ESSAY

# A Choice by Any Other Name: Ad Hoc Substitutes for Choice of Law

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*This Essay analyzes three methods of avoiding the doctrinal disarray in American choice of law: imposing constitutional restrictions on personal jurisdiction and therefore limiting the plaintiff's ability to forum shop for favorable choice of law; applying the presumption against extraterritorial application of federal statutes; and enforcing contractual choice-of-forum and choice-of-law clauses. Each method of avoidance has its advantages and its disadvantages. The former consist mainly in giving the parties and the courts more control over choice of law in a more determinate way. The latter arise from the uncertainty created by adding another layer of ad hoc evasions to the other complications of choice of law. The law of personal jurisdiction largely depends upon an analysis of all the factors that go into establishing "minimum contacts." The extraterritorial application of federal statutes depends upon the context, both textual and factual, in which they operate. And choice-of-forum and choice-of-law clauses depend upon the terms and interpretation of the contracts in which they are found.*

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## I. BACKGROUND

Contemporary choice of law suffers from indeterminacy at every level: in theory and in practice, in variation between states, exhibiting divergent rules, standards, exceptions, and methods. Some quarrel with how bad the disorder really is, but few assert that the existing system is in any sense optimal. It generates a number of problems, the most visible arising from forum shopping to take advantage of choice-of-law rules favoring forum law. Plaintiffs simply look for a forum with favorable substantive law, favored by its own choice-of-law rules.[1] Attempts to devise determinate rules that might deter such practices might yet succeed in generating consensus. Until they do, however, choice of law has left a vacuum to be filled by different sources of legal doctrine—different enough to be separable from the field of choice of law, but similar enough to dictate the choice of one state's law or another's. If judges, lawyers, and parties cannot find solutions within the field, they naturally turn to solutions outside it. This Essay surveys these efforts, which might, to be sure, be worse than the disease. Nevertheless, they indicate how serious the disease is.

The latest attempt to remedy the indeterminacy in choice of law appears in the circulating drafts of the Restatement of the Law Third, Conflict of Laws (Third Restatement). It seeks to devise easily followed rules which would generate consensus and fairly uniform decisions by American courts.[2] This project begins from the premise that consensus is, at best, only emerging and that the proposed rules would give courts a salient point upon which to coordinate their decisions. At the present, however, different states still follow different approaches rooted in the previous restatements of Conflict of Laws. The First Restatement followed a formal, territorial theory to devise definite rules that looked to the location of a single event to select the law of a single state.[3] The Second Restatement deployed an array of factors to determine which state's law could most reasonably be applied to the facts of a particular case.[4] And different academic versions of "interest analysis" emphasized the underlying purpose behind each state's laws and resolved doubts in favor of the forum's law when these purposes came into

1. *E.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 261 (1981) (holding that the presumption in favor of a plaintiff's forum is weaker when "the real parties in interest are foreign").

2. *See* Restatement (Third) of the Conflict of Laws (AM. L. INST., Tentative Draft No. 1 xx, 2020) (Reporters' Memorandum) (writing rules that capture patters of judicial decisions "is the primary goal of this Restatement").

3. *E.g.*, Restatement (First) of the Law of Conflict of Laws § 377 (1934) (selecting the law of the place of injury for most tort cases).

4. Restatement (Second) of the Conflict of Laws § 6 (1971) (identifying the principles that go into determining the state "with the most significant relationship" to the case).

conflict.[5] The current drafts of the Third Restatement candidly acknowledge all these variations and then opt for following the consensus rule, if one exists, distilled from the decisions since the Second Restatement.[6] It leaves open several caveats, however, derived from interest analysis, both in seeking to justify the recommended rules and in recognizing a general exception if one state's interest in applying its law is clearly superior to the competing interests of any other state.[7] Only time will tell whether this compromise will generate consensus from the welter of diverging decisions and approaches now evident in the field.

