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Symposium

Supreme Court Intervention in Jurisdiction and Choice of Law: From *SHAFFER* to *ALLSTATE*

FOREWORD

In *Shaffer v. Heitner*[1] the Supreme Court, abandoning its benign neglect, adopted an activist attitude toward jurisdiction. Four times in as many years it struck down decisions in which state courts asserted power to affect the rights of nonresident defendants.[2] The Court's intervention in these interstate controversies soon prompted legal writers to discuss what role the Court might play in choice of law.[3] It has been argued, with some cogency, that the freedom of state courts to apply forum law to foreign facts needs to be constrained even more carefully than their assertions of long-arm jurisdiction.[4]

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[1] 433 U.S. 186 (1977).

[2] One year after *Shaffer* the Court decided Kulko v. Superior Court, 436 U.S. 84 (1978); two years later Rush v. Savchuk, 444 U.S. 320 (1980), and Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[3] *See, e.g.*, Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980); Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978); Silberman, Shaffer v. Heitner: *End of an Era*, 53 N.Y.U.L. REV. 33 (1978).

[4] The point was made most 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

That jurisdictional decisions should inspire a choice-of-law discussion is not surprising for, as has long been recognized, the two fields are interrelated.[5] The matter took on more than mere academic interest once the Court granted certiorari petitions in two conflicts cases. The first of these, *Nevada v. Hall*,[6] disappointed the cognoscenti because the Justices, while talking at considerable length about the interstate reach of sovereign immunity, took for granted that a court may apply forum law to an in-state accident. In *Allstate Insurance Co. v. Hague*,[7] however, the Court faced the choice-of-law issue squarely. That case had been argued but not decided by the time the Association of American Law Schools held its 1981 annual meeting in San Antonio, presenting the Association's Conflicts Section with an opportunity to indulge in our profession's favorite pastime: soothsaying.[8]

The following contributions differ, in content and format, from the papers presented at the AALS meeting. Although confident in their prescience, the panelists recognized the value of reworking their disquisitions in the light of what the Justices had to say in *Allstate*. However, it is fair to say that they have not changed the views they expressed in San Antonio on what the role of the Constitution in choice of law should be.

Professor Lowenfeld, who ably represented Mrs. Hague in the Supreme Court, and Professor Silberman, the first to comment on the choice-of-law ramifications of *Shaffer*,[9] have chosen to combine their contributions and present them in the form of a

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choice of law is to believe that an accused is more concerned with where he will be hanged than whether." Silberman, *supra* note 3, at 88. *See also* Martin, *supra* note 3, at 879-80.

[5] *See* F. VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS 114-15, 126, 129-30, 133-34, 194-97, 202-03, 221-22 (2d ed. W. Guthrie trans. 1880).

The first member of the Supreme Court to comment on this relationship was Justice Black, who said that choice of law and jurisdiction "are often closely related and to a substantial degree depend upon similar considerations." Hanson v. Denckla, 357 U.S. 235, 258 (1958) (dissenting opinion). This statement now has the support of a plurality of Justices. Allstate Ins. Co. v. Hague, 449 U.S. 302, 317 n.23 (1981).

[6] 440 U.S. 410 (1979).

[7] 449 U.S. 302 (1981).

[8] *Allstate* was also discussed at the Association's Civil Procedure Section meeting on January 4, 1981, one day before the meeting of the Conflicts Section.

[9] *See* Silberman, *supra* note 3, at 79-90, 100-01.

spirited dialogue. Professor Peterson, who once mockingly called current choice-of-law orthodoxy a "religion" for "True Believers,"[10] now espouses the view that jurisdiction and choice of law should benefit from holy wedlock. Like Professor Silberman, he favors Supreme Court intervention in choice of law. On the same side we find Professor Kozyris. He deplores the Court's refusal either to curtail the states' exorbitant assertions of "legislative jurisdiction" or to avow its *laissez-faire* position openly. His painstaking analysis of *Allstate* concludes that since the Court has failed to do the job, it is up to the scholars to drain the conflicts swamp. Whatever the odds on the scholar's task, my own reading of the opinions in *Allstate* confirms my belief that it is futile to hope that the Supreme Court could clear up the murky field of choice of law.

Thus, in the best academic tradition, the panelists manage to disagree in principle (and, of course, on various details). But whether the *Allstate* decision is a missed opportunity, a fumbled attempt, or an expression of wise restraint, we trust that the reader will find the following spectrum of views to be of interest. As with *Allstate,* those who seek certainty will be frustrated, though we do add balance of sorts: two of us, like the plurality of four Justices, reject Supreme Court intervention while the other three, like the three dissenters, favor it. With this six-to-six score Justice Stevens remains the tie-breaker, but the game goes on.

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[10] Peterson, *Weighing Contacts in Conflicts Cases: The Handmaiden Axiom,* 9 DUQ. L. REV. 436, 441 & n.30 (1971).