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UNLIMITED VINDICATION: CHOOSING STATUTES OF LIMITATIONS IN THE ERA OF CONSTRAINED PERSONAL JURISDICTION

Patricia Youngblood Reyhan*

INTRODUCTION

Personal jurisdiction defines the circumstances in which a state is constitutionally permitted to exercise judicial power over a defendant.¹ Once a state has personal jurisdiction, it has expansive but not unlimited legislative jurisdiction² to apply its substantive law to claims before it.³ A state with personal jurisdiction also has essentially *unlimited* power to apply its procedural laws to such claims.⁴ The power of a state to apply its procedural laws is consequential to a number of issues⁵ but to none more so than the choice of its own statute of limitations to either bar or permit plaintiff's suit. As the forum, a state with personal jurisdiction over the defendant thus may advance the sovereign interests reflected in its limitations period, whether those interests favor vindication for the plaintiff or repose for the defendant, without regard to the strength of the sovereign interests of other states. Because this power of choice lies exclusively with the forum state⁶ the question of the connection a state must have with the defendant in order to be a constitutionally-permissible

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1. Personal or judicial jurisdiction refers to the power of a state to hear a case against a defendant in its own courts. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 24–79 (AM. LAW INST. 1971) (hereinafter RESTATEMENT (SECOND)). For purposes of this Article, personal jurisdiction and judicial jurisdiction are used interchangeably.

2. Legislative jurisdiction as here used refers not to the power of a governmental entity to enact law but rather to the “power of a state to apply its law to create or affect legal interests.” Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1587 (1978). When a state has legislative jurisdiction, it is constitutionally empowered to choose and apply its own law. *See id.*

3. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (Brennan, J., plurality) (“[F]or a State’s *substantive* law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”) (emphasis added); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (adopting the *Allstate* standard).

4. *See, e.g., Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988) (holding that there was no constitutional impediment to a state choosing its longer limitations period even if the state whose law created the cause of action would bar plaintiff’s claims).

5. Other rules widely considered to be procedural include those related to service of process, pleading, burdens of proof, sufficiency of evidence, and notice and proof of foreign law. *See* RESTATEMENT (SECOND), *supra* note 1, at ch. 6.

6. *McCarrell v. Hoffman-La Roche, Inc.*, 153 A.3d 207, 215 (N.J. 2017) (noting that when suit is brought in New Jersey, its courts apply New Jersey’s choice-of-law rules in deciding whether its or another state’s statute of limitations governs the matter).

forum choice, that is to have judicial jurisdiction, is determinative of whether the state has the power to choose its statute of limitations.

From the United States Supreme Court's 1877 decision in *Pennoyer v. Neff*⁷ to its 1945 decision in *International Shoe Co. v. Washington*⁸ the judicial jurisdiction of American courts was constrained by the requirement that a nonresident⁹ defendant who had not consented to suit in a state must be present there in either person or property. Thus, the only possible fora for suit against a defendant, in the absence of consent, were the state of defendant's residence, the state of the location of defendant's property, and the state where defendant was personally served with process. If a defendant remained in his state of residence and owned no property outside of that state, not an unusual circumstance in mid-nineteenth to mid-twentieth century America, there was only one forum available for plaintiff's suit and, according to the then-prevailing *lex fori*¹⁰ rule, only one statute of limitations, the forum's, that governed plaintiff's suit. If the limitations period were closed there, defendant would enjoy repose. That result followed even if defendant had caused injury to plaintiff in plaintiff's domicile and that state's limitations period remained open. Correspondingly, if the statute of limitations of defendant's domicile remained open and the statute of limitations of plaintiff's domicile had closed, plaintiff gained the possibility of vindication from defendant's domicile that would not be available in her own. Whether the repose of the defendant or the vindication of the plaintiff won the day turned entirely on the forum and the forum was determined by tight standards of judicial jurisdiction and not by plaintiff's choice.

International Shoe brought a sea change in the constitutional limitations on the power of states to hear claims against nonresident, non-present defendants. It unmoored jurisdiction from physical presence and allowed a state to exercise jurisdiction in any instance where the defendant had "minimum contacts" with it.¹¹ Where *Pennoyer* tightly constrained jurisdiction, *International Shoe* expanded it and, in so doing, offered plaintiff an opportunity to choose among all states with which the defendant had constitutionally-sufficient contacts. With the choice of fora came the possibility, if not likelihood, of different limitations periods reflecting different

7. 95 U.S. 714 (1878) (discussed *infra* notes 61 and 62).

8. 326 U.S. 310 (1945) (discussed *infra* notes 63–77).

9. Even in the *Pennoyer* era domicile, and later, residence formed a constitutionally permissible basis for the exercise of judicial power over a defendant. See *Milliken v. Meyer*, 311 U.S. 457, 463–64 (1940). A defendant's domicile is "where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 41 (Melville M. Bigelow ed., 8th ed. 1883). Every person has one and only one domicile. RESTATEMENT (SECOND), *supra* note 1, § 11. Although domicile has the dual requirement of a "home" and an intention, residence lacks the intention element. See *id.* at § 30 cmt. a. A person's residence is simply a place where she has a dwelling and thus a significant connection; residency in a state does not "require the existence of an attitude of mind similar to that required for the acquisition of a domicile of choice." *Id.* The connection of residence must be more than briefly transitory, however. See *id.* A business entity's domicile is the place where it establishes its legal existence, as in the place of incorporation or formation. *Daimler AG v. Bauman*, 571 U.S. 117 (2014). Its residence, for jurisdictional purposes, is the locale of its principal place of business. See *id.* (holding that California did not have personal jurisdiction over the defendant) (discussed *infra* notes 176–91).

10. The near universal rule of the time was that the forum applied its own procedural rules, including its statute of limitations. See discussion *infra* notes 103–05.

11. *Int'l Shoe Co.*, 326 U.S. at 316.

calibrations of the plaintiff's vindication and the defendant's repose interests. Suddenly, plaintiff had a powerful motive to "shop" for a forum that would permit her to bring her claim and to avoid all fora that would not. As long as the chosen forum had judicial jurisdiction over the defendant and a statute of limitations that remained open, plaintiff had an avenue for vindication of her rights, whether or not her own domicile, defendant's domicile, or the place where her claim arose saw fit to leave that avenue open. Defendant, once effectively able to rely on his own domicile's repose protection, now found that he knew no repose as long as one state with jurisdiction over him had determined to favor the plaintiff's vindication interest.¹²

The intersection of the exercise of expansive judicial jurisdiction and the choice of the procedural *lex fori* did not escape the impassioned criticism of courts and commentators.¹³ At the height of the expansive exercise of judicial jurisdiction and before the United States Supreme Court again constrained that exercise,¹⁴ states began to rethink the propriety of the reflexive choice of their own statute of limitations, especially where that choice did not serve the interests of the forum and disserved the interests of other states more connected to the dispute. This rethinking was most pronounced with respect to the then-typical circumstance where the forum's limitations period was open and all other interested states' periods were closed, the forum had no particular sovereign interest in favoring the vindication interests of the plaintiff, and other states had significant interests in favoring the repose interests of the defendant. The *lex fori* rule was a common law product and judges, seeing modern reasons to change it, did so by adopting choice-of-limitations methods that were far more nuanced and sensitive to the sovereign interests of all the states with a connection to the parties and the claims.¹⁵ The intended and actual effect was to constrain plaintiff's forum shopping by insuring that a limitations bar, favoring the repose of defendant, would be chosen by a forum with a vindication-favoring rule when that forum had no particular reason in an individual case to favor vindication, as where the plaintiff was a nonresident. Judicial jurisdiction continued to be expansive; the procedural consequences, at least with respect to limitations periods, were harnessed.

Significantly, however, in four cases decided between 2010 and 2018, the United States Supreme Court substantially constrained the circumstances in which a state is constitutionally permitted to exercise judicial power over a defendant. Expansive judicial jurisdiction is now gone and with it the opportunity for the plaintiff to engage in any broad form of forum shopping.¹⁶

12. See *Keeton v. Hustler Magazine Inc.*, 465 U.S. 770 (1984) (discussed *infra* notes 90–95).

13. See *infra* note 107.

14. See discussion *infra* Section IV.

15. See *infra* Section III.

16. The Supreme Court actually decided six jurisdiction cases in this period. Because two of them, *Walden v. Fiore*, 134 S. Ct. 1115 (2014) (holding that Nevada did not have personal jurisdiction over the defendant) and *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017) (holding that Montana did not have personal jurisdiction over the defendant), did not significantly change jurisdictional analysis in a way not captured by the other four, only the latter are analyzed in this Article. See *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017) (holding that California did not have personal jurisdiction over the defendant) (discussed *infra* notes 194–200); *Daimler AG v. Bauman*, 571 U.S. 117 (2014) (holding that California did not have personal jurisdiction over the defendant) (discussed *infra* notes 176–

Clearly, with the new constraints in place, the primary goal, curtailment of forum shopping, that drove states' adoption of flexible and nuanced choice-of-law methods to determine the governing limitations period, is met. Those methods, in conjunction with newly-restricted judicial jurisdiction, now consistently advance the repose interest of the defendant over the vindication interests of the plaintiff. Post-*Daimler AG v. Bauman*, plaintiff has lost a significant choice of fora for her suit; as a consequence of the modern choice-of-limitations rules adopted in the *International Shoe* age, she has lost the opportunity in many cases to have her suit heard at all.

This Article examines the intersection of the constitutional constraints on judicial jurisdiction and the choice-of-law models currently employed to determine whether to bar or permit plaintiff's suit. Section I describes the practice and purposes of states in adopting statutes of limitations, first with respect to domestic concerns and then with respect to multistate cases. Section II overviews the expansion of judicial jurisdiction from *International Shoe* to *Daimler* and the forum-shopping consequences of that expansion. Section III explains the methods historically and modernly used by states to choose between conflicting limitations periods in multistate cases. Section IV briefly examines the recent Supreme Court cases, each of which constricted the circumstances under which a state court is constitutionally permitted to exercise judicial jurisdiction. Section V demonstrates the current consequences of the intersection between modern constraints on jurisdiction and the limitations on vindication interests that are the intentional product of modern choice-of-limitations models. Section VI concludes with a proposed rule that calls for the forum to choose the *longer* of the limitations period of the defendant's domicile or the place where the cause of action arose in order to balance more appropriately the docket, repose, deterrence and vindication interests underlying competing limitations periods in the era of constrained judicial jurisdiction.

I. CHOOSING STATUTES OF LIMITATION

A. The Source, Function and Purpose of Statutes of Limitations

Statutes of limitations reflect "[a] legislature's attempt to achieve a balance among State interests in protecting both forum courts and defendants against stale claims and in insuring a reasonable period during which plaintiffs may seek recovery on otherwise sound causes of action."¹⁷ These sovereign interests, which focus on the forum, the defendant, and the plaintiff, are here referred to respectively as docket interests, repose and deterrence interests, and vindication interests.

191); *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915 (2011) (holding that North Carolina did not have personal jurisdiction over the defendants) (discussed *infra* notes 167–73); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (holding that New Jersey did not have personal jurisdiction over the defendant) (discussed *infra* notes 160–64).

17. *Keeton v. Hustler Magazine, Inc.*, 549 A.2d 1187, 1192 (N.H. 1998); see also RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 603 cmt. a (1934) (hereinafter RESTATEMENT (FIRST)) ("[T]he policy of a statute of limitations is to confine actions in the local courts to a period within which it is believed substantial justice between the parties can be administered.")

Each state is entitled to weigh these interests and to calibrate the balance among them as it sees fit without constitutional constraints limiting its evaluation.¹⁸ There is, in fact, wide variance in the outcomes states have reached in striking the balance between defendant's repose and plaintiff's vindication. State statutes limiting actions sounding in either contract or tort range from one year¹⁹ to fifteen years.²⁰ Sovereign interests may push a state to enact a shorter limitations period for broad classes of cases and yet serve as the motivation for choosing a longer limitations period in unique cases.²¹ Sovereign interests may equally underlie generally longer limitations periods with shorter periods in exceptional instances where those interests tug in a different direction.²² Just as the limitations periods themselves vary considerably, the events that trigger the running of the limitations

18. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988) (holding that the forum did not violate constitutional constraints in choosing its own statute of limitations to a substantive claim governed by the law of another state whose limitations period had run). While the United States Supreme Court has upheld the constitutionality of the forum's choice, many commentators have suggested that due process concerns should render the choice unconstitutional in any situation where the forum has no substantial connection with the parties or transaction, the application of its law is grounded only in the fact that it is deemed "procedural," and the application of its law is potentially outcome-determinative. See, e.g., James A. Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 WASHBURN L.J. 405, 417-18 (1980). Only if the forum could show service of a significant local policy, difficult in this context, would the choice be permissible. See *id.*

19. See, e.g., ARIZ. REV. STAT. ANN. § 12-541 (West, Westlaw through 2020 Second Reg. Sess. of the 54th Legis.) (contract claims); FLA. STAT. ANN. § 95.11 (West, Westlaw through 2020 Second Reg. Sess. of the 26th Legis.) (UCC claims).

20. See e.g., KY. REV. STAT. ANN. § 413.090 (West, Westlaw through Ch. 5 of the 2020 Reg. Sess.) (written contracts executed before July 15, 2014). For contracts under seal only, Massachusetts retains a twenty-year limitations period. See MASS. GEN. LAWS ANN. ch. 260, § 1 (West, Westlaw through Ch. 30 of the 2020 Second Ann. Sess.).

21. For example, Delaware's general statute of limitations in contracts actions is three years and yet when it desired to incentivize foreign parties in high-dollar contracts to choose both Delaware courts and Delaware law for the resolution of any disputes arising from those contracts, Delaware provided for a 20-year limitations period if the parties adopt such a term in a contract involving at least \$100,000. See DEL. CODE ANN. tit. 10, § 8106 (West, Westlaw through Ch. 236 of the 150th Gen. Assembly (2019-2020)). States have enacted exceptions to their general torts limitations period, creating longer limitations periods for sexual harassment or sexual assault. See, e.g., N.Y. C.P.L.R. § 208(b) (McKinney, Westlaw through L.2019, Ch. 758 & L.2020, Ch. 23) (a person who is the victim of sexual abuse as a child can bring a lawsuit for money damages against the abuser or the institution that enabled the abuse until the victim reaches the age of 55).

22. A common example is a shorter limitations period for libel or slander actions than for other torts. Compare COLO. REV. STAT. ANN. § 13-80-102 (West, Westlaw through 2020 Reg. Sess.) (imposing a two-year statute of limitations for personal injury actions), with COLO. REV. STAT. ANN. § 13-80-103 (West, Westlaw through 2020 Reg. Sess.) (subjecting *inter alia* libel and slander to a one-year limitations period). Another example is presented by limitations periods applicable against governmental entities as defendants that are shorter than the periods applicable to non-governmental defendants. Compare N.M. STAT. ANN. § 37-1-8 (1976) (imposing a three-year statute of limitations for personal injury actions), with N.M. STAT. ANN. § 41-4-15(A) (1977) (imposing a two-year period for suit against New Mexico governmental entities rather than the three-year generally-applicable period).

period²³ and the circumstances when the running of the periods is tolled²⁴ vary widely from jurisdiction to jurisdiction. Especially significant to the analysis of this Article is the existence of borrowing statutes in most states, rules that direct the choice of another state's limitations period in certain instances, and the wide variations as to what those instances are.²⁵

The desire to eliminate stale or fraudulent claims is the oldest²⁶ and most commonly-referenced policy goal behind drawing the line in favor of a relatively-shorter limitations period.²⁷ This purpose advances the repose interests of the defendant and the docket interests of the forum. Barring stale claims saves the defendant from evidentiary disadvantages created by a dilatory plaintiff.²⁸ As one court put it, statutes of limitation "afford parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage."²⁹ The same bar advances the orderly administration of justice in a state, the docket interest, by preserving the state's judicial resources for those cases in which the plaintiff has shown the requisite attention and in which the evidence has not been made more challenging for the parties and the court by the sheer passage of time. "The statutes are predicated on the

23. In a contracts context, *compare* *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1301 (1st Cir. 1988) (under New York law, statute of limitations does not begin to run until depositor has made a demand for payment on the bank), *with* *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 998 (9th Cir. 2006) (under California law, limitations period begins to run when plaintiff could or should have made the demand). In a torts context, *see* *McCarrell v. Hoffman-LaRoche, Inc.*, 153 A.3d 207, 212 (N.J. 2017) (comparing New Jersey's "discovery rule" delaying the beginning of the limitations period with Alabama's lack of such a rule).

24. *See* *Hatfield v. Halifax PLC*, 564 F.3d 1177, 1182–85 (9th Cir. 2009) (discussion of English and California tolling rules).

