td>Notes for Conclusion</td>
</tr>
</tbody>
</table>
PART III. A Side Glance at the Common Market

Chapter A. Introduction to the European Conflicts System 81
Notes for Chapter A 85

Chapter B. European Reaction to the "Conflicts Revolution" 87
Notes for Chapter B 91

Chapter C. Limitations on European Conflicts Rules 93
Notes for Chapter C 97

Chapter D. The Significance of Non-Discrimination Clauses with Respect to Choice of Law 99
Notes for Chapter D 102

Chapter E. Conclusion 104

General Conclusion 106

Bibliography 109
GENERAL INTRODUCTION

In this paper I intend to examine the influence of constitutional equality principles on choice of law decisions in the United States and Europe. Therefore, this analysis is an exercise in constitutional law, conflict of laws and comparative law.

Part I is an inquiry into the origin, role and contemporary significance of an important part of the United States Constitution and its guarantees of equality. However, I do not intend to deal here exhaustively with all the aspects of the non-discrimination clauses: my goal is to clarify the implications of contemporary Fourteenth Amendment theory for state autonomy in deciding conflict cases. Therefore, I will concentrate on state discrimination against non-residents and aliens.

Under settled principles of judicial review, the Supreme Court is empowered to define the obligations that antidiscrimination principles impose upon the states. The court has developed a multi-tiered approach whereby different tests are used according to the degree of "suspectness" of legislative classifications. As we will see, non-residency, unlike alienage, has not been held to be a "suspect classification" and is thus not subject to strict Equal Protection scrutiny. However, I will argue that the classifications that
distinguish locals from out-of-staters are, in my opinion, suspect and that they should, therefore, be subjected to the highest scrutiny under the Equal Protection Clause.

In Part II, I will attempt to describe traditional and modern choice of law methodologies in the United States. As we will see the influence of the United States Constitution in this area is mainly exercised through the limitations it places on the power of the states to shape their own choice of law rules. The measure of federal control by the Supreme Court has varied from time to time and from field to field. But so far, the Supreme Court has not invalidated a state's choice of law decision on the basis of either antidiscrimination provision.

I will argue that several modern theories, because of their systematic preference for forum residents, violate the Equal Protection Clause of the United States Constitution and that it is time for the Supreme Court to control this tendency.

In Part III, I will make a brief comparative analysis of the European conflicts system. I will point out the basic differences between American and European choice of law methodologies. The European reaction to the American "Conflicts Resolution" and its influence on European choice of law methodologies will be examined. Another interesting question is whether the European Community has any impact on choice of law decisions made by its Member States.
Finally, I will discuss the decisions of the German Constitutional Court, establishing an interaction between constitutional equality principles and choice of law rules.
PART I. THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION

CHAPTER A

INTRODUCTION TO EQUAL PROTECTION

The first and basic step in Equal Protection analysis must consist of looking at the concept of equality as such. Equality is the only concept that tells us that different treatment of people does matter. It is the concept that forces us to consider how society treats people in relationship to one another. It forces the government to justify inequalities that might otherwise go unnoticed or unremedied.¹

We all implicitly have an idea of what "equality" means. We know what equal and unequal mean by having learned since childhood how to use them in countless spheres of everyday life: Equality is the relationship of identity that exists among two or more persons or things by reference to a given standard of measure. The standard of measure may be specific or implied. However, we tend to neglect what equality means.²

But, equality cannot be used as a talismanic incantation to decide controversies. Therefore, it is necessary to examine the underlying substantive rights that conflict.³

Although it will not automatically resolve the conflicts, a knowledge of the history of the idea of equality
may also be helpful in establishing a perspective within which partial solutions may be achieved a little more easily.  

One of the roots of the idea of equality lies in the experience of the ancient Hebrews in their covenant with God. Under the covenant, God governed through his law which was binding on all and thus a moral guarantee to all of equal justice.

To the Athenians of the Fifth Century Before Christ, equality had much of the meaning which it possesses for us today. Aristotle, building on the work of Plato said two things about equality that have dominated Western thought ever since: "Equality in morals means this: things that are unalike should be treated unalike in proportion to their unalikeness. Equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal."  

The Christian contributions to the idea of equality were important and farreaching. St. Paul wrote to the Galatians: "There is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye we are all one in Christ Jesus."

It may be reassuring to many to discover how old and pertinent the idea of equality is. It possessed a considerable history before it received characteristic statement in the great legal and political documents of the 18th Century. The Declaration of Independence numbered
among its self-evident truths that "all men are created equal."  

The drive to abolish slavery culminated in a civil war and three amendments to the Constitution. One of these amendments, the fourteenth, contains the one explicit guarantee of equality that: "No State shall deny to any person within its jurisdiction the equal protection of the laws."  

In recent years the Equal Protection guarantee has become the single most important concept in the Constitution for the protection of individual rights.

State regulations are commonly placed in one of three categories for the purpose of Equal Protection analysis:

(1) Regulations affecting the exercise of "fundamental rights."

(2) Regulations classifying people on the basis of criteria that are constitutionally suspect.

(3) All remaining regulations.  

An important factor, in determining how much further the Supreme Court will go in enforcing rights under the Fourteenth Amendment, is the opinion of its new Chief Justice in this respect. Chief Justice Rehnquist has described the Supreme Court's decisions, with the exception of those involving classifications based on race, as an "endless thinkering with legislative judgments, a series of conclusions unsupported by any guiding principle."  His scrupulously drafted dissents have proliferated in response
to the majority's propensity toward invalidating legislative classifications based on sex, illegitimacy or alienage.¹³

The constitutional ideal of equality seems problematical in two fundamental aspects:¹⁴

(1) The fact that virtually all governmental action involves the making of choices and the drawing of lines in ways that entail favoring some over others. The Equal Protection clause then permits the judiciary to step in and trump the freedom of the political system to make these choices.

(2) The fact that the Equal Protection clause is supposed to play itself out in a universe in which individuals create inequalities themselves because of the pre-existing or background system of individual freedom.

At what point then, must the government or the judiciary intervene to flatten out these inequalities?¹⁵ Let us first go back to the framers to examine the standards for judicial review they had in mind while drafting the Fourteenth Amendment.
NOTES TO CHAPTER A


3. Note, supra note 1, at 575.


7. Abernethy, supra note 5, at 17.

8. The American Declaration of Independence, 4 July 1776.


10. Westen, supra note 6, at 537.


CHAPTER B

THE INTENT OF THE FRAMERS

To understand the text of the Fourteenth Amendment, a document written more than a century ago, it is necessary to understand the period in which it was written.¹

The Civil War Amendments grew out of the conflict between the ideals of the Declaration of Independence and the institution of slavery. There exists strong agreement among constitutional historians that the Fourteenth Amendment had its main origin in the anti-slavery movement.² These anti-slavery origins go back to the period of 1835-1838. During this period, an important reorientation of the abolitionist movement³ took place from that of private conversion to public action.⁴ The shift entailed a change from a program which used equality and liberty as aides to attack the ethical and moral evils of slavery to a program which employed liberty and equality as primary arguments to overturn slavery.⁵ Slavery was still an ethical and moral evil but its abolition was not to wait upon individual conversion; it was to be rooted out by political action.⁶ The evil sought to be redressed was the state's failure to protect blacks against systematic private discrimination by refusing to enforce the common law concerning access to public accommodations; common carriers and other community
facilities for the benefit of blacks and whites alike the state's failure to provide "Equal Protection of the laws." The words of the Equal Protection clause are general and, when read literally, express no limitation on the equal protection which states are forbidden to deny. The clause means exactly what its language says; namely, that any person coming within the jurisdiction of a state has the right to the same protection of the laws of that state as the state extends to other persons within its jurisdiction. It does not mean that the laws must be the same; only the protection must be the same.

In spite of its clear language, there has been much scholarly controversy over the original understanding of the Fourteenth Amendment. In "Government by the Judiciary," Raoul Berger argues that the Equal Protection Clause was intended to prohibit only racially partial legislation that affects specific civil rights concerning the security of person and property, provided in the Civil Rights Act of 1866. Berger says further that the provision of section one does not empower Congress to enact laws for direct enforcement thereof: "To convert 'no state shall deny' into 'Congress shall make' does violence to the text." This construction has been successfully challenged elsewhere on a number of grounds:

(1) Bickel argues that the framers did not simply use the language of the Civil Rights Act, because they were aware it was a Constitution they were writing: an organic document that because of its unique function and permanence must contain language which allows for future
unforeseen problems. In his view the framers did what they intended to do: propose a general constitutional prohibition of inequality under law.12

(2) Ten Broek argues that the protection of the laws must be supplied. In other words, the absence of all protection is a ground for federal intervention.

(3) Dimond says that Berger's interpretivist theory of judicial review fails to comprehend the Supreme Court's institutional mission such as its role in articulating the contemporary meaning of sweeping phrases like Equal Protection.14

There exists a rather serious question whether anyone today can hope to accurately discern the intent of the majority of people responsible for the proposal and ratification of the Fourteenth Amendment.15 As Terrance Sandelow put it "to ask in each instance, whether the framers intended the specific or the general is to pose a question that almost invariably is unanswerable."16

In my opinion, although section one had a core focus with respect to racial discrimination, the framers consciously used broad language to comprehend new circumstances, experiences and insight.
NOTES FOR CHAPTER B


3. There were in that time three distinct abolitionist theories:
   
   (1) One theory said that the Constitution was among the worse things a proslavery document. Its proponents argued for constitutional amendment or for dissolution.
   
   (2) The coalitionists insisted that the Constitution was anti-slavery, but only in spirit. They sought to weaken slavery by securing the passage of federal laws rather than to change the Constitution.
   
   (3) Most important for understanding the Fourteenth Amendment is the argument that the Constitution already forbade slavery. Anti-slavery constitutional doctrine did just what disturbs most contemporary jurists: it found ideas of justice and natural law in the Constitution. It was with this strain of constitutional theory that several framers of the Fourteenth Amendment were most familiar and most comfortable.

   See Baer supra note 2, at 60.


5. Ten Broek, supra note 4, at 116.

6. Ten Broek, supra note 4, at 117.


13. Ten Broek, supra note 4, at 117.

14. Dimond, supra note 9, at 494.

15. Note, supra note 7, at 832.

CHAPTER C

JUDICIAL SUPERVISION OF LEGISLATIVE CLASSIFICATIONS

The Equal Protection Clause has meaning as a legal force only to the extent courts give it that effect.¹

Therefore, judicial review under the Equal Protection Clause raises broad problems as to the respective roles of courts and legislatures.²

It is possible to rationalize all Equal Protection decisions as judicial determinations of whether the government has fairly classified persons.³ At this point, the demand for equality confronts the right to classify.⁴ The Equal Protection Clause does not reject the government's ability to classify persons or draw lines in the creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria or arbitrarily used to burden a group of individuals.⁵

The Equal Protection doctrine of the Supreme Court has undergone rapid and drastic transformations in recent years.⁶ Prior to the Warren Court the Equal Protection Clause played a very minor role outside racial discrimination cases.⁷ Only a minimal judicial intervention was supported; the courts insisted merely that the classification in the statute "reasonably relate to the legislative purpose."⁸ Very little attention was paid to whether the legislative purpose itself
was valid. Only in racial discrimination cases did the courts apply a stricter scrutiny due to the historical background of the Fourteenth Amendment.

