Constitutionality of a Forum State's Use of Its Own Longer Statute of Limitations When Its Only Contact with the Dispute Is Its Status as a Forum—Sun Oil Co. v. Wortman, 108 S. Ct. 2117 (1988)

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Abstract: In Sun Oil Co. v. Wortman, the United States Supreme Court declared constitutional a forum's use of its own longer statute of limitations. The Court essentially equates the requirements imposed by the due process clause and the full faith and credit clause. This Note concludes that the tests for constitutionality advanced by the Court do not adequately protect the individual rights of litigants, and recommends adopting a new choice of law test which recognizes both governmental and individual interests.

In Sun Oil Co. v. Wortman, the United States Supreme Court held that Kansas could constitutionally apply its own longer statute of limitations even though the claim would have been time barred in the states whose substantive law controlled the issues of liability. The majority relied on the characterization of statutes of limitations as procedural, while the concurring justices ("the concurrence") used an interest analysis. The Court focused on the full faith and credit clause, and gave only slight consideration to the due process clause.

The Court's limited consideration of the due process clause reflects an unwarranted assumption that the due process and full faith and credit clauses require the same analysis in the context of choice of law. Application of the Court's historical approach may lead to an arbitrary and unfair treatment of litigants. Applying the Court's approach to other issues generally considered to be procedural illustrates the possible infringement on individual rights. State courts could replace the traditional substance/procedure dichotomy with an interest analysis that incorporates the interests protected by both the due process clause and the full faith and credit clause. This interest analysis would lessen the potential for fundamentally unfair treatment of litigants.

I. CHOICE OF LAW: STATUTES OF LIMITATIONS

When a dispute involves contacts with more than one jurisdiction, the forum court must apply rules to determine what law should govern the dispute. The rules applied by the forum courts are referred to as choice of law rules.

2. Id. at 2121.
3. Id. at 2121–25.
4. Id. at 2128–30 (Brennan, J., concurring).
5. Id. at 2121–26.
6. As Professor von Mehren notes:
A. **Constitutional Limits on Choice of Law**

States are free to make their own choice of law decisions within certain constitutional boundaries. The two most frequently cited constitutional limits are the full faith and credit clause and the due process clause of the fourteenth amendment. The two clauses serve different purposes. The full faith and credit clause focuses on the interests of states and requires mutual respect between sovereign states. The due process clause, by contrast, focuses on the interests of individual litigants, and protects those interests by limiting the power and territorial reach of states.

Although the interests protected by the two clauses are quite different, and arguably require different analyses, the Supreme Court has equated the clauses in the recent decisions of *Phillips Petroleum Co. v. Shutts* and *Allstate Insurance Co. v. Hague*. In *Phillips* and *Allstate*, the Court articulated a unitary choice of law test for both the full faith and credit clause and the due process clause: "[F]or a State's choice-of-law problem presents two different, though at times interrelated, questions: (1) What legal order ultimately controls—or should control—in a situation or transaction that has significant connections with more than one state; [and] (2) How should a given legal order regulate a particular multistate situation or transaction?

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7. Wells v. Simonds Abrasive Co., 345 U.S. 514, 516 (1953) ("states are free to adopt such rules of conflict of laws as they choose,... subject to the Full Faith and Credit Clause and other constitutional restrictions.

8. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1.

9. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . ." U.S. CONST. amend. XIV, § 1. See generally Grossman, Statutes of Limitations and the Conflict of Laws: Modern Analysis, 1980 ARIZ. ST. L.J. 1, 44 (1979); Martin, Constitutional Limitations on Choice of Law, 61 CORNELL L. REV. 185, 186 (1976). Other constitutional clauses limiting choice of law are the commerce clause, U.S. CONST. art. I, § 8, the privileges and immunities clause, U.S. CONST. amend. XIV, § 1, and the equal protection clause. U.S. CONST. amend. XIV, § 1; see generally Martin, supra, at 185-86.

10. Grossman, supra note 9, at 44; Martin, supra note 9, at 186.


14. 449 U.S. 302, 308 & n.10 (1981). In both cases, Justice Stevens argued against equating the two clauses. *Phillips*, 472 U.S. at 824 (Stevens, J., concurring in part and dissenting in part); *Allstate*, 449 U.S. at 320 (Stevens, J., concurring). In *Allstate*, Justice Stevens suggested that two separate questions needed to be answered:

First, does the Full Faith and Credit Clause require Minnesota, the forum State, to apply Wisconsin law? Second, does the Due Process Clause of the Fourteenth Amendment prevent Minnesota from applying its own law? The first inquiry implicates the federal interest in ensuring that Minnesota respect the sovereignty of the State of Wisconsin; the second implicates the litigants' interest in a fair adjudication of their rights.

449 U.S. at 320 (footnotes omitted) (emphasis in original).
Statutes of Limitations and Choice of Law

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."  

B. The Substance/Procedure Dichotomy

In making choice of law decisions, courts traditionally have applied a characterization approach. Under the characterization approach, courts identify issues as either substantive or procedural. Matters dealing with the right are generally considered to be substantive and are governed by the law of the foreign state. In contrast, matters dealing only with the remedy or judicial administration are considered to be procedural and may be governed by forum law.

