
After Bhopal

COURTS OF or Have Lawsuit,

LIBERIA DOES it for tankers, Delaware does it for corporations, and our courts are now doing it for litigants. Not with anything so simple as a flag, of course; judges generally use less conspicuous standards. They have nonetheless been remarkably successful in holding out their courtrooms as harbors of convenience for plaintiffs from across the country and around the world. Combine this with the fact that different jurisdictions often have very different rules of liability, and defendants whose operations transcend jurisdictional boundaries are in deep trouble.

Choice-of-forum and choice-of-law rules have been described by *The New Republic's* TRB as "among the most pointlessly arcane in the whole American legal system." Arcane, yes: these backwoods of the law are so tangled and obscure that landmark developments often pass unnoticed outside the legal profession. But not pointless. The method in the impenetrable madness has consistently been to tighten the regulatory ratchet. As a result, a single state's activist legislature or supreme court can now quietly set regulatory policy for the nation. Or perhaps, as Bhopal may soon demonstrate, for the world.

The Suit-of-the-Month Club

The Supreme Court's June 26 decision in *Phillips Petroleum v. Shutts* sets the stage. Phillips extracted gas from land located in eleven different states, paying royalties to some 33,000 owners of the gas leases. Some of these owners *Peter Huber, a Washington, D.C., lawyer and an associate of Science Concepts, Inc., is visiting associate editor of Regulation.*

(three, to be precise) concluded that Phillips owed them interest—an average of \$100 per plaintiff—on payments that had been delayed pending approval of a price change by federal authorities. They came together in Kansas, home of one of the three, which by happy circumstance apparently applies more generous interest rules than, say, Texas or Oklahoma, where much more gas is in fact produced. And they brought a class action not only on behalf of themselves but of the other 33,000 too. The absentees were notified of the lawsuit they had just joined, and in an "opt out" procedure familiar to book-of-the-month club members, were invited to send in a form if they did *not* want to subscribe. Some got around to doing just that, leaving a mere 28,000 in the class. Ninety-seven percent of the members of this plaintiff group, and ninety-nine percent of the underlying gas leases had no connection whatsoever with Kansas. The Kansas court nevertheless certified the class and, applying Kansas law, concluded that Phillips owed interest to all class members, payable at Kansas-established rates.

The U.S. Supreme Court affirmed the first half of this exercise but reversed on the second. A state, the Court unanimously ruled, is constitutionally permitted to take *jurisdiction* over nationwide class actions in its courts: Kansas's readiness to do so did not violate the "due-process" rights of either the defendant Phillips Petroleum—which did have some business contact with Kansas—or of the 28,000 plaintiffs—who got all they deserved when offered the chance to opt out of the Kansas lawsuit. But the Constitution was violated, seven members of the Court agreed, in the Kansas court's *choice of law*: rights under contracts uncon-

CONVENIENCE

Will Travel

Peter Huber

nected in any way with Kansas should not have been determined by Kansas law.

Three Joins in the Long Arm of the Law

Shutts-style litigation has much to do with national and even international regulatory policy. State legislatures and judges are of course active regulators in areas involving health, environmental, and safety matters, and economic relations of all description. In many instances—especially in the handful of states that have been driving their tort law toward the frontiers of absolute liability for any and all harm—local regulatory demands are not the least bit like those in other states. But no matter. The California legislature or supreme court may, for example, declare that under its law persons injured by knives may recover because the manufacturer failed to warn that knives are sharp. Even if lawmakers in, say, Texas consider the warning unnecessary.

But Texas knife victims—if they have minimally competent lawyers—will soon yearn to graze in California's greener regulatory pastures. As Justice William Rehnquist indulgently noted in another recent jurisdictional decision, *Hustler v. Keeton* (1984), it is "the litigation strategy of countless plaintiffs [to] seek a forum with favorable substantive or procedural rules or sympathetic local populations." A receptive California judge with dreams of improving knife-warning policies across the nation needs three tools to welcome those "countless plaintiffs" to California courtrooms:

- first, jurisdiction over all the parties—a right in the *California* courts to reach *these* particular litigants;

- second, a favorable choice-of-law rule—a right to apply California (and not Texas) law to the dispute, since California law is the only law that the California lawmakers have the power to shape; and

- third, a receptive recognition-of-judgment rule—an assurance that the California judgment will be enforceable in Texas, where the defendant may keep its assets.