25. *See* discussion *infra* notes 109–17.

26. *See* The Act of Limitation with a Proviso 1540, 32 Hen. 8, c. 2 ("Forasmuch as the time of limitation appointed for suing . . . extend, and be of so far and long time past, that it is above the remembrance of any living man, truly to try and know the perfect certainty of such things, as hath or shall come in trial . . . to the great danger of mens consciences that have or shall be impanelled in any jury for the trial of the same.").

27. *See, e.g.,* *Cameron v. Hardisty*, 407 N.W.2d 595, 597 (Iowa 1987) (applying Iowa limitations period based on Iowa's "primary interest in protecting its courts and litigants from stale claims"). At early common law, there was not a fixed time to bring an action because the life of the suit was generally defined by the lifetimes of the parties. *See, e.g.,* *Flanagan v. Mount Eden Gen. Hosp.*, 248 N.E.2d 871, 872 (N.Y. 1969).

28. *See, e.g.,* *Flanagan*, 248 N.E.2d at 872 ("The Statute of Limitations was enacted to afford protection to defendants against defending stale claims after a reasonable period of time had elapsed during which a person of ordinary diligence would bring an action. The statutes embody an important policy of giving repose to human affairs."). Supreme Court Justice Robert H. Jackson put the concern this way: "Statutes of limitations . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944).

29. *Wilkinson v. Harrington*, 243 A.2d 745, 752 (R.I. 1968); *see also* *Order of R.R. Telegraphers*, 321 U.S. at 349 ("The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.").

reasonable and fair presumption that valid claims which [are of value] are not generally left to gather dust or remain dormant for long periods of time.”³⁰

Limitations periods, particularly relatively longer ones, also reflect a sovereign concern with the vindication of plaintiff’s rights, a concern that is as important as the efficient functioning of a court system and the protection of defendants.³¹ Vindication interests are often unrecognized or unexamined in probing the purposes behind the adoption of a particular statute of limitations rule.³² While there are doubtless myriad reasons for this, the one that particularly suggests itself is that statutes of limitations, by their very name, suggest an intent to limit rather than to allow. While this was the motivation for setting a limitations period for plaintiff’s suit, it was not the sole motivation for the choice of how long that period was to be. Thus, a sovereign’s choice of a generous period reflects in part a recognition that plaintiffs need a reasonable time to identify and understand their injury³³ and to act on that knowledge before suit should be foreclosed.³⁴ Delay is not always the conscious sacrifice or disregard of a claim for vindication. Among factors potentially influencing delay are the plaintiff’s state of knowledge, the consequence of the injury itself,³⁵ efforts at extra-judicial resolution, lack of resources, and lack of access to legal services are now far more likely to be the determinants of when plaintiffs ultimately file suit. Nonetheless, the vindication interest of the plaintiff often is either discounted or ignored altogether in courts’ consideration of whether to choose the limitations period of a state that is different in length and effect than the forum’s limitations period.³⁶

The fourth interest that may underlie a state’s enactment of a longer limitations period, the deterrence interest, is one in which the interests of the forum, the defendant and the plaintiff intersect.³⁷ This interest focuses on the forum’s

30. *Nardone v. Reynolds*, 333 So. 2d 25, 36 (Fla. 1976) (quoting *Renner v. Edwards*, 475 P.2d 530, 532–33 (Idaho 1969)); see also *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) (“[T]he courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.”).

31. See, e.g., *Burnett*, 380 U.S. at 428 (“This policy of repose, designed to protect the defendants, is frequently outweighed . . . where the interests of justice require vindication of the plaintiff’s rights.”).

32. See, e.g., Wm. Grayson Lambert, *Focusing on Fulfilling the Goals: Rethinking How Choice-of-Law Regimes Approach Statutes of Limitations*, 65 SYRACUSE L. REV. 491, 496–97 (2015) (describing the purposes behind statutes of limitations as ensuring fairness for the defendant, ensuring courts have reliable evidence upon which to decide cases, and ensuring vigilance by plaintiffs).

33. See e.g., Louise Weinberg, *Choosing Law: The Limitations Debate*, 1991 U. ILL. L. REV. 683, 687. (“Especially short periods of limitation or periods set without regard to the plaintiff’s state of knowledge might be seen as undermining the policies supporting the right sued on, undercutting general policies supporting the whole field of law, or negating procedural policies favoring access to courts, trial by jury, rights to notice and hearing, and so forth.”).

34. See e.g., *McGee v. Arkel Int’l, LLC*, 671 F.3d 539, 547 (5th Cir. 2012) (plaintiffs should not be considered guilty of procrastination because they would not know the details of the alleged tortious actors and conduct until the completion of a protracted military investigation).

35. See Gary L. Milhollin, *Interest Analysis and Conflicts Between Statutes of Limitations*, 27 HASTINGS L.J. 1, 1–2 (1976) (discussing the personal impact of thalidomide damage to children in Canada and the effect of Quebec’s one-year statute of limitations); see also *Henry v. Richardson-Merrell, Inc.*, 508 F.2d 28 (3d Cir. 1975).

36. See discussion *infra* note 138 and text following note 225.

37. See *Andersen v. Lopez*, 957 N.E.2d 726, 729 (Mass. App. Ct. 2011) (noting that in enacting its limitations period for torts claims the Massachusetts legislature had determined that that period was “an

concern that defendants either domiciled in or acting within the state not conduct themselves in ways that predictably may cause either *ex contractu* or *ex delicto*³⁸ injury. By denying defendant repose for a relatively longer period, the forum's limitations period can be seen as an incentive to defendants' careful conduct both within and without the forum.³⁹ Much as is true of the vindication interest, however, the deterrence interest of a state is often submerged by considerations of repose, especially where the defendant is a forum domiciliary and the legal claim of the plaintiff accrued outside the forum.⁴⁰

As a general matter, the forum has an interest in the legal protection or legal exposure of defendants and in the opportunity for a plaintiff to pursue legal recovery and has struck the balance between the two through the adoption of a particular set of limitations rules. The weight of these interests, unlike the forum's docket control interests, will change with the domicile of the parties. A state's docket interests are implicated simply by virtue of the state being the forum and are completely irrelevant if the state is not the forum. A state's interest in providing a plaintiff an opportunity for recovery by not foreclosing her suit on limitations grounds is stronger if the plaintiff is a forum resident and the forum's statute of limitations has not run.⁴¹ Correspondingly, a forum's interest in keeping its courts open for a non-domiciliary plaintiff against a domiciliary defendant is generally not of paramount concern to the forum if the plaintiff's domicile would have closed its courts to her.⁴² It is perfectly within a legislature's or court's prerogative to make a choice among competing limitations periods adopted by different states, where presented, based upon the forum's perception of the effect of the domicile of the parties and the locus of the

appropriate balance between the length of time its citizens should remain accountable for the consequences of their negligent conduct and the protection they need against 'protracted exposure to liability'" (quoting *Nierman v. Hyatt Corp.*, 808 N.E.2d 290, 293 (Mass. 2004))).

38. Lawyers and legal academics historically favored Latin legal phrases; as will soon be evident, lawyers and legal academics engaged in analyzing multistate cases presenting "Conflicts of Law" still do. *Consuetudinis magna vis est*.

39. An excellent example is provided by *DeLoach v. Alfred*, 960 P.2d 628 (Ariz. 1988) (en banc). *DeLoach* involved a California plaintiff, an Arizona defendant, and an accident occurring in Tennessee with a Tennessee driver who was not subject to the personal jurisdiction of the Arizona courts. *Id.* at 629. Arizona's limitations period was open, Tennessee's was closed. *Id.* Arizona's Supreme Court focused on Arizona's deterrence interest, stating:

Arizona's two-year statute reflects the substantial interest underlying its policy requiring its citizens to answer for the harm they cause. . . . Arizona courts have long recognized that, in addition to making injured plaintiffs whole, holding tortfeasors accountable also advances the important interest in deterring wrongful conduct. . . . Thus the policy of deterrence extends to providing a forum for redress against Arizona defendants for their negligent conduct outside the state.

Id. at 631–32. See also *Resner v. Owners Ins. Co.*, No. CA 2001 0091, 2002 WL 236970, at *2 (Ohio Ct. App. Feb. 14, 2002) (despite the fact that the plaintiff was a non-Ohio resident suing an Ohio resident, Ohio's longer limitations period was chosen because the state had an interest in ensuring that its domiciliary defendants "are acting in a manner so as not to cause injury or damage to the public").

40. See discussion *infra* notes 207–17.

41. As discussed in Section IV, recent decisions of the United States Supreme Court constricting the exercise of general jurisdiction over defendants have resulted in significantly fewer instances when plaintiff's state of residence is constitutionally allowed to hear the case against a non-present defendant. See *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915 (2011).

42. See discussion *infra* notes 215–16.

claim on the sovereign interests underlying those competing periods.⁴³ Part B examines the general effects of multistate contacts on the question of which limitations period, that of the forum or that of another state, is to be chosen.

B. The Presence of Conflicts of Law Regarding Limitations Periods

Part A establishes that states can and do select very different limitations periods to govern the timeliness of claims brought before their courts. When a case before it involves only domestic parties and a transaction that has occurred wholly intrastate, the forum court simply must pick which of the forum's limitations rules governs.⁴⁴ Increasingly common, however, are cases where the parties and occurrences relevant to the suit are connected to multiple states and nations. When such "foreign"⁴⁵ connections are present, the prospect of a conflict of law is also present and the forum court may find itself asked to apply not its forum rule but a rule adopted by a foreign jurisdiction. Conflicts of law arise in nearly every realm of civil law and courts have developed sophisticated conflict-of-law rules and methods⁴⁶ to identify and resolve them.⁴⁷

What is meant here by conflict-of-law rules and methods? A good starting point is section 1 of the First Restatement: conflicts rules are "[t]hat part of the law of each state which determines whether in dealing with a legal situation the law of some other state will be recognized, be given effect or be applied. . . ." ⁴⁸ Three aspects of this statement deserve attention here. First, when speaking of a conflict-of-law or choice-of-law rule we are dealing with a rule or law of a given state⁴⁹ that,

43. See discussion *infra* note 58.

44. This is not always an easy task. Courts are frequently faced with causes of action that appear to fall in one legal category, *ex delicto*, but are pled as falling into another legal category, *ex contractu*, or vice versa. Often the driving reason for the recharacterization of the claim is to gain an open limitations period for claims pled in one legal silo, most often in contract, where the claim facially appears more appropriately pled in another, most often in tort, where the statute of limitations has run. See, e.g., *Precision Gear Co. v. Cont'l Motors, Inc.*, 135 So.3d 953, 954 (Ala. 2013) (involving the question of whether an indemnification claim sounded in tort, for which Alabama's two-year statute of limitations would apply, or in quasi-contract, for which Alabama's six-year period would apply).

45. In Conflicts parlance, "foreign" simply means non-forum and does not necessarily connote foreignness in the conventional sense of "non-national." For Conflicts purposes, in forty-nine states Utah is as "foreign" as Uzbekistan. See *Foreign*, BLACK'S LAW DICTIONARY (11th ed. 2019).

46. In this Article, unless the context suggests otherwise, "conflict of law" and "choice of law" are used interchangeably to describe issues surrounding the question of which of two or more laws sourced in different jurisdictions and differing in content and outcome is to be chosen.

47. It is beyond the scope of this Article to explain in depth the different general choice-of-law rules and methods that have been adopted by states, except as necessary to understand the choice-of-law approach a state will use in resolving a conflict regarding limitations periods. Two such methods, one based on the Restatement Second and the other, "government interest analysis", will deserve significant exploration in that regard. See discussion *infra* notes 118–86 and 143–52. For a brief description of the prevailing general methods for choosing substantive law, see Patricia Youngblood Reyhan, *Choice of What? The New York Court of Appeals Defines the Parameters of Choice-of-Law Clauses in Multijurisdictional Cases*, 82 ALB. L. REV. 1241, 1243–44 n.n21–24 (2019).

48. RESTATEMENT (FIRST), *supra* note 17, § 1.

49. A word on the use of the word "state." As used generally in Conflicts literature and in this Article, the term "state" is employed as a generic term to cover any "territorial unit with a distinct general body of law." RESTATEMENT (SECOND), *supra* note 1, § 3. For purposes here, those units may be a state of the

like any other rule or law, is either enacted by a legislature or announced by a court. Second, although the source of the law is similar to other laws, its effect is entirely different, directing a process of law selection that will often choose applicable rules sourced in a foreign state.⁵⁰ For this reason, conflict-of-law or choice-of-law rules have been called “indicative” rather than “dispositive” law.⁵¹ It is in the nature of such rules that they do not determine the merits of a case. Instead these rules choose or “indicate” the law that will govern that determination, the dispositive rules. Where a conflicts rule so directs, the courts of the forum apply the law of another sovereign. In most instances, it is the responsibility of the party seeking the choice of “foreign” law to plead and prove the content and purpose of that law.⁵²

Finally, although the term “conflict of laws” is defined as the choice among laws sourced in more than one jurisdiction, there is a narrower sense in which the term is often used and will be used in this Article. A “conflict of law” in practice comes into play only when the following prerequisites are present: there the two or more states with a claim to the choice of their legal rule, the competing rules are different, and most significantly, the difference makes a difference. The final requirement, that the difference make a difference, is what truly creates a “conflict” of law requiring courts to engage in “conflict” resolution.⁵³ If State A has a limitations period of two years and State B has a limitations period of four years, one might say there is a conflict, but in fact, there is only a difference. Should the plaintiff bring suit in one year or in five, the difference will not matter as the case in the first instance can proceed under either rule and in the second instance will be barred by both rules.⁵⁴ Only where the plaintiff has sued after two and before four years will the choice matter and therefore will a conflict exist.

United States, the United States itself or a foreign nation or political subdivision thereof. Often this Article will refer to “state interests.” That concept also has a meaning inclusive of foreign national interests.

50. Conflict-of-law inquiries are essentially directed to “the operative effect at the forum of foreign law because of a foreign fact element in the case.” GEORGE WILFRED STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 1 (2d ed. 1951).

51. See PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTECK, *CONFLICT OF LAWS* 1067–68 (6th ed. 2018).

52. See *Hatfield v. Halifax PLC*, 564 F.3d 1177, 1184 (9th Cir. 2009) (discussing parties’ failure to prove the content of England’s tolling statute). Where the content of foreign law is ambiguous, however, such that a party cannot prove its precise contours, courts will often lend their assistance. See, e.g., *Rocky Mountain Helicopters, Inc. v. Bell Helicopter Textron, Inc.*, 24 F.3d 125, 128 (10th Cir. 1994) (federal court, applying Utah’s choice-of-law rules which chose Texas law, endeavored to determine whether Texas would recognize interspousal immunity where Texas law was unclear on the point).

53. Where it is determined that a difference in law makes no difference with regard to the resolution of an issue, that is, where there is no conflict, the forum will typically choose its own rule. See *Woodward v. Taylor*, 366 P.3d 432, 434 (Wash. 2016) (en banc) (holding that because there was no conflict between the substantive rule of Washington, the place of domicile of the parties, and Idaho, the place of the accident, forum law was to be chosen). This may have both direct and indirect consequences for selection of the governing limitations rule. For example, in *Woodward*, the determination that forum law governed the substance of the case drove the conclusion that the forum’s longer statute of limitations should govern the case as well. *Id.* at 438. See also discussion *infra* notes 142–45.

54. See, e.g., *Grothe v. Grothe*, No. 109,002, 2014 WL 5801003, at *3 (Kan. Ct. App. Oct. 31, 2014) (holding that a choice between the limitations periods of the two connected states was unnecessary under the forum’s borrowing statute because the action was timely under the laws of both states).

In the United States, most choice-of-law rules are the product of common law development.⁵⁵ Two states, Louisiana and Oregon, have codified their choice-of-law regime, Louisiana entirely and Oregon as to torts and contracts conflicts only.⁵⁶ A number of other states have enacted targeted statutory rules to achieve certain outcomes when two or more states with conflicting rules have connections to the case. Common among these are borrowing statutes that direct courts of the forum in certain instances to apply the statute of limitations of a foreign state, part of the subject of this Article.⁵⁷

Within limited constitutional bounds on a state's legislative jurisdiction,⁵⁸ a state is free to adopt its own rules regarding the proper methods by which to select between and among conflicting laws. The processes through which states resolve conflicts between statutes of limitations have generally followed a track laid by the development of rules governing the choice of substantive law that will govern a claim. As will be seen in Section III, however, the process of moving from static, reflexive choice-of-law rules regarding conflicting limitations rules to more nuanced choice-of-law rules has progressed less broadly and more slowly than the adoption of those rules as regards matters of substance.