The principal way in which the Clause gained new vitality during the Warren era was by means of a broadened view of when a statutory classification should be subjected to strict scrutiny. The courts will not accept every permissible government purpose as sufficient to support a classification under this test, but will instead require the government to show that it is pursuing a "compelling" or "overriding" end -- one whose value is so great that it justifies the limitation of fundamental constitutional values. The courts will furthermore not defer to the decision of the other branches of government but will instead independently determine if the classification is necessary to promote such a compelling interest.

Strict scrutiny under the Warren Court was imposed whenever either the classification was a suspect one because it discriminated against a politically powerless or unpopular minority, or that classification had an impact on a fundamental right or interest.

In actual fact the Warren Court found only race and national origin to be suspect classifications. The fundamental interest ingredient of the new Equal Protection doctrine was particularly open-ended, but the list of interests identified as fundamental by the Warren Court was quite modest: voting, criminal appeals and the right of interstate
travel. In all other contexts, the "old" rational relationship test reigned with "minimal scrutiny in theory and virtually none in fact." 

At the end of the 1960's, it was possible to do a detailed analysis of all Supreme Court Equal Protection decisions in terms of a two-tiered model involving the rational relationship test and the strict scrutiny test. Professor Bickel wrote that "a broadly conceived egalitarianism was the main theme in the music to which the Warren Court marched." 

What has been the response to the Warren Court's legacy? The Burger Court has declined to expand the Warren doctrine in the ways that Warren-era opinions suggested the doctrine might ultimately evolve. In particular, the Court has refused to extend the suspect label to classifications based on illegitimacy and sex.

The Burger Court has, however, added an intermediate standard of review to the Warren Court's two-tier approach. Most clearly in the area of gender based classifications, but also probably in the areas of illegitimacy classifications, the Court would uphold the classification only when the government could demonstrate that the classification it had employed was "substantially related" to an "important governmental objective." 

Also, there were a number of cases in which the Burger Court, even while voicing the traditional "mere rationality" standards of the old Equal Protection doctrine proceeded to find the statute unconstitutional.
As a result, the most important thing that one can say about the Burger Court's performance in Equal Protection is that Equal Protection has remained an interventionist tool.25

It is hard to predict at this point what the Equal Protection doctrine of the Rehnquist Court will be. In the past, Chief Justice Rehnquist has been adamantly opposed to the three-tier approach of the Burger Court. In carefully formulated dissents, he argued that the rational basis test is the only proper standard of review where racial discrimination is not implicated.26 In his opinion, states should be given maximum leeway to determine the best solution to their problems.27

The possibility of a Supreme Court majority subscribing to this interpretation of the Equal Protection Clause will have serious implications: members of "discrete and insular" minorities, who have turned to the judicial system because relief was not available from the democratic process, will find the courts unresponsive as well.28
NOTES TO CHAPTER C


5. Rotunda, Nowak and Young, supra note 3, at 317.


9. Tussman and Ten Broek, supra note 4, at 344.

10. Gunther, supra note 6, at 657.

11. Emanuel, supra note 7, at 242.

12. Rotunda, Nowak and Young, supra note 3, at 324.


16. Gunther, supra note 6, at 8.

17. Rotunda, Nowak and Young, supra note 3, at 326.


19. Gunther, supra note 6, at 659.

20. Emanuel, supra note 7, at 243.

22. Note, supra note 7, at 292.


25. Gunther, supra note 6, at 661.


28. Note, supra note 7, at 312.
CHAPTER D
APPLICATION OF CLASSIFICATIONS UNDER THE EQUAL PROTECTION CLAUSE

Throughout American history aliens have been subjected to numerous restrictions imposed by Congress and State Legislatures.\(^1\) One area of particular complexity concerns state and federal laws which discriminate against aliens. These alienage cases raise unique problems of federalism.\(^2\) In 1886, the Supreme Court held that aliens are "persons" so as to enjoy the protection of the Equal Protection Clause.\(^3\)

In 1971, the Supreme Court declared that "classifications based on alienage are inherently suspect and subject to close judicial scrutiny."\(^4\) In reality, however, the Court's scrutiny is not as strict as in cases involving classifications based upon race or national origin.\(^5\) Alienage classifications are special in two respects:

1. the concept of citizenship itself implies the existence of a favored status for members of a specified group; and

2. alienage is not an irrevocable personal trait.\(^6\)

The Supreme Court has chosen not to analyze all alienage classifications in terms of a single standard of review.\(^7\) Instead the Court has employed a more lenient standard of review -- the traditional rational basis test -- in two cases:

20
(1) Local governments may require U. S. citizenship as a condition of obtaining a government position "ultimately related to the process of democratic self-government."

This exception is premised on the view that the distinction between citizens and aliens, irrelevant in other contexts, is fundamental to the definition and government of a state. This is paradoxical, however, because the suspect classifications device was intended specifically to protect minorities not adequately safeguarded by the political process.

The trend has been toward broadening this exception, one result of which has been to diminish the national treatment of aliens which is more explicitly provided to some nationalities within U.S. jurisdiction by bilateral treaties.

(2) Because of the important nature of the federal interest in foreign affairs and foreign relations as well as the federal power to regulate immigration and naturalization, alienage classifications by federal law are subjected only to the rational basis test.

The use of a preemption standard, however, would justify the Court's differential treatment of state and federal alienage classifications, a difference that is anomalous under Equal Protection analysis.
NOTES FOR CHAPTER D


3. Yick Wo v. Hopkins, 118 U.S. 356 (1886). It should be noted that, while the Equal Protection Clause does not apply to the Federal Government, the Fifth Amendment's Due Process Clause guarantees Equal Protection in the application of federal law.

A principal difference between the Privileges and Immunities and the Equal Protection Clause is that aliens can only invoke the latter while U. S. citizens can invoke both.


7. Rotunda, Nowak & Young, supra note 5, at 489.


9. Note, supra note 1, at 940.

10. Nafziger, supra note 6, at 73.

11. Rotunda, Nowak & Young, supra note 5, at 481.

12. Note, supra note 1, at 940.
CHAPTER E

DISCRIMINATION AGAINST NON-RESIDENTS

The Privileges and Immunities Clause of the United States Constitution explicitly prohibits state discrimination against the citizens of other states. Although the Clause only speaks of "citizens of each state," as a practical matter residence and citizenship are interchangeable.

Non-residents possess two characteristics that generally call for some special attention:

(1) they lack the right to vote; and

(2) they are vulnerable to local prejudice or insensitivity.

The Framers adopted the constitutional ban on discrimination against non-residents primarily as an instrument of national unification. Hamilton deemed the Privileges and Immunities Clause "the basis of the Union." And as Professor Ely put it "by constitutionally tying the fate of outsiders to the fate of those possessing political power, the Framers insured that their interests would be well looked after.

When a non-resident is discriminated against, the case could in theory be actionable under the Equal Protection Clause as well as under the Privileges and Immunities Clause. But each clause has a separate history of judicial enforcement of the principle barring discrimination on the basis of state residence.
Non-residency (unlike alienage) has not been held to be a "suspect classification" for Equal Protection scrutiny but only to mere rationality review.9

The current Privileges and Immunities doctrine rests application of the clause on whether or not the Privilege of Immunity claimed is fundamental.10 Assuming that a fundamental right is involved, the Court applies the following test to determine whether the discrimination against non-residents was acceptable:11

(1) the Court inquires whether non-residents were "a peculiar source of the evil the law sought to remedy," and

(2) the Court further inquires whether the discrimination against non-residents bore "a substantial relationship" to the problem the statute was attempting to solve.12

The fundamentality doctrine of the Privileges and Immunities Clause, although considerably stricter than minimum rationality review, is not as rigid as the Equal Protection strict scrutiny test. The doctrine resembles closely the "intermediate level of scrutiny" under the Equal Protection Clause.13

State discrimination with respect to nonfundamental activities does not fall within the purview of the Privileges and Immunities Clause.14 In such a case the state is only required to justify the discrimination under the minimum rationality standard of review of the Equal Protection Clause.15
As a result, the Supreme Court now interprets the Equal Protection Clause to limit state power to discriminate against in-state aliens more severely than it has ever limited state power to discriminate against out-of-state citizens under both the Privileges and Immunities and the Equal Protection Clause!¹⁶
NOTES FOR CHAPTER E


5. The Federalist No. 80 (Hamilton), at 83.


8. Note, supra note 3, at 490.


11. Emanuel, supra note 7, at 115.


CHAPTER F
THE RIGHT TO INTERSTATE TRAVEL

The Freedom of interstate migration is not explicitly given by any constitutional provision. The reason for this exclusion is not clear:

(1) It is possible that the Framers believed it to be so basic a right that it did not need to be expressed in the text of the Constitution.

(2) Another possibility is that the Framers considered this guarantee to be included in the other protections given by the Constitution.

But the Supreme Court has always treated this right to travel as "fundamental" and thus triggering strict Equal Protection scrutiny.

Shapiro v. Thompson is widely considered the classic case illustrating the right to interstate travel. In that case, the Supreme Court held unconstitutional state and federal provisions denying welfare benefits to individuals who had resided in the administering jurisdiction less than one year.

The majority held that because the right limited (the right to travel) and the right denied (the right to welfare benefits) were "fundamental rights," the classification had to be invalidated unless it was shown to be "necessary to promote a compelling governmental interest."
The Court declined to locate this right to travel in any particular constitutional clause. Rather the Court recognized that the "nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict the movement." 7

Later cases have construed Shapiro to mean 8 that the right to travel is impaired, wherever it is "penalized," even if there is no actual deterrent effect on interstate migration. 9 But the Supreme Court has also shown its willingness to permit, without triggering strict scrutiny, minor impairments of the right to travel. 10
NOTES FOR CHAPTER F


2. Rotunda, Nowak & Young, supra note 1, at 680.

3. Rotunda, Nowak & Young, supra note 1, at 680.


6. Rotunda, Nowak & Young, supra note 1, at 684.

7. Tribe, supra note 5, at 1003.


9. Rotunda, Nowak & Young, supra note 1, at 688.

10. E.g., lower tuition rates at state universities are not sufficiently basic. Therefore, the state could impose durational residence requirements for such lower charges, without meeting strict scrutiny. Starns v. Malkerson, 326 F. Supp. 234 (D. Minn 1970), aff'd, 401 U.S. 985 (1971).
CHAPTER G
CONCLUSION

TOWARDS A THEORY OF CONSTITUTIONAL EQUALITY

I think that the authors of that notable instrument (the Declaration of Independence) intended to include all men but they did not intend to declare all men equal in all respects. They did not mean to say all men were equal in color, size, intellect, moral developments or social capacity.