The forum's application of its own procedural law is justified by the time and expense that would otherwise be involved in conducting trials that are identical to those of sister states. The line between substance and procedure is not always clear. Some issues, such as sufficiency of the pleadings, method of selecting jurors, and selection of the proper court, fall on the side of judicial administration and always should be governed by the law of the forum. Other issues, such as burden of proof, burden of production, and sufficiency of the evidence, fall into a "grey" area between substance and procedure. A categorical listing of these issues as procedural could infringe upon

15. Phillips, 472 U.S. at 818 (emphasis added) (quoting Allstate, 449 U.S. at 312-13). Both the Allstate and Phillips decisions dealt with the substantive law that was to govern the dispute. See infra notes 16-25 and accompanying text (discussing the differences between substantive and procedural law).


17. R. LEFLAR, supra note 16, § 121; R. WEINTRAUB, supra note 16, § 3.2C; Grossman, supra note 9, at 3–5.


20. See generally R. LEFLAR, supra note 16, at 331 ("it would be unthinkable . . . to have to set up judicial machinery such as exists in the other legal entity, and operate it in the other state's fashion").


23. See, e.g., RESTATEMENT, supra note 19, § 122 comment a.
the rights of the individual litigants. Some courts have replaced the traditional characterization approach with an interest analysis approach that balances the competing interests of the separate states.

C. Procedural Classification of Statutes of Limitations

Statutes of limitations traditionally have been characterized as procedural, and forums have freely applied their own statutes of limitations to disputes. The Supreme Court has upheld this practice since the 1800's. In Townsend v. Jemison, the Court held the state court's application of its longer statute of limitations to be constitutional under the full faith and credit clause. The Court reasoned that statutes of limitations affect the remedy, rather than the right.

In Keeton v. Hustler Magazine, Inc., however, the Supreme Court left open the question whether application of the forum's longer statute of limitations violated the due process clause. Recently, three federal courts of appeals have upheld the constitutionality of a forum applying its own longer statute of limitations to a dispute with which it has only minimal contacts. The Third Circuit, however, has held that such an application violates the due process clause.

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24. Id. See infra notes 110-12 and accompanying text (illustrating some of the substantive interests inherent in burden of proof, burden of production, and sufficiency of the evidence).
26. RESTATEMENT, supra note 19, § 142; Grossman, supra note 9, at 11-12.
29. Id. at 413-20.
30. Id. The fourteenth amendment with its due process clause had not yet been adopted when the Court decided Townsend in 1850.
32. Id. at 778 n.10. The Court stated:
There has been considerable academic criticism of the rule that permits a forum State to apply its own statute of limitations regardless of the significance of contacts between the forum State and the litigation. But we find it unnecessary to express an opinion at this time as to whether any arguable unfairness rises to the level of a due process violation.
Id.
II. **SUN OIL CO. v. WORTMAN**

A. **Facts and Disposition**

*Sun Oil Co. v. Wortman* is the culmination of a series of cases involving a class action suit to recover interest payments on suspended royalties. The Kansas Supreme Court affirmed the trial court’s application of Kansas’ longer statute of limitations to allow claims that were time barred in the states whose substantive law controlled the liability issues. The Supreme Court granted *certiorari* to consider whether the Constitution barred Kansas’ application of its own longer statute of limitations, and upheld the Kansas courts’ decision.

B. **The Majority Relied on the Substance/Procedure Dichotomy**

The five member majority, in an opinion by Justice Scalia, focused on whether statutes of limitations may be characterized as substantive or procedural under the full faith and credit clause. If procedural, Kansas’ application of its own statute of limitations would not violate the full faith and credit clause because forum states are competent to legislate procedural matters. Relying on the historical classification of statutes of limitations, the majority held that statutes of limitations may be considered to be procedural, and therefore, Kansas did not violate the full faith and credit clause. The Court further held that...

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36. Under a series of leases, Sun Oil extracted gas from properties in exchange for royalties from the proceeds of the sale of the gas. *Id.* at 2120. Sun Oil sold the gas interstate at prices that included a proposed rate increase. The Federal Power Commission ("FPC") allowed Sun Oil to collect the increased amount on the condition that Sun Oil would make a refund of any amount not approved by the FPC. Sun Oil did not include the amount of the rate increase in its royalty payments until it got approval for the rate increase from the FPC. When Sun Oil made the suspended royalty payments it failed to include interest on the suspended amounts. The plaintiffs filed a class action suit in Kansas to compel Sun Oil to pay the interest on the suspended amounts. An analogous suit against Phillips Petroleum was already in the court system. *Id.* at 2120–21.
40. *Id.* at 2121.
41. *Id.* at 2122–25. The majority noted that the full faith and credit clause allows states to apply their own laws to matters about which they are competent to legislate. States are competent to legislate about procedural matters, and if statutes of limitations are procedural, a forum’s application of its own statute of limitations does not violate the full faith and credit clause. *Id.* at 2122.
42. According to the majority, the framers of the full faith and credit clause expected that it would be interpreted against the precedents set in international law. Early courts looked to international law in interpreting the clause. International conflicts law considered statutes of
the notion of what issues are considered substantive enough to deserve full faith and credit did not need to be updated by the Court.\textsuperscript{43} The Court noted that although certain practices may no longer be considered wise, they are not necessarily unconstitutional.\textsuperscript{44} If the states no longer wish to treat a matter as procedural, it is up to those states to institute change.\textsuperscript{45}