This Essay does not take sides in the ongoing disputes over the Third Restatement, and more generally over the entire field of choice of law. It argues, instead, that the persistence of those disputes, dating back to the First Restatement, has led courts to seek alternatives to avoid them. These alternatives themselves are open to criticism and could be reconceptualized as part of choice of law itself, but they do not display the global indeterminacy characteristic of the field. The most familiar are constitutional restrictions on personal jurisdiction. If the forum cannot exercise personal jurisdiction over the defendant, then the case must be dismissed on this ground, rendering any attempt by the forum to apply its own law moot.[8] Another alternative is dismissal for forum non conveniens, which operates in much the same fashion and, as we have been told by the Supreme Court, must generally disregard changes in the applicable law disadvantageous to the plaintiff.[9] Closer to a choice-of-law rule is the presumption against extra-territorial application of federal statutes. This presumption has been repeatedly invoked by the Supreme Court, although with grudging recognition that it does not apply to certain claims, like those for violation of the antitrust laws.[10] Another set of alternatives comes, in the first instance, from private parties, who agree to choice-of-law and choice-of-

5. BRAINERD CURRIE, THE CONSTITUTION AND THE CHOICE OF LAW: GOVERNMENTAL INTERESTS AND THE JUDICIAL FUNCTION, IN SELECTED ESSAYS ON THE CONFLICT OF LAWS 188, 189 (1963) (describing method of interest analysis when more than one state has an interest that would be served by applying its law).

6. Restatement (Third) of the Conflict of Laws, (AM. L. INST., Council Draft No. 4 xxi, 2020) (Reporters' Memorandum) ("When decisions largely support one characterization, we feel relatively confident in following that as the correct answer.").

7. *Id.*

8. Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. 102, 115 (1987) (requiring dismissal by California court in part because "it is not at all clear at this point that California law should govern").

9. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254-55 (1981); An empirical study of choice of law finds no bias in favor of forum law but does find bias in favor of plaintiff's choice of law, which is consistent with the thesis that plaintiffs forum shop for favorable law. Daniel M. Klerman, *Bias in Choice of Law: New Empirical and Experimental Evidence*, J. INST. & THEORETICAL ECON. (forthcoming Sept. 2022).

10. F. Hoffman-LaRoche, Ltd. v. Empagran, S.A., 542 U.S. 155, 165 (2004) (noting that "our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable").

forum clauses in order to bring a degree of certainty to how and where disputes between them might be resolved. Arbitration clauses also play a similar role in reducing the uncertainty faced by the parties.

Each of these alternatives will be taken up in successive parts of this Essay, with an emphasis on their significance in international civil litigation. That takes place against the background of foreign choice-of-law, which have almost entirely refused to follow the American approach after the First Restatement. Unlike domestic cases, international cases involve a wider range of possible forums and wider variation in substantive and procedural law. For that reason, these cases pose greater risks to the parties from uncertainty in the resolution of choice-of-law issues. We begin with personal jurisdiction.

## II. PERSONAL JURISDICTION

The constitutional limits on personal jurisdiction come in two parts: those focused upon the defendant, principally the defendant's contacts with the forum; and those that invoke a wide range of other factors. The latter invoke a general concept of "reasonableness," which include a variety of factors:

> the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.[11]

Despite this lengthy list of broadly framed factors, the focus on the defendant is "always a primary concern."[12]

The emphasis upon the defendant distinguishes the constitutional limits on personal jurisdiction from those on choice of law. The latter look at all the contacts of "the parties and the occurrence or transaction" with the forum and requires only "a significant contact or significant contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[13] In choice of law, the focus expands well beyond the defendant and invokes some of the same factors that go into finding that the exercise of personal jurisdiction is reasonable.

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11. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

12. *Id.*

13. Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981) (opinion of Brennan, J.). A decisive fifth vote would have upheld the forum's choice of its own law "unless that choice threatens the federal interest in national unity." *Id.* at 323 (Stevens, J., concurring in the judgment).

Against the prevailing leniency of constitutional limits on choice of law, restrictive decisions have remained few and far between. *Home Insurance Co. v. Dick*[14] refused to allow Texas to apply its own law to an insurance contract originating from a Mexican corporation concerning an event in Mexico and a reinsurance contract between that corporation and corporations in New York. The only connection of these events with Texas arose from the plaintiff's permanent residence there, although he also resided in Mexico when the insurance contract was made and when the loss occurred.[15] The Texas court acquired personal jurisdiction by attachment of the reinsurance policies,[16] a form of personal jurisdiction that has since become constitutionally suspect.[17] All these facts pointed to a minimal interest that Texas could assert in applying its own law.[18] A modern variation on the same theme occurred in *Phillips Petroleum v. Shutts*,[19] which refused to allow Kansas to apply its own law to determine interest on delayed payments for oil and gas leases in other states and owed to landowners in those states.[20] Again, it is hard to discern any interest that Kansas had in applying its law to these parties and transactions in other states. Restrictive decisions like *Home Insurance Co.* and *Phillips Petroleum* appear very much as exceptions that prove the role of general lenience towards a state's choice of its own law.