They defined with tolerable distinctness in what respects they did consider all men created equal -- equal with certain inalienable rights, among which are life, liberty and the pursuit of happiness.

This they said and this they meant. They did not mean to assert the obvious untruth that all were then actually enjoying that equality, nor yet that they were about to confer immediately upon them. In fact, they had no power to confer such a boon. They meant simply to declare the right so that enforcement of it might follow as fast as circumstances should permit.1

How progressive were we in the enforcement of that right during the 130 years that passed since these famous words were written by President Lincoln? This was the major problem of this first part of my analysis.
First, the equality ideal was placed in its historic context: the Fourteenth Amendment, the one explicit constitutional guarantee of equality, obviously had a core focus with respect to racial discrimination. But the Framers consciously used broad language to comprehend new circumstances, experiences and insights.

Then, the different standards of judicial review used by the Supreme Court were examined: the rational relationship test, the strict scrutiny test and the intermediate standard of review. The conclusion was that at this point it is hard to predict what the Equal Protection doctrine of the Rehnquist Court will be.

Furthermore, the specific problems of classifications based on residence and alienage were considered. The conclusion was that the Supreme Court now interprets the Equal Protection Clause with respect to discrimination against in-state aliens more severely than it has ever interpreted the Privileges and Immunities or the Equal Protection Clauses with respect to discrimination against out-of-state citizens.

Finally, the existence of a limited right to travel was proven.

As a result, Americans generally seem more concerned with the idea of liberty, which they identify with absence of government, than with the idea of equality.

In my opinion, the Court has not over-extended the Fourteenth Amendment: A sweeping guarantee of protection from stigmatization and oppression was narrowed into a protection
of certain kinds of discrimination and classification. And the Privileges and Immunities Clause has never been a meaningful vehicle for judicial review of state actions.

However, in no country are the needs of the interstate system more important than in the United States, where business and social activities almost ignore state lines.

Therefore, I believe that the Court, in deciding the reasonableness of classifications based on residence, has been too deferential to state legislatures. Limiting the protection of local laws to local people is obviously rational under traditional tests but somehow that seems unsatisfying: Decreasing the significance of state residence tends to strengthen interstate attachments and thereby diminishes the likelihood of interstate conflicts.

One way of doing this is by broadening the fundamental right to travel. Another possibility is to stop interpreting the Privileges and Immunities Clause as being limited to "fundamental rights." But I prefer yet another method: classifications that distinguish locals from out-of-staters are suspect and should therefore be subjected to the strict scrutiny test of the Equal Protection Clause.

What is now the relevance of this Equal Protection analysis to choice of law decisions? This will be the central question in the following chapters: To be examined is the extent to which a state may make choice of law decisions that apply its domestic law to extrastate events
involving its own residents but refuse to make similar applications of its law to residents of other states.

In the conflicts context one will not ordinarily deal with laws that on their face limit their protection to locals. Therefore, choice between the two basic principles of a Federal Union --- equal treatment and the advancement of local values --- should be avoided wherever possible. But no choice of law methodology can harmonize these two principles in all cases. Accordingly, every conflicts approach decides which principle is ultimately to be preferred.

The Supreme Court has not yet limited a state's choice of law on the basis of the Equal Protection or the Privileges and Immunities clauses. The following chapters will be a plea for the Court to take up that responsibility.
NOTES TO CONCLUSION

PART II. EQUAL PROTECTION AND CHOICE OF LAW

CHAPTER A

INTRODUCTION: SETTING THE STAGE

In the adjudication of any case, a court is called upon to effectuate two basic but opposing objectives: to achieve justice in the individual case and to protect the interests of society in the integrity of its legal system. \(^1\) Extended to their extremes, societal needs would best be advanced by rigid rules; conversely complete justice in the individual case would often call for ad hoc decisions.\(^2\)

When critical elements in a legal relationship transcend a single jurisdiction, a conflict of laws case may arise.\(^3\) The problem then becomes whether to ignore the foreign element and to treat the case as arising under local law, or to seek an accommodation between the forum and the foreign legal system by giving weight to the foreign element and applying foreign law.\(^4\)

Conflicts of law has always struggled with the hopeless task of solving, with local territorial means, an essentially international problem, namely to assure that the same case will be decided everywhere according to the same law.\(^5\)

Therefore, conflicts is an area of the law noted for disputations over theory.\(^6\) Basically, however, there are two groups in conflict of law thinkers:
(1) the "forum faction" thinks that the forum should apply foreign substantive law only by way of exception.

(2) the "substantivists" would like to see the creation of new rules of substantive private law to decide the case.

In the United States, facts or contacts with legal systems/territorial other than the forum raise conflict of law concerns primarily in three different situations:

(1) whether a court can appropriately entertain a case which has a foreign contact, i.e., jurisdiction.

(2) if a court does hear a case, to what extent does the law of another state or country have claim to consideration, i.e., choice of law.

(3) if a court hears a case, what is the effect of the determination or judgment in another state or country, i.e., recognition and enforcement of judgments.

The second question, namely the choice of law problem, is the subject of this analysis.

In the United States, the principle source of choice of law rules is state law. Each state determines whether in a given case its courts should apply substantive rules taken from one or another of the state legal systems, from federal law or from a foreign legal system.

Except when Congress has occupied the field, a federal court, too, must in diversity cases apply the choice-of-law rules of the state in which it sits.
The influence of the United States Constitution is mainly exercised through the limitations it places on the power of the states to shape their own choice-of-law rules, to the detriment of other states of the Union, and much more important, to the detriment of the federal symbiosis of states. However, in this area there is still little authoritative guidance.

The last thirty years have witnessed a fundamental change in the landscape of choice of law doctrine in the United States. Most of the efforts of the past decades have been to escape from the traditional choice-of-law rules.

Under the traditional approach, to a given set of facts the rules of substantive law of that state which enjoys an intimate relationship with the issue at hand are applied because of the existence of a given fact: the so-called "point of contact." The substantive laws of all states are treated equally since they are all applied according to the same point of contact. This explains why the rules of lex loci --- the law of the place where the act occurred was the law with the point of contact --- developed in the United States.

These rules trace their history back to Europe in the Middle Ages. Until then, the courts generally applied lex fori, the law of the forum adjudicating the case. With the rise of international commercial transactions, it became
important to recognize the law of the country in which the disputed act had occurred. 18

Traditional choice of law in the United States has, furthermore, reflected the tension between the relatively flexible doctrine of comity and the more rigid concept of vested rights. Comity as a choice of law mechanism in the United States is generally traced to the writings of Joseph Story in the early 1800's. 19 Comity, he said, refers to the paramount obligations of nations to give effect to foreign law when that foreign law is appropriate for the case. That obligation rests on the forum's voluntary consent to apply that law, given in order to do substantial justice. As a result, rights acquired within the boundaries of a country retained their validity because of comitas. 20

This concept was transmitted by Holland, an English legal philosopher, to Dicey, who used it to develop his doctrine of vested rights: 21 "Any right duly acquired by the law of any civilised country is recognized . . . by the English courts." 22

Joseph Beale, a highly influential American conflict-of-laws theorist during the early 1900's further developed the concept of "vested rights." He insisted that once a right is lawfully created in a given jurisdiction, it must be recognized and validated everywhere. 23 Beale codified the vested rights approach in the First Restatement of Conflict of Laws (1934). 24 That document thus became responsible for implanting in American law a continental dogma which, by then, had
long been discarded in the countries of its origin.25 Namely, the vested rights theory has been subjected to attack as explaining only why foreign law should be applied and not when foreign rights should be recognized and protected by the local forum.26

The same was true of yet another American doctrine of that time: "the local law theory" of Judge Learned Hand and Walter Wheeler Cook27 which saw the sole source of conflicts law in the law of the forum: no foreign law was actually applied. Rather, the court created its own law patterned after the foreign model.28

The local law theory too has been subjected to criticism as leaving the courts without a guide as to which law they should apply. Legislators, judges and scholars have sought new answers.
**NOTES FOR CHAPTER A**


27. On possible differences between Judge Hand ("homologous right" theory) and Cook ("local law" theory) see Cavers, Comment: The Two "Local Law" Theories, 63 Harvard L. Rev. 822-828 (1950).

CHAPTER B

REVOLUTION AND COUNTERREVOLUTION IN CHOICE OF LAW

What has been described as the American "Conflicts Revolution" consists of doctrinal writings and case law which have influenced American practice since the late fifties. The development started in the thirties, when a number of distinguished law teachers began to criticize the traditional way of solving conflict of law problems.¹

Traditional conflict of law thinking, as exemplified by the First Restatement, was dominated by the search for sensible and clear rules leading to the application of the same law wherever multiple contact cases arose.² The principal benefits claimed for the First Restatement's system for choice of law are ease of administration, predictability and uniformity (or forum neutrality).³

However, the system of escape devices substantially undermined predictability and forum neutrality.⁴ Innovative courts resorted to such escape devices as characterization, renvoi and public policy to avoid literal application of the rules which would lead them to inequitable and unjust results.⁵

Several commentators criticized these judicial gymnastics.⁶ But their criticisms, however effective, were largely negative, until 1933 when the first major breakthrough came...
with David Cavers seminal "Critique of the Choice-of-Law Problem." The chief defect of the traditional systems, Professor Cavers argued, was that they were designed in terms of "jurisdiction selecting" rules which purported to lead to the applicable law irrespective of its content: "The Court must blind itself to the content of the law to which its rule or principle of selection points and to the result which that law may work in the case before it." Cavers seemed to suggest that choice of law be made in each case with a view to doing justice between the parties. The central example he used in the 1933 article was modeled on the case Milliken v. Pratt and contained in it the seeds of the Currie revolution. But, it was not until a quarter of a century later that this "false problem" case was recognized to be a "no conflict" or "false conflict" case, the abiding cornerstone of governmental interest analysis.

Professor Brainerd Currie announced his governmental interest analysis for choice of law problems in 1958. He wrote several articles most of which were collected in a book, "Selected Essays on the Conflict of Laws." Basically his interest analysis applies in a series of steps: First forum law is applied unless the law of another state is claimed. If such a claim is made, the court then determines whether, given the policy purposes of the conflicting laws and the state's contacts with the dispute, each state has an interest in applying its law. At this point, there are three possible situations:
(1) False conflict: only one state is interested and that state's law will be applied.