C. \textit{The Concurrence Relied on an Interest Analysis}

The concurrence, in an opinion by Justice Brennan, argued that the proper question was not whether statutes of limitations may be considered procedural for purposes of the full faith and credit clause, but whether the forum had sufficient interest in the dispute to make application of its own law neither arbitrary nor fundamentally unfair.\textsuperscript{46} The concurrence concluded that the forum, by virtue of being the forum, had sufficient interest in the dispute to make application of its own statute of limitations constitutional.\textsuperscript{47}

In reaching this conclusion, the concurrence attempted to balance three competing governmental interests: First, the procedural interest in not adjudicating stale claims; second, the substantive interest in the repose of defendants; and third, the substantive interest in vindicating injured plaintiffs.\textsuperscript{48} The concurrence concluded that, on balance of the

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\item limitations to be procedural, and generally governed by forum law. Furthermore, viewing statutes of limitations as procedural followed analogously from the common law concept of the right subsisting even though the remedy is withheld. The majority concluded that the historical record conclusively shows that statutes of limitations may be characterized as procedural. \textit{Id.} at 2122–23.
\item \textsuperscript{43} \textit{Id.} at 2123–25.
\item \textsuperscript{44} \textit{Id.} at 2125.
\item \textsuperscript{45} "If current conditions render it desirable that forum States no longer treat a particular issue as procedural for conflict of laws purposes, those States can themselves adopt a rule to that effect." \textit{Id.}
\item \textsuperscript{46} \textit{Sun Oil}, 108 S. Ct. at 2128–29 (1988) (Brennan, J., concurring).
\item \textsuperscript{47} \textit{Id.} at 2129–30.
\item \textsuperscript{48} \textit{Id.} The interest balancing is easiest when the forum’s statute of limitations is shorter than the foreign state’s. \textit{Id.} at 2129. The forum should not be forced to adjudicate stale claims, and thus, its procedural interest may be seen as stronger than that of the foreign state. \textit{Id.}
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The balancing becomes more difficult when the forum state’s statute of limitations is longer than the foreign state’s statute. If both the forum state and the foreign state have an equal interest in the repose of the defendant, the forum’s application of its longer statute of limitations is fair because the foreign state has no interest in not allowing a right it has created. If, however, the interests in the repose of the defendant are not equal, an attempt to balance interests may produce an ambiguous result. The forum’s procedural interest in wanting to apply its own statute of limitations becomes even stronger where there is an ambiguous result. \textit{Id.} at 2129–30.
three interests, it was not arbitrary or fundamentally unfair for Kansas to apply its own longer statute of limitations. 49

III. THE COURT'S ANALYSIS FAILS TO PROTECT THE INDIVIDUAL RIGHTS OF LITIGANTS

A. The Court Conducted Only a Limited Due Process Clause Analysis

The majority's reliance on the full faith and credit clause follows directly from its earlier decisions involving statutes of limitations and indicates an unwillingness to upset established choice of law precedent. 50 The Court has never applied the due process clause in determining the constitutionality of a forum applying its own longer statute of limitations. Sun Oil gave the Court an opportunity to answer the question of constitutionality under the due process clause that it had left open in Keeton. 51 The Court, instead, chose to give the due process clause only scant consideration. 52

The Court began its due process analysis by stating that the full faith and credit cause of action was dependent on the due process cause of action. 53 The full faith and credit claim could arise only if the other states were compelled to consider their statutes of limitations as substantive. 54

49. Id. at 2130. In the concurrence's opinion, a thorough balancing of governmental interests may be difficult and unwieldy. This difficulty gives strength to the forum's procedural interest in applying its own law, particularly when, as here, the states where the claims arose view their statutes of limitations as procedural. The concurrence concluded that claims that are at best arguable do not merit changing over 150 years of precedent holding that it is constitutionally permissible for the forum to apply its own statute of limitations. Id.

50. See, e.g., Townsend v. Jemison, 50 U.S. (9 How.) 407, 413–20 (1850). In Townsend, the defendant objected to the forum's application of its own longer statute of limitations to allow a claim that was time barred in the state of the otherwise applicable law. Id. at 413. The Court used an historical analysis of statutes of limitations to reject the defendant's claim. Id. at 413–20. The Court in Sun Oil conducted a similar historical analysis. Sun Oil, at 2121–23; see also Wells v. Simonds Abrasive Co., 345 U.S. 514, 516–18 (1953); M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 327–28 (1839).

51. See supra note 32 (Court's language leaving the question open).

52. Sun Oil, 108 S. Ct. at 2125–26, 2125 n.3. The majority had already held that the application of Kansas' longer statute of limitations was constitutional under the full faith and credit clause even before considering its constitutionality under the due process clause. Id. The majority noted that it would limit its discussion of the due process clause because most of the ground had been covered in its discussion of the full faith and credit clause. Id. at 2125 n.3.

The concurrence also gave the due process clause limited attention. The concurrence stated that the minimum requirements imposed by the two clauses are the same. Id. at 2128 n.2 (Brennan, J., concurring).

