THE MARGINAL RELEVANCE OF CHOICE OF LAW THEORY

STEWART E. STERK†

In recent years, the legal academy has seen a renaissance in choice of law theory. After a period of great intellectual ferment during the 1950s and 1960s—when academics substantially reshaped thinking about conflicts—choice of law scholars in the 1970s and early 1980s were largely content to refight old battles, sharpening or fine-tuning arguments here and there. Over the last several years, however, a number of scholars have attempted to reconceptualize choice of law, incorporating currents in legal thinking—law and economics, the jurisprudence of rights, and game theory—that have previously been applied to more substantive areas of law.¹

This new wave of choice of law scholarship, however, has left choice of law theory and practice in its usual state of disarray. Contemporary theorists are no more in agreement regarding choice of law methodology than were their predecessors. Some scholars remain unreconstructed interest analysts,² while others advocate more territorial approaches.³ Some believe rules are essential to

† Mack Professor of Law, Benjamin N. Cardozo School of Law. I would like to thank Lea Brilmayer, David Carlson, Marci Hamilton, Michael Herz, Al Hill, Larry Kramer, Melanie Meyers, Paul Shupack, Barbara Woodhouse, and Charles Yablon for their helpful comments on earlier drafts.

¹ See, e.g., LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 145-230 (1991) (borrowing from economic analysis of law, game theory, and rights theory in developing a workable system of choice of law that furthers the goals that states actually have); Perry Dane, Vested Rights, "Vestedness," and Choice of Law, 96 YALE L.J. 1191, 1242-45 (1987) (developing an offspring of traditional vested rights theory called "vestedness" from basic ideas about the nature of law to serve as a foundation for choice of law); Larry Kramer, Rethinking Choice of Law, 90 COLUM. L. REV. 277, 340 (1990) (arguing that his "canons of construction" for choice of law questions result in a positive-sum game for states); Louise Weinberg, Against Comity, 80 GEO. L.J. 52, 55-58, 80-89 (1991) (discussing Kramer's canons and applying game theory to conflicts).

² See Robert A. Sedler, Continuity, Precedent, and Choice of Law: A Reflective Response to Professor Hill, 38 WAYNE L. REV. 1419, 1426 (1992) (asserting that interest analysis is "the preferred approach to choice of law because it provides functionally sound and fair solutions to the choice of law issues arising in actual cases"); Weinberg, supra note 1, at 73-75 (performing an interest analysis on EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991), and concluding that the "classic interest-analytic prescription is for the interested forum to apply its own law").

³ See BRILMAYER, supra note 1, at 216-21 (proposing a rights-based approach to choice of law problems which incorporates territoriality to protect the parties' rights); Douglas Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 COLUM. L. REV. 249, 318 (1992) (arguing that in
choice of law while others believe that choice of law rules are undesirable. Choice of law theorists differ not only about method but also about the very foundations of choice of law theory. Conventional interest analysts and most contemporary scholars evaluate choice of law rules or methods by reference to the consequences those rules or methods produce. Indeed, some have explicitly labelled their methods "functional" approaches to choice of law. By contrast, some scholars, most notably Lea Brilmayer, question consequentialist thinking and argue that choice of law doctrine should rest on deontological, rights-based premises.

Moreover, as choice of law theorists debate the fundamental premises of choice of law theory, other conflicts scholars complain that choice of law theory has focused on problems far removed from those faced by contemporary courts. Friedrich Juenger, in particular, has lamented that theorists continue to debate the proper approach to guest statutes and wrongful death limitations

choice of law problems, "the territorial allocation of state authority is a fundamental constitutional principle . . . [and] too deeply embedded in our law to require justification ").

4 See Kramer, supra note 1, at 319-38 (proposing five "canons of construction" that reflect compromises states would make in choice of law problems).


6 See Joseph W. Singer, Real Conflicts, 69 B.U. L. REV. 1, 26-33 (1989) (arguing that in order to choose among territorial rules, policy considerations must be taken into account); Weinberg, supra note 1, at 94 ("Rather than abstractions like comity and reciprocity, what the world needs is effective control of spoliation and predation, and administration of law free of local dysfunction and systemic risk."); cf. BRILMAYER, supra note 1, at 191-230; see also Dane, supra note 1, at 1245 (arguing that a "Norm-Based" view of law requires an analysis of substantive legal rights rather than determinations made because of concerns about enforcement or decisions based on the forum in which the action was brought).