The opposite pattern prevails in the decisions on personal jurisdiction. In recent decades, the decisions of the Supreme Court have been almost invariably restrictive. A handful of decisions finding personal jurisdiction came to an end in 1990, but these were all domestic cases.[21] The restrictive decisions also began in domestic cases, but they put greater emphasis upon the defendant's contacts with the forum than on the forum's interests in adjudicating the dispute, as will be discussed shortly. The Supreme Court's more recent decisions have been concentrated in international cases and they have been entirely restrictive. The restrictive decisions, both domestic and international, have often drawn dissents that call attention to the forum state's interests in adjudicating the dispute, much like the constitutional decisions endorsing the forum state's choice of its own law.

The restrictive decisions commenced in the middle of the twentieth century, with *Hanson v. Denckla*,[22] which concerned the validity of a trust

14. 281 U.S. 397 (1930).

15. *Id.* at 408.

16. *Id.* at 402.

17. *See* Shaffer v. Heitner, 433 U.S. 186, 212 (1977) ("[A]ll assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.").

18. Home Ins. Co., 281 U.S. at 402-03.

19. 472 U.S. 797 (1985).

20. *Id.* at 814–15, 823.

21. Burnham v. Superior Court, 495 U.S. 604 (1990); Burger King v. Rudzewicz, 471 U.S. 462 (1985); Calder v. Jones, 465 U.S. 783 (1984); McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957).

22. 357 U.S. 235 (1958).

established in Delaware and whether it would be upheld under Delaware law or invalidated under Florida law. The Supreme Court found no personal jurisdiction over the Delaware trustee in the Florida courts.[23] The Court reasoned that "[f]or choice-of-law purposes such a ruling [applying Florida law] may be justified, but we think it an insubstantial connection with the trust agreement for purposes of determining the question of personal jurisdiction over a nonresident defendant."[24] A court "does not acquire jurisdiction by being the 'center of gravity' of the controversy, or the most convenient for litigation. The issue is personal jurisdiction, not choice of law."[25] The dissent took issue with this reasoning, arguing that the same factors that supported the choice of Florida law also supported personal jurisdiction over the Delaware trustee.

The Supreme Court took the same approach in *Shaffer v. Heitner*,[26] whose enduring contribution was to greatly restrict quasi-in-rem jurisdiction based on seizure of property. The Court rejected the argument that, because Delaware law could apply to govern the obligations of defendants as directors and officers of a Delaware corporation and its subsidiary, the Delaware courts could exercise jurisdiction for this reason.[27] Again, a dissenting opinion found that Delaware's interest in "vindication of its important public policies" supported personal jurisdiction over the defendants.[28] Much the same approach was taken in *World-Wide Volkswagen Corp. v. Woodson*.[29] That case involved the attempt to acquire personal jurisdiction over an out-of-state retailer and wholesaler who sold a car in New York that caught fire after an accident in Oklahoma.[30] The majority reasoned that "even if the forum State has a strong interest in applying its law to the controversy," insufficient contacts of the defendants with the forum would defeat personal jurisdiction.[31] The dissent again adopted reasoning from choice of law, finding that "the interest of the forum State and its connection to the litigation is strong."[32] Yet another case displayed the same contrast between the majority decision and reasoning and the dissent. *Bristol-Myers Squibb Co. v. Superior*[33] concerned an attempt to join claims of out-of-state plaintiffs, with claims arising out-of-state, to claims by in-state plaintiffs. The Court repeated the reasoning of the majority in *World-*

23. *Id.* at 255.
24. *Id.* at 253.
25. *Id.* at 254.
26. 433 U.S. 186 (1977).
27. *Id.* at 216.
28. *Id.* at 228 (Brennan, J., concurring and dissenting).
29. 444 U.S. 286 (1980).
30. *Id.* at 287.
31. *Id.* at 294.
32. *Id.* at 305 (Brennan, J., dissenting).
33. 137 S. Ct. 1773 (2017).