53. Id. at 2125 n.3.

54. Id.
The Court's reasoning is circular. First, the Court analyzed statutes of limitations under the full faith and credit clause to determine if they are properly categorized as procedural. Second, the Court stated that the full faith and credit clause is dependent on the due process clause. Finally, the Court used the previously constitutionally authorized procedural characterization of statutes of limitations to dismiss the due process claim as being without merit.

The test for due process in the choice of law context is whether the state's action is arbitrary or fundamentally unfair.\textsuperscript{55} As the principal justification for its due process holding, the majority noted that states have an interest in determining when a claim is too stale to be adjudicated.\textsuperscript{56} The Court may have been trying to establish that Kansas' decision to apply its own law was not arbitrary. The defendant, however, was not challenging a state's constitutional right to bar stale claims. Rather, the defendant was challenging the forum's right to allow a claim that is time barred in the states whose substantive laws governed the liability issues. The two questions raise fundamentally different interests, but the Court failed to make a distinction.\textsuperscript{57}

Under the test of fundamental unfairness the Court focused on whether the defendant had been unfairly surprised.\textsuperscript{58} The Court concluded that the defendant could not have been surprised because the rule that a forum applies its own statute of limitations is "as old as the Republic."\textsuperscript{59} Implicitly, the Court concluded that because the practice essentially had been unchallenged throughout the years, it must be fair. Yet, just because a practice has been in place for 200 years should not necessarily make it constitutionally permissible.\textsuperscript{60}

\textsuperscript{55} Id. at 2126 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821–22 (1985)); see supra note 15 and accompanying text (text of Phillips test).

\textsuperscript{56} Sun Oil, 108 S. Ct. at 2126.

\textsuperscript{57} Arguably, a court should be able to apply a shorter statute of limitations in order to conserve judicial resources. See R. Leflar, supra note 16, § 121, at 349; R. Weintraub, supra note 16, § 9.2B, at 538–39; Grossman, supra note 9, at 50. The policy of conserving judicial resources is inapplicable to the decision to apply a longer statute of limitations. See R. Leflar, supra note 16, at 348–49; R. Weintraub, supra note 16, § 9.2B, at 539–40; Grossman, supra note 9, at 51–52.

\textsuperscript{58} Sun Oil, 108 S. Ct. at 2126.

\textsuperscript{59} Id.

\textsuperscript{60} "That certain choice-of-law practices have so far avoided constitutional scrutiny by this Court is in any event a poor reason for concluding their constitutional validity." Id. at 2131 (Brennan, J., concurring).
B. The Court Mistakenly Equated the Due Process and Full Faith and Credit Clauses

The Court’s limited analysis of the due process clause and reliance on the full faith and credit clause followed from the Court’s treatment of the two clauses in Allstate and Phillips. In both cases, the Court equated the two clauses and stated that the same test would be required for each. Following this logic, the majority could have relied on either clause for its holding that Kansas’ application of its own statute of limitations was constitutional, and would have reached the same result.

By equating the test for the due process clause with that required by the full faith and credit clause, the Court failed to recognize the differences in the purposes behind the two clauses. The due process clause focuses on the relationship between the individual litigants and the state. In Home Insurance Co. v. Dick, the Court held that Texas violated the due process clause by applying its own statute of limitations, instead of the limitations period specified in a Mexican insurance contract. The Court determined that the Texas court’s application of its own statute of limitations imposed a greater obligation on the insurance company than that agreed upon in the insurance contract. By relying on the due process clause, the Court focused on the relationship of Texas to the dispute, examining the Texas court’s action in light of fairness to the litigants.

In contrast, the full faith and credit clause focuses on the interests of the states. In earlier cases, the Court used an interest analysis which balanced the competing governmental interests. In Alaska Packers

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61. For a discussion of Allstate and Phillips see supra notes 13-15 and accompanying text.
63. In its treatment of the due process clause, the Court noted that “[t]he nub of the present controversy . . . is the scope of constitutionally permissible legislative jurisdiction, and it matters little whether that is discussed in the context of the Full Faith and Credit Clause, as the litigants have principally done, or in the context of the Due Process Clause.” Sun Oil, 108 S. Ct. at 2125 n.3.
64. For a reasoned criticism of the Allstate plurality’s equating of the due process clause and the full faith and credit clause, see Allstate, 449 U.S. at 320-33 (1981) (Stevens, J., concurring).
65. Grossman, supra note 9, at 44; Martin, supra note 9, at 229.
66. 281 U.S. 397 (1930).
67. Id. at 407-10.
68. The court concluded that Texas had no significant relationship with the dispute which justified varying the terms of the contract. Id. at 408.
Association v. Industrial Accident Commission,\textsuperscript{71} the Court affirmed California's application of its own worker's compensation statute to an employee who was injured in Alaska.\textsuperscript{72} The Court stated that the full faith and credit clause did not automatically compel the use of the foreign state's statute.\textsuperscript{73} Rather, the full faith and credit clause required the court to appraise the governmental interests of each state.\textsuperscript{74} The Court held that Alaska's interest was not superior to California's, so California could constitutionally apply its own law.\textsuperscript{75} Relying on the full faith and credit clause, the Court focused on the competing interests of the states.\textsuperscript{76}