Under current constitutional doctrine all three tools are readily at hand. Jurisdiction over plaintiffs presents the least of problems. It has long been the rule that the peripatetic plaintiff may go wherever he pleases; *Shutts* now establishes that he may also be *taken* wherever his self-appointed class-action lawyer pleases, so long as he does not actively protest. Of course, when the stake (for the individual class member) is trivial, few will bother to opt out, just as few would bother to opt *in* to the litigation if the choice were framed in those terms. The result: regulation through class actions in the courts, like the cookie on the ice-cream sundae, will be something few much want but few will bother to avoid.

As a result, a single state's activist legislature or supreme court can now quietly set regulatory policy for the nation. Or perhaps . . . for the world.

A court's power to reach distant *defendants* is more limited, but quite a bit less so than one might expect. *Shutts* noted that the due-process clause of the Constitution "protect[s] a defendant from the travail of defending in a

distant forum, unless the defendant's contacts with the forum make it just to force him to defend there." One cannot briefly convey all the rich legal complexities that this simple statement conceals; to note just one, "specific" jurisdiction for an attack on a defendant's more local peccadilloes can be based on fewer contacts than "general" jurisdiction for an action against all the defendant's sins wherever committed. But in either instance, finding jurisdictional "contacts" turns out in practice to be a very creative and elastic exercise. In the *Hustler* case, for example, Kathy Keeton was permitted to sue *Hustler* for libel in New Hampshire because *Hustler* sold some of its magazines—though only a tiny fraction of its total national circulation—in that state. A defendant who lives in a state, or sells a product likely to end up there, or enters a contract, employs an agent, maintains an office, deals with suppliers, or perhaps even buys insurance there, can most probably be summoned into court there too. Specific jurisdiction is almost certainly available for a suit in connection with the specific product, contract, office, or other "contact" with that state; general jurisdiction may require a contact or two more. A defendant is wholly immune from the jurisdiction of a distant state's courts only if its contacts with the state can be characterized as "random," "isolated," "fortuitous," or entirely nonexistent. Few large corporations can meet those standards anywhere, which means that most can be sued everywhere.

The back end of the reach-out-and-put-the-touch-on-someone picture is even more favorable for the activist state judge or legislature. A little known clause of the Constitution—aptly named the "lawyer's clause"—directs that "Full Faith and Credit shall be given in each State to the Public Acts . . . and judicial Proceedings of every other State." Texas courts, in other words, must enforce a California judgment against *Widget Co.*, even if *Widget* is a Texas company being sued by Texas plaintiffs and has done nothing wrong under Texas law.

The courts take this recognition-of-judgment requirement of the full faith and credit clause very seriously. A Texas court must give effect to a California judgment even if the court believes that California lacked jurisdiction over the defendant, or that the judgment was based on a California statute that was unconstitu-

tional or on an unconstitutional application of California law to the dispute. Indeed, Texas must enforce the judgment even if the California court purported to apply—but in the view of the Texas court actually misapplied—Texas law in deciding the case for the plaintiff. The only judgment that the Texas court need *not* enforce is a default judgment entered after *Widget* boldly refuses to acknowledge or contest the California litigation. Only well-insured lawyers will be willing to take such a large and simple gamble on the small and complex jurisdictional technicality.

So everything comes down to choice-of-law rules. If a California court can open its doors to any plaintiff, reach virtually any national corporate defendant, and count on having its judgment enforced against the defendant's assets anywhere in the country, California can make tort law for the nation. Unless the California court is required, in appropriate circumstances, to apply Texas law rather than its own.