8 See BRILMAYER, supra note 1, at 191-230; see also Dane, supra note 1, at 1245 (arguing that a "Norm-Based" view of law requires an analysis of substantive legal rights rather than determinations made because of concerns about enforcement or decisions based on the forum in which the action was brought).

while ignoring products liability and other mass torts, the most pressing of today's conflicts problems.\textsuperscript{10}

Judicial opinions suggest that Juenger is right: modern choice of law scholarship has been singularly unhelpful in a host of important choice of law cases. In the celebrated Agent Orange litigation, the distinguished Judge Jack Weinstein announced that "national consensus law"—an entity foreign to choice of law scholars—would be applied to resolve the knotty choice of law problems involved in assessing liability for injuries to American soldiers and civilians resulting from the use of toxic chemicals in Vietnam.\textsuperscript{11} In other cases, where courts do purport to apply one or another conventional choice of law approach, the result in the case often appears to have dictated the judge's choice of law approach at least as much as the approach itself generated the result. The widespread popularity of the Second Restatement of Conflict of Laws,\textsuperscript{12} perhaps the most malleable of choice of law approaches,\textsuperscript{13} tends to confirm the judgment that choice of law theory exerts at best a marginal influence on choice of law decisions.

Nevertheless, the choice of law picture is not entirely dismal. Widespread approval by courts of party autonomy rules has made it more possible for commercial parties to avoid choice of law confusion.\textsuperscript{14} Thus, as a practical matter, the failure of choice of law theory has been most pronounced in tort cases and in contract cases in which the contract does not reveal the parties' expectations about choice of law.\textsuperscript{15}

My thesis is simple. Choice of law is in disarray because conflicts scholars have not made the case that choice of law theory

\textsuperscript{10} See Juenger, \textit{supra} note 9, at 107-08.


\textsuperscript{12} \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} (1971); \textit{see also infra} note 121.

\textsuperscript{13} For instance, the Second Restatement provides that "[t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles state in § 6." \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} § 145(1) (1971). The Second Restatement then lists four contacts to be taken into account in applying the principles of § 6, and instructs that "[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue." \textit{Id}. § 145(2). Section six, in turn, lists seven factors "relevant to the choice of the applicable rule." \textit{Id}. § 6.

\textsuperscript{14} \textit{See infra} text accompanying notes 67-72.

\textsuperscript{15} \textit{See infra} text accompanying notes 80-213.
should matter in deciding a wide variety of cases. They have not persuaded judges that judges should take care to make "correct" choice of law decisions. As a result, courts often worry less about choice of law than about the other substantive implications of the decisions they reach.\textsuperscript{16}

This is not a correctable problem. Conflict scholars have failed to persuade courts about the importance of choice of law not because scholars are insufficiently persuasive or judges are insufficiently receptive, but because in many cases reaching the "correct" choice of law result is and should be less important to judges than other substantive law considerations. In these cases, subordinating choice of law concerns generates only one identifiable social cost—the cost of uncertainty in litigation. That loss, however, would be avoidable only if virtually all courts consistently and uniformly embraced the same choice of law approach—a possibility so unlikely that in resolving these cases courts understandably and justifiably pay little more than lip service to choice of law theory.

After Section I’s brief survey of the development of choice of law theory, Section II examines the limited impact choice of law theory has had on decided cases. Section III explores the reasons for the failure of choice of law theory, and explains why no comprehensive choice of law theory, whether consequentialist or rights-based, will or should supersede the judicial inclination to focus on substantive results in the cases before them.

\section{The Development of Choice of Law Theory}

\subsection{From Beale to Currie}

Joseph Beale, the reporter for the original Restatement of Conflict of Laws,\textsuperscript{17} shaped choice of law theory for much of the first half of the twentieth century. His influence was due not so much to widespread acceptance of his ideas but rather to the use of his work as a focal point for the realist critique of choice of law orthodoxy.

In Beale's view, the common law "consisted of a system of thought based upon principles which covered every possible

\textsuperscript{16} See infra text accompanying notes 170-95.

\textsuperscript{17} RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).
occurrence. Every human act was either permitted or forbidden; every act either changed or left unchanged existing rights.\(^\text{18}\) Given Beale's view of common law, it followed that "the chief task of the Conflict of Laws [is] to determine the place where a right arose and the law that created it."\(^\text{19}\) Although Beale saw a role for instrumentalism in defining rights,\(^\text{20}\) instrumentalism had no place in Beale's choice of law scheme: courts were to find the rights that had "vested" upon the occurrence of specified events and to enforce those vested rights.\(^\text{21}\)

Beale's theories came under almost immediate attack from the followers of the emerging legal realist movement,\(^\text{22}\) but it was not until Brainerd Currie developed his brand of governmental interest analysis that Beale's "vested rights" theory had a serious choice of law competitor. While other scholars developed complex multifactored analyses of choice of law problems,\(^\text{23}\) Currie's method, like Beale's, generated definitive answers to choice of law questions, a feature that contributed in large measure to the popularity of governmental interest analysis.\(^\text{24}\)


\(^{19}\) Id. at 64.

\(^{20}\) For instance, Beale wrote that "[e]ach generation of men has its own mental as well as physical ways, its own solution of the problems of life, its own criteria of justice and social need; and these mental characteristics necessarily color its understanding of its legal system." Id. at 49.