Because the interests represented by the two clauses are different, the clauses require separate analyses for constitutionality. A unitary test of constitutionality is possible, however, if it recognizes both the governmental interests and the individual interests involved in the dispute. The test articulated in Allstate and Phillips recognizes governmental interests, but ignores individual interests.\textsuperscript{77} The concurrence in Sun Oil applied the Allstate and Phillips test literally, and the rights of the individual litigants, which the due process clause was designed to protect, got lost in the analysis.\textsuperscript{78}

C. Kansas' Application of Its Own Longer Statute of Limitations Violated the Due Process Clause

A closer examination of the individual interests inherent in a forum's choice of a statute of limitations should have led the Court to strike down Kansas' application of its own longer statute of limitations as unconstitutional. The majority failed to consider the defendant's substantive right to repose.\textsuperscript{79} The contractual limitation in Home

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\item \textsuperscript{71} 294 U.S. 532 (1935).
\item \textsuperscript{72} Id. at 550.
\item \textsuperscript{73} Id. at 547.
\item \textsuperscript{74} Id. "[O]nly if it appears that, in the conflict of interests which have found expression in the conflicting statutes, the interest of Alaska is superior to that of California, is there rational basis for denying to the courts of California the right to apply the laws of their own state." Id. at 549.
\item \textsuperscript{75} Id. at 550. The court noted that it was unlikely that the employee could successfully prosecute his claim in Alaska, and he presented a danger of becoming a public charge of California. Id. at 542.
\item \textsuperscript{76} Id. at 546-50. The Court has since abandoned the weighing-of-interest analysis. See Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 n.10 (1981) (citing Carroll v. Lanza, 349 U.S. 408 (1955)).
\item \textsuperscript{77} See supra note 15 and accompanying text (text of the Allstate and Phillips test).
\item \textsuperscript{78} Sun Oil Co. v. Wortman, 108 S. Ct. 2117, 2128-30 (1988) (Brennan, J., concurring).
\item \textsuperscript{79} The majority's failure to focus on repose may have followed from its holding in Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945):
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Insurance and the statutory limitation in Sun Oil are not different in their effect on the parties' interests. The right to sue should be extinguished in all forums when the statutes of limitations expire in the states whose substantive law controls the liability issues.

The Sun Oil concurrence considered the repose rights of defendants, but only in the context of the state's interest in giving individuals repose. A state's interest in repose and a litigant's interest in repose are quite different. A state desires to protect resident defendants from suit and to conserve judicial resources by limiting the time available for claims. A defendant, by contrast, needs to be protected from the possibility of suit after a reasonable period of time because witnesses may be unavailable and evidence may be lost or destroyed. Allowing a forum state to adjudicate a stale claim forces a defendant to defend without the resources that would have been available under a more timely suit. Allowing the plaintiff to bring a claim that would be time barred in the state whose law controls issues of liability also encourages forum shopping among plaintiffs.

Sun Oil also was treated unfairly because it could not have anticipated that Kansas law would govern the plaintiffs' right to bring the suit. The parties entered into the leases in Oklahoma, Louisiana, and Texas; Sun Oil reasonably anticipated that those states' laws would govern the dispute. Failure to apply those states' limitations periods frustrated the justifiable expectations of Sun Oil. If the plaintiffs had sued in Oklahoma, Louisiana, or Texas, Sun Oil would have

Statutes of limitation find their justification in necessity and convenience rather than in logic. . . . Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Id. at 314.

However, Chase can be distinguished from Sun Oil because it involved a legislative change in the limitations period rather than a judicial choice of law decision. Id. at 306–08.

80. For a discussion of Home Insurance, see supra notes 66–68 and accompanying text.


82. R. LeFlar, supra note 16, at 349.


85. Id.

86. For an example of the potential for forum shopping, see Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984). In Keeton, the plaintiff could have brought suit in any jurisdiction which sold Hustler magazine. Id. at 773. The plaintiff brought suit in New Hampshire which had an unusually long statute of limitations; the statute of limitations had already run in every other jurisdiction. Id. at 778.

been protected from liability because the claims would have been time barred. Instead, Sun Oil was unfairly forced to defend against a stale claim.

Kansas had no state interests which justified the application of its own statute of limitations. The class-action plaintiffs resided chiefly in other states, so Kansas was not vindicating the rights of resident plaintiffs. Sun Oil was a foreign corporation, so Kansas could not have been trying to set an example for other in-state corporations. Most importantly, the Kansas court was further burdening Kansas' court system by allowing the claim, so it could not have been attempting to save judicial resources. Because application of the longer statute of limitations violated the defendant's right to repose and frustrated the defendant's justifiable expectations, and because there were no state interests justifying the application, Kansas violated the due process clause by applying its own longer statute of limitations.

D. Application of the Sun Oil Rationale to Other Issues Generally Considered to be Procedural

The potential for infringement of individual rights resulting from the reasoning in the majority and concurring opinions becomes even more evident when the reasoning is applied to other issues that courts generally have classified as procedural. An analysis of three issues cited by the majority, burden of proof, burden of production, and sufficiency of the evidence, illustrates the potential inequities that could occur when applying the rationale of the majority or concurring opinions.

1. The Majority Is Unlikely To Declare Unconstitutional a Choice of Law Involving Traditional Procedural Issues

At the end of its full faith and credit analysis, the majority declared its unwillingness to constitutionalize choice of law decisions. It is difficult to conceive of a situation in which the Court would ever...
Statutes of Limitations and Choice of Law

declare a choice of law practice to be unconstitutional if it involves only an issue traditionally characterized as procedural.