Choice-of-Law Limits

Shutts quietly staked federalism on the strength of this middle, choice-of-law joint in the judicial arm. Individual state autonomy will not be undermined (the argument must run) if California judges are not altogether free to apply California law to the dispute. It may seem bizarre that a California court should be permitted to reach across the country to snare a Texas-based defendant and then be forced to apply Texas law in deciding the case; one might suppose that courts apply only their own law to their own lawsuits. But this is not how things work. "We do not think that . . . choice of law concerns should complicate or distort the jurisdictional inquiry," wrote Justice Rehnquist in the *Hustler* decision.

Regrettably for federalism, constitutional limits on choice of law are (under current doctrine) as elastic and unprincipled as any one may find in the arsenal of regulatory activism. Here again, opaque legal principles have crystalline, real-world consequences.

To start with, a court is always free to apply its own rules of "procedure"—a term that embraces some very crucial regulatory tools. The availability of class actions, for example,

is a question of procedure that determines whether many lawsuits will ever be initiated. Without class actions it seems doubtful that 180,000 plaintiffs (much less their inspired lawyer) would have bothered to sue Gillette Co., as they recently did, for failing to make good on an advertised offer for a free cigarette lighter worth just a few dollars.* And New Hampshire views its (unusually long) statute of limitations as procedural, a convenient fact for Kathy Keeton who resolved to sue *Hustler* only after her right to do so had expired in every other state. The icing on the cake for Keeton was that New Hampshire courts also apply the single-publication rule, which allows a libel plaintiff to consolidate all damages from nationwide publication into a single recovery. So Keeton was able to sue for her New York injuries, even though she would not have been permitted to do so under New York law or in a New York court. Such is the beauty of legal "procedure."

Elastic though it is, procedure of course does not cover everything. A California court that wishes to impose its particularly strict standards of liability on a Texas manufacturer of consumer products is not entirely free to do so. Once again, the full-faith-and-credit clause is the source of federal constitutional limits. We have already seen that the clause is a veritable tiger when it comes to enforcing a final California judgment against the defendant's Texas property. But, it turns out, the same clause starts life as a surprisingly toothless kitten when the issue is California's right to apply its own (rather than Texas) law in reaching that same judgment.

In *Allstate Insurance Co. v. Hague* (1981), a plurality of the Supreme Court provided yet another count-the-contacts test for what "full faith and credit" requires in choice-of-law matters. "For a State's substantive law to be selected in a constitutionally permissible manner," the plurality explained, "that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary or unfair." This, however, is verbal mush that establishes no real limit at all.

The plaintiff's or defendant's residence or employment in California is almost certainly sufficient to permit California to apply its own law to the dispute, without more. When insur-

ance companies are involved, *their* residence or business in California will also count in the "contact" arithmetic. So will almost any link between California's territory and the "transaction" involved in the lawsuit—where the contract was made, where the accident occurred, where the product was designed, manufactured, sold, advertised, or what have you. Even California contacts (a change in plaintiff's residence, for example) that conveniently arise *after* the event being litigated count as contacts in some courts, though apparently only as "little" ones. None of this much troubled the plurality in *Allstate*: the opinion blandly acknowledged that a particular set of facts could justify the application of more than one state's laws to a single dispute.

The Widening Circle

Jurisdictional and choice-of-law issues do not stop at national boundaries. We do not stand entirely alone, of course, in our willingness to reach distant defendants or in favoring the application of local rules to decide disputes regardless of their origin. Many other countries apply similar rules, in an understandable effort to take care of their own according to standards they themselves have established. But the open-door judicial policies of courts of convenience greatly amplify underlying regulatory

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So strict, in fact, that most foreign lawyers view them with amazement if not incredulity. This does not, however, deter their plaintiff clients from recognizing a good legal deal when

*Gillette did distribute 270,000 lighters as promised, but was caught short by an unexpectedly large response to its offer. The class action on behalf of all 180,000 plaintiffs, who hailed from all fifty states and Canada, was brought in Illinois state court. Only 12,000 of the plaintiffs were from Illinois.

they see it. The results often verge on the Kafkaesque.

