For our colloquium, Professor Vitta has chosen the perfect setting: the city of Bologna, cradle of the civil law and of the conflict of laws. Europeans and Americans alike owe a debt to the labors of the glossators and commentators who in this very spot invented our science. Although our nation did not exist when Irnerius, Bartolus and all the other great doctors taught here, we too can trace our conflicts law back to the simple answer Aldricus once gave to a very difficult question.¹ Let me remind you that our federal system strikingly resembles Upper Italy in the Middle Ages: against the backdrop of a supranational common law our states, like the medieval Italian cities, have developed their own legislation and case law. Thus, American soil has provided the same fertile ground for conflicts, a mixture of diversity and universality, that had once produced the mos italicus. Moreover, there was as little in the common law of England as in the Justinian Code to resolve the multistate problems that first appeared in Italy and much later in the New World. Fortunately, the Americans did not have to invent conflicts law from scratch. Soon after the birth of our Republic a great American scholar, teacher and judge synthesized the European learning and added his own in a treatise² that impressed even the great Savigny.³ What Story planted in America’s fertile federalist soil quickly took root and has since yielded an indigenous crop of conflicts law and literature. Might it be possible to retransplant to Europe our mutations of European ideas? Or has our conflicts flora become too exotic for European cultivation?

The European panelists have given us an ambivalent answer to the question whether American conflicts learning can be exported to their shores. On the one hand, they tell us that there has been no “Americanization” of European conflicts law. But in the same

² Story, Commentaries on the Conflict of Laws (1834).
³ See 8 von Savigny, System des heutigen römischen Rechts iv (1849).
breath they give us many examples of European conflicts developments that look distinctly American. For example, analogues to the Second Restatement's 4 "most significant relationship" formula are found in the conflicts statute of Austria, 5 the Swiss draft, 6 and in a European draft convention. 7 Also, Common Market nations have emulated American practice by combining what we would call full faith and credit with a long-arm statute to produce the Brussels Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments. 8

Family law, too, affords good illustrations of European conflicts ideas that parallel our own. A landmark opinion by the German Constitutional Court uses language one would expect to find in American cases. 9 Our "homing trend" has found international recognition in two Hague Conventions, 1 0 and Professor Siehr's discussion indicates that the better-law idea is no stranger to European courts and writers. 11 And, in the never-ending European discussion about "norms of immediate application" 12 we find arguments that echo Currie's thinking.

Despite such striking parallels, the European panelists deny the Americanization of their conflicts law. In this, I believe, they are correct, because when it comes to conflicts theories, we have not been particularly inventive. Samuel Livermore, the first American to write a conflicts treatise, 13 borrowed from the statustists. 14

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professed to follow Huber's teachings.15 Joseph Beale cribbed the vested rights theory from Dicey,17 who had apparently "imbibed [it] from Huber through Holland's Jurisprudence."18 Our modern writers as well lack originality. Ehrenzweig's indebtedness to Waechter has been noted,19 and Leflar's discussion of result-selectivity recalls Aldricus.20 The author whose views are now most widely accepted by American judges and writers is the late Brainerd Currie. He was original only in the sense that he reinvented the wheel. If he had read Beale's translation of Bartolus21 he would have appreciated the venerable age of the idea that choice-of-law problems can be resolved by the "ordinary processes of construction and interpretation."22 A further glance at Beale's translation of a passage by Coquille23 would have revealed that the attempt to divine the spatial reach of rules from their underlying policies is several centuries old. In fact, Currie sensed that his ideas were not novel, and he even credited a statutist with having preconceived them,24 but Currie's lack of comparative and historical perspective made him pick the wrong one.25 Similarly, as several European panelists have pointed out, the "most significant relationship" formula can be traced to Savigny,26 though we should recall that Savigny called his notion of the "seat" of legal relationships a merely "for-

mal" principle, by which he presumably meant that it can not resolve specific cases but merely restates the problem. That author would hardly have condoned such phrases as "closest connection" in a statute or a treaty, even if he had favored codification, which he did not.