The Court relied on the historical characterization of statutes of limitations in holding constitutional Kansas' application of its own statute of limitations. Like statutes of limitations, burden of proof, burden of production, and sufficiency of the evidence are all issues which courts have traditionally characterized as procedural. Most courts thus have determined that the forum may apply its own law to these issues. Applying the majority's historical characterization analysis to these traditionally procedural issues would necessarily lead to the conclusion that application of forum law on these issues is constitutional. Unfortunately, allowing states almost unlimited freedom to make choice of law decisions regarding issues traditionally classified as procedural ignores the substantive elements contained within some of the traditionally procedural issues.

2. The Concurrence's Rationale Will Usually Achieve the Same Result as That Reached by the Majority

The concurrence in Sun Oil used a balancing of interests before concluding that Kansas' application of its own statute of limitations was constitutional. The concurrence concluded that the forum, by virtue of being the forum, had sufficient interest in the dispute to make application of its own statute of limitations neither arbitrary nor fundamen-

90. See supra notes 42-43 and accompanying text (description of the Court's historical analysis).

91. Burden of proof refers to the burden of persuading the trier of fact on a particular issue. See RESTATEMENT, supra note 19, § 133 comment a.

92. Burden of production refers to the burden of going forward with the evidence; the legal question of what is sufficient to justify going to the jury on an issue. Presumptions are included in this category. See RESTATEMENT, supra note 19, § 134 comment a.

93. Sufficiency of the evidence refers to the quantum of evidence necessary to justify a finding in a party's favor. An example of a rule defining the sufficiency of the evidence is res ipsa loquitur, where a jury may infer negligence from the occurrence of the accident itself. See RESTATEMENT, supra note 19, § 135 comments a, b.


95. See, e.g., Foley v. Pittsburg-Des Moines Co., 363 Pa. 1, 68 A.2d 517, 521 (1949) (law of the forum governs burden of proof); Richardson, 11 Wash. 2d at 312, 118 P.2d at 996 (law of the forum governs presumptions); Dodson v. Maddox, 359 Mo. 742, 223 S.W.2d 434, 438 (1949) (law of the forum governs res ipsa loquitur).

96. See, e.g., R. LEFLAR, supra note 16, § 124; RESTATEMENT, supra note 19, § 122 comment a.

tally unfair. Although the concurrence warned against the evils of an offhanded characterization by the majority of the cited procedural issues, a closer look at the application of the concurrence's interest analysis indicates that it usually will reach the same result as that reached by the majority under the traditional approach.

The concurrence used what is traditionally a choice of law test and turned it into a constitutional test. When using an interest analysis to make choice of law decisions, most state courts follow a similar procedure: the court considers the state interests and policies behind the statutes in question, and then evaluates those interests and policies in light of the specific facts of the case.

The concurrence, by contrast, identified what interests might generally be involved in a statute of limitations choice of law situation. After identifying the general policies involved, the concurrence failed to evaluate those policies in light of the facts of *Sun Oil*. The concurrence, instead, made some general observations about the analysis' potential weightiness and ambiguity. The concurrence probably used more general terms because it was using the interest analysis test to determine the constitutionality of a choice of law decision, rather than making the choice of law decision itself. Nonetheless, state courts would be hard pressed to find an unconstitutional procedural classification under this more general type of analysis.

98. *Id.*


101. *Id.*

102. A burden of proof example illustrates the difficulty of applying the concurrence’s test. Consider a case in which state *F*, the forum, has a contributory negligence rule that requires the plaintiff to prove freedom from contributory negligence. State *X*, whose substantive law is being applied, has a contributory negligence rule that requires the defendant to prove plaintiff’s contributory negligence as an affirmative defense. The concurrence would require a balancing of the governmental interests involved, such as: First, the forum’s strong procedural interest in applying law with which it is familiar; second, the forum’s substantive interest in protecting its defendants from paying claims for which the plaintiff is at fault; and third, the foreign state’s interest in protecting its citizens so that they do not become dependent on the state.

An attempt to balance these interests is similar to the concurring justices’ attempt to balance the foreign state’s interest in the repose of its defendants with the forum state’s interest in vindicating the rights of its plaintiffs. The justices would probably conclude, as they did in the statute of limitations analysis, that the interest analysis results in potential ambiguity. See *supra* notes 48–49 (concurrence’s application of its interest analysis test).

When the statute of limitations analysis resulted in ambiguity, the concurrence considered other factors. First, the concurrence noted that the ambiguity strengthens the forum’s interest in applying its own law. The potential ambiguity which could result from the burden of proof interest analysis also would strengthen the forum’s interest in applying its own law as to burden.
IV. STATES MUST ACT TO PROTECT LITIGANTS

The Sun Oil decision makes clear that the United States Supreme Court is not likely to hold unconstitutional choice of law practices involving issues traditionally characterized as procedural. Therefore, the state courts must shape choice of law rules in a way that protects the individual rights of litigants.103

A. Toward A New Interests Analysis Choice of Law Rule

The Court in Sun Oil cited Heavner v. Uniroyal, Inc.,104 as an example of what state courts can do if they decide that use of the procedural characterization of statutes of limitations is unwise in making choice of law decisions.105 In Heavner, the New Jersey Supreme Court abandoned the procedural characterization in favor of an interest analysis.106 Heavner represents the great flexibility state courts have in making and applying choice of law rules. By following the lead given by the New Jersey Supreme Court in Heavner, state courts can apply a choice of law approach that recognizes interests rather than formalities.