• In *Taca International Airlines, S.A. v. Rolls Royce of England, Ltd.*, an El Salvador corporation was able to come to a New York court to sue Rolls Royce, an English company, for damage resulting from an airplane crash in Nicaragua. Rolls Royce had no officers in New York and was not authorized to do business there. But it did own all the stock of a Canadian company, which in turn owned all the stock of a U.S. subsidiary incorporated in Delaware, which in turn had an authorized business office in New York. That connection with New York proved enough for Taca to reach the parent in a lawsuit brought in New York courts: Taca successfully argued that the grand-daughter subsidiary corporation was a “mere department” of Rolls Royce, not a “really independent entity.”

• In 1980 Paraguayan Joel Filartiga was able to bring a federal court tort action against another Paraguayan, America Pena-Irala, for the torture of Filartiga’s son, Joelito, in Paraguay. Joel Filartiga subsequently obtained political asylum in the United States and Pena-Irala moved here two years later. That, the Second Circuit Court of Appeals ruled, was enough to bring the matter and the parties under the statutory jurisdiction of the federal courts.

• In its 1981 decision in *Piper Aircraft v. Reyno*, the Supreme Court finally drew a small line, at least as to federal courts. Scottish relatives of Scottish citizens killed in a Scotland crash of a plane registered in Scotland, in circumstances already investigated by British authorities, simply could not sue the Pennsylvania and Ohio manufacturers of the plane in U.S. courts. Unfortunately, the *Piper* decision was a pure exercise of discretion; had the trial judge called things the other way, he might well have been permitted to do so.

Against this background, the ongoing legal posturing over the Bhopal tragedy leaves one with a strong case of déjà vu. The Bhopal plant was owned and operated by Union Carbide (India), an Indian corporation that is locally run by Indian management and 49.1 percent owned by Indian interests. But the other 50.9 percent was of course owned by Union Carbide (America). A legal system adept at fitting distant pegs into local holes can (if it feels so inclined) take care of the rest.

Jurisdiction over the government of India is not a problem: India is the plaintiff, it is willing to travel, and its right to do so is now almost unshakably entrenched in U.S. law. Jurisdiction over Union Carbide (America) is also constitutionally unassailable under the standard analysis: there are plenty of “contacts” between the U.S. company and the New York federal court to satisfy the plastic requirements of due process.

Whose law will be applied to the dispute? That already complicated question is further muddled by the fact that the litigation is in federal, not state court, and involves an international rather than an interstate choice of law. At the international level, the full-faith-and-credit constraint on choice of law is replaced by even more amorphous considerations of international comity. But since India itself is the plaintiff here, U.S. courts need not worry about offending Indian sovereignty by applying U.S. law to the dispute. Beyond that, the usual, almost standardless counting of “contacts” will govern.

India has already laid its list on the table. The first count of India’s complaint alleges “multinational enterprise liability” (a basis for liability previously unknown to the law) and points to a series of allegedly key contacts between the accident and this country: the training of personnel, the “supervision” of the Bhopal operations, and the design, construction, and overall management of the Bhopal facility. For its part, Union Carbide can note that the methyl isocyanate was manufactured at a plant in India as opposed to the United States at the express request of the Indian government, that the plant’s management and personnel are Indian and its owner an Indian corporation, and that a more than nominal portion of that corporation’s shares is held by India itself. To be sure, Union Carbide owns a bare majority of the shares. But a minority shareholder that is the government (and thus controls the machinery of zoning, environmental and safety regulation, condemnation, and import controls) is no ordinary minority shareholder.