(2) No conflict: no state is interested and forum law will be applied.

(3) True conflict: the situation in which the applicable laws of two or more states connected to the dispute differ and each state has an interest in applying its policy. Currie's controversial proposal was that in such cases forum law would be applied.\(^1\)

The decision of the New York Court of Appeals in Babcock v. Jackson\(^1\) ignited the modern revolution of choice of law in the courts. The coincidence of the publication of Currie's collected writings and the decision in Babcock is, in retrospect, quite significant.\(^1\)

Since then, interest analysis has become a term employed to describe perhaps a dozen different methods. Each method generally agrees on the process of identifying interests and on the recognition and resolution of false conflicts.\(^1\) But interest analysis breaks into discretely different methods because of the variety of techniques for breaking true conflicts.

Basically, however, there are two groups of interest analysis defenders:

(1) The orthodox whose prophet remains Brainerd Currie perhaps with a few modifications and reservations.

(2) The reformists who start from other premises: they modify the ingredients but stick with the recipe.\(^1\)

Interest analysis, even if restricted to false conflicts, has been criticized since its inception by a
"counter-revolution" led mainly by advocates of rules for choice of law problems. In summary, the following are the major critics and their main points:

1. Cavers, after starting the conflicts revolution returned to territorially based "principles of preference."

2. Rosenberg argued that governmental interest analysis ignores legislative policies favoring simplicity, predictability and multistate harmony, while it necessitates subjective and therefore dangerous value judgments.

3. Scoles and Hay discussed the almost insoluble dilemma facing courts attempting to determine the policies and relative interests of relevant states, resulting in unpredictable and ad hoc results.

4. Ehrenzweig noted that Currie's analysis relied on governmental interests while most conflicts cases resolve disputes that concern only private interests.

5. Brilmayer argued that Currie had a preconceived notion of what state interests ought to be and that he followed those a priori beliefs rather than following actual legislative intent or even likely constructive intent.

6. Kegel questioned the idea underlying the doctrine of governmental interests that states are interested in realizing certain policies by means of the application of their own substantive law to cases involving foreign elements.

7. Korn proposed that the common domicile of the parties should be the preeminent choice of law rule, based on the concept of a social contract and consent of the governed, as well as communally shared goals, conditions and concepts of morals.

8. Leflar identified five "choice influencing considerations" that he perceived as a "working basis" for judicial decision making.
(9) Reese, the reporter of the Second Restatement, favored the increased use of rules. Beginning in 1953, the American Law Institute labored for seventeen years to produce the first official draft of the new Restatement. The final produce was published in 1971 and reflects the period's mood of flexibility and openness to new ideas, while refusing to abandon past learning and remaining committed to the principle of decision according to rules to the extent that satisfactory rules exist or can be developed.

The Second Restatement's approach to choice of law questions is basically the following:

1. A court must follow the statutory choice of law rule if one is available.
2. If there is no statutorily directed choice, the Restatement provides specific rules to resolve some issues.
3. For most issues, however, the Restatement prescribes that the law of the state with the "most significant relationship" to that issue should be applied.

The ultimate goal is the development of a large number of relatively narrow rules that will be applicable only in precisely defined situations. The argument for such a rule-oriented choice of law method is based on the belief that rules channel the application of policy in ways that achieve certainty and predictability.

The coincidence of the development of interest analysis and the Second Restatement provoked widespread re-examination of the choice-of-law question. The basic dispute in the United States today is whether the development of rules should be the ultimate objective in choice of law or whether cases should be decided on a case by case basis after consideration of certain enumerated factors.
The disarray in the courts is even worse:

(1) Half a dozen theories are in vogue among the various states.
(2) Many decisions use - openly or covertly - more than one theory.
(3) Inconsistency between decisions in the same jurisdiction is also common.36

Because neither legislatures nor scholars seem to have developed a sure alternative to the present confusion, conflicts law must gather its breath as it waits for the next breakthrough.37
NOTES TO CHAPTER B


20. Symposium, supra note 19, at 586-587; Baade, supra note 2, at 141.


26. Korn, supra note 9, at 772.


29. Korn, supra note 9, at 816.

30. Richman & Reynolds, supra note 3, at 158.


34. Symposium, supra note 13, at 517.


36. Richman & Reynolds, supra note 3, at 207.

37. Richman & Reynolds, supra note 3, at 211.
CHAPTER C

CHOICE OF LAW AND CONSTITUTIONAL LAW

If constitutional principles of federalism serve to order intersystem relations (and the assumption here is that they do), it seems quite plain that application and implementation of the ordering function cannot rest with the states.¹

The states of the Union retained their lawmaking power as to conflict of laws. They even retained their power in international conflict of laws, despite the argument that international conflicts are a part of the field of foreign policy reserved wholly to the federal government.²

It is a curious phenomenon that in the United States the notion of federalism is usually employed to convey limitations on the national government only, with connecting freedom for the states.³

However, in matters of choice of law, federalism requires more than a one-way deference to states' rights: it encompasses the obligation of each state to give due deference to the laws of other states as well as to the needs of the interstate and international system as a whole.⁴

It is the place of the Supreme Court or some other branch of the federal government to settle issues that go to the extent of the states' power vis-a-vis other states or countries.⁵
Federal control over states' choices of law might take several forms:

(1) The constitutionalization of a choice of law system. There is, however, a danger in viewing a single choice of law solution as the only constitutional one in that this creates a state of affairs in which future changes are almost impossible.  

(2) The development of a federal common law of choice of law. In Klaxon v. Stentor Electric Mfg. Co. the Supreme Court extended the Erie doctrine to encompass choice of law and held that a federal court sitting in a diversity case must apply the choice of law rules of the state in which it sits. This has been criticized as requiring the federal courts to abdicate an opportunity to resolve choice of law issues with less bias than state courts would presumably have.

(3) The development of a set of outer limits on state choice of law decisions. Such a negative control is obviously less intrusive than other approaches and it also permits standards or limits to evolve. Therefore, this approach should be preferred.

Although the Supreme Court in the past has flirted with the possibility of constitutionalizing the choice of law, constitutional law is now being viewed as setting only the boundaries for permissible choice of law decisions. The principal constitutional instruments which can and should be used to implement the principles of federalism in the sphere
of choice of law are: the Due Process clause, the Full Faith and Credit clause, the Privileges and Immunities clause and the Equal Protection clause.\(^{13}\)

Thus far the Supreme Court has shown extreme caution in applying these clauses of the Constitution to choice of law problems.\(^{14}\) However the advantages of extended federal control over choice of law are clear. First, more federal control would help to produce that uniformity in result which is a principal goal of conflict of laws. Second, such federal control would also prevent the harmful results of state provincialism and jealousy, which is a primary purpose of the American Constitution.\(^{15}\) Because choice of law involves by its nature interstate and international matters and not merely matters of local concern, national solutions are crucial but every exercise of power at that level entails the destruction or diminution of state power, with the consequent weakening of local self-government.\(^{16}\)

In the United States, the two prevailing methods for choice of law are the rules and the policy approach. Choice of law rules do reflect special value judgments and should therefore be valid only if in accord with the applicable principles of substantive justice embodied in the Constitution.\(^{17}\)

To contemporary American lawyers unconstitutional choice of law rules warrant no special discussion: they will not be enforced. This view presupposes the supremacy of constitutional law and the existence of constitutional review by the
judiciary. The only argument that could be made against constitutional review is that the Framers never intended that constitutional provisions should be applied to choice of law rules. However, the American Constitution did not except choice of law rules from its reach.

A policy approach to choice of law could pose at least two serious constitutional problems. The first such problem is underreaching: Under interest analysis, a state is believed to have an interest in the application of its law if, but only if, a resident would benefit from the application of that law. Such a resident-centered approach raises the specter of discrimination (under the Privileges and Immunities or the Equal Protection clause) against non-residents or aliens. Moreover a state that denies the beneficial effects of its rules arguably infringes on the right to travel. The second problem is overreaching, namely, the application of local law despite Due Process clause objections.

Constitutional review becomes somewhat complicated when the constitutional clauses seem to suggest contrasting solutions, e.g., when the Due Process and the Full Faith and Credit clauses indicate that foreign law should be applied while the Equal Protection clause and the Privileges and Immunities clause point to domestic law. In the following chapters, the extent to which the Supreme Court controls and has controlled state choice of law decisions will be examined: After an historical introduction
on constitutional control in general, the focus will be on Equal Protection control of choice of law decisions.

The conclusion will be that coexistence of state choice of law and federal control in a flexible process of decision is needed, a process that considers both conflict of laws and constitutional law from the standpoint of doing justice between the parties.
NOTES FOR CHAPTER C


2. With respect to judicial jurisdiction, the Supreme Court has exercised federal control by using constitutional provisions such as Due Process and Full Faith and Credit. Cheatham, Federal Control of Conflicts of Law, 6 Vand. L. Rev. 582 (1953).


4. Symposium, supra note 3, at 723.


8. In Erie v. Tompkins, 304 U.S. 64 (1938), the Supreme Court decided that in diversity of citizenship cases a federal court must not only apply the statutes but also the substantive common law of the states in which it sits. For these purposes, said Mr. Justice Brandeis, "there is no federal general common law."


10. Scoles & Hay, supra note 9, at 922.

11. Symposium, supra note 3, at 723.


15. Cheatham, supra note 2, at 588.

17. Muller-Freienfels, supra note 6, at 604.
18. Muller-Freienfels, supra note 6, at 602.
19. Muller-Freienfels, supra note 6, at 603.


22. Brilmayer, supra note 20, at 1303.

CHAPTER D

HISTORICAL OVERVIEW OF FEDERAL CONTROL OF CHOICE OF LAW

What is the measure of federal control of choice of law effected through the vague words of the United States Constitution? The answer given by the Supreme Court has varied from time to time and from field to field.2

For many years, the Court exercised no control at all.3 The history of Supreme Court intervention in state choice of law dates only from the beginning of this century.4 The only provisions successfully invoked with any regularity are the Due Process and the Full Faith and Credit clauses.5

In the beginning of this century, it looked as if the Supreme Court would impose a constitutionally derived territorial rule on the states.6 At that time, the Supreme Court came close to engraving in the Constitution the vested rights theory associated with Professor Beale and the First Restatement. The leading cases that illustrate this approach are New York Life Ins. Co. v. Dodge7 and Mutual Life Ins. Co. v. Liebing.8 These decisions led the American Law Institute in 1934 to reserve the question whether every problem in conflict of laws had become a question of constitutional law.9

It is probably safe to say that the "modern era" of constitutional restrictions on choice of law began with the case Home Ins. Co. v. Dick.10 For in Dick, the language used by
the Court could easily be read as adopting a test which took into account the interests of the involved states. In Dick, a Texas Court was held to have violated the Due Process Clause by applying the laws of Texas while the only contact it had to the case was the plaintiff's domicile. In other words, Dick established that the plaintiff's domicile is insufficient by itself for imposition of the forum's law: Texas, lacking any interest in the insurance contract at issue, lacked authority under the Constitution to regulate it. Since Dick, the Court has tended to give state courts a broad discretion to use their own law.