The current substance/procedure dichotomy may adequately protect governmental interests but does not adequately protect individual interests. State courts could adopt a new choice of law rule which recognizes both the governmental interests protected by the full faith and credit clause and the individual interests protected by the due process clause.107

of proof. Second, the concurrence looked at the strength of the precedents allowing the forum to apply its own statute of limitations. Burden of proof has been characterized consistently as procedural throughout the century. See supra notes 94–95 and accompanying text (burden of proof is procedural and governed by forum law). The concurrence probably would declare the forum's use of its own burden of proof rule to be constitutional.

103. See supra note 45 and accompanying text (it is up to the states to change choice of law practices). The state courts would not be constitutionally required to take action. They would be acting to protect the litigants from potentially unfair action.
105. Sun Oil, 108 S. Ct. at 2125.
106. Heavner, 305 A.2d at 418. Heavner involved a products liability action brought in New Jersey. The plaintiffs resided in North Carolina, which was also the state where the truck involved in the accident had been purchased and where the accident occurred. Id. at 414. The statute of limitations had run in North Carolina, but the Uniform Commercial Code limitation, adopted in New Jersey, would have allowed the suit in New Jersey. Applying an interest analysis test, the New Jersey court determined that North Carolina's statute of limitations must be applied to bar the suit. Id. at 418.
107. See supra note 103 (states not constitutionally required to change choice of law practices).

755
The proposed interest analysis involves three steps. First, the court determines the governmental interests and policies behind the conflicting laws. Second, the court evaluates those policies in light of the facts of the specific case and makes an initial determination as to which law should be applied. Finally, if the initial determination indicates that forum law should be applied, or leads to an uncertain result, the court considers whether the parties have any individual interests which might be impinged upon by applying forum law. If so, the court determines whether the individual interests are strong enough to make application of forum law unfair.\footnote{108. This analysis is based in part on the relevant inquiries identified by the concurrence in \textit{Allstate}. \textit{Allstate Ins. Co. v. Hague}, 449 U.S. 302, 320 (1981) (Stevens, J., concurring). \textit{See supra} note 14 (Justice Stevens' relevant inquiries).}

\textbf{B. Application of the New Interest Analysis}

To illustrate the results that would flow from a new interest analysis, this section will examine how the interest analysis would apply to choice of law issues of burden of proof, burden of production, and sufficiency of the evidence.\footnote{109. The analysis does not attempt to answer definitively how these issues should be handled by the courts because each case will depend on the factual background. Instead, the analysis provides a framework for future application.}

\textit{1. Burden of Proof}

Consider the following fact situation:\footnote{110. The facts of this example are based in part on Peterson v. Warren, 31 Wis. 2d 547, 143 N.W.2d 560 (1966), overruled on issues not relevant to this illustration, Allen v. Ross, 38 Wis. 2d 209, 156 N.W.2d 434 (1968).}

$H$ is a resident of Minnesota where he enters into an insurance contract with a Minnesota insurance company to cover his truck. The contract requires that $H$ give the insurance company timely notice of an accident in order to recover. $H$ is driving the truck in Wisconsin when he hits the plaintiff, a Wisconsin resident. Plaintiff brings suit jointly against $H$ and the insurance company in a Wisconsin court. The insurance company raises the defense of $H$'s failure to give notice of the accident. Wisconsin law places the burden of proof on the insurer as to the defense of no notice. By contrast, Minnesota law places the burden of proving notice on the insured. The plaintiff, suing the company directly, is in the same position as the insured. Which law should the Wisconsin court apply?

The first and second step in an interest analysis, identifying the governmental interests and applying those interests to the facts, indicates
that the court could apply either law. Wisconsin may put the burden on the insurer in an effort to make recovery easier for accident victims, here a Wisconsin resident. This interest is made stronger because the accident occurred in Wisconsin. Minnesota may put the burden on the insured, thus protecting insurance companies and encouraging insurance business within the state. Minnesota also has a strong interest in having the contract's terms interpreted in accordance with Minnesota law because the parties entered into the insurance contract in Minnesota. Where the burden is placed may affect those terms. Finally, Wisconsin, as the forum, has a strong procedural interest in applying familiar law, although this interest may be weakened because Minnesota's law is easily ascertainable. Because both states have strong interests in having their own law apply, either law would be appropriate if the court considered only governmental interests.

The third step in an interest analysis, examining the individual interests of the defendant, however, shifts the balance in favor of Minnesota law. The insurance company entered into the contract in Minnesota. The company had every reason to expect that the terms would be interpreted according to Minnesota law. One of those terms requires the insured to notify the company of accidents in a timely fashion. All previous Minnesota decisions have placed the burden on the insured to prove notice. Switching the burden would frustrate the defendant's justifiable reliance on Minnesota law. The plaintiff, by contrast, was not a party to the making of the insurance contract, and so could not have been unduly surprised by a requirement which places the burden on him to prove that notice was given to the insurance company. The Wisconsin court, balancing the state and individual interests, should apply Minnesota's burden of proof law on the issue of notice.