One final note about choice-of-law rules in general: they are forum-based. Except in the rare *renvoi* scenario,⁵⁹ it is only the forum's choice-of-law model that matters because it is the forum court that is making the choice. Thus, for the prospective parties there are two key issues. Which states are available as potential fora and what choice-of-law methods will those states employ to determine the governing statute of limitations? Both inquiries are key to the issues raised in this Article. If a state cannot assert personal jurisdiction over the defendant, the limitations period it would choose were it to hear the case may be treated as irrelevant. If multiple states are available as fora for the resolution of plaintiff's claim, plaintiff must make a sophisticated analysis not simply of which state's

55. The Restatement Second acknowledges both this fact and the consequences of it. "The rules of Conflict of Laws, and especially the rules of choice of law, are largely decisional and, to the extent that this is so, are as open to reexamination as any other common law rules." RESTATEMENT (SECOND), *supra* note 1, § 5.

56. Louisiana adopted its statute in 1991. *See* LA. CIV. CODE ANN. Bk. IV. Oregon adopted its statute in 2001. *See* OR. REV. STAT. ANN. § 15.360 (West, Westlaw through 2019 Reg. Sess.); *Id.* § 15.440. For an extensive discussion of the scope and effect of both statutes, *see* HAY ET AL., *supra* note 51, at 99–104.

57. *See* discussion *infra* notes 110–19.

58. *See* Reese, *supra* note 2.

59. "Conflicts" people also love French. *Renvoi*, meaning "send back", arises when the forum's rule chooses the "whole law" of a foreign state, including its choice-of-law rules. A true *renvoi*, or remission, is created when the forum chooses the whole law of another state and that state would under the same facts choose the whole law of the forum. The unattractive result is an unending volley between the two states. For this reason, choice-of-law rules nearly always choose the local law of another state rather than the whole law. A recent example is *Boutelle v. Boutelle*, 337 P.3d 1148 (Wyo. 2014). Plaintiff sought to avoid the bar to her claim that resulted from Wyoming's borrowing statute's choice of Montana's statute of limitations by arguing that the borrowing statute should borrow the "whole" law of Montana, which would choose Wyoming's statute of limitations. *Id.* at 1154. The Wyoming Supreme court rejected this argument. *Id.* "If we were to apply Montana's choice of law statutes, those statutes would refer us back to Wyoming's law governing the statute of limitations, which presumably would include Wyoming's borrowing statute, which would refer us again to Montana law, and so on in a continuous looping fashion." *Id.* at 1154.

substantive and procedural rules are favorable to her but also of whether that state, if it were the forum, would choose its own plaintiff-favoring rule or adopt instead a less plaintiff-favoring rule of another connected state. Properly understood, this is a powerful tool for the plaintiff and it becomes more or less powerful depending on the number of choices the plaintiff has regarding fora for her suit, a subject to which we now turn.

II. THE INTERSECTION BETWEEN JUDICIAL JURISDICTION AND CHOICE OF LIMITATIONS PERIODS

A. Expanding Judicial Jurisdiction: *International Shoe* and its 20th Century Progeny.

For nearly seventy years, beginning with the United States Supreme Court's 1945 decision in *International Shoe Co. v. Washington*⁶⁰ and continuing through the first decade of the 21st century, the constitutional power of a state to exercise judicial jurisdiction over a nonresident defendant was greatly expanded from that which existed prior to *International Shoe*. For the sixty-seven years prior that power was defined by *Pennoyer v. Neff*.⁶¹ *Pennoyer* held that the presence in the forum state of either the defendant or his property was a prerequisite to the exercise of judicial jurisdiction.⁶² In the *Pennoyer* era, the only forum for plaintiff's suit often was the state where defendant resided unless he ventured outside his state and was served with process there or owned foreign property. Put simply, plaintiff often did not have a choice of fora; she had a choice to sue or not sue in the only place where defendant was constitutionally present. *International Shoe* expanded the constitutional connections that a state might have with a nonresident defendant to support the exercise of judicial jurisdiction over it by introducing the "minimum contacts" test⁶³ as the constitutional standard by which exercises of *in personam* judicial jurisdiction by state courts over non-present⁶⁴ nonresident defendants were to be measured.⁶⁵ In contrast to *Pennoyer*'s insistence on a *tangible* presence of the defendant, the minimum contacts standard allowed jurisdiction to be grounded on defendant's "contacts, ties or relations"⁶⁶ with the forum. *International Shoe*'s contribution to jurisdictional jurisprudence was additive in that the original grounds of personal or

60. 326 U.S. 310 (1945).

61. 95 U.S. 714 (1878).

62. *Id.* at 722.

63. *Int'l Shoe Co.*, 326 U.S. at 316 ("[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

64. In-state service of process on a nonresident defendant, without regard to whether the defendant has additional contact with the forum, continues to provide a constitutional basis for the exercise of personal jurisdiction. See *Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990).

65. See *Int'l Shoe Co.*, 326 U.S. at 316.

66. *Id.* at 319.

property presence in a state, recognized in *Pennoyer*, remained sufficient, although no longer necessary, for the exercise of judicial authority over the defendant.⁶⁷

In order to satisfy the newly-announced minimum contacts test, *International Shoe* required not only the identification of the defendant's contacts, ties and relations, but also an evaluation of the quality, nature, and quantitative substantiality of those links between the defendant and the forum state.⁶⁸ To aid in that task the opinion offered a structure for analyzing judicial jurisdiction that persists to this day. That structure is created by the intersection of two variables. The first variable distinguishes the defendant's continuous and systematic contacts with the forum from single, isolated or occasional ones.⁶⁹ "A defendant's continuous and systematic contacts with the forum are jurisdictionally supportive, although not determinative, whereas single or occasional contacts are jurisdictionally debilitating, but not fatal."⁷⁰ The second variable examined the "connectedness" of the contacts and the cause of action. A cause of action "arising out of, or related to" defendant's forum acts is jurisdictionally supportive but not determinative.⁷¹ A cause of action that does not arise out of or is not related to defendant's forum acts is jurisdictionally debilitating but not fatal.⁷² While *International Shoe* does not use the term, jurisdiction over claims that do not arise out of or relate to defendant's forum contacts is now widely referred to as "general" jurisdiction, while jurisdiction over claims so related is widely referenced as "specific" jurisdiction.⁷³

The two variables identified by *International Shoe* created four jurisdictional scenarios into which defendant's contacts with the forum state might fall. The first is created when the defendant has continuous and systematic contact with the forum state and the cause of action arises from that contact, an exercise of specific jurisdiction. In such cases, judicial jurisdiction "has never been doubted."⁷⁴ Correspondingly, where defendant has only single or isolated contacts within the forum and the cause of action is not related to or does not arise out of that act or acts, judicial jurisdiction is rejected as laying an unreasonable burden on the defendant.⁷⁵

The constitutional propriety of a state's exercise of judicial jurisdiction in the other two scenarios cannot be determined so directly. In each of these scenarios

67. This would change with regard to *in rem* jurisdiction in *Shaffer v. Heitner*, 433 U.S. 186, 208 (1977), wherein the Court stated in dicta that the minimum contacts test was to govern all assertions of state court jurisdiction whether *in personam* or *in rem*. *Shaffer* was reductive in a jurisdictional sense in that it removed the presence of defendant's property within the forum as a sufficient contact of the defendant, folding it instead into the minimum contacts analysis in which it was not sufficient *per se*.

68. See *Int'l Shoe Co.*, 326 U.S. at 318.

69. See *id.* at 317.

70. Patricia J. Youngblood, *Constitutional Constraints on Choice of Law: The Nexus Between World-Wide Volkswagen Corp. v. Woodson and Allstate Insurance Co. v. Hague*, 50 ALB. L. REV. 1, 5 (1985).

71. *Id.* at 5-6.

72. See *id.* at 6.

73. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966). The Court's recent jurisdiction cases adopt the terms. See *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014); *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915, 919 (2011).

74. *Int'l Shoe Co.*, 326 U.S. at 317. *International Shoe* itself was such a case as was the Court's next judicial jurisdiction case, *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950).

75. *Int'l Shoe Co.*, 326 U.S. at 317.

there is one jurisdictionally-supporting and one jurisdictionally-debilitating factor. Where the case involves a cause of action arising out of defendant's single or isolated contact with the state, an exercise of specific jurisdiction, the constitutional propriety of the jurisdictional exercise turns on the *quality* of defendant's forum acts.⁷⁶ Where the defendant has continuous and systematic contacts with the forum but the cause of action does not arise out of or relate to those contacts, an exercise of general jurisdiction, *International Shoe* emphasized that the propriety of the jurisdictional exercise depends on the *quantity* of such contacts and suggested that that standard would be high.⁷⁷ Nearly seventy years after *International Shoe*, the United States Supreme Court, in *Goodyear*⁷⁸ and *Daimler*,⁷⁹ discussed in Section IV, would declare just how high that bar is.

During that seventy years, the Supreme Court added meat to the bones of the analysis it laid out in *International Shoe*, sometimes emphasizing the fairness interests of the plaintiffs,⁸⁰ more often indicating that it is the defendant's contacts that must be the primary focus of the jurisdictional inquiry. In *Hanson v. Denckla*,⁸¹ decided thirteen years after *International Shoe*, the Supreme Court cautioned state courts that a state's interest in hearing a case and the plaintiff's convenience interests become relevant considerations in jurisdictional inquiries only *after* the court has determined the existence and level of defendant's purposeful contacts, ties or relations with the forum.⁸² Despite *Hanson's* admonition, the decades following *International Shoe* saw an unparalleled expansion in the exercise of judicial jurisdiction.⁸³ The United States Supreme Court would note in 2014 that "*International Shoe's* momentous departure from *Pennoyer's* rigidly territorial focus . . . unleashed a rapid expansion of tribunals' ability to hear claims against out-of-state defendants when the episode-in-suit occurred in the forum or the defendant purposefully availed itself of the forum."⁸⁴

The great majority of both Supreme Court jurisdiction cases and states' exercise of jurisdiction involved specific jurisdiction.⁸⁵ Only two Supreme Court cases post-*International Shoe* and pre-2011 called upon the Court to evaluate the

76. *Id.* at 318. In 1957, the Supreme Court decided *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), a case presenting this scenario. The defendant sold only one insurance policy in the State of California and had no other contacts in that state. *Id.* at 222. The cause of action arose out of that policy. *Id.* In upholding California's jurisdiction over the defendant, the Court noted that the contract had a substantial connection with California and that the state had a manifest interest in providing a means of redress for its residents, particularly where the claims were small and distant litigation was burdensome to the resident plaintiff. *Id.* at 221.

77. *Int'l Shoe Co.*, 326 U.S. at 318.

78. *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915 (2011) (discussed *infra* notes 167–73).

79. *Daimler AG v. Bauman*, 571 U.S. 117 (2014) (discussed *infra* notes 176–91).

80. *See, e.g., McGee*, 355 U.S. 220; *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950).

81. 357 U.S. 235 (1958).

82. *Id.* at 251.

83. *See* Martin B. Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C. L. REV. 407–08 (1980).

84. *Daimler*, 571 U.S. at 128.

85. *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915, 916 (2011).

standards for general jurisdiction. In one, *Perkins v. Benguet Consol. Mining Co.*,⁸⁶ the Court approved the exercise of such jurisdiction; in the other, *Helicopteros Nacionales de Colombia, S. A. v. Hall*,⁸⁷ it did not.

Entering the 21st century, despite occasional efforts by the Supreme Court to rein in the scope of “minimum contacts,” American states exercised judicial jurisdiction over defendants who did routine business within their borders whether or not the cause of action sued upon arose from that business. Not only was specific jurisdiction rarely rejected, general jurisdiction was widely exercised as well.

B. Expansive Judicial Jurisdiction and Its Impact on Applicable Limitations Periods: “Egregious” Forum Shopping

As a result of expansive notions of jurisdiction arising out of the limited contact a defendant was required to have with a state to justify the exercise of judicial jurisdiction over it, in many cases, especially those involving defendants with contacts touching many and often all states, the plaintiff had an array of choices regarding where to bring suit. Once plaintiff made her choice, that forum enjoyed considerable leeway in choosing to apply its own substantive and procedural laws to govern the controversies before it.⁸⁸ A forum’s then nearly-universal choice of its own laws to govern matters deemed procedural meant that a well-represented plaintiff could gain a predictable, reliable and often determinative benefit that, while not necessarily assuring ultimate victory, would subject a defendant to a suit not possible in other states, with the consequent cost of litigation, pressure toward private settlement and potential for significant financial liability. The most consequential and controversial exercise of the power inherent in the forum’s permissible choice of its procedural law lay in the choice of the forum’s statute of limitations to allow

86. 342 U.S. 437 (1952). *Perkins* involved the State of Ohio’s exercise of jurisdiction over a company that had continuing contacts with Ohio but those contacts did not give rise to the liability upon which suit was brought. *Id.* at 438. Plaintiff’s claims arose out of the defendant’s mining operations in the Philippines, under whose laws the company had been incorporated. *Id.* at 439. The issue in *Perkins* was “whether, as a matter of federal due process, the business done in Ohio by [Benguet Mining Company] was sufficiently substantial and of such a nature as to permit Ohio to entertain” the action. *Id.* at 447. The Court held the company’s Ohio activities to be sufficiently substantial, noting that the defendant’s president had returned to his home in Ohio after the company’s mining operations were halted by the Japanese occupation in the Philippines. *Id.* at 447–48. He maintained an office in Ohio in which he carried on many of the company’s affairs, including holding meetings of the board of directors. *Id.* at 447. The Court found that “[w]hile no mining properties in Ohio were owned or operated by the company, many of its wartime activities were directed from Ohio and were being given the personal attention of its president in that State at the time he was served with summons.” *Id.* at 448.

87. 466 U.S. 408 (1984). The survivors and representatives of four United States citizens killed in a helicopter crash in Peru brought suit in Texas state court against a Colombian corporation that provided helicopter transportation for oil and construction companies in South America. *Id.* at 409. The transportation contract was executed in Peru. *Id.* One of the helicopters providing transportation service pursuant to this contract crashed. *Id.* Plaintiffs brought a wrongful death action and defendant moved to dismiss for lack of personal jurisdiction. *Id.* at 412. The Court held that defendant’s contacts with Texas did not rise to a level necessary to support general jurisdiction, noting that defendant did not have a place of business in Texas and had never been licensed to do business there. *Id.* at 411. The defendant had made substantial purchases in Texas and had sent its employees to be trained there but the Court held these contacts, even if regular, to be insufficient for an exercise of general jurisdiction. *Id.* at 418.

88. See discussion *supra* notes 3 and 4.

prosecution of a suit that was barred by the limitations period of states with closer connections to the parties and the occurrence or transaction that underlay the suit.⁸⁹

Two cases in particular serve to illustrate the significance of the forum's choice of its own limitations period in this context. *Keeton v. Hustler Magazine*⁹⁰ arose out of a suit brought in federal court in New Hampshire by a New York plaintiff against defendant for libel.⁹¹ Hustler Magazine's only connection with New Hampshire was its monthly sale of 10,000 – 15,000 copies of its magazine in the state, a small fraction of its national sales. The lower court dismissed the case for lack of personal jurisdiction on due process grounds.⁹² The Court of Appeals for the First Circuit affirmed, noting two significant concerns arising out of the law that New Hampshire would choose to apply should it be permitted to hear the suit. First, New Hampshire applied a "single publication" rule that authorized an award of damages arising out of defendant's sales in *all* states.⁹³ Second, the court was concerned that the exercise of jurisdiction by New Hampshire would allow it to choose its statute of limitations, which was unusually long for libel actions and was, in fact, the only limitations period among the fifty states that did not time-bar the claim.⁹⁴ This, of course, was exactly why plaintiff chose to sue in New Hampshire. The United States Supreme Court reversed, stating that the concerns expressed by the Court of Appeals did not defeat jurisdiction that was otherwise constitutionally proper.⁹⁵ Once New Hampshire had judicial jurisdiction, it had legislative jurisdiction to choose to apply its own statute of limitations, even if no other state would permit the suit to proceed.

A second case involving undisguised forum shopping for an open statute of limitations, less known but arguably more problematic than *Keeton*, is *Schreiber v. Allis-Chalmers Corp.*⁹⁶ The claim by a Kansas plaintiff for a cause of action arising in Kansas, against a defendant who shipped its product there, was brought in Mississippi where the local statute of limitations remained open. Defendant successfully moved to transfer the case to Kansas where the case would have been barred if originally brought there. Under federal transfer rules, Mississippi's limitations period continued to govern the case "even though (a) Mississippi had no conceivable interest in the case; (b) the case was to be tried in Kansas, otherwise under Kansas law; and (c) the case was brought after a period of time almost three times longer than the Kansas limitations period."⁹⁷

There were two avenues to avoid this result, both of which were taken by the United States District Court in Kansas. One was to find that Mississippi did not

89. As earlier noted, *see supra* note 4, this power of a state to choose its own law is without limit with regard to choice of its statute of limitations. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 721 (1988) ("This Court has long and repeatedly held that the Constitution does not bar application of the forum State's statute of limitations to claims that in their substance are and must be governed by the law of a different State.").