*Wide Volkswagen*,[34] while the dissent echoed the reasoning of the dissent in that case.[35]

The pattern established in domestic cases became only clearer in international cases, where the foreign dimensions of the litigation served as an added reason to take a restrictive approach to personal jurisdiction. Paradoxically, the decision to give the greatest emphasis to the interests of the forum state did it to deny personal jurisdiction. In *Asahi Metal Industry, Ltd. v. Superior Court*,[36] a majority of justices coalesced on reasoning that personal jurisdiction could reasonably be exercised over a Japanese manufacturer of tire valves on a claim for indemnity by a Taiwanese corporation to which it supplied the valves. The case arose from a motorcycle accident in California brought by a California resident.[37] After his claim settled, only the indemnity claim remained in the California courts.[38] As the Court reasoned: "Because the plaintiff [on the indemnity claim] is not a California resident, California's legitimate interests in the dispute have considerably diminished."[39] The Court also expressed extra caution in international cases: "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."[40]

In another international case, the Court returned to the emphasis upon the defendant's activities in the forum state. In *J. McIntyre Machinery, Ltd. v. Nicastro*,[41] a plurality of four justices, with two justices concurring in the result, found no jurisdiction over a British scrap machine manufacturer, one of whose machines was sold by an American distributor to a New Jersey recycling company. The machine injured the plaintiff, who sued in the New Jersey courts.[42] The plurality drew the established distinction between choice of law and personal jurisdiction,[43] while the dissent assimilated the two inquiries.[44]

When the Court turned personal jurisdiction based on a foreign defendant's contacts with the forum unrelated to the plaintiff's claim—cases

34. *Id.* at 1780-81.

35. *Id.* at 1787 (Sotomayor, J., dissenting) ("California, too, has an interest in providing a forum for mass actions like this one.").

36. 480 U.S. 102 (1987).

37. *Id.* at 105-06.

38. *Id.* at 106.

39. *Id.* at 114.

40. *Id.* at 115 (quoting United States v. First National City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

41. 564 U.S. 873 (2011).

42. *Id.* at 878.

43. *Id.* at 886 (opinion of Kennedy, J.) ("A sovereign's legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts.").

44. *Id.* at 903 (Ginsburg, J., dissenting) ("Do not litigational convenience and choice-of-law considerations point in that direction [to finding personal jurisdiction]?").

of "general jurisdiction"—it took an even more restrictive approach. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[45] the court refused to uphold personal jurisdiction in North Carolina over the foreign subsidiaries of an American corporation for claims arising from an accident in Paris. The Court refused to attribute the contacts that the American corporation had with North Carolina to its subsidiaries,[46] and it explicitly rejected the reasoning of the North Carolina court in relying upon its interest "in providing a forum in which its citizens are able to seek redress for injuries that they have sustained."[47]

The Court took this reasoning a step further in *Daimler AG v. Bauman*.[48] Like *Goodyear*, *Daimler* concerned an attempt to acquire general jurisdiction over claims arising in another country, in this case human rights claims arising from the "dirty war" in Argentina from 1976 to 1983.[49] Daimler, a German corporation, had contacts with the forum state, California, only through its American subsidiary, Mercedes-Benz USA.[50] Those contacts consisted solely of the amount of business the subsidiary did in California, while its headquarters were in New Jersey and it was incorporated in Delaware.[51] These contacts of the subsidiary could not be attributed to the parent corporation based on an "agency theory" because the subsidiary invariably acts as the agent of the parent, even when it is not "so dominated by the latter as to be its alter ego."[52] But even if the subsidiary's contacts could be attributed to the parent, they did not constitute a sufficient proportion of the parent's total activity to make the latter "at home" in California.[53]

To hold otherwise "would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'"[54] The Court also emphasized the international nature of this dispute, observing that "[o]ther nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case."[55] The plaintiffs attempted to obtain personal jurisdiction in California so that they could assert claims under federal statutes protecting human rights, not to rely upon foreign law.[56] The combined assertion of expansive general jurisdiction and

45. 564 U.S. 915 (2011).
46. *Id.* at 920-21.
47. *Id.* at 929 n.5.
48. 571 U.S. 117 (2014).
49. *Id.* at 120.
50. *Id.* at 123.
51. *Id.*
52. *Id.* at 134-35.
53. *Id.* at 136.
54. *Id.* at 139 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).
55. *Id.* at 141.
56. *See id.* at 140-41.

invocation of federal law posed an unnecessary risk to international comity.[57]

The need to limit personal jurisdiction in order to limit choice of law is all the more urgent in international cases because the stakes are so much higher. Plaintiffs and their lawyers face a more drastic choice between domestic and foreign law, as opposed to the choice between the law of one American state and the law of another. The Supreme Court has responded with repeated warnings not to extend personal jurisdiction too far in international cases. This pattern underlines the makeshift role that limits on personal jurisdiction play in constraining choice of law. These limits step in when choice of law does not supply limits itself.