The parallels between American and European thought, whether the results of creative borrowing or of independent reinvention, are not surprising. There may be such a thing as New York, Scottish, French or European conflicts law, but the basic ideas are not peculiar to any country or continent. If any territory has a valid claim to be the fountainhead of conflicts jurisprudence, it is the city of Bologna, where these ideas were first conceived. As Nadelmann reminds us, "everything worthy of trying has been tried before, under the same or other labels." The reason for such universal unoriginality in the conflict of laws should be obvious. By now everyone agrees that we should not simply disregard the choice-of-law problem, as the early glossators and common law judges did. Then how do we tackle it? So far only three basic methods for dealing with multistate problems have been advanced:

(1) the attribution of a spatial reach to local rules;
(2) the localization of legal relationships;
(3) the search for substantive solutions.

These methods have long coexisted. The last one is the oldest: Aldricus' answer to the question which law should govern a dispute between residents of different provinces was to apply the better rule. That is clearly a substantive solution, for if it were applied consistently it would generate a body of rules of certified superiority to govern multistate transactions. Aldricus would have judges do what the Roman praetor peregrinus did: to develop a ius gentium superior to the ius civile. There are other historical precedents for the substantive law approach, such as the lex mercatoria, which served Europe as a supranational commercial law, and the practice of English admiralty courts, which pieced together an international

27. 8 von Savigny, supra n. 3, at 210, 211.
30. See Neumeyer, supra n. 1 at 1-21.
32. "Aldricus, however, can claim the fame to have founded the scientific doctrine of private international law." Id. at 66-67.
33. "Respondeo eam quae potior et utilior videtur. Debet enim iudicare secundum quod melius ei visum fuerit." Id. at 67.
maritime law from such disparate sources as the mythical law of Rhodes, the usatges of Barcelona and the rôles d'Oléron.

The idea that the spatial reach of law could be determined by interpretation, either of each particular rule or of groups of rules, was implicit in the statutists' endeavors. Of course, opinions varied on how to perform this remarkable feat. Thus Bartolus relied on the wording of the English rule of primogeniture\(^{34}\) to divine its territorial purport, an approach that has earned him ridicule ever since. Guy Coquille, writing in the 16th century, looked instead to the "presumed and apparent purpose of those who have created the statute or custom,"\(^{35}\) which comes close to Currie's precepts. Even Savigny still viewed the conflicts problem as one of determining the territorial dimensions of substantive rules,\(^{36}\) and both the French and the German Civil Codes ascribed to a "unilateralist" philosophy.

However, for well over a century unilateralism has been in decline and most European conflicts scholars follow a "multilateralist" approach, which is usually identified with Savigny's teachings.\(^{37}\) But multilateralism also has American roots. Samuel Livermore, whom Savigny does not cite, could claim priority for viewing the conflict of laws as a discipline founded on a "sense of mutual utility"\(^{38}\) of sovereign nations that form the civilized world, "one great society composed of so many families, between whom it is necessary to maintain peace and friendly intercourse."\(^{39}\) This was written 21 years before Savigny's famous statement about the "international legal community of nations that deal with each other."\(^{40}\) Story did not attribute a "seat" to legal relationships, but he classified conflicts problems in the same way as Savigny, i.e., according to broad legal categories, each of which called for an appropriate connecting factor. Thus the American jurist implicitly posed the same question as his German successor, namely: what law governs each legal relationship? Arguably, the European tradition is therefore an American tradition, as the great Martin Wolff suggested when he called

\(^{34}\) See Bartolus, supra n. 21 at 45-46.

\(^{35}\) Id. at 1.

\(^{36}\) See Audit, supra n. 12 at 590-92.

\(^{37}\) Savigny, supra n. 3 at 2. His volume on private international law bears the title "Control of Legal Rules over Legal Relationships." Id. at 1. The two chapters it contains are entitled "Territorial Limits of the Control of Legal Rules Over Legal Relationships," id. at 8, and "Temporal Limitations of the Control of Legal Rules over Legal Relationships," id. at 368.