90. 465 U.S. 770 (1984).

91. Federal jurisdiction was based upon diversity of citizenship. *See* 28 U.S.C. §1332 (2012).

92. *Keeton*, 465 U.S. at 772.

93. *Keeton v. Hustler Magazine, Inc.*, 682 F.2d 33, 35 (1st Cir. 1982).

94. *Id.* at 35–36.

95. *Keeton*, 465 U.S. at 775.

96. 611 F.2d 790 (10th Cir. 1979).

97. *Martin, supra* note 18, at 409.

have personal jurisdiction over the defendant and therefore there was nothing to transfer to Kansas; the other was to read Mississippi law as permitting the choice of Kansas' statute of limitations under the unique circumstances of the case. While sympathizing with the District Court's desire to avoid what appeared a ridiculous result, the United States Court of Appeals for the Tenth Circuit reversed, finding the propriety of jurisdiction on the ground that the defendant was doing business in Mississippi and determining that there was no reason to anticipate that Mississippi would abandon its commitment to the rule directing choice of its own statute of limitations.⁹⁸

Mississippi still has not abandoned that commitment. The avenues by which other states did, in part to discourage forum shopping, are the subject of Section III.

III. STATE RESPONSES TO FORUM SHOPPING FOR OPEN STATUTES OF LIMITATION IN THE AGE OF EXPANSIVE JUDICIAL JURISDICTION

Keeton and *Schreiber* dramatically illustrate the intersection of broad concepts of judicial jurisdiction with a forum's reflexive choice of its own limitations period. Immediately post-*International Shoe*, nearly every state chose the governing limitations period based on the *lex fori* rule: all matters of procedure were to be decided by the law of the forum and the forum's statute of limitations, being a matter of procedure, was therefore the governing rule. If the forum's statute of limitations remained open, the suit was heard regardless of whether the state whose substantive law created and governed the claim would foreclose it. If the forum's statute of limitations had run, the suit was dismissed regardless of whether the state whose substantive law created and governed the claim deemed the claim open.

The *lex fori* rule was a choice-of-law rule that each state chose to adopt. It was not constitutionally mandated, however, and as the scope of judicial jurisdiction expanded and the methods used by courts to decide other choice-of-law questions became less reflexive and more nuanced,⁹⁹ courts in many states began to question the wisdom of the *lex fori* rule.¹⁰⁰ Understanding how states now make the choice regarding the governing limitations rule requires a familiarity with the four general approaches to choosing limitations periods that states have adopted in the era of expansive judicial jurisdiction.

A. Choosing the Limitations Period through Reflexive Reference to the *Lex Fori*

Lex Fori as a Forum-Centric Rule

The Restatement of Conflict of Laws (hereinafter First Restatement), adopted by the American Law Institute in 1934, reflected the then well-nigh universal practice of American courts in choosing as the applicable source of the

98. *Schreiber*, 611 F.2d at 794.

99. For an excellent discussion of the shift from traditional to modern theories regarding choice of law, see Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585 (1985).

100. For a discussion of this criticism see *Heavner v. Uniroyal, Inc.*, 305 A.2d 412 (N.J. 1973).

governing statute of limitations, the law of the forum.¹⁰¹ This rule is content neutral in the sense that it is not concerned with whether the forum's limitation rule bars or permits the suit. The First Restatement devoted two sections to the choice of the forum's statute of limitations and one section to the only overarching circumstance where the forum's statute was not to be chosen. Section 603 stated in full "[i]f action is barred by the statute of limitations of the forum, no action can be maintained though action is not barred in the state where the cause of action arose," the state which was often the source of the law governing the parties' substantive rights. Section 604 addressed the opposite situation, stating in full "[i]f action is not barred by the statute of limitations of the forum, an action can be maintained though action is barred in the state where the cause of action arose." Plaintiffs rarely chose to sue in a state where the statute of limitations had run, unless they had little or no other choice, and thus section 603 rarely was in issue. Quite the opposite was true of section 604, in that one of the most common motivations for forum shopping is the search for a state whose courts remain open to claims that are barred in other, perhaps more obvious, venues for suit.¹⁰² By expressly directing the choice of the forum's law, the First Restatement established that a plaintiff who was able to identify a state with judicial jurisdiction over the defendant and an open limitations period would be able to resurrect a claim that was barred under the law of the state that created it.¹⁰³

The *lex fori* rule continues to be the choice-of-law method employed by a slim majority of states.¹⁰⁴ At the time the rule was initially embraced, the key policy that supported it was saving the local bench and bar from having to apply rules that were deemed difficult to discover and interpret without familiarity with the foreign states' local practices.¹⁰⁵ Of course, not all procedural rules impose such difficulty. While a particular twist on the admission of hearsay testimony might be difficult to glean and would require a hiatus in a court proceeding to determine, the discovery and application of a statute of limitations would be neither difficult nor disruptive. Modern courts employing the *lex fori* rule are thus far more likely to describe the

101. RESTATEMENT (FIRST), *supra* note 17. The First Restatement was largely shaped by its Reporter Joseph Beale's embrace of the "vested rights" nature of Conflicts of Law. 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAW (1935). Beale's vision determined the appropriate source of a given rule in conflict as determined by a pre-assigned territorial connection. *See id.*

102. *See* discussion of *Schreiber*, 611 F.2d 790 (1979), *supra* notes 96 and 97.

103. The First Restatement's third section on statutes of limitations addressed the historical exception that foreign limitations periods functioning to define rights rather than to limit remedies should be chosen over conflicting forum limitations periods. *See* *Davis v. Mills*, 194 U.S. 451, 454 (1904). In such cases, the foreign limitation was seen as so intimately tied to the creation of the right that it could not be separated therefrom. *See* RESTATEMENT (FIRST), *supra* note 17, § 605 ("If by the law of a state which has created a right of action, it is made a condition of the right that it shall expire after a certain period of limitation has elapsed, no action begun after the period has elapsed can be maintained in any state.").

104. Symeon C. Symeonides, Choice of Law in the American Courts in 2018: Twenty-Third Annual Survey 1, 65 (2019).

105. At least one author has suggested that the *sole* justification for the overarching traditional rule that matters of procedure were to be decided according to the law of the forum was convenience. *See* David H. Vernon, *Statutes of Limitation in the Conflict of Laws: Borrowing Statutes*, 32 ROCKY MOUNTAIN L. REV. 287, 288 (1960) ("Foreign rules of evidence and foreign peculiarities of pleading would, it is thought, overburden and disrupt the forum's judicial machinery.").

value of the rule in terms of its virtue of certainty and simplicity.¹⁰⁶ As courts that have abandoned the *lex fori* rule have been quick to note, those virtues are bought at the cost of any recognition of the competing interests of other states with a much closer connection to the parties and the transaction or occurrence.¹⁰⁷

Understanding the Full Scope of Modern Lex Fori: Borrowing Statutes

While a significant number of states remain committed to the classification of statutes of limitation as procedural and therefore governed by the rules of the forum,¹⁰⁸ in a large majority of those states, the rules of the forum include “borrowing” statutes.¹⁰⁹ While such statutes differ significantly in the circumstances that trigger their application,¹¹⁰ all but one of them¹¹¹ chooses the *shorter* limitations period of a foreign jurisdiction with a specified connection to the parties or the controversy. Thus, only in the circumstances where the forum limitations period remains open, and the foreign period closed, will borrowing statutes come into play. This fact alone suggests that the primary goal underlying the enactment of borrowing statutes was the prevention of forum shopping for a longer limitations period.¹¹² Not surprisingly, the effect of borrowing statutes is to advance defendant’s repose interests over plaintiff’s vindication interests.

106. In *Berger v. AXA Network LLC*, 459 F.3d 804, 810–11 (7th Cir. 2006), the Seventh Circuit Court of Appeals, examining which choice-of-law model best suggested itself for adoption in cases brought under § 510 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140 (2006), noted “[o]ne possible approach would be simply to choose, in every case, the forum state’s law as the source of the applicable limitations period. The prime advantage of this approach is its simplicity; neither the court nor the parties remain in doubt concerning which state’s law ought to apply. Certainly, predictability and ease of administration are factors long recognized in the fashioning of any choice of law tool.”

107. See, e.g., *Tomlin v. Boeing Co.*, 650 F.2d 1065 (9th Cir. 1981); *Bates v. Cook, Inc.*, 509 So.2d 1112 (Fla. 1987); *Heavner v. Uniroyal, Inc.*, 305 A.2d 412, 418 (N.J. 1973); see also *Martin*, *supra* note 18.

108. See *Symeonides*, *supra* note 104.

109. For a list of state borrowing statutes, see *Prod. Liab. Rep. (CCH) P 3250*, 2015 WL 7172485.

110. For a detailed and largely still accurate categorization of the kinds of borrowing statutes enacted by states, see *Vernon*, *supra* note 105 at 294–323. See also Ibrahim J. Wani, *Borrowing Statutes, Statutes of Limitations and Modern Choice of Law*, 57 UMKC L. REV. 681 (1989).

111. Oklahoma is the exception and borrows the foreign limitations period whether it is longer or shorter. See OKLA. STAT. tit. 12, §105 (West, Westlaw through First Reg. Sess. of the 57th Legis. (2019)).

112. See, e.g., *Juran v. Bron*, No. Civ.A. 16464, 2000 WL 1521478, at *12 (Del. Ch. June 20, 2000). New York has long recognized that an additional interest is the protection of residents, *Besser v. E.R. Squibb & Sons, Inc.*, 539 N.Y.S.2d 734, 737 (N.Y. App. Div. 1989), *aff’d*, 552 N.E.2d 171 (N.Y. 1990), and perhaps of nonresident defendants as well, *George v. Douglas Aircraft Co.*, 332 F.2d 73 (2d Cir. 1964). More recently, the New York Court of Appeals embraced a third interest, that of providing certainty and predictability as to which limitations period New York courts will choose. See *Global Fin. Corp. v. Triac Corp.*, 715 N.E.2d 482, 485–86 (N.Y. 1999).

Most borrowing statutes are aimed at the scenario where a claim has accrued¹¹³ outside the forum¹¹⁴ and is barred by the state where it accrued. One central difference in the effect of the statutes turns on whether they govern only when the plaintiff is a nonresident of the forum, at the time the cause of action accrued, the suit was brought, or both.¹¹⁵ Excepting a plaintiff who was or is a resident of the forum from the borrowing effects of the statute recognizes that such a plaintiff is not engaged in inappropriate forum shopping.¹¹⁶

Borrowing statutes are *forum* choice-of-law rules. They operate to borrow only the limitations period of the foreign state where the cause of action arose. They do not, however, direct courts to ask what limitations period the foreign state would choose if the suit were filed there. Put another way, borrowing statutes borrow the “local” law of the foreign state, not its “whole” law.¹¹⁷ To illustrate, if a nonresident of New York were to sue in that state on a claim arising in New Jersey, New York would choose New Jersey’s limitations period if it were shorter than New York’s even if New Jersey, were it hearing the case, would apply a choice-of-law model choosing the longer limitations period of another state, including potentially New York.

Borrowing statutes drastically curtail forum-shopping by nonresident plaintiffs and thus mitigate the more egregious effects of the traditional rule. In doing so, such statutes have exchanged the certainty of the rule reflexively choosing the limitations period of the forum for what is considered a fairer result for the *defendant*. As will be seen later in this Article, the existence of borrowing statutes, along with the function of the more nuanced choice-of-limitations law models discussed

113. One of the major problems with the content of borrowing statutes is that they do not define where a cause of action “accrues,” leaving to the courts the challenge of that determination. Most courts continue to apply a reflexive conclusion that very much parallels the First Restatement’s choice-of-law rules for substantive issues by simply adopting the *lex loci delicti*, the law of the place of the wrong (most often the place of the injury), in torts cases and the *lex loci contractu*, the law of the place of contract formation or performance, in contracts cases. That is, courts have rejected attempts to tie the operation of borrowing statutes to complicated issues of which state is the state of accrual, instead assigning accrual to one factual contact. Those states that have applied a more nuanced view to the question of where the cause of action accrued for borrowing statute purposes engage in what is, in essence, a *dependent* choice-of-law analysis discussed *infra* notes 137–41. For an excellent analysis of how complicated the accrual issue can be for borrowing statute purposes, see *Braune v. Abbott Labs.*, 895 F.Supp. 530 (E.D.N.Y. 1995) (involving the question of where claims by daughters of mothers who took an allegedly injurious drug accrued).

114. Courts have also been required to determine the contours of “outside” or “without” the forum. In *Scherer v. Hellstrom*, a Michigan appellate court held that the phrase “without the state” in Michigan’s borrowing statute meant that the action must accrue “without any essential facts giving rise to the cause of action occurring in Michigan.” 716 N.W.2d 307, 310 (Mich. Ct. App. 2006).

115. See, e.g., N.Y. C.P.L.R. 202 (McKinney, Westlaw through L.2019, Ch. 758 & L.2020, Ch. 23). But see *Tanges v. Heidelberg N. Am., Inc.*, 710 N.E.2d 250, 253–54 (N.Y. 1999) (the New York Court of Appeals held that although § 202 did not apply to plaintiffs who were state residents, New York choice-of-law analysis directed application of a Connecticut statute of repose to a Connecticut law claim brought by a New York resident).

116. See *Antone v. Gen. Motors Corp., Buick Motor Div.*, 473 N.E.2d 742, 745 (N.Y. 1984) (stating that the “primary purpose” of the New York borrowing statute “is to prevent forum shopping by a nonresident seeking to take advantage of a more favorable Statute of Limitations in New York”).

117. See Reese, *supra* note 2.

immediately below, has the effect of limiting the vindication of plaintiff's rights in multistate cases where such rights would be protected in a purely domestic case.¹¹⁸

B. Choosing the Limitations Period through the Revised Restatement Second Model

The Restatement Second of Conflict of Laws was published by the American Law Institute in 1971.¹¹⁹ In many respects it represented a sea change in the legal view of conflicts of law. The Restatement Second adopted vast changes in the rules that had been embraced by the First Restatement in overarching and directed ways. In the place of the "vested rights" theories that had pervaded the First Restatement,¹²⁰ the Restatement Second announced broad choice-of-law principles by reference to which most conflicts decisions were to be made.¹²¹ Additionally, in a wide range of areas it announced a "most significant relationship" test that was to be the standard by which individual choice-of-law decisions were to be reached in a number of substantive areas. The Restatement Second made no change, however, to the Restatement First rules regarding the choice of limitations periods. The Restatement Second devotes two sections to choice of law regarding statutes of limitations. The first, section 142, addresses the two conflict possibilities regarding the forum's limitations period, that it is shorter than that of another state and that it is longer than that of another state. In both cases, it chooses the *lex fori*, exactly the First Restatement's result.¹²²

The general refocus of the Restatement Second away from vested rights and toward a more nuanced choice-of-law approach was widely welcomed by courts and commentators.¹²³ The specialized rules regarding statutes of limitations were not. While commentators were generally comfortable with the Restatement Second's choice of the forum limitations period, when that period was *shorter* than that of other states whose laws might have been chosen, they were decidedly not so as to those more common cases where the forum's limitations period was longer than the period of other connected states.

There was a clearly emerging trend by the middle of the 1980s to reject the Restatement rule selecting the longer *lex fori* limitations period in circumstances where the sole connection of the forum to the case was that plaintiff had chosen to

118. See Section V *infra*.

119. RESTATEMENT (SECOND), *supra* note 1. The Restatement Second was widely adopted by American states, especially as the choice-of-law model that is to be employed to choose the substantive law that will govern the issues in the case.

120. See discussion *supra* note 101.

121. See RESTATEMENT (SECOND), *supra* note 1, § 6.

122. The other statute of limitations section, Restatement (SECOND) § 143, adopts the right/remedy exception recognized in the First Restatement § 605, *see supra* note 103, stating that if the state creating the claim bars "the right and not merely the remedy" it is that state's limitations period and not the limitations period of any other state, including the forum, that governs.