The one hope for getting the Bhopal litigation back to India, where it so obviously belongs, is the doctrine of *forum non conveniens*, which permits federal courts simply to decline to exercise jurisdiction over disputes that sensibly belong in other courts. A federal trial judge

may make a purely discretionary call about which forum is the most "convenient," considering both the public and the private interests in having the litigation proceed in one or another courtroom. This inquiry is not an even-handed one; the plaintiff's choice of forum must be honored unless the defendant's preference is deemed vastly more convenient. Moreover, the whole exercise evokes the most disingenuous lawyerly behavior. The plaintiff—who has often traveled a great distance in search of the forum with favorable legal rules—must baldly insist that the forum is perfectly convenient, while the defendant—which is often litigating in its own backyard—must swear high and low that it would find it vastly easier to travel halfway around the world.

The Price of Promiscuity

One can understand and respect a state's desire to set regulatory standards for its own by its own, whether through its legislature or its common law courts. One can also understand the judicial urge to keep the house doors open to all customers, for without customers there is no business and thus no opportunity for judges to make the world at large a better place. But the combined effects can be very pernicious.

Regulatory Dumping. The first effect might be called regulatory dumping. India (let us say) welcomes the development of technological or commercial exports in cooperation with U.S. firms, and of course retains exclusive control over the administrative regulatory regime within its borders. Because it urgently needs these projects, it regulates them moderately, and because it needs to train its own citizens, it insists that local personnel be heavily involved in operations. India strikes a balance between tight regulation and rapid development that may be perfectly sensible for India, though it would not be for the United States.

And, of course, that is no business of *our* Environmental Protection Agency, Occupational Safety and Health Administration, or whatever other U.S. regulatory body might intervene if the same operation were conducted here. Foreign governments have in fact protested, vehemently and (one must concede) very cogently, that U.S. agencies have no business invoking U.S. securities or antitrust laws to meddle in the

affairs of foreign corporations merely because they are subsidiaries of U.S. firms, and this argument would be at least equally good if U.S. safety and environmental laws were at issue. Except perhaps in matters involving the relations between corporate management and shareholders, the argument in *this* setting has almost uniformly been that a foreign firm should be governed by the law where it is incorporated or where its operations are conducted, no matter where its shareholders may live.

But when the foreign regulatory "subsidy" goes sour, as it is bound to do sooner or later, somewhere or other, the U.S. market—now policed by our civil courts instead of our administrative agencies—immediately becomes the new center of regulatory action. One day the foreign subsidiary's emancipation from U.S. paternalism is being fiercely protected by its host nation, and the next day (*after* the accident) the subsidiary has become a mere child, tightly tied to the apron strings of its U.S. parent. Thus, other nations can take the full bene-

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fits of regulating first according to their own lenient terms, and second according to our strict ones. The arrangement is too good to last.

Interstate Ratcheteering. And it won't, because regulatees caught up in this shell game will soon catch on to how it is being played. Multistate or multinational businesses will come to understand that the attractiveness of a lenient local regulatory system is a mirage; reality is the standard of liability enforced by the strictest court in which the regulatee could conceivably land. Recognizing this solves one problem: states or countries will no longer be able to attract business by offering a superficially lenient regulatory climate, while at the same time relying on the benefits of strict judicial regulation elsewhere in case things end up going wrong.

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Courts of Convenience

Peter Huber

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But it also creates a second problem, more worrisome than the first. There is nothing inherently wrong in the decision of California's courts to enforce extraordinarily strict rules against—let us say—sharp knives. But Texas may have equally good reason to strike a different legal balance between consumers and producers, and only the Trial Lawyers of America will be confident that California's choice is the wiser one. Likewise, an industrialized western society may be able to afford a level of go-slow caution in dealing with (say) drugs or pesticides that would be criminally stupid if adopted by a third world country in the grip of epidemic disease and mass starvation; or a tiny nation of bankers like Switzerland may quite sensibly view securities and antitrust laws from a different perspective than we do. Because they carry different passengers, ambulances do not obey the same speed limits as cars.

Thus, many jurisdictions will sincerely want to maintain a moderate level of regulation, with no ulterior design to take advantage of foreign courts even should the occasion arise. But courts of convenience leave no room for a state-by-state and nation-by-nation search for the dose of regulation that is right for local circumstances. Potential defendants must,

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quite simply, anticipate, comply with, or insure against, the strictest regulation they might conceivably encounter. Open-door judicial policies lead everyone into the house of stricter regulation, because that is where plaintiffs always head. A very few jurisdictions offering strict regulation and a welcome to all litigants can thus have influence far beyond their borders.