The Court's routine distinction between personal jurisdiction and choice of law demonstrates both an established doctrinal distinction and the existence of a persistent problem. Constitutional limits on personal jurisdiction focus upon the defendant's contacts with the forum and significantly restrict the plaintiff's choice of forum. Constitutional limits on choice of law, by contrast, take into account the contacts of the case as a whole with the forum and impose little restraints on the forum's ability to choose its own law. Yet in invoking this distinction so frequently, the Supreme Court seems to protest too much. Continued attention to an established distinction betrays a continuing need to invoke it. Plaintiffs, their lawyers, and some lower courts push on the boundaries that the Court seeks to impose. With only so much capacity to police these boundaries, the Court has tacitly conceded that its project of placing indirect restraints on choice of law has met with only mixed success. The same is true, as we shall see, of other ad hoc alternatives to choice of law.

## III. THE PRESUMPTION AGAINST EXTRA-TERRITORIALITY

So far from replacing choice-of-law rules, the presumption against the extra-territorial application of federal statutes could simply be regarded as one. It has limited scope, as do all doctrines limited to federal law. More troubling is its highly contextual nature, especially when held up to congressional reaction to decisions invoking the presumption. It promises a simple rule to cut through the complexities of choice of law, but what it delivers is a further complication of its own.

The evolution of the presumption in antitrust cases is illustrative. The presumption first took its modern form in *American Banana Co. v. United Fruit Co.*[58] That case arose from a dispute between two banana companies in

57. *Id.* at 141.
58. 213 U.S. 347 (1909).

Costa Rica.[59] The plaintiff alleged a conspiracy in restraint of trade to drive it out of business. The Court refused to apply the Sherman Act to the plaintiff's claim because "the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States, and within that of other states."[60] Several decades later, however, that simple rule admitted an exception that threatened to swallow the rule itself. In *United States v. Aluminum Co. of America*,[61] the Second Circuit established the "effects test" for coverage of the Sherman Act. Effects in the American market, coupled on the facts of the case with the intent to cause those effects, brought a foreign conspiracy to restrict the supply and raise the price of aluminum with the coverage of the act. The authority of *Alcoa*, as it is called, was enhanced by the identity of its author, Judge Learned Hand, and by the statutory designation of the Second Circuit as a court of last resort, since the Supreme Court lacked a quorum.[62] The effects test seemingly opened the antitrust laws to worldwide coverage because of the close connection between the domestic and international markets in the modern world economy.

To head off this expansion of the antitrust laws, the lower federal courts and then the Supreme Court resorted to restraining devices modeled on the Second Restatement, considering a variety of factors to determine if the purposes served by the antitrust laws created a true conflict with the policies of another country.[63] Congress eventually responded to these decisions with the Foreign Trade Antitrust Improvements Act (FTAIA),[64] a statute that sought to limit coverage of foreign economic activity but in terms that defy simplification and precision. The Supreme Court attempted to rehabilitate and clarify the FTAIA in *F. Hoffman-LaRoche, Ltd. v. Empagran, S.A.*[65] The claim in that case alleged an international cartel to fix the price of vitamins in foreign countries, but the Court held that coverage did not extend to "*conduct that causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim.*"[66] Such conduct did not have the requisite "direct, substantial, and reasonably foreseeable effect" on domestic commerce required by the FTAIA.[67] The Court reached this conclusion, not because it was required by the literal terms of the statute, but because the statute's

59. *Id.* at 355.
60. *Id.*
61. 148 F.2d 416 (1945).
62. United States v. Aluminum Co. of America, 320 U.S. 708 (1944).
63. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993); Timberlane Lumber Co. v. Bank of America N.T. & S.A., 549 F.2d 597 (1976).
64. 15 U.S.C. § 6a.
65. 542 U.S. 155 (2004).
66. *Id.* at 165 (emphasis in original).
67. 15 U.S.C. § 6a(1).

animating purpose was to restrict, not expand, coverage of the antitrust laws.[68]

Two features of the FTAIA and *Hoffman-LaRoche* stand out. One is the attempt to limit private actions under the antitrust laws, which occasionally have resulted in friction with other countries.[69] The FTAIA also applies to public enforcement actions, but these can more readily be restrained by the Executive Branch by entering into agreements with foreign countries.[70] The second distinctive feature turns on the categorical distinctions made in the statute. As noted, it does allow coverage based on direct effects on the domestic market, but it also allows coverage based on direct effects on "export trade or export commerce with foreign nations" for special treatment.[71] Likewise, the opinion in Hoffman-LaRoche singles out "independent foreign harm" for special treatment, but to exclude rather include coverage.