123. See Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 486 (1991) (measured by its acceptance by courts the Restatement Second was a "smashing success").

sue there.¹²⁴ In response, the American Law Institute published a revision of section 142 in 1988. The Revised Restatement Second model for choosing limitations periods has now been directly adopted by eight states.¹²⁵

Under Revised section 142 (1), where the forum's statute of limitations *bars* the claim, that bar is to be applied "unless the exceptional circumstances of the case make such a result unreasonable."¹²⁶ Such exceptional circumstances might exist "when through no fault of the plaintiff an alternative forum is not available as, for example, where jurisdiction could not be obtained over the defendant in any state other than that of the forum."¹²⁷ The most common scenario where this would occur is where the only alternative fora are outside the United States.¹²⁸ In such case, assuming that the forum would not suffer significant harm to its docket interests if it heard the case, choice of a longer foreign statute of limitations is appropriate.

Revised section 142(2) addresses the circumstance where the forum's statute of limitations has not run such that the claim is timely under forum law. This, of course, is the forum shopping context. Again, the Restatement favors the choice of forum law, offering only one scenario that would appropriately lead the forum to choose a statute of another state to bar the claim. This scenario arises when no significant interest of the forum is served by allowing the claim to proceed *and* a state with a more significant relationship to the parties and transaction or occurrence bars the claim.¹²⁹ Both facets must be met; thus, if the forum's hearing of the case

124. See, e.g., *Tomlin v. Boeing Co.*, 650 F.2d 1065 (9th Cir. 1981); *Heavner v. Uniroyal, Inc.*, 305 A.2d 412 (N.J. 1973).

125. See Symeonides, *supra* note 104, at 66 (Arizona, Florida, Idaho, Iowa, Massachusetts, New Jersey, Ohio and West Virginia).

126. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142(1) (AM. LAW INST. 1986 Revisions, Supp. 3). For a case involving a conflict between Massachusetts or Rhode Island's limitations period in which the court concluded that such exceptional circumstances did not exist, see *Shamrock Realty Co. v. O'Brien*, 890 N.E.2d 863 (Mass. App. Ct. 2008).

127. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 cmt. f (AM. LAW INST. 1986 Revisions, Supp. 3).

128. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (discussed *infra* notes 160–64).

129. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142(2) (AM. LAW INST. 1986 Revisions, Supp. 3). The significance of the language of § 142(2) allowing rebuttal of the *lex fori* presumption if the forum is uninterested and another state that bars the actions has a more significant relationship to the parties *and* the occurrence is illustrated in *Jackson v. Chandler*, 61 P.3d 17 (Ariz. 2003). All of the parties in the case were California domiciliaries; the accident occurred in Arizona. *Id.* at 17–18. Arizona's limitations period remained open at the time of suit in Arizona; California's had closed. *Id.* at 18. Arizona's lower courts, focusing only on the connection of the two states with the parties, concluded that the §142(2) exception should apply. *Id.* The Arizona Supreme Court reversed noting that, while California had the more significant relationship with the parties, Arizona had the more significant relationship with the occurrence. *Id.* at 21. Since the foreign period trumped the forum period only where the forum had no interest and a less significant connection to *both* the parties and the occurrence, the presumption that the *lex fori* applied was not overcome. *Id.* For a case holding that the presumption is overcome, see *MTK Food Serv., Inc. v. Sirius Am. Ins. Co.*, 189 A.3d 914 (N.J. Super. Ct. App. Div. 2018). A Pennsylvania plaintiff sued an attorney practicing in New Jersey and Pennsylvania for malpractice in a New Jersey court. *Id.* at 915. The gravamen of plaintiff's complaint was that defendant had failed to file plaintiff's claim against its insurer within the applicable statute of limitations and thus the claim was lost. *Id.* Ironically, the subsequent malpractice action involved the question of whether it too was barred by the passage of time. *Id.* Pennsylvania's limitations period had closed; New Jersey's remained open. *Id.* Section 142 presumptively favored choice of New Jersey's limitations period because New Jersey was the forum. *Id.* at 917. The trial court had held that this presumption was not overcome because New Jersey

advances a significant interest of the forum, that longer limitations period is properly chosen even if a state with a more significant relation to the litigation would bar it.¹³⁰ The Comments to Revised Restatement Second section 142 identify this as posing a decisional difficulty because the forum often has some interest that is served by hearing the claim but application of its longer statute would undermine the interests of another state that had closer connections to the parties and transaction. “One such situation is where the domicile of the plaintiff is the state of the forum and that of the defendant is in the other state with the most significant relationship to important issues in the case.”¹³¹ The Comments suggest that “the forum should only entertain the claim in extreme and unusual circumstances.”¹³² Most courts faced with this juxtaposition, however, will choose to apply the forum’s statute and allow the suit to proceed.¹³³ In such a case, the plaintiff is not a forum shopper; she is a forum resident, and the impact of her injuries is felt in and by the forum state.¹³⁴

The American Law Institute is in the process of drafting a third Conflicts Restatement. Perhaps not surprisingly, it is considering a recast of section 142’s rules on choice-of-limitations periods. Draft section 5.29 articulates a general rule that, unless exceptional circumstances make the choice unreasonable, when the forum is entertaining a claim based on foreign law, it will apply the law, whether forum or foreign, *barring* the claim unless maintenance of the claim in the face of a foreign bar would serve a substantial interest of the forum.¹³⁵ Comment b acknowledges that this rule will generally track the result reached by borrowing statutes.¹³⁶ Section 5.29 does not directly recognize a different rule for resident and nonresident plaintiffs.¹³⁷ Significantly however, Comment b states the following: “Although the plaintiff’s status as a forum resident might be relevant to determining whether maintenance of the claim serves a substantial interest of the forum . . . *it will usually not by itself be*

had a substantial interest in a case involving an attorney licensed to practice there. *Id.* at 918. The Appellate Division reversed, noting that the only pertinent contact with New Jersey was that defendant was licensed to practice law and had an office there, contact that “falls short of establishing a substantial interest for New Jersey to apply its statute of limitations.” *Id.*

130. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (AM. LAW INST. 1986 Revisions, Supp. 3).

131. *Id.* § 142 cmt. g.

132. *Id.*

133. *See id.* An example is *Nierman v. Hyatt Corp.*, a case involving a Massachusetts citizen who was injured in a hotel in Texas. 798 N.E.2d 329 (Mass. App. Ct. 2003). The court acknowledged that Texas had the more significant interests in the substantive issues presented. *Id.* at 332. As to the limitations issue, when the forum had the longer limitations period, docket concerns are not an issue since “from the perspective of the forum State, the claim is not too stale to be fairly adjudicated.” *Id.* Note that this rule essentially reaches the same outcome as a borrowing statute that allows the longer limitations of the forum to be chosen if the plaintiff is a forum resident. *See* discussion *supra* note 115.

134. *Nierman*, 798 N.E.2d 329. *See also* *Weitz Co. v. Travelers Cas. & Sur. Co.*, 266 F. Supp.2d 984 (S.D. Iowa 2003) (although all of the underlying transactions occurred in Connecticut and thus Connecticut law governed the substance of the claims, the court applied Iowa’s longer statute of limitations to a claim brought in federal court in Iowa by an Iowa citizen).

135. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS, (AM. LAW INST. Preliminary Draft No. 4 (Oct. 10, 2018)) (hereinafter Restatement (Third) Preliminary Draft No. 4).

136. *See* discussion of borrowing statutes *supra* notes 108–17.

137. *See* discussion *supra* note 115.

*enough to excuse compliance with a foreign limitations period.”*¹³⁸ Unquestionably, section 5.29, if ultimately adopted by the American Law Institute and later by courts, will favor the repose interest of the defendant over the vindication interests of the plaintiff significantly more often than does the current Revised Restatement Second.

C. Choosing Statutes of Limitations through *Dependent* Choice-of-Law Analysis

In 1982, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Conflict of Laws-Limitations Act (UCLLA),¹³⁹ which rejected the traditional characterization of statutes of limitations as procedural rules to be drawn from the *lex fori* and announced a rule that would, in nearly all cases, adopt as a source of the limitations period the law that governs the substantive issues in the case. Section 2 of the UCLLA provides generally that, if a claim is substantively based upon the law of another state, the limitations period of that state applies.¹⁴⁰ Section 4 provides the single exception to the section 2 rule and governs when the limitations period of the state chosen by section 2 is substantially different from the forum’s limitation period and either does not afford the plaintiff “a fair opportunity to sue”¹⁴¹ or imposes on the defendant an “unfair burden” in defending the claim, in which case the forum is to apply its own limitations period.¹⁴² UCLLA is agnostic as to what the appropriate substantive choice of law model should be. Six states have enacted UCLLA.¹⁴³

The crucial feature of UCLLA and the one that results in here characterizing the analysis it directs as a *dependent* choice-of-law analysis, is that the choice of the limitations period is, in most cases, compelled by the choice of the governing substantive law. That law governs the limitations period even if the facts would otherwise strongly suggest that it should be governed by the law of another state more interested in the limitations issue with the result that UCLLA can compel a choice that does not reflect the limitations concerns of *any* state. Consider this scenario: Two domiciliaries of State A are injured in a traffic accident in State B with a truck owned by a company incorporated in State C and driven by a domiciliary of

138. RESTATEMENT (THIRD) Preliminary Draft No. 4, § 5.29 cmt. b. (emphasis added).

139. UNIF. CONFLICT OF LAWS ACT, 12 U.L.A. 56 (2015).

140. *Id.* § 2.

141. For example, a state that has adopted a six-year limitations period for contracts actions might hold that a foreign one-year limitations period is not only substantially different than the forum’s rule but operates in the given case to undermine the plaintiff’s vindication interest by failing to provide a fair opportunity to sue.

142. UNIF. CONFLICT OF LAWS ACT § 4, 12 U.L.A. 56.

143. See MINN. STAT. § 541.31 (West, Westlaw through 2019 Reg. and First Spec. Sess.); MONT. CODE ANN. 27-2-503 (West, Westlaw through 2019 Sess.); NEB. REV. STAT. § 25-3203 (West, Westlaw through Second Reg. Sess. of the 106th Legis. (2020)); N.D. CENT. CODE ANN. § 28-01.2-02 (West, Westlaw through 66th Gen. Assem.); OR. REV. STAT. ANN. § 12.430 (West, Westlaw through 2019 Reg. Sess. of the 80th Legis. Assem.); WASH. REV. CODE ANN. § 4.18.02(1)(a) (West, Westlaw through Ch. 1 of the 2020 Reg. Sess.). Arkansas repealed its enactment of UCLLA in 1999. Colorado’s enactment has been ruled superseded by the state’s later adoption of a borrowing statute. See *Jenkins v. Panama Canal Ry. Co.*, 208 P.3d 238 (Colo. 2009) (finding the choice of law rules in UCLLA and the state’s borrowing statute irreconcilable and choosing the borrowing statute to foreclose the suit because it was enacted after Colorado enacted the UCLLA).

State D. The plaintiffs sue in State A, their domicile, which has adopted UCLLA. The action is timely under the limitations periods of State A, C and D; it is barred under the limitations period of State B. Because the underlying claim in negligence is governed by the law of the state where the cause of action accrued, here State B, the limitations law of that state is chosen to bar the claim. If the choice-of-limitations question were severed from the choice of the substantive law, State A's law would likely have been chosen as State A has a vindication interest, the limitations periods of States C and D were still open and therefore defendants' domiciles had no interest in their repose interests, and State B's repose and docket interests were not at play as the defendants were from State B and it was not the forum.¹⁴⁴

D. Choosing Statutes of Limitations through *Independent Interest Analysis*

"Interest Analysis," writ large, is a modern choice-of-law approach, grounded in the work of Professor Brainerd Currie,¹⁴⁵ to govern substantive choice-of-law issues. At least seven states have adopted governmental interest analysis to determine the governing limitations period where a conflict exists.¹⁴⁶

A court applying interest analysis¹⁴⁷ identifies the contacts of the parties and the transactions or events with each of the states whose rule might be chosen and asks whether the policy¹⁴⁸ behind that rule is "triggered" by the contact. If it is, the state has an "interest" in having its rule applied and the rule remains one of the choices; if it is not, the state does not and the rule is no longer a choice. If two or more states have an "interest," a "true" conflict is presented. An example in the context of limitations periods would involve a forum in which defendant is a domiciliary with a closed limitations period barring the claim and a foreign state with connections to the plaintiff and the occurrence or transaction whose limitations

144. See *Cropp v. Interstate Distrib. Co.*, 880 P.2d 464 (Or. Ct. App. 1994). States, A, B, C and D were respectively Oregon, California, Washington and Nevada. See *id.* at 464. The majority barred the claim under California's one-year statute of limitations period. *Id.* at 466. The dissent conducted an analysis of the limitations issued divorced from the substantive choice of law and concluded that California had no interest in limiting plaintiffs' suit and Oregon's vindication interest in applying its then-open two-year limitation should prevail. *Id.*

145. See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 57–58 (1963).

146. They are Arkansas, California, Delaware, Indiana, Michigan, Rhode Island, and Wisconsin. See Symeon C. Symeonides, *Choice of Law in American Courts in 2017: Thirty-First Annual Survey*, 66 Am. J. Comp. L. 1, 66 (2018). For an excellent explanation of interest analysis as applied to conflicting statutes of limitations, see Milhollin, *supra* note 35.

147. This will definitionally be a court of the forum. See discussion *supra* note 59. The significance that it is the forum weighing the interests is well-illustrated by *Greer v. Academy Equipment Rentals*, No. C94 0120 CAL ARB (FSL), 1994 WL 443421 (N.D. Cal. Aug. 11, 1994). Two California plaintiffs sued two Nevada defendants in California for injuries arising out of an automobile accident in Nevada. *Id.* at *1. California's one-year limitations period had run; Nevada's two-year period had not. *Id.* The court, while acknowledging Nevada's vindication interest in the application of its limitations period in favor of its citizens, chose California law finding California's repose and docket interests to be stronger. *Id.* at *5.

148. The burden is on the party who is arguing that a state interest is triggered to convince the court that the interest is in fact an interest that motivated the state to adopt the rule in question. See e.g., *Indus. Indem. Co. v. Chapman & Cutler*, 22 F.3d 1346, 1350 (5th Cir. 1994) (plaintiff offered no evidence that Illinois adopted a longer statute of limitations in order to regulate the Illinois bar therefore the fact that the defendant was a member of the Illinois bar did not trigger the state's interest in application of its longer statute of limitations).

period remained open. The forum would have docket and repose interests triggered by its contacts; the foreign state would have vindication and deterrence interests triggered by its contacts.¹⁴⁹ According to Currie, such a conflict should be resolved by choice of forum law.¹⁵⁰ Dissatisfaction with that outcome has led courts to apply instead either a “greater interest” or a “comparative impairment” test to choose between interested states.¹⁵¹ If only one state has an “interest,” there is a “false” conflict and that state’s rule is chosen.¹⁵² This would arise where the claim arose in a state that has a closed limitations period and the state of the common domicile of the parties, the forum, has an open period, such that only the latter state would have an interest. The foreign state’s interest in its shorter statute is not triggered under these facts.¹⁵³ A suit where neither state has an interest is an “unprovided-for” case.¹⁵⁴ An example in the choice-of-limitations context is a forum state, home to the defendant, with an open limitations period and a foreign state, home to the plaintiff and site of accrual, with a closed limitations period. Assuming that the forum has disclaimed a deterrence interest, its interests in its longer period would be triggered by either a forum plaintiff or a forum accrual, neither of which is here. Likewise, the foreign state’s interest is not triggered if its rule was adopted to protect its docket and its defendants. Currie favored choice of the forum’s law in such a case.¹⁵⁵

All of the above methods of choosing limitations periods, including the *lex fori* rule when the state has a borrowing statute, permit or require the forum court to choose the limitations law of a foreign state. As this section illustrates and Section V will amplify, the new methods of choice tilt strongly toward an outcome that gives

149. *See id.* at 1350.

150. *See supra* note 145.

151. This approach does not ask which state has a greater interest in choice of its law, but rather which state would suffer the more serious legal, economic and social harm if its rule were not chosen. *See* Symeon C. Symeonides, *Louisiana’s New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677, 690 (1992). For a discussion of the two approaches, greater interest and comparative impairment, *see Indus. Indem. Co.*, 22 F.3d 1346.

152. *See Mahne v. Ford Motor Co.*, 900 F.2d 83 (6th Cir. 1990). This case involved a conflict between a Florida period that was closed and a Michigan period that was open. *Id.* at 84–85. Plaintiff was a Floridian injured in Florida. *Id.* at 84. The suit was brought in Michigan based on general jurisdiction over Ford. *Id.* The district court chose Florida law to bar the suit; the Court of Appeals reversed, applying Michigan law and finding that Florida had no docket or repose interests and that Michigan had a deterrence interest in regulating manufacture within the state. *Id.* at 85, 88.