America Pays. Being the national host to courts of convenience can also be expensive. Because the United States is the international center for courts of convenience, these courts are far more

efficient in forcing U.S. firms to pay their foreign debts than in helping them to recover from their foreign debtors.

It would obviously be grossly unfair for California courts adjudicating interstate disputes always to choose the law that favored the California litigant, whether plaintiff or defendant. The Constitution may even forbid this in its declaration that "[t]he Citizens of Each State shall be entitled to all Privileges and Immunities of Citizens in the several States," though the precise import of this clause remains under debate in the legal literature. There is less debate, however, about the international picture. Foreigners can in fact take virtually all the "privileges" of litigating in U.S. courts under U.S. law, while retaining many of their "immunities" from back home when that better suits their purposes.

Both U.S. and international law, to start with, establish that a foreign *government* is generally immune from suit in U.S. courts unless it consents to be sued here. The federal Foreign Sovereign Immunities Act tries to strike some balance on this matter, by rejecting the immunity defense when a foreign government's alleged misconduct either causes injury in the United States or relates to commercial activities here. But these exceptions are quite rigidly territorial. Thus when the Soviet Union was recently sued in our courts in connection with its downing of Korean Air Lines flight 007 over the Soviet Union, it wasted no time in asserting its "sovereign immunity" from suit, and the case against it was promptly dismissed. And Union Carbide could not easily sue India in U.S. courts if India had (say) expropriated Carbide's Bhopal assets before the accident or simply regulated them out of existence. India, in contrast, stands a good chance of staying in U.S. courts and taking full advantage of our laws to recover damages from a private U.S. defendant.

In addition, all defendants in U.S. courts, public and private, also benefit from the "Act of State" doctrine, according to which courts will not question the conduct of a foreign government on its own turf in connection with any type of litigation. This broadly insulates both public and private foreign defendants from liability for damage to U.S. interests caused by a foreign government's condemnation of property, closure of its ports, and other executed public acts of that character.

Finally, considerations of comity and international harmony greatly limit a U.S. plaintiff's ability to recover in our courts for another country's change in its tax or regulatory requirements, or promulgation of directives that conflict with U.S. antitrust, securities, or other regulatory policies. In its 1985–86 term, for example, the Supreme Court will be reviewing *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, a fourteen-year-old antitrust suit in which Zenith alleges that Japanese manufacturers conspired to drive American television makers out of business by dumping merchandise in the United States. The district court dismissed the case when it was advised by the government of Japan that Japanese manufacturers were merely following government policy. The governments of Australia, Canada, France, and Britain are also urging "mutual respect for each nation's sovereignty."

Viewed in isolation, the several requirements that our courts show delicate respect for the sensibilities and the acts of foreign governments make good sense. Governments can reasonably insist on dealing with governments, not with courts, and it seems unfair to hold a private party accountable for what its government may do or direct it to do, even if in many foreign countries the division between the public and private sector is considerably less clear than in the United States. But there is something wrong when jurisdictional privileges and immunities are asymmetric—that is, when they give more to foreign sovereigns and their protégés as plaintiffs than they demand of them as defendants. Nevertheless, that is precisely what the combination of our unusually strict regulatory systems and open-door judicial policies achieve.

Where's the Exit?

For those interested in rational regulatory policy, courts of convenience are a vexing problem, both domestically and internationally. Within this country, ironically enough, a relatively small handful of aggressive state courts and legislatures now present a real threat to state autonomy in general; internationally, overreaching U.S. courts pose a long-term threat to the regulatory autonomy of other countries. There is no single altogether satisfactory solu-

tion, but there are three areas in which developments are possible.