The course of decisions under the federal securities laws followed a similar course, first of expansion based on the effects of foreign securities fraud on the domestic market, and then of restriction. The expansive approach, as in *Alcoa*, originated in the Second Circuit and resembled it to a degree.[72] Coverage could be based either on "(1) an 'effects test,' 'whether the wrongful conduct had a substantial effect in the United States or upon United States citizens,' and (2) a 'conduct test,' 'whether the wrongful conduct occurred in the United States.'"[73] This whole line of decisions met with disapproval in *Morrison v. National Australia Bank Ltd.*, which denied a private right of action for securities fraud in transaction on a foreign exchange between foreign parties involving securities not registered for trading on American exchanges.[74]

Morrison did recognize that Congress had authorized regulation of foreign transactions in a separate provision of the statute, section 30(a) of the Securities Exchange Act,[75] but that provision had not been invoked by the plaintiffs.[76] They relied instead on section 10(b),[77] which had long been the basis for an implied right of action for securities fraud. The Court held that the general provisions of section 10(b), as opposed to the specific

68. Hoffman-La Roche, 542 U.S. at 169.

69. *Id.* at 165.

70. JOACHIM ZEKOLL, MICHAEL G. COLLINS & GEORGE A. RUTHERGLEN, TRANSNATIONAL CIVIL LITIGATION 588 (2013).

71. 15 U.S.C. § 6a(1)(B).

72. *E.g.*, Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968).

73. Morrison v. National Australia Bank Ltd., 561 U.S. 247, 257 (2010) (quoting SEC v. Berger, 322 F.3d 187, 192-193 (2d Cir. 2003)).

74. *Id.* at 250.

75. 15 U.S.C. § 78dd.

76. *Id.* at 265.

77. 15 U.S.C. § 78j(b). They also relied on § 20(a), 15 U.S.C. § 78t(a) and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5.

provisions of section 30(a), were inadequate to overcome the presumption against extra-territoriality.[78] Here again, the Court expressed uneasiness about private litigation and its impact on relations with other countries:

> While there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets, some fear that it has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.[79]

This concern carried over to human rights claims in *Kiobel v. Royal Dutch Petroleum Co.*[80] That case did not, strictly speaking, concern interpretation of a federal statute, but the scope of a federal common law claim that invoked federal jurisdiction under the Alien Tort Statute[81] for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The federal common law claim was implied from the terms of this jurisdictional statute,[82] which of course only supports jurisdiction in domestic courts. *Kiobel* arose from alleged violations of human rights in the Niger delta within the boundaries of Nigeria.[83] The Court found no reason in the terms of the statute or the nature of international law to extend the implied federal common law remedy to claims arising in other nations.[84] Concern over diplomatic relations also figured prominently in the Court's analysis.[85] The presumption against extra-territoriality operates as a general principle of federal law. Although the trend in the Supreme Court favors the presumption, it takes account of a variety of factors that go well beyond the text of the relevant statute. In this, it resembles the use of forum non conveniens as a surrogate for choice of law.

The last decision of the Supreme Court to apply the presumption illustrates both the Court's willingness to invoke it. *RJR Nabisco, Inc. v. European Community*,[86] concerned a claim under the Racketeer Influence and Corrupt Organizations Act (RICO).[87] That statute created a treble damage remedy for harms arising from a long list of crimes that constitute

78. *Id.* at 265.
79. *Id.* at 270.
80. 569 U.S. 108 (2013).
81. 28 U.S.C. § 1350.
82. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) ("The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.").
83. 569 U.S. at 113.
84. *Id.* at 124.
85. *Id.* at 128-29.
86. 136 S. Ct. 2090 (2016).
87. 18 U.S.C. §§ 1961-1968.

a "pattern of racketeering activity."[88] The application of RICO to extraterritorial conduct depended upon the scope of the underlying criminal prohibitions, but the existence of remedy required proof of "a *domestic* injury" to the plaintiff's business or property.[89] The text of RICO alone, or of the underlying criminal prohibition, did not dictate this result. The presumption, instead, appeared to be triggered by the Court's unwillingness to broadly interpret private remedies, even when they are expressly conferred by statute.[90] What the statute did not say—that it covered foreign harms—turned out to be more critical than what it did say—giving private plaintiffs a treble damage remedy.