153. *See Cropp v. Interstate Distrib. Co.*, 880 P.2d 464 (Or. Ct. App. 1994) (discussed *supra* note 144). Another case presenting a “false” conflict is *Dindo v. Whitney*, 429 F.2d 25 (1st Cir. 1970), an action arising out of a Quebec car accident involving residents of Vermont and New Hampshire. *Id.* at 25. The statute of limitations of Quebec, whose law would have governed issues regarding the conduct of the defendant, had run; the statute of limitations of New Hampshire, where the defendant resided had not. *Id.* Clearly applying an interest analysis, the court found that Quebec had no interest in the choice of its statute as the parties had only a fortuitous relationship with the province and the province’s limitations period was intended to protect its citizens and its courts from “stale” claims. *Id.* at 26. New Hampshire’s interests were triggered to the extent that New Hampshire had determined that its citizens should be subject to suit for a designated period of time, presumably even if the plaintiff was not a New Hampshire resident, especially because the limitations period of Vermont, plaintiff’s state of residence, also had not run. *Id.* *See also Baldwin v. Brown*, 202 F. Supp. 49 (E.D. Mich. 1962) (to the same effect).

154. *See CURRIE, supra* note 145, at 152.

155. Unprovided-for cases are rare if only because courts are inclined to find state interests if there is a state policy that will allow them to do so. *See HAY ET AL., supra* note 51, at 733.

the repose interest more weight than the vindication interest. Most often, these methods were adopted to prevent or at least curtail forum shopping. In Section IV, the Article turns to the recent jurisdiction jurisprudence of the Supreme Court that, in effect, directly limits forum shopping by withdrawing all but a few fora from the market.

IV. *MCINTYRE, GOODYEAR, DAIMLER AND BRISTOL-MYERS*: THE CONSTITUTIONAL CONSTRICTION OF PERSONAL JURISDICTION

In a span of six years, from 2011 to 2017, the United States Supreme Court decided four cases¹⁵⁶ that substantially curtailed the scope of constitutionally-permissible exercises of personal jurisdiction, returning that scope to one closer to *Pennoyer*¹⁵⁷ than to *International Shoe*,¹⁵⁸ at least with respect to corporate and other business-entity defendants. It is not the purpose of this Article to criticize or praise the Court's opinions: other academic scholars have effectively done both.¹⁵⁹ The purpose here is to describe briefly the effect of each case on a state's power to hear a plaintiff's claim and, in the next section, to explore how the modern constriction of personal jurisdiction interplays with modern limitations choice-of-law models to subsume protection of the plaintiff's vindication interest in favor of the defendant's repose interest.

*J. McIntyre Machinery, Ltd v. Nicaastro*¹⁶⁰ came to the Court on relatively straightforward facts. Plaintiff, a citizen of New Jersey, brought a products liability suit against defendant after a machine sold to plaintiff's employer by the sole United States distributor of defendant's products allegedly caused plaintiff serious injury. Plaintiff's injury occurred in New Jersey where his employer, a New Jersey company, operated its plant. Defendant was an English company that desired an American market for its machines and sought that market through a separately-owned national distributor and through regular attendance at trade shows in the United States. None of these trade shows were in New Jersey nor was the distributor

156. See *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Mach., Ltd. v. Nicaastro*, 564 U.S. 873 (2011). The Court decided two other cases on jurisdiction during the period, *supra* note 16. Because the constriction of personal jurisdiction that occurred during this period can be fully explained by reference to the four cases, the others are not discussed here.

157. See discussion *supra* notes 61 and 62.

158. See discussion *supra* notes 63–77.

159. Examples of thoughtful articles analyzing the Court's modern jurisdiction jurisprudence include: Patrick J. Borchers, *J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1246, 1263 (2011) (describing *McIntyre* as "quite possibly the most poorly reasoned and obtuse decision of the entire minimum contacts era" and *Goodyear* as "not nearly as bad"); Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 5 (2018) (arguing that the disaggregation of claims due to the Supreme court's constraints on personal jurisdiction "causes waste and unfairness to the parties and the [legal] system"); Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. 499, 499 (2018) (arguing that the Supreme court is "radically changing existing law while claiming to follow controlling precedent"); Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 211 (2014) (predicting that *Daimler* will "significantly shift the balance of power in civil litigation");.

160. 564 U.S. 873 (2011).

located there. The New Jersey courts upheld jurisdiction. The Supreme Court reversed. Justice Kennedy's plurality opinion began by noting the excessive reach of state courts which he characterized as "[f]reeform notions of fundamental fairness divorced from traditional practice."¹⁶¹ The Court then proceeded to narrow that reach by limiting jurisdiction to those circumstances "where the defendant can be said to have *targeted* the forum."¹⁶² It would no longer be enough, as a general rule, "that the defendant might have predicted that its goods will reach the forum State."¹⁶³ In the plurality's view, defendant targeted the United States but did not specifically target New Jersey. As to the need cited by the New Jersey Supreme Court for a New Jersey plaintiff to have access to a convenient forum, the plurality concluded that any interest of the plaintiff and the State of New Jersey must yield to the liberty interests of the defendant.¹⁶⁴

Should the plurality's "targeting" test be adopted by a majority of the Court in a future case, the impact on the constitutional standards for the exercise of personal jurisdiction over a defendant will be significant. The targeting test will curtail those contacts between a defendant and a state that can constitutionally "count." Limiting the contacts that are cognizable for this purpose has consequences for both variables of *International Shoe*.¹⁶⁵ First, to the extent that certain contacts of the defendant with the forum do not count, the quantity of defendant's contacts are reduced, potentially resulting in the recharacterization of what might be argued to be continuous and systematic contact to single, isolated and occasional contact, or, as in *McIntyre*, to no contact at all. Second, removing connections of the defendant with the forum state from the constitutional count may result in the litigation being *unconnected* with defendant's constitutionally-cognizable contacts with the forum. Thus, declaring actions or activities of the defendant as uncountable for minimum contacts purposes potentially undermines a finding that the two jurisdictionally supporting factors, quantity and connectedness, exist.

Had the Supreme Court found the contact of McIntyre with New Jersey to be constitutionally cognizable, the case would have involved an exercise of specific jurisdiction.¹⁶⁶ The second of the four cases curtailing personal jurisdiction, *Goodyear Dunlop Tires Operations, S. A. v. Brown*,¹⁶⁷ involved an exercise of

161. *Id.* at 880.

162. *Id.* at 882 (emphasis added).

163. *Id.*

164. *Id.* at 889. Justice Breyer concurred in the judgment. *See id.* at 887. He opined that the case easily could have been decided according to existing precedent and that the announcing of a "targeting" test was unnecessary. *Id.* at 890 (Breyer, J. concurring). Justice Ginsburg, joined by Justices Kagan and Sotomayor, dissented. *See id.* at 893 (Ginsburg, J., dissenting). Where the plurality focused primarily on sovereignty concerns as the hallmark of proper jurisdiction, Justice Ginsburg focused the jurisdictional inquiry more squarely on fundamental fairness not simply with regard to the defendant but with regard to the *litigants*. *Id.* at 903 (Ginsburg, J., dissenting). Was it not fair, she asked, given an international seller's business goal of increasing its market in the United States, to require that seller to defend in a state where its products caused an injury? *Id.* at 906 (Ginsburg, J., dissenting).

165. *See* discussion *supra* notes 68–73.

166. The cause of action would arise out of McIntyre's tires being present in the state, a presence that would have been constitutionally recognized for jurisdiction purposes.

167. 564 U.S. 915 (2011). *Goodyear* was heard and decided on the same day as *McIntyre*, 564 U.S. 873.

general jurisdiction. Again, the facts were straightforward and largely uncontested. Plaintiffs were families of two teenage boys from North Carolina who died in a bus accident in France while travelling with their soccer team. Plaintiffs alleged that the accident occurred because of a defect in the bus tires and sued, among others, the Turkish subsidiary of Goodyear Tire and Rubber Company, a United States corporation, that had manufactured the tires. The case was one of general jurisdiction because, although the Turkish and other Goodyear subsidiaries sold tens of thousands of tires in North Carolina, the particular tires alleged to have failed were not sold there.¹⁶⁸ The North Carolina courts found the exercise of jurisdiction over the defendant constitutionally authorized based on the subsidiaries' continuous and systematic sales in the state.¹⁶⁹

The Supreme Court reversed in an opinion by Justice Ginsberg, the author of the *McIntyre* dissent. The issue presented was whether "foreign subsidiaries of a U.S. parent corporation [are] amenable to suit in a state court on claims unrelated to any activity of the subsidiaries in the forum State."¹⁷⁰ The Court found the facts of *Goodyear* much closer to those of *Helicopteros*,¹⁷¹ than to those of *Perkins*.¹⁷² In differentiating *Goodyear* from *Perkins*, the Court noted that defendants "are in no sense at home in North Carolina."¹⁷³ Significantly, the Court opined that, while the presence of a domiciliary plaintiff might strengthen the constitutional footing of an exercise of specific jurisdiction,¹⁷⁴ fairness concerns surrounding the plaintiff played no role in evaluating the constitutionality of exercises of general jurisdiction over the defendant.¹⁷⁵

Goodyear, standing alone, is the least significant of the four cases discussed in this section. While its ultimate conclusion that the foreign subsidiaries were not subject to general jurisdiction in North Carolina was predictable, two questions deserve mention here. The first, discussed in more detail later in this Section, is the reference to general jurisdiction being present in *Perkins* because the defendant was "at home" in the forum. Was the notion of being "at home" simply an observation or was it the standard for determining a constitutional minimum? If the first, it was inconsequential; if the second, it suggested that general jurisdiction would exist in at most two states, regardless of the quantity of defendant's business activity in other states. Second, where plaintiff is a forum domiciliary, why is the vindication interest of plaintiff and his state not entitled to some, though not determinative, weight in a general jurisdiction analysis?

The third and by far most consequential of the cases here under review is *Daimler AG v. Bauman*.¹⁷⁶ *Daimler* was a general jurisdiction case brought in

168. *Goodyear Dunlop Tires Operations, S. A.*, 564 U.S. at 921.

169. *Brown v. Meter*, 681 S.E.2d 382 (N.C. Ct. App. 2009), *rev'd sub nom. Goodyear Dunlop Tires Operations, S. A.*, 564 U.S. 915.

170. *Goodyear Dunlop Tires Operations, S. A.*, 564 U.S. at 918.

171. *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408 (1984) (discussed *supra* note 87).

172. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (discussed *supra* note 86).

173. *Goodyear Dunlop Tires Operations, S. A.*, 564 U.S. at 929.

174. *See McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957) (discussed *supra* note 76).

175. *See id.* at 224.

176. 571 U.S. 117 (2014).

California federal court¹⁷⁷ under the Alien Tort Claims Act,¹⁷⁸ the Torture Victims Protection Act of 1991,¹⁷⁹ and various state statutes by Argentinian residents against DaimlerChrysler Aktiengesellschaft (Daimler), a German corporation,¹⁸⁰ alleging that defendant's wholly-owned Argentinian subsidiary, Mercedes Benz Argentina (MB Argentina) had collaborated with Argentinian security services to kidnap, torture and kill plaintiffs or their relatives who worked for the subsidiary during Argentina's "Dirty War."¹⁸¹ Jurisdiction over the suit was argued to be constitutionally permissible based on the contacts of Mercedes-Benz USA, LLC (MBUSA), a subsidiary of Daimler that was incorporated in Delaware and had its principal place of business in New Jersey. Given the lack of connection between MBUSA's California contacts¹⁸² and the plaintiffs' claims, all parties and the courts treated the case as one involving the exercise of general jurisdiction.¹⁸³

The Supreme Court, in an opinion authored by Justice Ginsberg, who had also authored *Goodyear*,¹⁸⁴ held that the Due Process Clause precluded California's exercise of general jurisdiction because MBUSA was not "essentially at home in the forum state."¹⁸⁵ *Goodyear* had hinted that such a "home" link was necessary for general jurisdiction; *Daimler* cemented that necessity.

With regard to individual defendants, the place where they are at home is their domicile.¹⁸⁶ With regard to corporations and like business entities¹⁸⁷ that place is the state of incorporation or the principal place of business.¹⁸⁸ "Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable."¹⁸⁹ Somehow that is described as a benefit to plaintiffs as "[t]hese bases afford [them] recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims."¹⁹⁰

Daimler ultimately answered the question left open by the gulf in years and circumstances between *Perkins* and *Helicopteros*. It confirmed what had been hinted

177. As a general rule, federal courts follow state law to determine the scope of their jurisdiction over persons. *See id.* at 753; FED. R. CIV. P. 4(k)(1)(A). California's long-arm statute permits the exercise of jurisdiction to the full extent that it is permissible under the U.S. Constitution. *See* CAL. CIV. PROC. CODE ANN. §410.10 (West, Westlaw through Ch. 3 of 2020 Reg. Sess.).

178. 28 U.S.C. § 1350 (2012).

179. Pub. L. No. 102-256, 106 Stat. 73 (1992).

180. Daimler is headquartered in Stuttgart, Germany and manufactures Mercedes Benz vehicles in that country. *Daimler*, 571 U.S. at 121.

181. *Id.*

182. Those contacts were multiple California-based facilities and the sale of luxury vehicles to the California market. *Id.* at 123. The California sales amounted to 2.4% of Daimler's worldwide sales. *Id.*

183. *Id.* at 127.

184. *See* discussion *supra* notes 167–73.

185. *Daimler*, 571 U.S. at 127 (quoting *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915, 919 (2011)).

186. *Id.* at 760 (quoting *Goodyear Dunlop Tires Operations, S. A.*, 564 U.S. at 924).

187. While *Daimler* involved a corporate entity, the same rule would apply to any statutorily-created entity, including limited liability companies.

188. *Daimler*, 571 U.S. at 137.

189. *Id.*

190. *Id.* Justice Sotomayor concurred in the judgment because she believed the exercise of jurisdiction under the unique circumstances of the case was unreasonable despite the presence of sufficient contacts of the defendant with the forum. *See id.* at 142 (Sotomayor, J., concurring).

at in *Goodyear*. For this, it at least had the salutary effect of making clear exactly how high the bar is set for the exercise of general jurisdiction. The effect of the decision on plaintiffs' efforts in seeking judicial vindication for their injury cannot be overstated. While not completely reverting to the jurisdictional construct of *Pennoyer*, the outcome and reasoning of *Daimler* brought general jurisdiction much closer to the strict territorial focus of that case than to the broader grounds of *International Shoe*. The court itself acknowledged this. "Specific jurisdiction has been cut loose from *Pennoyer's* sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized."¹⁹¹

The final case, *Bristol-Myers Squibb Co. v. Superior Court of California*,¹⁹² called for the Supreme Court to address what was meant by *International Shoe's* "arising out of" or related to¹⁹³ language that distinguishes specific from general jurisdiction. In *Bristol-Myers*, in excess of 600 plaintiffs, most of whom were not California residents, sued Bristol-Myers Squibb (BMS), a Delaware corporation headquartered in New York, for injuries allegedly arising out of their use of Plavix, a BMS drug. BMS had numerous business contacts in California but it did not manufacture Plavix in the state. If did, however, sell Plavix there taking in over \$900 million from in-state sales, a figure that represented just over one percent of its nationwide sales revenue. The California courts originally held that the state had general jurisdiction over all the claims based on BMS's extensive business activities there,¹⁹⁴ but after *Daimler* required rejection of general jurisdiction in any state other than the state of incorporation or principal place of business, the California courts reconsidered the case as an exercise of *specific* jurisdiction.¹⁹⁵ The California Supreme Court, in upholding specific jurisdiction, stated that the wide-ranging nature of BMS's contacts within the state permitted the exercise of specific jurisdiction because the claims of nonresidents were similar to the claims of California residents, over whom specific jurisdiction was not contested. In essence, the California high court found plaintiffs' causes of action to be sufficiently "related to" defendant's forum contacts although they did not "arise out of" them, and thus permitting the exercise of specific jurisdiction.¹⁹⁶

The Supreme Court reversed in an 8-1 decision. In order to exercise specific jurisdiction on constitutionally permissible grounds, in the Court's opinion, "there must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.'"¹⁹⁷ Because all of the conduct giving rise to the nonresident plaintiffs' claims occurred outside the state, California could not claim specific jurisdiction.¹⁹⁸

191. *Id.* at 132 (Sotomayor, J., concurring).

192. 137 S. Ct. 1773 (2017).

193. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

194. *Bristol-Meyers Squibb Co.*, 137 S. Ct. at 1778.

195. *Id.*

196. *Id.* at 1779.

197. *Id.* at 1780 (quoting *Goodyear Dunlop Tires Operations, S. A.*, 564 U.S. at 919).