\(^{38}\) Savigny believed that approaching conflicts problems by ascertaining the reach of rules would yield the same results as localizing legal relationships. See id. at 2-3. The difference between these two approaches is discussed by Neuhaus, Die Grundbegriffe des Internationalen Privatrechts 30-32 (2d ed. 1976).

\(^{39}\) Id. at 30.

\(^{40}\) See id. at 128.
Story the "secret teacher of the world." 41

Whoever deserves the credit for inventing multilateralism, that school was highly successful. Seemingly, its victory over the unilateralist statutist school was decisive and complete. Savigny's teachings proved sufficiently powerful even to prevail over statutes. 42 But there have always been rebels, such as Niboyet in France and Quadri in Italy, who questioned the communis opinio doctorum. And lately, as a Swiss author has observed, "the statutist theories are experiencing a surprising renaissance." 43 In fact, in Savigny's home country the Constitutional Court not long ago applied a unilateral approach to curb the excesses of exaggerated multilateralism. 44

II

The current mos Americanus favors the unilateralist method. Most courts purport to follow interest analysis; and interest analysts ponder, as the statutists did, the territorial reach of rules. Yet, at the same time, our courts harken back to Savigny whenever they cite the Second Restatement and talk about the "most significant relationship." The results they reach, however, tend to accord with Aldricus' prescription. In other words, our judicial opinions are internally inconsistent, because the various approaches they use simply do not jibe.

But there is method in this madness. Most cases in which American courts have applied the new learning were tort actions that presented a stereotyped pattern: the tortfeasor introduces a defense imported from another jurisdiction, usually a foreign guest statute or a statutory limitation on recovery. Counsel for the victim then presents the court with a number of reasons for not applying that foreign monstrosity. It is "hardly surprising that the great majority of these decisions resulted in the application of a law that was favorable to the plaintiff." 45 This, of course, was the pattern underlying such landmark cases as Kilberg v. Northeast Airlines 46 and Babcock v. Jackson. 47 In Kilberg the New York Court of Appeals still purported to apply the lex loci delicti. However, it refused to

honor the Massachusetts limitation on wrongful death recovery whose bite it could avoid by simply invoking the old-fashioned escape device of public policy. In Babcock, however, the court scuttled the rigid conflicts rule altogether and instead embraced all of the "modern" theories it could find to avoid applying the Ontario guest statute.

Ever since Babcock, eclecticism has reigned supreme. As Leflar observes:

Most of the current cases follow a pattern of multiple citation, seldom relying solely upon any single modern choice-of-law theory, but combining two or more of the theories to produce results which, interestingly, can be sustained under any or nearly all of the new non-mechanical approaches to conflicts law.

* * *

[J]udicial opinions tend to speak simply of the "new" law of choice of law as distinguished from the "old," and to conclude that results arrived at can be supported by citation to the work of just about any of the conflict-of-laws writers who have proposed new ways to solve the old problems.48

This tendency to lump incompatible approaches may explain why foreign observers are "puzzled and amazed" by our modern conflicts law.49 On the other hand, not all Europeans have been purists. Thus, Bartolus already advocated multilateral rules of the type favored by Savigny.50 Conversely, Savigny recognized the existence of "statutes of a strictly positive, mandatory nature"51 that did not fit his multilateral scheme. These he considered exceptional, without explaining what the demarcation between rule and exception might be. Instead, he left the respective provinces of multilateral rules and unilateral approaches to such unhelpful guides as legislative intent and the nature of particular statutes.52 Thus in Savigny's teachings as well the two managed to co-exist. If the current European discussion about "norms of immediate application" and other forms of unilateralism53 is any indication, matters are no clearer now than they were before.