Because of the economic depression in the 1930's and the increased state regulations of business in response to this depression, the Supreme Court became increasingly concerned with state interests.

In Alaska Packers Ass'n v. Industrial Acc. Comm'n the Court found that both Alaska and California had "a legitimate public interest" in the resolution of the problem. The solution devised was to weigh those interests "by approving the governmental interests of each jurisdiction and turning the scale of decision according to their weight." Three years later in Pacific Employers Ins. Co. v. Industrial Accident Comm'n, Justice Stone did not balance the interests of the two states. Instead, he determined that the forum had a substantial interest in the dispute. The Court's concern with states' interests was confirmed by later

After remaining silent on these issues for seventeen years, the Supreme Court, in 1981, decided the much discussed case of Allstate Ins. Co. v. Hague. There are several important aspects of the Hague case. First, by considering the plaintiff's new residence as a relevant contact with the forum, Allstate further expands the criteria available to state courts in selecting their own law. However, the state of the after-acquired residence could not without further contact regulate the case for its resident's benefit. Therefore, Justice Brennan's plurality opinion "found" other contacts between the state and the controversy and the aggregation of these contacts was said to create Minnesota's interest in the dispute. Second, the Hague plurality opinion further interpreted and equated the Due Process and Full Faith and Credit clauses. Third, Minnesota was allowed to apply a controversial new approach to choice of law: the "better law" approach of Leflar. Finally, since the result in the case was acceptable only to a plurality rather than a majority of the justices, it may be that there is no certain rule of law to serve as precedent resulting from the case.

It would appear that, Hague was a missed opportunity to say something meaningful about federal control of modern approaches in choice of law: Currie's assurances that undue protectionism would be curtailed by the Equal Protection and Privileges and Immunities clauses and that excessive forum
favoritism would be controlled by the Due Process and Full Faith and Credit clauses are therefore hardly convincing or reassuring. 28

In the jurisdiction and recognition field, however, the Due Process and Full Faith and Credit clauses have, because of effective Supreme Court intervention, become unifying elements of great potency and potentiality. And the consequences of a choice of law decision affect a party much more severely than does an inconvenient forum. 29 This point was made colorfully by Professor Silberman who said: "To believe that a defendant's contacts with the forum state should be stronger under the Due Process clause for jurisdictional purposes than for choice of law, is to believe that an accused is more concerned with when he will be hanged than whether." 30

One can therefore only hope that the jurisdiction cases will show the way to intervention by the Court with regard to choice of law. 31 Tolerance for parochialism in choice of law may have been warranted in the past because it involved few costs and because it provided doctrinal simplicity. Now, however, the greater mobility of the people and their greater tendency to engage in multistate activities has increased the number of conflicts that arise and has thus decreased the justification for accepting parochialism. 32 It is therefore time for the Supreme Court to take up its responsibilities as a disinterested and dispassionate umpire in disputes between the different passions and interests of the states. 33 A set
of guidelines which will further the notion of justice underlying the Constitution is needed for choice of law decision making.\textsuperscript{34}

Several modern approaches, based only on favoritism for local residents, run counter to the established principles of the American federal system.\textsuperscript{35} The next chapter will concentrate on how these modern approaches might violate the Equal Protection and Privileges and Immunities clauses.
NOTES FOR CHAPTER D


2. Cheatham, supra note 1, at 586.


6. Richman & Reynolds, supra note 4, at 235.


11. Richman & Reynolds, supra note 4, at 236.


13. Martin, supra note 5, at 236.


15. Richman & Reynolds, supra note 4, at 236-237.


17. Richman & Reynolds, supra note 4, at 236.


20. Richman & Reynolds, supra note 4, at 237.


30. Lowenfeld & Silberman, supra note 29, at 843.

31. Lowenfeld & Silberman, supra note 29, at 850.

32. Martin, supra note 5, at 230.

33. Lowenfeld & Silberman, supra note 29, at 856.

34. Martin, supra note 5, at 230.

CHAPTER E

EQUAL PROTECTION LIMITATIONS ON CHOICE OF LAW IN THEORY AND PRACTICE

Throughout history, arbitrary geographical boundary lines have made unjustified differences to the lives of Americans.¹

The Framers, aware of this danger, inserted the Privileges and Immunities Clause into the United States Constitution, designed, at least partly, to minimize friction among the people of the various states.² In view of the Framers' deep commitment to representative government, it also seems appropriate to suppose that, in placing some constraints on states' freedom to discriminate against non-residents, the Framers were moved, in part, by democratic ideals,³ not to exercise government without the consent of the governed.⁴

Moreover, the Supreme Court's deferential attitude towards the states in the context of conflict of laws, has encouraged experimentations with new ideas and methodologies for resolving choice of law questions.⁵ Special problems arise, however, when a forum state's decision to apply foreign law turns on the residence of the parties, and results in worse treatment for the non-resident. Discrimination against non-residents evokes particular concerns in the constitutional system of the United States not only under the
Privileges and Immunities Clause, but also under the Equal Protection Clause. It should be stressed that while the Supreme Court has never invalidated a state's choice of law decision on the basis of either of the discrimination provisions, arguments have been made in some cases that the choice of law rules applied violated these clauses.

The traditional "vested rights" doctrine basically ignored the citizenship of the parties. That system minimized cases of discrimination thanks to utilization of neutral and impersonal choice of law rules. These rules were applied to all cases in the local courts, irrespective of who the parties were. Brainerd Currie, however, accused the traditional system of choice of law of sweeping discrimination problems under the rug. However, the cases he cites in support of this contention are, in my opinion, not very convincing: one has to believe in his methodology, called "governmental interest analysis" in order to accept his conclusions. This is shown even more clearly by the argument of Russel Weintraub, one of Currie's followers who has stated that "a form of Equal Protection problem arises if the forum would refuse to apply its own law to its own residents because the forum's traditional choice of law rule points to some other geographical location as having the 'decisive contact'. Such a refusal may be based upon an unreasonable classification of forum residents if the policies underlying the forum rule would be advanced by applying it and it such
application would not interfere with the legitimate interest of any other state.\textsuperscript{13}

None of the new approaches\textsuperscript{14} to choice of law explicitly discriminate against parties on the basis of state citizenship.\textsuperscript{15} When such choice of law approaches are not discriminatory on their face, we must now consider whether they are discriminatory in their application.\textsuperscript{16} Modern theories assume, without further examination,\textsuperscript{17} that a state has an interest in applying its law in order to protect its domiciliaries or residents but has no such interest in non-domiciliaries or non-residents.\textsuperscript{18} Domicile looks like a very reasonable foundation for modern approaches: it possesses a rather precise definition and it caters to the general perception that everyone has a home.\textsuperscript{19} But, for at least two reasons, excessive reliance on domicile constitutes the most important weakness of modern approaches:

1. it jeopardizes a principle essential to smooth functioning of federal systems: treating non-residents as fairly as residents;\textsuperscript{20} and

2. it also raises problems of whether an individual ought to be able to get a change of law by deliberately acquiring a new domicile after the transaction in question occurred.\textsuperscript{21} However, without the basic methodological premise --- that states are interested in protecting their own residents in a way they are not interested in protecting others --- modern approaches are largely impotent.\textsuperscript{22}
Currie wrote two articles about the constitutionality of defining protective interests as running only in favor of locals. His device to cope with the constitutional problem was the so-called "intermediate solution" of extending the protection of forum law to an out-of-stater if he or she was similarly protected by the law of his or her home state. In other words, whether or not nonresidents are accorded benefits equivalent to those accorded by local law, will depend on what their legislators have seen fit to do for them, and that, interest analysts argue, would not be a violation of the Privileges and Immunities Clause.

However, as Dean Ely points out, this is not the way the Supreme Court has proceeded under Article IV: there is no case where the Court has asked what the challenger would be entitled to at home. On the contrary, in *Austin v. New Hampshire* the Court held that the content of the challenger's home state law is irrelevant to a Privileges and Immunities challenge: "The constitutionality of one State's statutes affecting nonresidents [cannot] depend upon the present configuration of the statues of another State." *Austin* thus seems to stand for the proposition that it is not sufficient under the Privileges and Immunities Clause to treat people as the laws of their home state would treat them. However, the Court's decision in *Allstate Ins. Co. v. Hague* supplies reasons to suppose that the implications of *Austin* were not fully considered. In *Hague*, seven of the eight Justices argued that local residence is a factor on
which a state may constitutionally rely in applying its own law. It is time for the Supreme Court to clarify this issue.

Dean Ely offers, if only as the devil's advocate, another defense of the constitutionality of modern conflicts methodologies. In accordance with his "representation-reinforcing" interpretation of the Privileges and Immunities Clause, he argues that non-residents do not need the protection of that clause when their obligations are defined by their own state government, rather than by a state in which they lack political representation.

However, as Neuman points out, reference to the law of a non-resident's domicile can also frustrate the broader purpose of the Privileges and Immunities Clause: to fuse the states into a single nation by eliminating differential treatment of citizens of other states: "Automatic approval of recourse to the law of the domicile maintains rather than reduces existing differential treatment between residents and non-residents. Thus this methodology does not foster a national economic union." The Supreme Court has also incorporated this fuller vision of national unity into its Equal Protection analysis, as illustrated by its decision, involving discriminations against newer residents of a state. As a result, sooner or later the Supreme Court will have to address these Privileges and Immunities and Equal Protection issues that lurk within the modern view on choice of law.
I will now examine how the Supreme Court could limit modern choice of law successfully, without restraining the states completely from applying the choice of law method they prefer. Therefore, I will go back to the first part of my analysis: the overview of the impact on constitutional law of the Equal Protection and Privileges and Immunities Clause.37

As we have seen, the Equal Protection Clause obviously has a core focus on racial discrimination. But the Framers consciously used broad language to comprehend new circumstances, experiences and insights.

The Warren Court introduced the strict scrutiny test for laws that classify groups either with respect to fundamental interests or on the basis of suspect criteria. The Burger Court, in turn, developed an intermediate standard of review. Non-residency has not been held to be a suspect classification and is thus not subject to strict Equal Protection scrutiny but only to mere rationality review.

The Privileges and Immunities Clause was plainly intended to prevent discrimination against out-of-staters. But unfortunately, the current Privileges and Immunities doctrine rests application of the clause on whether or not the Privilege or Immunity claimed is "fundamental."