2. Burden of Production

Consider the following fact situation:\textsuperscript{111}

An insurance company issues a life insurance policy in South Carolina to a soldier stationed there. No benefit will be paid under the policy if the insured's death is caused by suicide. The soldier is found dead in the woods in South Carolina, and circumstances indicate that he may have committed suicide. The soldier's wife brings suit under the policy in Alabama, the soldier's legal residence. Alabama law has a strong presumption that a sane man will not take his own life. South

\textsuperscript{111} The facts of this example are based in part on Pilot Life Ins. Co. v. Boone, 236 F.2d 457 (5th Cir. 1956).
Carolina law only requires the insurance company to produce credible evidence of self-destruction. Which law should the Alabama court apply?

Both states have an interest in having their own burden of production law applied. The absence of a strong presumption in South Carolina indicates a protective policy towards insurers. The parties entered into the contract in South Carolina, and the accident occurred in South Carolina. South Carolina has strong interests in having its law applied. Alabama, by having a more stringent presumption, indicates a protective policy towards beneficiaries. Because the family’s legal residence is Alabama, the state has an interest in protecting the family. Alabama does not want the family to become a financial burden on the state. In addition to these substantive interests, Alabama also has a procedural interest in applying familiar law. The Alabama court would be justified in choosing its own law if it considered only governmental interests.

A consideration of the individual interests also indicates that the Alabama court can apply its own law. Although the contract was entered into in South Carolina, the insurance company was aware that the soldier’s legal residence was Alabama. The insurance company could have reasonably expected that the insured’s widow would bring suit in Alabama, and thus, could not be unfairly surprised if Alabama applied its own law. The Alabama court should apply its own presumption.

3. Sufficiency of the Evidence

Finally, consider the following fact situation:\footnote{112. The facts of this example are based in part on Missouri Pac. R.R. Co. v. Holmes, 197 Ark. 547, 124 S.W.2d 14 (1939).}

A young child resident of Oklahoma is walking by the railroad tracks in Oklahoma. Later, she is discovered near the train tracks dead, under circumstances indicating that she has been struck by a train. Her parents sue the interstate railroad in Arkansas to take advantage of its more protective laws. Arkansas law allows a res ipsa loquitur instruction that proof of the accident itself is sufficient for the jury to infer negligence. Oklahoma law requires actual proof of the railroad’s negligence. Which law should the Arkansas court apply?

Identifying the policies and interests involved as applied to the facts indicates that, even without consideration of the individual interests, Oklahoma law should be applied. Arkansas, through its allowance of res ipsa loquitur, may have a protective policy towards resident acci-
dent victims. However, because the child was a resident of Oklahoma, that interest is inapplicable. Arkansas may also have a policy interest in having railroads operate safely when operating within the state. Yet the accident did not occur in Arkansas, so this interest is also inapplicable. Arkansas has a strong procedural interest in applying its own familiar res ipsa loquitur rule, although the interest is weakened by the ease of determining Oklahoma law. Oklahoma's lack of a res ipsa loquitur rule may indicate a protective policy towards railroads, possibly to encourage railroad business within the state. Because the train was traveling in Oklahoma, Oklahoma has an interest in not having a res ipsa loquitur instruction given. Arkansas' procedural interest in applying its own law is not strong enough to overcome Oklahoma's substantive interest in protecting railroads against accidents where actual negligence has not been proven. The Arkansas court should not give a res ipsa loquitur instruction.

Furthermore, an examination of the defendant's individual interest indicates that applying the law of Arkansas would be potentially unfair. The effect of the Arkansas instruction is to impose almost absolute liability on the railroad unless the railroad can overcome the presumed inference of negligence. If the case had been brought in Oklahoma, where the accident occurred, the railroad probably would have been absolved of negligence because the evidence is circumstantial at best. The cause of action would be significantly different if the court applied Arkansas law. This difference would be potentially unfair to the railroad. In light of Arkansas' lack of interest in the dispute and the potential unfairness to the defendant, the Arkansas court should apply Oklahoma's law on the issue of the sufficiency of the evidence.

V. CONCLUSION

The full faith and credit clause and the due process clause are not the same in the context of conflict of laws. Limiting the importance of the due process clause, or equating the due process clause with the full faith and credit clause, can result in an unfair treatment of individual litigants. The treatment of the defendant in Sun Oil illustrates the potential unfairness which can occur if a forum is allowed to apply its own longer statute of limitations. The results may be equally, or even more, unfair if the Court's rationale is applied to other traditionally procedural issues. Because the Court appears unlikely to declare unconstitutional established choice of law rules, state courts must take it upon themselves to institute change.
Adopting a new choice of law rule which recognizes both governmental and individual interests would protect individual litigants from potential unfairness. Interest analysis tests are subject to the criticism of being easy to manipulate and difficult to apply. However, the potential difficulties in applying the new test are far outweighed by the importance of protecting the individual rights of litigants. Issues which relate purely to judicial administration would still be governed by the forum's own law. Other issues, however, which affect substantive rights, would be decided based on the interests of both the states and the individuals involved in the dispute.

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