The course of decisions in the Supreme Court has consistently expanded the presumption against extra-territoriality, and conversely, contracted the scope of federal claims by private plaintiffs. It has not, however, made federal law simpler and more easily comprehended. The lower courts occasionally deviate from the trend established by the Court and Congress has legislated in response with intricate compromises, as with the FTAIA. When the Court, for instance, invoked the presumption to limit the foreign application of the prohibition against employment discrimination in Title VII of the Civil Rights Act of 1964,[91] Congress quickly responded with an amendment that allowed citizens, but not aliens to bring such claims.[92] Such claims were further restricted to those against employers who could be identified with this country and to claims that would not require the employer to violate the laws of the foreign country. Such categorical limitations go well beyond a simple definition of what constitutes activity within or outside American territory.

## IV. CHOICE-OF-FORUM AND CHOICE-OF-LAW CLAUSES

Several key features of the presumption against extra-territoriality also appear in decisions upholding choice-of-forum and choice-of-law clauses. Those decisions could be characterized as a component of a comprehensive choice-of-law theory, and indeed, both clauses are strongly endorsed by the Second Restatement.[93] But if they are broadly consistent with general rules of choice of law, they also dispense almost entirely with the need to appeal to those rules. The validity of these clauses depends upon a variety of factors, but the trend strongly favors enforcing their terms. The limited

88. *Id.* §§ 1962, 1964(a).

89. *Id.* at 2106.

90. *See id.* at 2108 ("It is not enough to say that a private right of action must reach abroad because the underlying law governs conduct in foreign countries.").

91. EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991).

92. 42 U.S.C. § 2000e-1.

93. Restatement (Second) of the Conflict of Laws §§ 80, 187 (1971).

scope of such clauses, applying only to claims in which the parties have an opportunity to enter into a contract before the claim arises, complicates their effect. They do not apply at all to claims not implicated in a contractual relationship. And so, too, the force of decisions by the Supreme Court directly affects only federal law and claims in federal court. Those decisions are only persuasive authority for state law and state courts.

An observer would be hard pressed to find any decision by the Supreme Court in the last several decades critical of choice-of-forum clauses. The trend favoring these clauses began in a domestic case, *National Equipment Rental, Ltd. v. Szukhent*,[94] upholding appointment of an agent in the designated forum for service of process. Even the presence of farmers as defendants failed to elicit sufficient sympathy from the Supreme Court to question the validity of the clause.[95] This approach was soon extended to international cases in *The Bremen v. Zapata Off-Shore Co.*,[96] a case arising out of a contract to tow an oil rig from Louisiana to Italy. The contract specified that any litigation arising from it would take place in London.[97] The owner of the oil rig tried, instead, to litigate its claims in federal court in Florida.[98] The Court sharply distinguished dismissal of this action based on the contract clause from dismissal for forum non conveniens.[99] The latter put the burden of proving the superior convenience of the alternative forum on the party seeking dismissal.[100] The former put the burden on the party resisting to dismissal to "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."[101]

Like the decisions on personal jurisdiction and the presumption against extra-territoriality, The Bremen emphasized international comity: "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."[102] The clause, instead, "was an effort to eliminate all uncertainty as to the nature, location, and outlook of the forum in which these companies of differing nationalities might find themselves."[103] Private agreements could supply determinacy where choice of law alone could not.

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94. 375 U.S. 311 (1964).
95. *Id.* at 315-16.
96. 407 U.S. 1 (1972),
97. *Id.* at 2.
98. *Id.* at 3-4.
99. *Id.* at 8, 10.
100. *Id.* at 15.
101. *Id.*
102. *Id.* at 9.
103. *Id.* at 13 n.15.

Similar reasoning was deployed to support enforcement of a forum selection clause in a consumer contract. In *Carnival Cruise Lines, Inc. v. Shute*,[104] passengers from Washington on a cruise to Mexico filed claims for personal injury in a federal court in their home state. The Court held that they were required to litigate their claims in Florida, according to the mandatory forum selection clause in their passenger contract. This would save time and money by avoiding litigation and would enhance the overall efficiency of the cruise lines' operation.[105] Although the clause was "subject to judicial scrutiny for fundamental fairness," there was no evidence of bad faith, fraud, or overreaching.[106] Both *The Bremen* and *Carnival Cruise Lines* were admiralty cases, so there was no question under the *Erie* doctrine of applying state law.[107] All the applicable law was federal, but even when state law might arguably apply, the Court often finds it to be consistent with federal law, as it did in *Szukhent*.[108]