The conclusion of this constitutional law analysis was that the Supreme Court now interprets the Equal Protection Clause to limit state power to discriminate against in-state aliens more severely than it has ever limited state power to
discriminate against out-of-state citizens or non-residents under both the Privileges and Immunities and the Equal Protection Clause.

Professor Simson argues that it is not likely that the Framers intended coverage by the Privileges and Immunities Clause of a particular privilege or immunity to depend on whether they are "in their nature fundamental." According to Simson:\(^38\)

(1) "the relationship between the fundamental or non-fundamental character of a Privilege or Immunity and the amount of interstate friction generated by its selective denial to non-residents is highly speculative;\(^39\) and

(2) "the fundamental or non-fundamental nature of a right is irrelevant to the extent to which a law that discriminates against non-residents with regard to the enjoyment of that right satisfies democratic norms."\(^40\)

Therefore, Professor Simson is in favor of a new standard of review, that invalidates any residence classification not shown by the state to be necessary to serve a significant state objective.\(^41\)

As has been stated before, in the author's opinion,\(^42\) classifications that distinguish between residents and non-residents are suspect and should thus be subjected to the strict scrutiny test of the Equal Protection Clause. These classifications are suspect because they tend to bring about disadvantages to persons with little or no formal or informal input into the lawmaking process.\(^43\) Non-residents neither
sit in nor otherwise materially influence the state legislature, while residents fill its every seat.  

For at least three reasons, this author considers the Equal Protection Clause to be a better basis for a constitutional test of modern approaches than the Privileges and Immunities Clause:

(1) The Privileges and Immunities Clause never has been a meaningful vehicle for judicial review of state actions. On the contrary, thanks to the relative simplicity of the Equal Protection Clause and to the large number of cases in which the Supreme Court has been called upon to consider it, its significance is much less obscure than that of the Privileges and Immunities Clause.

(2) The Equal Protection Clause is broader in its application: aliens, corporations and residents are within its protection. The Privileges and Immunities Clause only applies to non-residents.

(3) Laws which place non-residents at a disadvantage as to rights not fundamental for the purposes of the Privileges and Immunities Clause, overstep the bounds of reasonableness set by the Equal Protection Clause.

Under this author's analysis, the Supreme Court should undertake a further revision of its interpretations of Equal Protection limitations on the action of states and more specifically on the choice-of-law decisions of states.

The Court should clarify that, although the Equal Protection Clause does not obligate a state with
decision-making authority to exercise its authority in favor of any particular choice-of-law approach, these antidiscrimination guarantees against discrimination of the effect of undermining the legitimacy of several choice of law methodologies in current use.
NOTES FOR CHAPTER E


3. Simson, supra note 2, at 384.

4. Simson, supra note 2, at 384.


7. Note, supra note 5, at 274. In the latest edition of Cramton, Currie and Kay, Conflict of Laws 429 (4th ed., 1987) the Supreme Court case of Supreme Court of New Hampshire v. Pifer, 470 U.S. 274 (1985) is cited as an example of Supreme Court control over choice of law. In my opinion, however, that was not a conflicts problem (there were no conflicting laws) but merely a constitutional problem. But See: Quong Ham Wah Co. v. Industrial Acc. Comm'n, 184 Cal. 26, 192 Pac. 1021 (1926): "A privilege and protection of the laws of a substantive nature is ... accorded to citizens of this state and denied to citizens of other states. This is forbidden by the Federal Constitution." In this case, strangely enough, the Court did not nullify the statute, but extended the privilege to non-resident employees.

8. E.g., Skahill v. Capital Airlines, Inc., 234 F. Supp. 906 (D.C.N.Y. 1964); Neumeier v. Kuehner, 31 N.Y. 2d 121, 286 N.E. 2d 454, 335 N.Y.S. 2d 64 (1972); The reasoning of Justice Stone's famous footnote in United States v. Carolene Products, Inc., 304 U.S. 152 N.Y. (1938), has not been tested in the choice of law context. The reasoning is based upon some vague notion that everyone who is affected by a political decision ought to have a right to participate in making that decision. Justice Stone argued that "groups whose discrete and insular status effectively excludes them from the political process, qualify for heightened concern." For a complete analysis see Brilmayer, Carolene, Conflicts

9. Therefore, they hardly every discriminate on their face.


11. Currie, Selected Essays on the Conflict of Laws 420 (1963): "A forthright statement of the interest of the state in protecting its own purchasers would bring to light questions of discrimination long obscured by the pietism of conflict of laws law, and they are not single problems; but they ought to be brough to light and resolved, not swept under the rug by formulas that compromise state policy."

12. See cases cited in Currie, supra note 11, at 572.

13. Weintraub, Commentary on the Conflict of Laws 572 (1986). As you will see further, the problem with this kind of argument is that Interest Analysis tends to ignore or downplay interests that are based on something else than party residence. In my opinion, a rules approach does not violate antidiscrimination clauses because the Body of Law imposed through the system of neutral and impartial rules on non-residents, is, on the average, no less favorable than the body of law imposed on local residents. In other words, rules have (if applied properly) the common advantage that they take the law referred to either way and not simply if they favor one or the other party.

14. By "new approaches" this author means governmental interest analysis and "related theories" such as the better rule of law.

15. A choice of law rule that expressly required application of whichever law was most favorable to the party from the forum state would be an example of such an explicit discrimination; Note, supra note 5, at 287.


17. That assumption went unquestioned until 1980, when an investigation of the assumption caused it to crumple like wet paper; See Brilmayer, Interest Analysis and the Myth of Legislative Intent, 78 Mich. L. Rev. 392 (1980): She argues that the normative assertion that states have no business protecting anyone but their own citizens, is not supported by case law or by common sense: "this talk about interest is a fiction and their premises are metaphysical."

19. Corr, supra note 18, at 676.

20. See further for an elaborate analysis.

21. See: Corr, supra note 18 for an excellent analysis; Brilmayer, supra note 17, at 410.

22. Ely, Choice of Law and the States' Interest in Protecting Its Own, 23 W. & M. L. Rev. 173 (1981); The question then is whether we should reintroduce hard and fast rules that work unjust and encourage evasion, or whether we should retain non-rule approaches that may be unconstitutional.


24. Currie, supra note 11 at 504; For critical remarks see: Ely, supra note 22, at 183.

25. Ely, supra note 22, at 185.


30. Ely, supra note 22, at 186; Ely further concludes that if Austin is right as written, the dominant modern choice of law theory is unconstitutional: "It Undercuts the entire methodology by indicating that, whenever a state would claim an interest in enforcing its protective policy on the ground that the party its law would protect is a local resident, it is obligated by the United States Constitution to claim a similar interest in protecting out-of-staters, irrespective of what their home state laws provide."


32. Ely, supra note 22, at 188; The opinion in Hague did not even mention Austin.
33. Ely supra note 22, at 190; Neuman, supra note 221, at 322.

34. Neuman, supra note 1, at 323.

35. Neuman, supra note 1, at 323.

36. Neuman, supra note 1, at 321.

37. See Chapter I.


40. Simson, supra note 38, at 388; His new standard is strikingly similar to the intermediate used by the Supreme Court in Equal Protection cases.

41. See Chapter I.


43. Simson, supra note 42, at 86.

44. Simson, supra note 42, at 86.

45. The major ambiguity in the Clause lurks in the phrase "within its jurisdiction." For an analysis see: Currie, supra note 10, at 529.
CONCLUSION

"Ye shall have one manner of law as well for the stranger, as for one of your own country."1

As we have seen, the last thirty years have witnessed a fundamental change in the landscape of choice of law doctrines in the United States. The traditional system for choice of law in the United States was embodied in the First Restatement and was based on the "vested rights theory". The system consisted of a few broad hard and fast rules, coupled with an array of escape devices. Now, this traditional framework has been discredited and replaced by a series of mutually incompatible methodologies. But all these modern approaches have in common a critical attitude towards mechanical choice of law rules and the desire to make choice of law more responsive to the demands of substantive policies.

Of greater interest, however, is whether modern theories offer superior alternatives: Several modern approaches, seemingly based only on favoritism for local residents, run counter to the established principles of the American federal system, embodied in the Privileges and Immunities and Equal Protection Clauses of the United States Constitution.
Even apart from those constitutional problems, it seems unfair to let justice depend on who sues whom and where: modern approaches thus raise fundamental questions about interstate and international justice. Their modus operandi is resort to a single issue and this is sometimes highly unfair to non-residents.

Moreover, even if judges were only "les bouches de la loi" as Currie argues, it has been shown convincingly that state legislatures themselves tend not to exclude strangers from the benefits of domestic reforms.²

However, thus far the Supreme Court has never invalidated a state's choice of law decision on the basis of either of the two antidiscrimination clauses. As shown above, this author has argued that it is time for the Supreme Court to take up its responsibilities in this respect. This author suggested the use of the strict scrutiny test of the Equal Protection Clause to review residence based classifications. But this whole analysis also brings up the old dispute: whether there should be rules, or in the alternative, whether there should be approaches in choice of law? In this author's opinion, there are two possible directions for choice of law methodology: opting for a modern approach in a narrow constitutional context or a return to a more rule-oriented approach. Of course, such a return should be a careful one (to avoid the manipulation of choice of law results via escape devices as in the traditional system).³
But before choosing a particular direction, let us observe some recent European trends in choice of law methodology. With Professor Schlessinger, the author strongly believes in the value of comparison as an antidote to "an unperceptive and uncritical attitude toward one's own law."
NOTES FOR CONCLUSION

1. Leviticus 24:22


3. There is a third alternative: creating new rules of substantive private law to decide conflicts cases.

PART III. A SIDE GLANCE AT THE COMMON MARKET

CHAPTER A

INTRODUCTION TO THE EUROPEAN CONFLICTS SYSTEM

"Comparative law has one incontestable virtue: it shows a greater range of possible solutions to a specific problem than any particular legal system can boast of."¹

Generalizations respecting the methodology of European conflicts law are more difficult to make and less accurate than are generalizations respecting thinking over these matters in the United States.² The task that I undertake is thus one of extreme difficulty. The following summary of current developments should therefore be read with cautious scepticism. My only excuse is my hope that this brief introduction may induce the reader to form his own opinion by reading the original texts.

Because of the mobility of persons and transactions, Europe has become as much of a "conflicts paradise" as the United States.³ There is no unified European choice of law method -- though some work in this direction has been done in the framework of the European Community.⁴

Most of the European countries still adhere to the jurisdiction-selecting methods:⁵ systems that select the legal order which is to control the choice of law issue

81
without particular regard to how the various concerned legal orders wish to regulate the matters in question.6

The jurisdiction-selecting rules formulated by the First Restatement are somewhat similar to those current in Western Europe: both incorporate the two-state process of:

(1) characterization; and

(2) selecting a connecting factor.7

However, there the analogy ends: European rules are based on Savigny's ideal of decisional harmony while American rules find their foundations in the Vested Rights Theory.