However, neither are they as simple as learned European com-

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49. Vitta, supra n. 26 at 2.
50. Such as the lex loci contractus, the lex loci solutionis, the lex rei sitae and the locus regit actum rules. See Bartolus, supra n. 21 at 18-20, 27, 29, 35-38, 42-43.
51. 8 von Savigny, supra n. 3 at 33.
52. Id. at 34-35.
mentary suggests. Most authors seem to believe that there are but two contending doctrines at issue, namely unilateralism and multilateralism. That is clearly false. To be sure, unlike Bartolus, scholars nowadays avoid such value judgments as characterizing laws as "favorable" or "burdensome." Instead, they view the choice-of-law problem as a search for spheres of "legislative jurisdiction," rather than as a quest for functional solutions to multistate problems. In other words, the emphasis is on method, not on results; they believe the conflict of laws to exist in a rarefied atmosphere of "conflicts justice," far removed from the concerns of ordinary mortals.

Yet, even during the heyday of legal positivism the substantive law approach did persist in various manifestations. One of these is the notion of party autonomy, i.e., the idea that the parties should be free to stipulate the law that governs their transaction. In several areas, most notably in contract choice of law, the principle that people rather than abstract rules should designate the applicable law has withstood countless academic attacks. Similarly, prorogation and arbitration clauses afford astute draftsmen the means necessary to cope with conflicting laws that threaten the stability of multistate transactions. Thus, by permitting the parties to designate the applicable law and the forum, courts and legislatures have substituted a functional solution for one geared to sovereignty and metaphysics.

Result-orientation can also take the form of condoning forum shopping and of liberally recognizing foreign judgments. Thus in the United States expanding notions of jurisdiction have provided plaintiffs with easy access to a plenitude of fora. Take, for example, tort cases. Combined with the all-pervasive homing trend in choice of law, permissive jurisdictional rules enable plaintiffs to sue and to win in plaintiff-oriented states. In other words, this combination achieves the same effect as an alternative reference rule that favors tort victims. But these are, of course, not the only ways in which the conflict of laws can be used to implement substantive policies. Classical conflicts concepts as well permit judges to reach desirable results. It has long been recognized that public policy, renvoi, characterization and the incidental question can be manipulated to afford relief from substandard laws.

Why then does our conflicts law seem so strange to European observers? Like us, they should be accustomed to judicial eclecticism and the coexistence of divergent scholarly opinions. The following reasons may explain their puzzlement: First, our conflicts revolution happened in tort law, while in Europe the pressures for

54. See Bartolus, supra n. 21 at 32.
55. Ehrenzweig had fathomed this parallelism even before the "conflicts revolution" broke loose. See Ehrenzweig, supra n. 42 at 597.
change are felt primarily in the field of domestic relations. Second, the sheer bulk of reported American decisions, along with an unprecedented deluge of conflicts literature, is overwhelming. Third, many of our American conflicts writers choose to publish in a prolix and incoherent cant. Fourth, Europeans are disturbed about the nonchalance with which most American courts and legal writers seem to discard all rules to engage in free-style analysis. Finally, the speed of the transition from rigid conservatism to apparent anarchism may come as a shock to the outside observer.

III

It is understandable if some European scholars, bewildered by the seemingly chaotic American conflicts scene, adduce a number of assumptions in their effort to explain the *mos Americanus*. These assumptions deserve comment.

First, one frequently encounters the supposition that the role of the judiciary is somehow different in the United States. Of course there are variations, notably in the status of judges, and these are bound to affect the law. However, it is easy to overrate them. As the European panelists concede, the view that courts are mere mouth-pieces of the legislature no longer prevails in Europe. Yet some would claim that European judges do not enjoy the same measure of freedom as their American brethren. In my opinion such a broad statement, if not erroneous, is at least misleading.

European courts are hardly less creative than their American counterparts. For example, in France a revolution that cost quite a few judicial heads lent a certain poignancy to the question of the proper role of courts. And yet, all of French administrative law, which has become a model for the world, is judge-made. Of course, the *droit administratif* is case law out of necessity for there was no statute other than that which granted the *Conseil d'État* the power to adjudicate public law controversies. But even in civil matters the *Cour de Cassation* has liberally made new law, the French Civil Code notwithstanding. Two striking examples are the judicial creation, contra legem, of third-party beneficiary agreements and the *de facto* strict liability for accidents caused by "a thing." As regards our discipline, the court has converted the Code's unilateral


provisions into multilateral choice-of-law rules, developing an “abundant and constructive” case law which is the true source of French private international law. The same is largely true of West Germany, even though the German Civil Code is much younger and more modern than the French.