198. *Id.* Justice Sotomayor dissented, finding both legal and practical problems with the majority's reasoning. *Id.* at 1784 (Sotomayor, J., dissenting). The legal weakness lay in the fact that it treated claims by nonresident plaintiffs that the defendant conceded were "materially identical" to the claims of resident plaintiffs as not sufficiently connected to the defendant's substantial connections with the forum state to

The collective effect of the Court's opinions in these four cases sharply restricted the kind of contacts that could be counted toward the constitutional minimum,¹⁹⁹ defined specific jurisdiction more narrowly,²⁰⁰ significantly limited the contours of constitutionally-permissible general jurisdiction,²⁰¹ and recalibrated the balance of "traditional notions of fair play and substantial justice" announced in *International Shoe*.²⁰² By 2018, the contours of judicial jurisdiction looked very different than they had in the previous seventy-five years.

V. LIMITATIONS CONFLICTS IN THE POST-*DAIMLER* AGE

What is the consequence of the extensive curtailment of judicial jurisdiction in the post-*Daimler* age with regard to the choice of the applicable statute of limitations to either bar or permit the suit? If one posits that the choice of fora in which to sue is reduced to one between the exercise of specific jurisdiction in the state in which the cause of action arose,²⁰³ what will here be called the *locus causae*, and the exercise of general jurisdiction in the place of incorporation or principal place of business (here called the *locus domicilii*)²⁰⁴ there is either a consequential choice

sustain the exercise of specific jurisdiction. *Id.* at 1785 (Sotomayor, J., dissenting). Unlike the majority, Justice Sotomayor would characterize the plaintiff's claims as clearly related to the defendant's contacts with California. *Id.* at 1786 (Sotomayor, J., dissenting). "All of the plaintiffs—residents and nonresidents alike—allege that they were injured by the same essential acts. Our cases require no connection more direct than that." *Id.* (Sotomayor, J., dissenting). Justice Sotomayor saw the exercise of jurisdiction as reasonable not only with regard to defendant's activities in California but also with regard to the plaintiffs' and the state's interest in hearing the case there. *Id.* at 1787 (Sotomayor, J., dissenting). As to the practical consequences, they were, in Justice Sotomayor's opinion, potentially dire. "Especially in a world in which defendants are subject to general jurisdiction in only a handful of States, the effect of today's opinion will be to curtail—and in some cases eliminate—plaintiffs' ability to hold corporations fully accountable for their nationwide conduct." *Id.* at 1789 (Sotomayor, J., dissenting).

199. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

200. See *Bristol-Myers Squibb Co.*, 137 S. Ct. 1773 (2017).

201. See *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915 (2011).

202. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

203. I am intentionally conflating specific jurisdiction and "the state where the cause of action arose" for the unique purposes of this section. In all other respects they are not synonymous. A state may have specific jurisdiction and not be the place the cause of action arose. Specific jurisdiction only requires an "affiliation between the forum and the underlying controversy." *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780 (quoting *Goodyear Dunlop Tires Operations, S. A.*, 564 U.S. at 919). A court could have specific jurisdiction in a contracts case based on the fact the contract was signed there. The cause of action will not arise, however, until there is a breach, which would likely be at the place of performance. Correspondingly, it is possible that jurisdiction cannot be had under current constitutional constraints even in the place where the cause of action arose, as when a plaintiff unilaterally brings defendant's product into a state with which defendant has not affiliated and the product causes injury there. In this Section's discussion it is assumed that the forum exercising specific jurisdiction is the place where the cause of action arose. As has historically been true with borrowing statutes, a state adopting the choice-of-limitations-law model proposed here will define for itself where the cause of actions arose. See discussion *supra* note 113.

204. *Locus domicilii* in this context simply refers to the place where defendant is "at home" in *Daimler* terms; that being the place of residence or domicile of in individual defendant and the place of incorporation or the principal place of business for business entities. For purposes of this discussion, the place of incorporation and the principal place of business will be treated as having not necessarily the same length of limitations periods but limitations periods that are both open or both closed.

between the two or there is not. If there is a consequential choice, it is because one permits the suit to proceed and the other does not. The discussion below examines the two broad scenarios wherein a conflict between the limitations period of the two states with personal jurisdiction arise. Scenario One posits that the limitations period of the *locus causae* remains open and that of the *locus domicilii* has closed; Scenario Two posits the opposite.

A. Scenario One: The Limitations Period of the Place the Cause of Action Arose (the *Lex Causae*) is Open and the Limitations Period of the Defendant's Domicile (the *Lex Domicilii*) is Closed.

Scenario One defines the conflict of law but does not itself designate which state is the forum. Let us begin by assuming that plaintiff would prefer to sue in the state with an open limitations period, here the *locus causae*. That forum will be required to make a choice between its open limitations period and the closed limitations period of the *locus domicilii*. How that choice is made depends upon the choice-of-law model that the forum has adopted to make it. If the forum is one of the slight majority of states that still characterizes limitations periods as procedural,²⁰⁵ the choice will be of the *lex fori* and the suit will proceed. Even if such a state has a borrowing statute,²⁰⁶ that statute will only apply where the cause of action accrues in a foreign state;²⁰⁷ a fact not present here. If the forum has adopted the Revised Restatement Second analysis,²⁰⁸ the forum will presumptively apply its own rule under section 142(2), which here will allow the suit to proceed. The presumption of choice of the *lex fori* is overcome under this rule only when no significant interest of the forum is served by allowing the claim to proceed. Here, the forum has a clear interest in choice of its longer limitations period because the cause of action arose there and the forum's deterrence interest is thereby triggered.²⁰⁹ If the forum has adopted UCLLA, choosing the limitations period of the state whose law governed the substantive claims at issue, the choice presumptively would be of the place where the cause of action arose, the forum here, because that state is most often the source of the governing substantive law.²¹⁰

The most complicated analysis will be required where the forum is a state that engages in an independent interest analysis, directly analyzing each state's interest in the choice of its limitations rule unmoored from the choice-of-law analysis with regard to the substantive claims.²¹¹ Here, the court will explore whether each of the states has an interest in the choice of its limitations period. Defendant's domicile, having legislated a relatively shorter limitations period that benefits both local courts and local defendants will clearly have a triggered interest in the choice of its rule for the latter purpose. What of the interest of the forum in choice of its longer period? Striking the balance of interests of the litigants and local courts in favor of a longer

205. See discussion *supra* note 104.

206. See discussion *supra* note 109.

207. See discussion *supra* note 114.

208. See discussion *supra* note 124.

209. See *Jackson v. Chandler*, 61 P.3d 17 (Ariz. 2003) (discussed *supra* note 129).

210. See discussion *supra* notes 139–44.

211. See discussion *supra* notes 145–55.

limitations period generally serves two goals, vindication and deterrence. Where the plaintiff is not a domiciliary of the forum, the first interest is not implicated by the choice of the plaintiff to sue there because courts have generally chosen a domicile-centric view of such interests, characterizing them as triggered only when a forum domiciliary has suffered injury.²¹² The second interest, deterrence, would seem to be clearly served in this instance as the very activity that caused plaintiff's injury or damage is, at the least, tangentially related to the forum. If both states have a governmental interest in the choice of their rule, the forum will normally choose its own rule as forum courts are instrumentalities of the state itself and thus presumptively charged with applying duly-enacted or adopted forum rules where the very policies sought to be achieved by those rules are advanced thereby.

The following is a proper summary of the outcomes the parties may expect where the limitations period of the place where the cause of action arose is longer than the limitations period of the state of defendant's domicile *and the plaintiff sues in the former*. First, there are no legitimate concerns regarding forum shopping as it is a rare court that would find suit in the place where the tort occurred or the contract was breached to be improperly strategic. Second, no matter which choice-of-law model the forum court has adopted with respect to choosing between limitations periods, the forum is likely to choose the *lex fori*, whether that choice is mechanical or nuanced, and allow the suit to proceed. Thus, where the *lex fori* and *lex causae* are the same and set a longer limitations period than that of the *lex domicilii*, the vindication interests of the plaintiff prevail.

Of course, plaintiff's choice of forum often is driven by a multitude of personal and strategic litigational factors. Might a plaintiff who finds advantage in suing in defendant's domicile have any hope of that forum choosing the longer limitations period of the *locus causae*? Here, the outcome will turn on the choice-of-law model employed by the forum. A *lex fori* forum will choose its own shorter period to bar the claim. It will do so, even if it has enacted a borrowing statute because such statutes will borrow only foreign limitations periods that are *shorter*: a fact not present here.²¹³ A Revised Restatement Second jurisdiction is highly likely to do the same. A forum that is the domicile of the defendant will have an interest in applying its shorter limitations period based both on both repose and docket interests that underlie its shorter period. An independent interest analysis jurisdiction will apply the *lex fori* as a bar for the same reasons as were described when the forum is the *locus causae*.²¹⁴ Both states have policy interests triggered by the connections of the parties or the claims with them thus creating a true conflict most often resolved by choice of the forum's law. Only in states that have adopted UCLLA does the plaintiff have a realistic hope of displacement of the forum's limitations bar as those states presumptively apply the limitations period of the state whose law will govern the underlying substantive claim, the *lex causae*.

In summary, unless the forum has adopted UCLLA, plaintiff has virtually no hope of defendant's domicile choosing the foreign period to allow the suit to

212. See, e.g., *MTK Food Servs., Inc. v. Sirius Am. Ins. Co.*, 189 A.3d 914 (N.J. Super. Ct. App. Div. 2018) (discussed *supra* note 129).

213. See discussion *supra* notes 110–12.

214. See discussion *supra* notes 210–12.

proceed. Where the limitations period of the *locus causae* is longer than that of the *locus domicilii*, plaintiff's choice of fora is thus reduced to one, the *locus causae*.

The above analysis has examined the relevance of only two of the three possible interested states: the forum, which here is the place where the cause of action arose, and the state of defendant's domicile. It has not examined the possible influence of the limitations rule in the place of plaintiff's domicile.²¹⁵ The fact that plaintiff's state may not be constitutionally permitted to exercise judicial jurisdiction over the defendant²¹⁶ does not directly disqualify plaintiff's state from being the source of the governing rule or from influencing the choice among two other rules. Indirectly, however, that is exactly the effective result whether plaintiff brings suit in the *locus causae* or in the *locus domicilii*. In the broad scenario under examination here, where the *lex causae* offers a longer limitations period than defendant's domicile, introduction of plaintiff's domicile rule will create one of two situations. Either the plaintiff-domicile limitations rule, like that of the *lex causae*, remains open or, like that of the *lex domicilii*, has run. In either case, little changes in the choice-of-law analysis described above. For those states that mechanically or presumptively apply the *lex fori*, the choice will be of the forum's rule regardless of the rules of the parties' domiciles. UCLLA states will presumptively apply the *lex causae* and nothing in the common view of the domiciles of the parties is likely to overcome that presumption.²¹⁷

Independent interest analysis will change the approach to making the rule choice but is not likely to change the outcome. If one of the interests behind the locus-forum's adoption of a longer limitations period is to allow that period to serve as a deterrent to defendant's injurious conduct or activity in the state, this interest is triggered by the fact that the cause of action arose there. Plaintiff's domicile's interest in the choice of its longer limitations period is triggered by the domicile link of the plaintiff. The coincidence of these two sovereign interests in the choice of a longer limitations period strengthens the forum's interest.

The more complicated choice-of-law issue arises when plaintiff's and defendant's domiciles both have enacted limitations periods that bar the particular suit being brought under the open period of the forum-locus. Significantly, from a choice-of-law perspective, the fact that the two parties hale from different domiciles is not relevant if the outcomes of the rules of the different domiciles are the same.²¹⁸ The parties in this instance will be considered as sharing a common domicile. In a jurisdiction that hews to the traditional rule, the open period of the locus-forum would be chosen. Restatement Second analysis will presumptively choose the longer period of the forum unless the forum has no interest in application of its limitations period, a conclusion not appropriate here. UNCLLA and dependent interest analysis will presumptively choose the *lex causae* regardless of the rule at plaintiff's domicile.

215. It should be noted, however, that very often the plaintiff's domicile is the place where the cause of action arose and therefore plaintiff's interest are often directly in play in the choice of law analysis. See, e.g., *George v. Douglas Aircraft Co.*, 332 F.2d 73, 77 (2d Cir. 1964).

216. See *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915, 920 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 887 (2011).

217. See discussion *supra* notes 139–41.

218. Such rules will be deemed the "same" if they both bar the action under the circumstances of the case, regardless of whether read in isolation they are not identical.

Again, it is forum states that apply an independent choice-of-law analysis to the limitations issue that are most likely to calibrate the balance differently in this context. The fact that the “common” domicile rule of plaintiff and defendant’s states have chosen a limitations period that elevates the significance of repose over vindication increases considerably the strength of the sovereign interest in having the bar applied even in the face of the locus-forum’s deterrence interest. If the *locus causae* does not reflexively choose its own law in cases where, as here, a “true” conflict is presented, it might defer to the stronger interest of the two domiciles in choice of their limitations and bar the suit.²¹⁹

B. Scenario Two: The Limitations Period of the Defendant’s Domicile (the *Lex Domicilii*) is Open and the Limitations Period of the Place the Cause of Action Arises (the *Lex Causae*) is Closed.

Scenario Two arises when the statute of limitations in the *locus domicilii* is longer than that of the *locus causae* and the former remains open while the latter has closed. As in Scenario One, in the absence of defendant’s consent to suit in another state, the plaintiff’s post-*Daimler* choice will be among the locus exercising specific jurisdiction and defendant’s domicile or principal place of business exercising general jurisdiction. Here, plaintiff’s presumptive choice will be of the state whose limitations period remains open, defendant’s domicile.

Depending on the choice-of-law model for limitations periods adopted by the *locus domicilii*, plaintiff will *often* find that the forum’s open limitations period is rejected and the closed period of the locus is chosen to bar the suit. A true *lex fori* forum will apply its local limitations period to allow the suit. If, however, that forum is one of the great majority that has enacted a borrowing statute, the forum is likely to reject its longer limitations period in favor of the shorter period of the locus, especially if plaintiff is a nonresident.²²⁰ A Revised Restatement Second court will presumptively choose the *lex fori*, but if that law incorporates a borrowing statute, the suit will be foreclosed, as the borrowing statute forms part of the *lex fori*. A UCLLA or dependent choice jurisdiction will choose the shorter period of the locus as the state whose law is most likely to govern the substantive claim.

As is true with Scenario One, the states that engage in an independent analysis of the limitations issue require a more targeted analysis of the sovereign connections and interests at play. Applying an interest analysis, the forum is most likely to find only one “interested” state, the locus state, and thus a “false conflict” leading to choice of the locus rule to bar the suit.²²¹ Recall that a state adopting a longer limitations period does so either to protect the vindication interests of

219. Some states will make a broad distinction in their choice-of-law models between choices involving loss-allocating rules, that is, rules that allocate loss resulting from admittedly tortious conduct, and those involving conduct-regulating rules that conflict on the required standard of conduct. *See* *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 684–85 (N.Y. 1985) (holding charitable immunity rules to be loss-allocating). Where a choice involving a conflict of loss-allocating rules is presented, courts will apply the law of the common domicile rather than the law of the locus. *See, e.g., Neumeier v. Kuehner*, 286 N.E.2d 454, 458 (N.Y. 1972) (establishing a rule designating the common domicile as the source of law regarding loss-allocating rules). Statutes of limitations are loss-allocating rules.

220. *See* discussion *supra* notes 109–15.

221. *See* discussion *supra* notes 150–52.

plaintiffs or to deter injurious conduct by defendants. As noted, it is certainly possible that a state could take an inclusive view of these interests, and some states have,²²² incorporating a vindication concern for nonresident plaintiffs and a deterrence concern with respect to resident defendant's conduct or activity outside the state. Most courts presented with the opportunity to so define state interests have adopted a significantly more insular view, holding that the state is concerned only with its resident plaintiffs and only with respect to activity within its borders that causes harm.²²³ In such case, the domicile has no interest in choice of its law because neither its vindication nor its deterrence interests are triggered. What of the interest of the locus state in application of its shorter limitations period? Here is where the analysis becomes challenging. The locus does not have a docket interest as it is not the forum. The locus does not have a repose interest as the defendant is not a domiciliary of the locus. Thus, the locus has no interest in the choice of its law. This is an "unprovided for" case.²²⁴ While it is possible that the forum would choose its own law and let the case proceed, it is more likely that a court will favor the interests of its domiciliary by choosing the foreign law and close its doors to plaintiff's claims, especially if the law of plaintiff's domicile would do so as well.²²⁵

In summary, where plaintiff might have some optimism at finding that the state of defendant's domicile, one of the few options open to her as a fora for her suit, has an open limitations period, that optimism will be short-lived. While plaintiff can hardly be charged with egregious forum shopping in choosing the state of defendant's domicile, the limitations choice-of-law rules designed to prevent such forum shopping likely will bar her suit even where defendant's domicile has made the sovereign choice to favor vindication and deterrence interests over repose interests.