Only recently, European lawyers and the courts in the Federal Republic of Germany have recognized that constitutional law affects choice of law decisions.8

Although American and European conflicts law have a common background --- the labors of glossatora and commentators who, in Italy, made the conflicts law a science --- there are basic differences which need to be explained:9 whereas the common-law lawyer argues from case to case, the civil-law lawyer primarily deduces his conclusions from statutory provisions in the form of choice of law rules. He has to discover and formulate the general principle governing his decision and there is no prima facie presumption in favor of internal substantive law.10

Also, the principle of legal certainty is of greater importance in Europe than in the United States where courts feel more inclined to attribute primary importance to the satisfactory solution of individual cases.11
Most conflicts cases in the United States are interstate rather than international, the states share a common language and legal heritage and they are part of a federal system. In Europe, however, questions of private international law mainly concern the relationship between the domestic system as a whole and foreign legal systems with differing substantive laws: problems are more truly international.

In Europe, some nations do not accord constitutional law primacy and even in countries which grant primacy to constitutional law, it is disputable that courts with constitutional review jurisdiction should invalidate unconstitutional conflicts rules. In the United States the primacy of constitutional law and the power of judicial review is established.

The most important difference between traditional European and modern American methodologies lies, as Kegel points out, in their view of the relation between substantive law and the conflict of laws. Traditionally, substantive law and conflicts were entirely different things: substantive law aims at the materially best solution while conflicts law aims at the spatially (and materially) best solution. American reformers, however, allowed the conflict of laws to become largely absorbed into substantive law so that choice of law rules almost disappeared. In order to reach a choice of law decision, American reformers start with an analysis of the substantive laws, while Europeans still "blindly" determine which law to apply. The American point of departure
from substantive rules lead to ad hoc decisions or at best to very narrow particular choice of law rules, while European conflicts law maintained widely formulated rules. According to Professor Kegel, the methodology followed by modern American conflicts thinkers misconceives the different tasks of both legal areas —- substantively correct solution within substantive law, spatially correct solution within international or interstate private law. In his opinion, conflict of laws is a system of itself and should thus operate without too much reference to the substantive laws underlying it.

The American conflicts revolution has stirred significant debate in Europe. In practice, however, the impact of the American revolution has been felt only in a few European countries. In the following chapter, we will take a closer look at the European reaction to the American revolution.
NOTES FOR CHAPTER A


2. Von Mehren, Comments, 27 Am. J. Comp. L. 605 (1979). Europeans use the term "private international law" to describe what in the United States is called "conflict of laws," that is, the domain of rights, duties and disputes between and among persons from different places.


6. Von Mehren, supra note 2, at 605.


10. Siehr, supra note 3, at 70.


13. Muller-Freienfels, supra note 9, at 599. Therefore, it is asking too much to expect a judge of one country to speculate on the policies underlying the laws of another country.

14. Muller-Freienfels, supra note 9, at 600.

15. Muller-Freienfels, supra note 9, at 600.

17. Kegel, supra note 17, at 617. The two conflicting goals of each choice of law system are decisional harmony and appropriate solutions.

18. Kegel, supra note 17, at 617-624.

19. Kegel, supra note 17, at 625.

20. Kegel, supra note 17, at 624.


22. Vitta, supra note 12, at 3; e.g., Germany, Switzerland.
CHAPTER B

EUROPEAN REACTION TO THE "CONFLICTS REVOLUTION"

"Law must be stable, and yet it cannot stand still."  

The writings of Professor Brainerd Currie have been very important in the development of European interest in the American approach to conflict of laws. Currie's purpose in proposing new methodologies was to have conflicts problems solved in the same way that domestic cases were decided and no longer by jurisdiction-selecting rules imported from Europe.

At first, the Europeans were moved by intellectual curiosity about the modern American approaches: they attempted to describe and analyze American developments. As early as 1964, Kegel devoted his Hague lecture, which he entitled "The Crisis of Conflict of Laws" to a description and critique of Currie's and Ehrenzweig's theories. Since then, many European authors have devoted considerable space in their articles, monographs and book reviews to evaluating and criticising modern American approaches. Their main criticism was directed against the unprincipled ad hoc decision-making, the forum shopping, the legal insecurity, the overriding importance to the problem of jurisdiction as opposed to choice of law and the homeward trend in the modern American approaches.
Even though there are many European studies on the American conflicts revolution, I know of no leading European conflicts treatise which advocates any American approach as a substitute for the traditional European conflicts methods. Instead, what happened in Europe must be considered not as a revolution but as an evolution of the existing system towards greater flexibility. The pressures for change were felt primarily in the field of domestic relations probably because of the excessive reliance on nationality as the connecting factor.

In practice, American influence on European developments was direct as well as indirect: In 1964, the United States joined the Hague Conference of Private International Law. Since then, American conflicts theories have directly influenced European private international law by way of international treaties drafted with American participation and entering into force in European countries. Any conclusion as to the indirect influence of American thoughts on European choice of law thinking and practice involves much speculation. It is, however, legitimate to assert that American thinking has stimulated reconsideration of the traditional rules for choice of law in European legal systems.

If any American theory has been coherently influential in Europe, it is the "most significant relationship" test of the Second Restatement, whose moderate position was very appealing to Europeans. The tradition of selecting the law applicable to cases with foreign elements by using
appropriate connecting factors was strongly rooted in European theory and practice. Therefore, when the need for more flexibility in conflict rules was felt, it was relatively easy to adopt flexible rather than rigid connecting factors.18

Another trend detectable in Europe relates to the protection of the weaker party in a legal transaction.19 This tendency shows that European countries now pay greater attention to the social realities underlying legal developments.20 However, even in such instances with a slight touch of policy analysis, the European courts made use of their traditional methods: they either created new conflicts rules as an exception or as an alternative to a formerly comprehensive general rule or they applied such tools as the public policy exception to avoid clashes between the lex fori and the designated foreign law.21

On the other hand, concepts developed in European conflicts scholarship have been noticed in the United States and some interaction seemed to take place. Thus, the concept of "directly applicable laws" has been recommended to American lawyers as a possible method for contributing to the development of American conflicts laws.22

Why is it that American ideas had no more impact on European thinking and practice?23 The explanation is probably that the new American theories have been difficult to apply to the European situation because of the basic differences in their views of conflicts law:24 The central role
of values as simplicity, certainty, equality and predicta-
ability in the European conflicts tradition prevented adop-
tion of interest analysis approaches. Moreover, any
successful system based on policy analysis, presupposes a
certain common background and, in my opinion, a certain
degree of federal control. Such a common background, based
on the English heritage, still exists in the United States
notwithstanding numerous differences in the statutes and in
the interpretation of the Common Law. This author has
argued before that federal control should be strengthened by
the Supreme Court.

In the next chapter, the author will discuss the
relationship between choice of law and constitutional or
European law in Europe and the possible influence of modern
American approaches in this field.
NOTES FOR CHAPTER B

9. See the Symposium in 30 Am. J. Comp. L. 1 (1982). This symposium contains copious reference to European comments on American choice of law methods.
13. In the United States, however, the conflicts revolution happened primarily in tort law; see Juenger, supra note 10, at 131.
14. Siehr, supra note 11, at 38; n. 2-6; Hanotiau, supra note 299, at 88-89.

16. Morse, supra note 15, at 94.

17. Morse, supra note 15, at 96. For different meanings of the "closest connection" principle see Vitta, supra note 4, at 12. However, as Morse points out there is no tendency in Europe to discover the most significantly related law by reference to the type of choice of law "principle" set out in section 6 of the Second Restatement. Thus, no obvious attention is paid to the "policy" of the relevant conflicting rules; Morse, supra note 15, at 96.

18. Vitta, supra note 4, at 14.

19. For examples, see Vitta, supra note 4, at 11.

20. Vitta, supra note 4, at 12: One can perceive a sort of interest analysis, albeit private interests, when shaping the conflicts rules."

21. Siehr, supra note 11, at 55.

22. Directly applicable laws: the domestic law of the forum is said to apply immediately, i.e., without any conflicts rule, although important contacts to foreign jurisdictions exist. See Siehr, supra note 11, at 66.

23. Vitta, supra note 4, at 7.

24. See supra chapter A for a brief description of those basic differences.


26. Sauveplanne, supra note 12, at 76.

27. Vitta, supra note 4, at 6. In fact, interest analysis may be nothing more than a return to the common law method of arguing from case to case.

28. See supra Chapter II.
CHAPTER C

LIMITATIONS ON EUROPEAN CONFLICTS RULES

European legislators and courts have for too long ignored constitutional and European law as setting boundaries for permissible choice of law rules and decisions.¹

What is the significance of the European Community for choice of law decisions made by its Member States?² Even in Europe, very few people have yet asked this question.³ The European Community offers standards of conduct to Member States in the field of economic and social relations.⁴ But problems of conflicts law were not dealt with in any substantial way in the treaties establishing the Communities.⁵

As Fletcher points out, three varieties of conflicts exist because of the creation of the European Communities: conflicts between the national and Community legal order, conflicts between the Member States and conflicts between the Community legal order and legal systems of other countries, whether members of the Community or not.⁶ American readers will certainly perceive certain parallels between these situations and those they encounter in the perennial phenomenon of a fixed yet fluctuating federal-state relationship.⁷ Just like the judge in a system regulated by a federal constitution, who must respect the limitations which the notion of constitutionality imposes upon his scope for reaching

93
his decision, the national judge in the European Communities exercises freedom of action only within certain defined limits. However, it is far from being the case that the European Community has yet succeeded in transforming itself into a federalized system.

Conflicts between Community and national rules are governed by the Supremacy Principle: the Community law, by virtue of its own special nature and conception, commands supreme force within the domestic legal order of every Member State.

With regard to "internal" conflicts cases, Article 220 of the Treaty contains limited provisions for the progressive substitution of unified rules of Private International Law. Member States should make genuine efforts to accelerate the rate of progress in this area, which has been disappointingly slow. The national courts, in responding to a conflicts problem, should enlist the assistance of the European Court of Justice by means of a reference pursuant to Article 177 of the Treaty. The Court is well qualified to undertake the sort of comparative investigation which the question may well require, and its ruling will thereafter constitute a source of reference and inspiration for all courts in all Member States.

One of the conflicts provisions that one can find in the Treaty is Article 7, requiring that the prohibition against any discrimination on grounds of nationality would be fully respected by every Member State. However, the principle of
non-discrimination does not occupy an important place as a limit on a country's choice of law decisions. There is not yet any clear "European test" available. This is very surprising if one considers how much attention the non-discrimination principle recently got in substantive law.