A comparison of the handiwork of the Cour de Cassation and the Bundesgerichtshof with, for instance, the Italian statutory provisions suggests that the judiciary is at least as capable of making conflicts law as the legislature. In fact, the Italian legislative deviation from the proper law approach followed by other European countries is one reason why it may be necessary to correct that error by codifying European conflicts law through a contracts convention.

These observations should suffice to cast doubt on the oft-heard observation that European judges cannot, or should not, assume a legislative role. But let me add that not all courts in the United States have been equally innovative and imaginative in dealing with conflicts issues. Even American judges tend to be conservative, and law is, after all, a conservative business. It takes time to accept new ideas and even more time to implement them. New departures are not simply a matter of one judge’s subjective evaluation. Even in a court of last resort, freedom is hardly unfettered. The innovator must be able to persuade a majority to sign his opinion, for without their consent it can never become law. Only if there is a pressing need to correct injustices do novel ideas stand a chance of judicial acceptance.

Moreover, it is doubtful whether European or American courts are more to blame, if blame must lie, for overstepping the bounds of judicial self-restraint. Unlike in Europe, in the United States judges have not been as bold as to substitute their judgment for that of the legislature by converting unilateral statutory rules into multilateral ones. Also, European critics might do well to keep in mind, though they might think it paradoxical, that the teachings of Currie, our arch-revolutionary, are not premised on the freedom of judges but

59. Loussouarn & Bourel, supra n. 53 at 100.
61. Loussouarn & Bourel, supra n. 53 at 23.
62. See Ehrenzweig, supra n. 42 at 312; Kegel, supra n. 42 at 97.
63. The principal Italian conflicts rules are contained in arts. 17-31 of the Preliminary Provisions of the 1942 Italian Civil Code, and arts. 5-14 of the Preliminary Provision of the Italian Code of Navigation.
on their subservience to the legislature.66 Thus, strange as it may seem to those who deny the judiciary's creative role in shaping the law of multistate transactions, they share Currie's narrow, positivistic view of the division of powers.

A second assumption, closely related to that about judicial freedom, is that about an attitudinal difference toward "legal certainty." But it is of course true on either side of the Atlantic Ocean that proposals for reform, whatever their nature, inevitably run into the pat argument that they will produce chaos. Certainty and predictability do play an important role in the U.S. as well, as shown by our principle of stare decisis. Outside the area of torts these values also infuse American conflicts law, as Professor Reese has pointed out.67 However, justice and consistency can conflict, and it may be necessary to sacrifice one for the other. As Roscoe Pound observed, "law must be stable, and yet it cannot stand still."68 Is that not also true in Europe?69 Are we not merely talking about matters of degree?

Professor Vitta, after insisting that in Europe legal certainty is held in high esteem,70 assures us that European conflicts law is flexible.71 Here I spot an inconsistency. Certainty requires rigid rules, and flexibility is the antithesis of rigidity. Or should it be possible to practice promiscuous chastity? And how do things look in practice? Having read my share of European conflicts cases, I have found little certainty and much that strikes me as manipulation. Of course, the sophistication with which judges handle the "General Part" of their conflicts law will vary. But some of them seem quite capable of adroitly wielding the scalpels of renvoi, characterization and the incidental question, or the meat-ax of public policy, to reach appropriate results in multistate cases. No doubt even European counsel, if they are sufficiently astute, should be able to persuade

66. It is simply not the business of the courts to substitute their judgment for that of the legislature.

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[A]ssessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy. It is a function that the courts cannot perform effectively, for they lack the necessary resources. . . . This is a job for a legislative committee. . . .