Market Responses. As long as the law stands as it does, the market will engage in self-help when it can. One exit from the interstate ratchet is to confine business contacts strictly to a single state. The present legal system therefore favors small companies over large ones and single-nation companies over multinationals. But whatever else it may be, smaller is generally not safer, cheaper, or more accountable. It is the large company that can afford comprehensive insurance, that can learn quickly from its national and international experience, and that can exploit economies of scale to offer consumer services and protections that would be unthinkable for the Mom-and-Pop operation. The third world knows this especially well; overbearing as they may sometimes be, the multinationals have proved absolutely essential to third-world development and economic growth. Mahatma Gandhi tried cottage industries for India, but it was high-tech pesticides and the Green Revolution that largely ended starvation on the subcontinent.

Containing the Damage. A second option is to try to confine eccentric regulatory demands to the jurisdictions that choose (whether through their legislatures or their courts) to adopt them. This requires abandoning the old and treasured principle of have-lawsuit-will-travel, or insisting that a state may apply its own laws only to lawsuits that are in its courts because of a solid connection between the dispute and the state. The Supreme Court has recently hinted that it may be receptive to change along these lines.

The easiest place to start might be in federal, not state, courts. In the exercise of their "diversity" jurisdiction, federal courts can displace state courts in deciding disputes involving litigants from different states. Since the Supreme Court's landmark decision in *Erie Railroad v. Tompkins* fifty years ago, diversity jurisdiction has provided only a neutral tribunal; state law has been applied to decide the merits of the dispute. This much is plainly consistent with the Constitution's federalist design. But *which* state's law is to be applied? Under current doctrine, the San Francisco federal district court deciding a suit between a California

plaintiff and a Texas defendant must apply California's own choice-of-law rules to determine the answer.* Yet if California courts are intent on setting regulatory policy for the nation, they will of course also craft their own choice-of-law rules accordingly. Freeing the federal courts to decide for themselves which state's law to apply in diversity cases could strike a subtle blow against state-court overreaching. But it could also prove an administrative nightmare. The independent federal circuit courts have a habit of ignoring each other's pronouncements, and years of frequent intervention by the already overburdened Supreme Court might then prove necessary.

An alternative, perhaps more directly effective but administratively even more daunting, would be to reshape choice-of-law rules in the state courts themselves. There have been two recent (though characteristically backhanded) hints from the Supreme Court that some tightening of loose choice-of-law standards may be forthcoming. Justice Rehnquist's 1984 opinion for the Court in *Hustler* noted that "we find it unnecessary to express an opinion at this time as to whether any arguable unfairness [from New Hampshire's treatment of its long statute of limitation as "procedural"] rises to the level of a [constitutional] violation." A year later, *Shutts* (again written by Rehnquist) adopted a line on choice of law sufficiently firm to alarm Justice Stevens, who consistently favors the longer judicial reach in these matters. "I trust," wrote Stevens in dissent,

that today's decision is no more than a momentary aberration, and that the Court's opinion will not be read as a decision to constitutionalize novel state court developments in the common law whenever a litigant 'most likely' would reach a different result.

Those on and off the Court who are interested in promoting federalism may be trusting precisely the opposite.

Parallel developments are possible in the international arena. Foreign governments (or their corporate arms) unwilling to serve as defendants in U.S. courts when invited to do so could be made equally unwelcome as plaintiffs. And if other nations insist (as they reasonably may) that foreign subsidiaries of U.S. corporations are outside the reach of U.S. antitrust, securities, affirmative action, foreign bribery,

health, safety, environmental, and other regulatory policies, they could also be required to abandon theories of "multinational enterprise liability," when U.S. and foreign interests are reversed. Likewise, if the act-of-state doctrine

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is to be a complete shield for foreign public or private defendants, "omissions of state"—what Indian regulators chose *not* to regulate before Bhopal—might be given equal weight. If direct, before-the-fact interference by the U.S. government in a foreign citizen's or corporation's conduct would impermissibly offend the sovereignty of some other nation, then after-the-fact adjudications of disputes arising out of that conduct do not seem to belong in U.S. courts either. The Supreme Court's forthcoming review of *Zenith* may help to shed some light on what new directions, if any, it may plan to take in this general area.