With respect to the situation in the individual Member States, it was mentioned before that for the important problems concerning the relation between conflicts and constitutional law to arise, constitutional law should be accorded primacy and judicial review must exist to implement that primacy:

1. In England there exists no power of judicial review.
2. In Germany, there is a power of review, concentrated in the Federal Constitutional Court.
3. In the United States, there exists a diffused system of judicial review: every court can refuse to apply a certain law.

Until recently, national constitutional principles had no influence at all on choice of law decisions. According to some conflicts thinkers, choice of law rules are simply neutral, formal provisions, rules of expediency, devoid of substantive justice and thus rules of Private International Law should not be subject to any national constitution. As it will be argued later, this view ignores the necessity of more international justice: in Europe rules are not always neutral or value free. A landmark decision of the German Constitutional Court ignited a European "revolution" by
establishing an interaction between constitutional principles and choice of law. The American emphasis on the importance of constitutional law in the conflicts area (especially with respect to jurisdiction) has undoubtedly influenced this European development.

This decision and its implications for German (European) choice of law rules are examined below.
NOTES FOR CHAPTER C


2. For an excellent book on Conflict of Laws and European Community Law; see Fletcher, Conflict of Laws and European Community Law 1-395 (1982).


5. Drobnig, supra note 3, at 204.

6. Fletcher, supra note 2, at 23.

7. Drobnig, supra note 3, at 204.

8. Fletcher, supra note 2, at 42.

9. Fletcher, supra note 2, at 43.

10. Supranational nature: able within the sphere of competence actually to override the legislature and the executive powers of the individual Member States.

11. Fletcher, supra note 2, at 34.

12. Fletcher, supra note 2, at 44.

13. Fletcher, supra note 2, at 50.

14. Fletcher, supra note 2, at 51.

15. Fletcher, supra note 2, at 50.

16. Sauveplanne, supra note 4, at 78; This in contrast to the United States where there are several tests available under the Equal Protection Clause. However, there the tests are not (yet) applied to choice of law decisions.

18. Muller-Freienfels, supra note 1, at 602.

19. Muller-Freienfels, supra note 1, at 602.


21. Muller-Freienfels, supra note 1, at 603; e.g., the rule that in domestic disputes the law of the husband's nationality is to be applied, brings numerous practical disadvantages for wives:

   (1) it ignores the fact that the law of the wife's nationality is generally most appropriate for application to her; and

   (2) the wife unlike the husband is not afforded the opportunity to influence the choice of law determination by acquiring a new nationality; see Muller-Freienfels, supra note 1, at 603.

22. Muller-Freienfels, supra note 1, at 982.
CHAPTER D

THE SIGNIFICANCE OF NON-DISCRIMINATION CLAUSES WITH RESPECT TO CHOICE OF LAW

The phenomenon of massive immigration in industrialized Europe forced some European countries and especially Germany to rethink their excessive reliance on nationality as a connecting factor in choice of law decisions.¹

The Garcia decision of the German Constitutional Court² has probably attracted more attention than any other case in the history of German conflicts law. In that case, both German conflicts rules and German or foreign substantive law were held to be subject to constitutional review.³

The facts were simple: A Spaniard intended to get married to a divorced German woman. Under the German Civil Code, marriage is, with respect to either spouse, governed by the law of the state to which he or she is a national. Consequently, a foreigner has to produce a marriage license from the authorities of his country or has to apply for an exemption from this requirement. In this case, the Court of Appeals in Germany had refused to grant an exemption on the ground that under Spanish law the divorce, even of a foreign civil marriage would not be recognized and that therefore the proposed marriage would be regarded as bigamous.⁴
The Federal Constitutional Court held that the conflicts rule of reference to the nationality of the parties was subject to constitutional review but that in this case it did not violate constitutional guarantees. Reference to the law to which a person owes allegiance and with which he or she is presumably most familiar would seem to accord with the intent of prospective spouses. Nor could the idea of protecting the stability of marriages be faulted: Germany made reference to the national law of both persons to avoid that the marriage would not be recognized in their home countries. However, the Court also held that the application of Spanish law would infringe the constitutional right of freedom of marriage and that therefore Spanish law could not be applied. This holding comports with recent American thinking that a court should look at the content of potentially applicable laws.

From this 1971 case, it was unclear whether German choice of law rules which connect the solution of problems in International Family Law to only one of the spouse's (usually the husband's) nationality, were in harmony with the Constitution's requirement that men and women are to be treated equally. At the end of 1982, the Federal Supreme Court (Bundesgerichtshoff) decided that the choice of law rule which subjected the dissolution of a marriage between spouses of different, non-German, nationalities to the lex patriae of the husband was not constitutional. In February, 1983, the Federal Constitutional Court had the occasion to consider the
rule according to which a married couple's matrimonial property regime is to be governed by the lex patriae of the husband at the time of the marriage. The Court had no doubts that the rule was also in conflict with the Article in the Constitution guaranteeing equality of sexes.  

The requirement that choice of law provisions must comply with constitutional precepts forced the German legislator to review a substantial segment of the German statutory conflicts rules.

For other European countries, the answer to the question of how they can incorporate equality principles in domestic conflict rules, remains uncertain. American and German experiences should encourage them in developing more just choice of law methodologies.
NOTES FOR CHAPTER D


5. Juenger, supra note 3, at 293.


7. Dickson, supra note 6, at 233.

8. Symposium, supra note 4, at 142.

9. Juenger, supra note 3, at 296; Whenever the constitutionality of the outcome of conflicts cases is at issue, German judges will have to engage in what looks remarkably like Governmental Interest Analysis.

10. Dickson, supra note 6, at 233; Article 3(2) of the 1949 Constitution (Grundgesetz): "Manner und Frauen sind gleich-berechtigt." (men and women have equal rights).

11. Dickson, supra note 6, at 233; In a previous judgment of 18 January 1954; BGHZ 42, 7 the Federal Supreme Court had held that this rule was not unconstitutional because it did not necessarily lead to the woman being disadvantaged; see Dickson, supra note 6, at 233: the reasons given in 1982 for the change of attitude was that the rule withheld the woman the application of the legal system with which she was probably more familiar and that it laid her open to the possibility of the husband's influencing the applicable law by changing his own nationality; see Dickson, supra note 6, at 233.

12. Division of February 1983, 63, 181. Some commentators have argued that conflict with Equal Rights principles may be avoided by giving the parties freedom to choose the applicable law among the common national law of the parties, the national law of one of the parties and the law of the place of residence. As Muller-Freienfels points out this
proposal neglects an important consideration: In marriage law, public policy considerations restrict the parties' freedom to alter their obligations inter se; see Muller-Freienfels, Conflicts of Law and Constitutional Law, 45 U. Chi. L. Rev. 598, 606 (1978).

13. Dickson, supra note 6 at 231 gives an overview of the modifications.
As has been shown, there is no "international" Private International Law: it is American, Californian, European and German Private International Law.

A universal system of choice of law is a utopia, but this ideal may help to determine the direction in which practical action should move. After the initial radicalism of opposed views is over, it should be possible to come gradually to at least a degree of "rapprochement" between European and American methodologies. It is with this goal in mind that I made this brief comparative analysis.

First, some of the basic differences between American and European conflicts law were explained. I pointed out that the most important difference lies in the opposing views of the relation between substantive law and the conflict of laws.

Second, European reactions to the American "conflicts revolution" were examined. The conclusion was that American thinking has stimulated an evolution of European choice of law rules towards greater flexibility.

Third, it was shown that the path towards European integration is long and difficult: so far European law has had
no notable influence on choice of law decisions by Member States.

Fourth, the author argued that European countries should adopt the principles set forth by the German Constitutional Court that choice of law rules must comply with constitutional equality precepts.

A factual basis for "rapprochement" between European and American choice of law methodologies already exists: the unprecedented mobility of persons and transactions all over the world.

In this paper the author did not really want to promote one method as the best for all choice of law decisions everywhere. The author only hopes that the softening of the hard and often discriminatory choice of law rules in European countries may develop further, under American influence. But, the author also believes that some modern American methodologies have, in recent years, been overly preoccupied with problems of narrow local concern. Observation of European trends might suggest that there are broader issues --- such as international harmony and equality --- which deserve attention.
GENERAL CONCLUSION

In this paper, the author confronted the premise, widely invoked in modern American choice of law thinking, that a state has a greater interest in protecting its own citizens or residents than it has in protecting others, using antidiscrimination clauses of the United States Constitution.

The author argued that classifications that distinguish local residents from out-of-staters are suspect and that they should therefore be subjected to the highest Equal Protection scrutiny.

The comparison with European conflicts thinking was meant to explain that conflicts justice is not perceived in similar terms in Europe and in the United States.

Conflicts justice in the United States is viewed as a case by case attempt to achieve justice in substantive terms. Conflicts law is conceived as adjective law, that is, as the mechanism for reaching the right result. In most states of the Union, there is a wide common basis of tradition and substantive principles; conflicts usually arise from details in legislation. This common background explains the success of Interest Analysis related methodologies in American courts.

However, the idea that multistate problems call for an analysis of the reach of local rules is, in my opinion, strikingly parochial.
Moreover, justice in the individual case also means that such an important goal as equality should not have to yield to the inwardlooking (or parochial) results often reached by modern American approaches. Federal concerns (for equal protection) call as much for attention in the choice of law process as do the concerns of the parties or of the particular forum. Decision-makers are representatives not only of their own nation-state, but also of the larger collective community and therefore preference for forum residents should be avoided by them.

But, as long as state conflicts decisions are subject only to the outer limits of constitutional control, a great deal of parochialism will continue to prevail. The Supreme Court has the power and the authority for activism in controlling state choice of law decisions. It should be used.

In Europe, conflict of laws interest in the application of this or that substantive law, that is European conflicts justice, demands that the same scope of application be accorded to every substantive law, domestic as well as foreign. European legal systems assign an ordering function to conflicts law and thus view it as a separate body of law which determines the applicable law in a neutral and objective fashion, without regard to the substantive result. Therefore, the most basic test of European conflicts rules is that they be formally just. The German Constitutional Court realized this in its holdings that equality of sexes should be respected when choosing the applicable law for family
relations. Other European countries such as Belgium should follow the German example and review their conflict rules as to their conformity with constitutional principles of equality.

Finally, the author would like to address a somewhat broader issue: What is the wisdom of applying local law to multistate or international realities? Complete equal treatment can only be assured if a uniform system of non-discriminatory choice of law rules is accepted by all states and countries and if this system is uniformly administered. This is clearly an unattainable ideal. However, treaties and cooperation on an international level can help develop a more uniform approach and thus close the gap between American and European conflicts law. Non-discrimination across the boundaries is a value thereby to be respected.
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