* * *

[C]hoice between the competing interests of co-ordinate states is a political function of a high order, which ought not, in a democracy, to be committed to the judiciary. . . .


67. Reese, supra n. 45, passim.
68. Pound, Interpretations of Legal History 1 (1967).
69. See Siehr, supra n. 11 at 68.
70. Vitta, supra n. 26 at 3.
71. Id. at 15.
their courts that the particular case does not fit the general pattern but calls for a tailormade lawsuit. In addition, European lawmakers increasingly favor open-ended formulations that call for ad hoc decisions. It is obviously a delusion to believe that the words "most closely connected" as used by Europeans\textsuperscript{72} have any more meaning than our Second Restatement's "most significant relationship." But those committed to legal certainty as the ultimate value in the law of conflicts are prone to succumb to this delusion. For instance, the draftsmen of the new Common Market draft convention on contract choice of law, whose precepts my colleague Lowenstein calls "Delphic,"\textsuperscript{73} boldly assert that their work product will increase legal certainty and inhibit forum shopping.\textsuperscript{74}

And what about forum shopping? This is, of course, the ultimate bugaboo those bent on legal certainty will conjure up to make their point. But if there is reason for concern, why is there so little effort to attack this practice at its roots? A number of European jurisdictional rules openly invite forum shopping. Thus § 23 of the West German Code of Civil Procedure empowers courts to assert jurisdiction over any defendant who has, say, forgotten his underwear in a German hotel.\textsuperscript{75} Art. 14 of the French Civil Code permits Frenchmen to sue anyone for anything in the French courts. These jurisdictional bases are blatantly unfair, as art. 3 of the Brussels Convention implicitly acknowledges by outlawing their use against Common Market domiciliaries. If there were any real concern about forum shopping, one would expect a call for national legislation to curtail such exorbitant jurisdictional assertions. If their total abolition should not be feasible, judges could at least be authorized to resist the forum shopper's imposition by exercising a discretionary power of dismissal. But the doctrine of forum non conviens, a standard ingredient of American law, has made little headway in Europe.

So far I have assumed that forum shopping is inevitably pernicious, an assumption that pervades European conflicts literature. But what is worse, from the perspective of their clients, than counsel who lack the imagination to ponder the advantages of wisely selecting among available fora? As Professor Siehr suggests,\textsuperscript{76} forum shopping may be beneficial because it allows an escape from substandard law. Clearly, there may be good reasons for offering plaintiffs a choice of fora. You may recall the action brought by Dutch

\textsuperscript{72} See n. 5-7 supra and accompanying text.

\textsuperscript{73} Lowenstein, supra n. 7 at 107.

\textsuperscript{74} See Giuliano & Lagarde, supra n. 65 at 5.

\textsuperscript{75} Cf. Siegel, "Case & Comment, In Vagrant Verse," 76 Case & Com. at 56, 62-63 (September-October 1971) (Austrian law).

\textsuperscript{76} Siehr, supra n. 11 at 51.
farmers against French mining interests that polluted the Rhine river and damaged seedbeds in Holland. The Court of Justice of the European Communities wrote an opinion that, in effect, condoned forum shopping when it stressed the desirability of keeping alternative fora open to tort victims.\textsuperscript{77} A similar endorsement of plaintiff's choice inures in the European Judgment Convention's provisions on support claimants,\textsuperscript{78} consumers\textsuperscript{79} and policyholders.\textsuperscript{80}

Thus, even in Europe, forum shopping is not universally condemned. Let me add, however, that in practice choice-of-law considerations play but a minor role in counsel's selection of a forum. Attorneys usually serve their own convenience by litigating in their home territory. Some counsel, and their more sophisticated clients, may ponder the strategical advantages of different legal systems. But their choice of forum is generally influenced by such procedural considerations as cost, the quality of the trial bench and bar, the availability of evidence and of discovery devices, as well as the general legal climate of the particular country.\textsuperscript{81} Thus, preoccupation with the prevention of forum shopping as the single most important aim of conflicts law appears excessive.