The closest that the Supreme Court has come to criticism of choice-of-forum or choice-of-law clauses is in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[109] In upholding arbitration of an antitrust claim, the Court offered the following dictum:

> [I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.[110]

This caution echoes the qualifying language in the cases just discussed. It also emerges from a line of cases almost uniformly favorable to arbitration, which itself is a kind of forum selection. The holding in *Mitsubishi*, as opposed to the dictum, was that antitrust claims were no exception to the trend in favor of arbitration.[111] This holding became all the clearer in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*,[112] which upheld arbitration of a cargo damage claim in Japan and subject to Japanese law. The plaintiff argued that this combined choice-of-forum and choice-of-law clause would undermine the mandatory limits on waivers of liability under the Carriage of Goods by Seas Act (COGSA).[113] The Court relied on the concern over

104. 499 U.S. 585 (1991).
105. *Id.* at 595.
106. *Id.* at 595.
107. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).
108. 375 U.S. at 316-17.
109. 473 U.S. 614 (1985).
110. *Id.* at 634 n.19.
111. *Id.* at 638-39.
112. 515 U.S. 528 (1995).
113. 46 U.S.C. § 1303(8).

international comity expressed in *The Bremen* and also noted that both international arbitration and COGSA were supported by multilateral treaties.[114] The dictum from *Mitsubishi* was relegated to later litigation, if any, over enforcement of any resulting arbitration award.[115]

The parallel treatment of choice-of-forum and choice-of-law clauses results from their frequent presence in the same contract and from the practical linkage between the two issues, noted earlier.[116] The forum where a case is brought most often apply its own law to the issues before it. The Second Restatement also takes a permissive approach to choice-of-law clauses. They are generally valid with respect to issues on which the substantive law of contract only supplies default terms, which can be altered by the parties. The parties can alter those terms by explicit contract terms or by reference to the law of a particular state or nation.[117] Choice-of-law clauses also can reach mandatory terms of contract law, which cannot be altered by the parties. As to such issues, the law chosen must have a reasonable connection to the case, it must not offend some fundamental policy of the state whose would otherwise be chosen, and even if it does, the chosen law applies if the offended state does not have a "materially greater" interest in having its law apply.[118] This test, while complicated, imposes successive hurdles to invalidating a choice-of-law clause even as it applies to mandatory terms.

Principles of freedom of contract and party choice support the deference accorded to choice-of-forum and choice-of-law clauses, but they need not be invoked dogmatically. In the current state of the law, parties face significant uncertainty in predicting where a case can be brought and what law will be applied to it. These clauses represent an understandable attempt to reduce or eliminate such uncertainty. Perhaps the Supreme Court has gone too far in deferring to party choice, especially when the parties have unequal bargaining power. Yet it is undeniable that the Court has gone very far in this direction. If the parties have tried to fill a vacuum created by the indeterminacy of choice of law, so has the Court.

## V. CONCLUSION

This Essay has sought to document a longstanding practice to avoid, displace, and in some respects duplicate, systematic principles of choice of law. The aspiration to generate a consensus on choice of law remains, as of this writing, just that: an unfulfilled goal yet to be implemented and realized.

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114. 515 U.S. at 538.
115. *Id.*
116. *See supra* notes 94-115 and accompanying text.
117. Restatement (Second) of the Conflict of Laws § 187(1) (1971).
118. *Id.* § 187(2).

The ad hoc alternatives surveyed here began as attempts to address the problems created by the lack of consensus. They have since become part of the problem, not part of the solution, as they have added another layer of legal doctrine and uncertainty to existing disagreements over choice of law.

The descriptive claims in this Essay find pervasive rest on established trends, at least in decisions of the Supreme Court, but they do not make a sound case to serve as a foundation for a new consensus on systematic principles. Their normative implications are not compelling or perhaps even acceptable. These ad hoc alternatives cannot be ignored by systematic choice of law, which operates primarily at the state level. Decisions at that level, for instance, cannot ignore the constitutional limits on personal jurisdiction. They have to take those limits into account, even though they were devised, in part, to avoid the choices that systematic theory would recommend. These evasions have to be accommodated by systematic theory. Otherwise, the current impasse and the resulting indeterminacy will continue. Absorption of these evasions into systematic theory, as has occurred with choice-of-forum and choice-of-law clauses, is one strategy, but not one that guarantees increased clarity. We remain in the middle of a journey whose destination also remains unclear.