Suppose in this instance that plaintiff chose to sue in the locus, despite its closed limitations period, with a faint hope that the locus might choose the *lex domicilii* and hear the suit. Nearly all of the choice of law models will choose the bar of the *lex fori* either by virtue of the fact that it is the law of the forum or by virtue of the fact that it is the law of the locus. The traditional rule, a borrowing statute, the Restatement Second and UCLLA analysis all lead either strictly or presumptively to choice of the locus-forum bar. Independent analysis does so as well, as only the forum will have an interest in application of its law. As noted above, assuming a narrow insular view of the interests underlying its longer period, defendant's domicile has no interest in the vindication interests of a foreign plaintiff or the deterrent interests surrounding a foreign injury. Here, however, the forum has a docket interest in choice of its shorter rule and therefore is likely to choose it. Again, the vindication interest reflected in the *lex domicilii* falls, this time to the docket interests of the forum.

What is the significance in Scenario Two of the limitations rule of plaintiff's domicile? For the position of the plaintiff's domicile to be influential, the forum must

222. See, e.g., *Mahne v. Ford Motor Co.*, 900 F.2d 83, 88 (6th Cir. 1990) (discussed *supra* note 150); *DeLoach v. Alfred*, 960 P.2d 628, 631-32 (Ariz. 1998) (discussed *supra* note 39).

223. See, e.g., *Greer v. Acad. Equip. Rentals*, No. C94 0120 CAL ARB (FSL), 1994 WL 443421 at *4 (N.D. Cal. Aug. 11, 1994).

224. See discussion *supra* note 154.

225. See discussion *supra* note 155.

be willing to meld the interests underlying the plaintiff-domicile rule with the interests of the other states. Plaintiff's domicile rule will either be open or shut and thus will coincide with either the *lex causae* or the *lex domicilii*. Assume the plaintiff's domicile limitations period, like that of the defendant's domicile, remains open. If defendant's domicile as the forum maintained strict adherence to the traditional *lex fori* rule, the suit would be heard. It is far more likely, however, that the forum has enacted a borrowing statute. That statute would choose the shorter period of the place where the claim accrued, the locus, to foreclose the suit. The most interesting issue in this regard is presented if the forum's borrowing statute, like that of New York and California,²²⁶ does not borrow a shorter limitations periods for plaintiffs who are forum residents at the time of accrual. Assuming that plaintiff was not a forum resident at that time, a facile answer is that the borrowing statute will apply and bar the suit. If, however, the rule introduced above that treats domiciliaries of different states whose limitations periods both remain open as essentially co-domiciliaries, an argument can be made that the plaintiff was and is, in the law's eyes, a domiciliary of the forum, thus falling under the exception. This would appear to be the only circumstance, an unlikely one, where a nonresident plaintiff could avoid the operation of a borrowing statute barring her claim.

Would the interests of the plaintiff's domicile in choice of its longer limitations rule fare any better under the other choice theories? Revised Restatement Second would favor the choice of the forum's law, permitting the suit unless the forum had no interest in choice of its law or a state with a more significant relationship barred the suit. Here, the defendant's domicile well might define its interest as only favoring resident plaintiff's and thus find no interest under these facts. If it desired to choose the *lex causae* to bar the claim, it would then have to do so by finding that that state had a more significant relationship to the suit because the transaction or occurrence was centered there. UCLLA/dependent analysis would presumptively choose locus law, choosing forum law only if the locus rule was judged significantly unfair to the interests of either plaintiff because it was too short or the defendant if it was too long.

Independent interest analysis might offer hope to plaintiff to the extent that the forum embraced the common domicile rule with regard to loss-allocating issues, including statutes of limitations.²²⁷ In a state that has adopted the common-domicile rule and extends it not only to where the plaintiff and defendant share a domicile but also to where the plaintiff and defendant hale from different domiciles that share a common rule or outcome, the court might very well find the limitations law of the forum entitled to greater if not presumptive weight. Otherwise, plaintiff's vindication interests again are subordinated.

VI. RESURRECTING THE VINDICATION INTEREST IN THE AGE OF CONSTRICTED JUDICIAL JURISDICTION

As Section III describes, the modern trend of choice-of-law rules regarding the selection of conflicting limitations periods has intentionally favored choice of a *shorter* statute of limitations. Although those rules were largely motivated by

226. N.Y. C.P.L.R. 202 (McKinney, Westlaw through L.2019, Ch. 758 & L.2020, Ch. 23).

227. See *supra* note 223.

concerns that a plaintiff was egregiously forum-shopping for an unconnected state with an open limitations period, the presumed unintended effect of the more-nuanced rules was to favor the repose interest of the defendant over the vindication interest of the plaintiff in cases where forum shopping was not present.

In light of *Daimler*, and the other cases that have significantly constrained states' exercise of both specific and general jurisdiction, inappropriate forum shopping by the plaintiff is no longer possible. The Supreme Court has so confined the "market" that there are limited places for the plaintiff to "shop." Choice of any one of the available fora today cannot be fairly labeled "forum shopping" in any pejorative sense.²²⁸ Suit in a state exercising specific jurisdiction is constitutional only if the defendant has acted within or targeted the state and the cause of action arises out of that action or targeting. No court has held that plaintiff's decision to sue in such a state is an inappropriate strategic choice. Neither would plaintiff's choice be inappropriately strategic if it were the state of defendant's "home," especially in light of the Supreme Court's designation of such a choice as not only appropriate but mandated in the general jurisdiction context.

How could and should the law respond to a legal outcome that was supported by significant policy goals in the past when those goals have been made obsolete and perhaps subverted by more modern legal developments? While there are narrow avenues for either parties²²⁹ or courts²³⁰ to advance the vindication interest, this Article proposes a more straightforward, overarching rule that intentionally returns consideration of the vindication interest to center stage. The rule, one of alternate reference, is this: if the limitations period of *either* the *locus causae* or the *locus domicilli* is *open* at the time the plaintiff files suit, the forum will presumptively choose that period and allow the plaintiff's claim to proceed. The forum is to do so regardless of which state's limitations period is open. The presumption may be overcome only upon a showing that the open period is *significantly* longer than the forum's such that forced recognition of the longer period seriously undermines the forum's docket interest. For reasons described below, in light of constrained judicial jurisdiction, the defendant's repose interest is entitled to *no* weight under the proposed rule.

228. As a practical matter, "forum shopping is inherent in any setting where independent sovereigns co-exist, and each one of them exercises its prerogative to adopt laws that reflect its own preferences." Wani, *supra* note 110, at 691. A plaintiff with any choice of forum, even a limited one, forum shops. A defendant seeking to displace plaintiff's choice is, in a sense forum shopping as well.

229. Where the parties are associated prior to the wrong, as in contracts cases, they might contract around the choice-of-law rules through a choice-of-forum and choice-of-law clause. For a description of the roadblocks recently undermining the success of such efforts, see Reyhan, *supra* note 47, at 1247-48.

230. Courts could advance the vindication interest by manipulating the results of the current rules by defining where the cause of action accrued to avoid a borrowing statute, defining contacts of the parties such as to fall within the exception to the Revised Restatement, or so defining state interests such that only the interests of the state with the open limitations period is triggered. Courts regularly engage in such manipulation which doubtless led to the observation that "of all the factors that may affect the outcome of a conflicts case, the factor that is the most inconsequential is the choice-of-law methodology followed by the court." Symeon C. Symeonides, *Choice of Law in the American Courts in 1994: A View "From the Trenches"*, 43 AM. J. COMP. L. 1, 2 (1995). Professor James Martin made the same observation: "Thus there is always a temptation to concede the general desirability of a limitations principle while seeking to avoid its application to a particular case." Martin, *supra* note 18, at 405.

We saw in Section V that where suit is brought in the *locus causae* and that state has a longer, open statute of limitations, the forum is likely to choose its rule under all choice-of-law models.²³¹ Although the rule here proposed would not change the outcome in those cases, it would make the process of reaching that outcome straightforward and consistent. Where the locus/forum has the longer statute, the only exception recognized in the proposed rule would not come into play as the forum is simply choosing its own limitations rule that has been legislatively determined not to impact docket interests negatively.

The proposed rule would change the outcome as well as the analysis in situations where plaintiff chooses to sue in the *locus domicilii* even in the face of its shorter limitations period.²³² Here, the forum would be obliged to choose the open limitations period of the *locus causae*, unless that period is significantly longer than the forum's limitations period. At first glance, the proposed rule would appear to undermine both the docket interest of the forum and the repose interest of the defendant. But how deeply does the rule in fact threaten these interests? Remember that the basis of the docket interest is the notion that a court should not be required to hear claims it deems stale.²³³ Where the *lex causae* is not significantly longer, however, asking the forum to hear the case in light of the sister state's vindication and deterrence interests would hardly seem to threaten the sovereign interests of the forum.²³⁴ It has long been established that state courts cannot constitutionally close their doors to claims created by other states simply on the ground that they are not local.²³⁵ Thus, states regularly hear and decide claims that would not be recognized under their local law. The docket interests of the forum would certainly be served by not hearing those claims, but it is hardly to be argued that the constitutional mandate to hear them has somehow undermined the sovereignty of the forum or crippled its judicial system. The rule proposed here would not do so either. As a practical matter, the difference between the two limitations periods, while creating a conflict, is unlikely to be such that the evidence at play is truly stale or that witnesses' memories have been drastically reduced or altered.²³⁶ While the forum may prefer not to hear the case, it is highly unlikely that doing so will impose a serious burden on it.²³⁷

231. See discussion *supra* notes 205–10.

232. See discussion *supra* notes 212–14.

233. See discussion *supra* note 27.

234. See *Cornett v. Johnson & Johnson*, 48 A.3d 1041, 1050 (N.J. 2012) (noting that differences in limitations periods do not implicate the fundamental public policies of the involved states).

235. See *Hughes v. Fetter*, 341 U.S. 609, 612–13 (1951) (holding unconstitutional Wisconsin's refusal to hear a suit grounded on Illinois's wrongful death statute).

236. As Professor Weinberg has pointed out, opening the courthouse doors would simply “let the trier of fact evaluate late blooming claims and long memories.” Weinberg, *supra* note 33, at 687.

237. That the sovereign interests of the forum in its limitations period are not seriously undermined by a rule requiring the forum to open its courts to a foreign claim is reflected in a 1945 statement of the Supreme Court that “[s]tatutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles.” *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). Further, the fact that in all jurisdictions the bar of the statute of limitations is an affirmative defense such that a defendant not only is permitted to waive it but also will be held to have waived it by failure to raise the defense in defendant's first responsive pleading undermines the forum's docket interest.

The repose interest of the defendant also would not be undermined by the adoption of the proposed rule. Denying repose to a defendant based solely on the *lex causae* hardly works an unconscionable burden on the defendant, especially since that state was at least theoretically available to the plaintiff as a *fora* and, if chosen, would have heard the suit. Allowing the plaintiff's suit to go forward in the *locus domicilii* when it could have been brought in the *locus causae* may not be to defendant's litigational advantage, but that fact alone should not prevent the hearing of a claim that remains open at the place creating it.

What of cases where the longer limitations period is that of the *locus domicilii* and not of the *locus causae* and suit is brought in the former? As explained in Section V, this scenario is one where the modern approaches to limitations conflicts have decidedly favored choice of the *shorter* period. The proposed rule would do exactly the opposite.²³⁸ What then would be the effect of the proposed rule on the interests of the *locus causae* and the *locus domicilii*? Shorter limitations periods are typically undergirded by docket and repose interests. Where the shorter period is that of the *lex causae* and the suit is brought in the *locus domicilii*, neither of these interests are undermined. The *locus causae* is not the forum and therefore docket interests are not triggered.

The defendant is by definition affiliated with the *locus domicilii*, whose limitations period is longer, and therefore repose interests are not triggered. Somewhat ironically, the state that might most object to the proposed rule in this context is the *locus domicilii* despite the fact that it is its limitations period the proposed rule chooses. The decision of the *locus domicilii* to enact a relatively-longer limitations period was presumably to favor the vindication interests of plaintiffs and to deter injurious behavior by defendants. The proposed rule would not permit states to "localize" those interests by defining the sovereign interest as only directed to resident plaintiffs or at defendants acting within the state.²³⁹ Rather, the rule would mandate that states adopting it apply their longer limitations periods for the benefit of resident and nonresident plaintiffs alike and to hear cases arising out of allegedly injurious actions of those defendants "at home" in their states regardless of where those injurious actions occurred. The reason for this inclusive evaluation of a state interest was well stated by the New Jersey Supreme Court:

We have never taken the parochial attitude that the health and safety of our State's citizens are of greater concern or worth than the health and safety of citizens of another state. Our national compact and our interstate system suggest that we should treat the citizens of other states as we treat our own. It would make little sense, if we were to find that New Jersey had a substantial interest in the maintenance of a lawsuit, to discriminate against an out-of-

238. Note that the exception to the proposed rule will never be at play here. That exception would allow a court to close its doors when the limitations period chosen by the proposed rule is significantly longer than the forum's limitation period. Here, the limitations period to be chosen under the rule is that which the forum has enacted.

239. See discussion *supra* at notes 220–25.

state plaintiff whose lawsuit was filed within our limitations period.²⁴⁰

Put simply, the proposed rule insists that defendants who are protected by jurisdictional rules directing litigation to their “home” not escape the value judgments of that state by arguing that they should somehow not be thought of as being “at home” when they acted.²⁴¹

Finally, how are the limitations interests supported or undermined if plaintiff chooses to bring suit in the *locus causae* and that state is required to choose the longer limitations period of the *lex domicilii*? To a significant extent, the interplay of interests in this scenario is the same as that examined above where the longer litigation period is that of the *locus causae* and suit is brought in the courts of the *locus domicilii*. Here, the forum’s interests are docket and repose focused. The repose interest is removed simply because the *lex domicilii* has removed it. The docket interest exists but should be resolved in the same manner as suggested when the states and laws are reversed. Only when the forum can show that there is a significant difference in the two periods, such that the “staleness” of the case would pose a serious threat to the forum’s docket interests, should that interest be given weight. The exception to the proposed rule recognizes and permits this.

A final point regarding the rule here proposed; it stands in stark contrast to the rule currently under consideration in the draft Restatement Third of the Conflict of Laws. As noted in Section III, that rule would presumptively choose the rule that *bars* plaintiff’s claim, regardless of whether that shorter rule is sourced in the forum or a foreign state and regardless of whether plaintiff is a resident of the forum or not.²⁴² Such a rule is decidedly focused on defendant’s interest in repose, where the rule proposed here is decidedly focused on plaintiff’s interest in vindication.

CONCLUSION

The United States Supreme Court has noted that “[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations.”²⁴³ Ease of application is but one value, however; fairness and a just result ought to be valued as well.²⁴⁴ The rule proposed here, that the forum choose the longer statute of limitations where two limitations periods are in conflict, advances all of the above values. Where newly-constrained judicial jurisdiction clearly favors fairness to the defendant over the interests of the plaintiff or the forum state, adoption of the rule here proposed will allow choice of law in the limitations context to advance the fairness interest of the plaintiff in a manner that does not threaten the repose interests of the defendant or the docket interests of the forum.

240. *McCarrell v. Hoffmann-La Roche, Inc.*, 153 A.3d 207, 224 (N.J. 2017).

241. For the point that a defendant can hardly claim unfair surprise when the law of its domicile is chosen, *see Allstate Ins. v. Hague*, 449 U.S. 302, 317–18 (1980); *Tomlin v. Boeing Co.*, 650 F.2d 1065, 1072 (9th Cir. 1981).

242. *See* discussion *supra* notes 135–38.

243. *Wilson v. Garcia*, 471 U.S. 261, 266 (1985) (quoting *Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)).

244. *See McCarrell*, 153 A.3d at 210.

Judicial jurisdiction and choice of law share much of the same DNA, grounded as they are in broad notions of due process and fairness. Judicial jurisdiction focuses on the process that is due defendants, but choice of law is motivated by broader considerations that take into account a fair process for both litigants. During the height of the *International Shoe* era, it was noted that “given the recent great expansion of permissible bases for judicial jurisdiction, it is imperative that choice of law rules take proper account of the relevant policies of states other than the forum.”²⁴⁵ The choice-of-limitations-law models adopted in that era did just that. They no longer do, nor do other models now seriously being considered. In the age of *Daimler*, it is the model proposed here that will “take proper account” of the interests of other states, of defendants, and of plaintiffs to reach a just and fair result.

245. RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAW 92 (3d ed. 1986).