IV

Let me now turn to two real differences between American and European law that may, to some extent, help explain the \textit{mos Americanus}.

Most conflicts problems that arise in American practice are interstate rather than international. Unlike European countries our states share a common language and legal heritage, and they are part of a federal system. In Europe, however, nationalism has destroyed the foundations of a Continental European legal culture that were laid here in upper Italy, and the Latin language has, of course, lost its supremacy long ago.

Thus, it is true that we have a supranational law and language, and you do not. Nevertheless, one may question whether the real

\textsuperscript{78} Brussels Convention art. 5(2).
\textsuperscript{79} Brussels Convention arts. 8-12.
\textsuperscript{80} Brussels Convention arts. 14-15.
\textsuperscript{81} It is likely that the true causes of forum shopping are to be found elsewhere than in the divergencies of the rules of private international law. The plaintiff usually shops in the forum with which he is most familiar or in which he gains the greatest procedural advantage or puts the defendant to the greatest procedural disadvantage.

differences between the private law systems of Europe are as great as many believe they are. After clearing away the conceptual underbrush, one is apt to find remarkably similar rules in the various European laws. Of course, there are splits of opinion, but that is equally true within the United States. In fact, as a noted comparatist has observed, "comparative studies concerning a controversial point, on which there is a division of authority, often show that there are both civil law and common law jurisdictions in each camp."82 Still, arguably at least, the basic unity and cohesion of American law allows a greater tolerance toward divergences in conflict rules and toward the homing trend.

There is yet another fundamental difference. Most European countries, following the example of the French Code Civil and Mancini's teachings, have strayed from Savigny's precepts to embrace the nationality principle.83 Clearly, citizenship is a legitimate connecting factor, as the Second Restatement recognizes,84 though Beale said that it is "entirely unnecessary, in an American book upon the Conflict of Laws, to consider nationality at all."85 After all, the United States has long used this nexus for so onerous a purpose as taxation.

However, to rely on citizenship rather than on domicile poses several problems. The nationality principle obviously does not work well if applied to Americans, Australians, or even Scotsmen. Moreover, it creates difficulties for stateless persons and those with more than one nationality. It also invites discrimination, in particular as applied to domestic relations cases that involve citizens of different countries. Finally, the nationality principle may not fit the needs of mobile societies. Nowadays, millions of aliens from every part of the globe live and work in Europe. Whatever one might say about attempts by emigration countries to retain some hold over their citizens abroad,86 nations that attract large numbers of immigrants clearly court trouble if they disregard the very real nexus that group of their population has with their new homeland.87 Stubborn insistence on nationality as the only legal tie that matters is bound to swamp their courts with foreign-law issues. Since it is more difficult, more expensive and more time-consuming to apply foreign law than local rules, immigrants are bound to receive a lesser, costlier and slower type of justice.88

82. Schlesinger, Comparative Law 300 n. 40 (1980).
84. See Restatement (Second) of Conflict of Laws § 31 and Comments b, c (1971).
85. 1 Beale, A Treatise on the Conflict of Laws 7 (1935).
86. 1 Rabel, supra n. 83 at 165.
87. Id. at 163-64.
West Germany affords a good example to illustrate the defects of the nationality principle. In that country, it is largely the socially and economically disadvantaged *Gastarbeiter* who have to bear its brunt. Matters are particularly bad, because the Federal Republic's highest court espouses the noble idea that foreign law must be ascertained *ex officio*, an idea which, in practice, founders on the simple fact that few judges are comparatists. Accordingly, they farm out cases involving foreign law issues to learned institutes where experts do what the judges should be doing. Thus the parties not only have to bear the added cost and delay such a procedure entails, but they are deprived of the elementary benefit of having their cases decided by a court of law.