Fighting Back. A final option within the United States, is to cure the problem of locally idiosyncratic regulatory demands by squashing them altogether, at least in areas of commerce that generally involve national or multistate markets. The domestic choice-of-law ratchet will cease to operate if there is only one law to choose. Thus, the proposal of Senator Robert Kasten (Republican, Wisconsin) for national product liability legislation, like the proposed national program for compensating victims of vaccine-related injuries, would curb two litigation industries in which forum-shopping now runs rampant. This may explain why both initiatives have been quietly supported by an administration otherwise committed to greater state autonomy.

If we are to stop short of new national legislation, we could at least require state laws to

*This position was established in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941).

defer more than they now do to federal regulatory pronouncements. This would put a quick end to a variety of recent judicial idiocies, such as *Chevron v. Ferebee*, in which Chevron was held liable under Maryland law for "mislabeling" a can of paraquat that was in fact labeled in exact accord with mandatory EPA requirements, or *Johnson v. American Cyanamid Co.*, in which an Idaho jury rejected the federal Food and Drug Administration's conclusion that the Sabin polio vaccine is to be preferred over the Salk alternative. It is important to repeat that even if most other jurisdictions may have less idiosyncratic views about herbicides or vaccines, the impact of decisions like *Chevron* and *Johnson* cannot be confined to the jurisdictions in which they are rendered, for the simple reason that plaintiffs will travel and large defendants must follow.

The idea of curing the problems of federalism with the sharp knife of nationally binding uniformity may seem less familiar and more radical than some of the other possible solutions, but in fact it has a long pedigree. In 1824 John Marshall first expounded on the negative implications of the Constitution's commerce clause. That clause, which explicitly grants the federal government the power to regulate interstate commerce, implicitly forbids the states to place unreasonable burdens on interstate activities. The Supreme Court has since relied on this to strike down a state's exorbitant or idiosyncratic taxes or administrative regulation. It is thus unconstitutional for a state to impose peculiar regulatory demands regarding mudflaps on trucks or maximum length on trains, or to levy a sales tax on an out-of-state seller who merely sends his goods to in-state buyers. There are the seeds of an idea here that could be encouraged to grow. National legislation would help; so would the simple recognition that what a state cannot constitutionally accomplish through its agencies, it should not be permitted to accomplish through its courts.

Sovereign Right and Responsibility

Regulatory diversity among states and nations is both consistent with federalism and sovereign autonomy and desirable to foster regulatory (or deregulatory) experiment and development. But if an independent and sovereign gov-

ernment has the privilege to do what it likes in shaping its own regulations and liability rules, it also has two corollary responsibilities. The first is to accept, for itself and its own citizens, the domestic consequences of these rules. The second is to avoid imposing its own idiosyncratic rules on defendants whose principal operations are centered elsewhere.

Courts of convenience as they presently operate undermine both of these responsibilities. On the one hand, they permit governments to evade the consequences of their own administrative regulatory decisions when things go wrong. On the other hand, they project local regulatory policies and liability rules into other jurisdictions where they do not belong. And it takes only a very small number of overreaching courts to shatter a federal or international regulatory system founded on autonomy and mutual restraint.

There is no simple, "more law" solution to the court-of-convenience problem, as the Bhopal litigation abundantly demonstrates. Two or more jurisdictions will almost invariably have at least arguable claim that each is the proper forum in which to resolve a dispute of any magnitude and complexity. Though attempts have been made, no one has yet found a statutory choice-of-law prescription that is both specific enough to constrain judges whose natural inclination is to overreach and at the same time comprehensive enough to cover the tremendous variety of interstate and international disputes that can arise. The only real cure for the problem lies in cultivating a much greater judicial sense of self-restraint. A judge honors neither himself nor the legal process when he throws open the house doors to any and all members of the international brotherhood of trial lawyers. Indeed, in another profession, conduct of this kind has been a source of ill-repute. ■

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