It is hardly accidental that, as Professor Siehr has shown us, the nationality principle is receding in the Federal Republic, a country with more than four million aliens. Indeed, that principle was responsible for the German Constitutional Court's intervention in the field of conflicts. To conform West German conflicts law to the tenets of the Federal Republic's Basic Law, no less than five legislative proposals have since been elaborated. These proposals range from the simple substitution of the domiciliary for the nationality principle to fairly complex alternative reference rules. Thus in West Germany, a conflicts revolution of sorts is brewing, although there the revolutionaries stalk the legislative chambers rather than the courtrooms. As this example shows, something akin to our turmoil is bound to happen whenever old principles clash with new realities.

V

Thus there are good reasons for questioning whether American and European conflicts law and reality are as far apart as is often assumed. It seems to me that the principal differences lie in the realm of doctrine. But there, surprisingly, we have become quite European. As Professor Siehr notes, theory has become an American prerogative, which may be more bane than boon. Much of the

89. Siehr, supra n. 11 at 47.
90. See Juenger, supra n. 44 at 290-91.
92. See Neuhaus & Kropholler, supra n. 91.
93. See Doppelf & Siehr, supra n. 91.
94. Siehr, supra n. 11 at 71. See also Hanotiau, supra n. 25 at 98.
writing in our law reviews is quite abstruse, and the many mystagogic theories there expounded appeal more to the True Believer than the lawyer. Nowadays it is American scholars who attempt to deduce the resolution of multistate controversies from the "nature of the thing." When it comes to conflicts law, it may therefore no longer be true to say, as Professor Lowenfeld does, that "American lawyers do not think like European lawyers."  

The effects of overdosing on dogma are illustrated by the astonishing naiveté with which conflicts authors write, ad nauseam, about such vanishing issues as guest statutes, while neglecting important conflicts problems posed by no-fault plans and corporate transactions. We tend to disregard Leon Green's admonition that

[d]octrine for doctrine's sake may become an obsession with lawyers as it does with preachers and politicians. It feeds on itself; hardens into cliches and blocks the arteries of thought.

Even our Supreme Court has become sufficiently befuddled by conflicting theories to compound the prevailing confusion in the case Professor Lowenfeld discusses. Thus, we Americans are becoming more dogmatic just as you Europeans are taking a more pragmatic stance. In Professor Lando's words, we need more kippers and less caviar.

Still, our scholarship has at least put in issue many firmly held beliefs. American scholars have managed to replace one bad dogma with a number of approaches. Now we have to sort the wheat from the chaff, but that seems preferable to being stuck with plain chaff. If we look at the mushrooming conflicts conventions, statutes and court decisions in Europe, again we find that things there are not all that different. The factual basis for a rapprochement between American and European conflicts law already exists. An unprecedented mobility of persons and transactions has made your Conti-


96. Lowenfeld, supra n. 7 at 102.

97. The choice-of-law experts continue to engage in transcendental meditation over guest statutes. . . while the state no-fault legislators are bulldozing away progressive conflicts innovations. . .


100. Lando, supra n. 26 at 31.
nent, in Professor Siehr's words, as much of a "conflicts paradise" as the United States. Perhaps our experience can help you save it from becoming a conflicts hell.

It is true that the "conflicts revolution" has made ours an untidy law. However, it seems to me that in most of our cases justice was done. If the end is clear but the means are not, fumbling may be the best policy. Now we are in a position to sort out matters and to ask what the aims of conflicts law should be, and how they can best be accomplished. This will require, first and foremost, the critical sifting of legislative, judicial and scholarly materials, from here and from abroad. If we undertake this task critically and open-mindedly we may find that behind the fog of words, concepts and doctrines there are but a few fundamental ideas whose value has already been tested in the laboratory of legal practice.

Both you and we could benefit from looking at each others' experiences, and once we look at what is essential rather than accidental, we should find much common ground. We Americans could profit from your conceptual prowess, your ability to turn thoughts into statutes, your penchant for elegant simplicity. We, in turn, can offer an emporium of hard-won empirical lessons. You Europeans call law a science. Let us then proceed in the spirit of scientific inquiry rather than to keep reciting the mantras learned from wise old masters.

101. Siehr, supra n. 11 at 69.
103. Leflar, supra n. 47 at 10.