\(^{21}\) Lea Brilmayer has observed that Beale's vested rights approach lost its intellectual foundation when the Supreme Court decided Erie R.R. v. Tompkins, 304 U.S. 64 (1938). As Brilmayer points out, the First Restatement's vested rights approach required judges to determine when a tort claim or a contract claim "vested." See BRILMAYER, supra note 1, at 36. States might, of course, differ on the elements necessary to establish a tort or contract claim. How then was a judge to decide where rights had vested? By looking to the general common law, which in Beale's view had an existence independent of the laws of the several states. See BEALE, supra note 18, at 29-32. The Supreme Court, however, discredited that view in Erie. See id. at 79 ("The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State . . . ").

\(^{22}\) See, e.g., David F. Cavers, A Critique of the Choice-of-Law Problem, 47 Harv. L. Rev. 173, 192-93 (1933) (arguing for a results-oriented rather than a rights-based test); Walter W. Cook, The Logical and Legal Bases of the Conflict of Laws, 33 Yale L.J. 457, 484 (1924) (arguing that the law of a given state may only affect the relation between litigants and cannot itself be enforced beyond its boundaries).

\(^{23}\) Professors Elliot Cheatham and Willis Reese pioneered this method of analysis. See Elliot E. Cheatham & Willis L.M. Reese, Choice of the Applicable Law, 52 Colum. L. Rev. 959, 981 (1952) (identifying multiple factors to be considered in choice of law determinations); see also Cavers, supra note 22, at 192-93 (same); Robert A. Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U. L. Rev. 267, 279 (1966) (same); Leflar, supra note 5, at 1586-88 (same).

\(^{24}\) Indeed, the definitive answers generated by governmental interest analysis have
Currie’s approach to choice of law was purely instrumental. He argued that courts should not try to identify pre-existing vested rights, but instead should use choice of law decisions as a tool for implementing state policy. Currie’s critique of vested rights never took deontological approaches to choice of law seriously. For Currie, the vested rights theory was deficient because its supposed

led Lea Brilmayer to conclude that Currie, who ridiculed the idea that courts can sensibly decide choice of law cases without investigating state policies and interests, in fact endorsed jurisdiction-selecting rules. Brilmayer argues that the domiciliary focus of Currie and his brand of governmental interest analysis leads to two choice of law rules, applicable to all classes of disputes:

1. If the parties have a common domicile, apply the law of the common domicile; and
2. If the parties do not have a common domicile, apply the law of the forum.

Brilmayer correctly observes that these two rules do not depend on the content of the law of any state. See Brilmayer, supra note 1, at 59.

The question, though, is whether Currie’s approach was as wooden as Brilmayer paints it to be. Currie was, as Brilmayer recognizes, consistently vague about the role of non-domiciliary “interests” in the choice of law process. See id. at 61-62. Currie was as much a salesman as a scholar, and when he sought to demonstrate the simplicity of his approach, he frequently focused on cases in which the only state interests he identified were interests in protecting domiciliaries. Currie’s extensive and widely read study of Milliken v. Pratt, 125 Mass. 374 (1878) is a prime example. See Brainerd Currie, Married Women’s Contracts: A Study in Conflict-of-Laws Method, 25 U. Chi. L. Rev. 227, 233 (1958) [hereinafter Currie, Married] (discussing Massachusetts’s interest in giving married women in the state special protection in passing a law restricting their ability to form binding contracts), reprinted in Brainerd Currie, Selected Essays on the Conflict of Laws 77, 85 (1963) [hereinafter Currie, Selected Essays]. But at other times, Currie explicitly recognized the importance of non-domiciliary interests. See Brainerd Currie, Comment on Babcock v. Jackson, 63 Colum. L. Rev. 1233, 1237-41 (1963) (recognizing state interest in expanding sources of recovery for caregivers in tort action since “liability insurance rates in [the situs] were determined on the basis of claims arising from accidents in [the situs]” and not the domicile, and traffic regulations at issue were intended to apply within the enacting state). At other times, Currie implicitly recognized the importance of non-domiciliary interests, as in his endorsement of Justice Traynor’s opinion in Bernkrant v. Fowler, 360 P.2d 906 (Cal. 1961). See Brainerd Currie, The Disinterested Third State, 28 Law & Contemp. Probs. 754, 757-58 (1963) (commending Judge Traynor’s holding that Nevada law applied where a broad application of a California statute which protected decedents’ estates from false claims based on alleged oral contracts to make wills was unnecessary to effectuate California legislative policy, thereby avoiding a conflict between the states).

See Brainerd Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 Duke L.J. 171, 173-74 [hereinafter Currie, Notes], reprinted in Currie, Selected Essays, supra note 2, at 179, 179-82 (criticizing judges who “will address themselves to metaphysical questions concerning the nature of law and its abstract operation in space—matters remote from mundane policies and conflicts of interest—and will evolve a set of rules for determining which state’s law must, in the nature of things, control”).
advantage—uniformity of result—would be gained only at an “extravagant price”: frequent frustration of state interests.\textsuperscript{26}

In promoting advancement of state interests as his chief instrumental goal, Currie’s analysis largely ignored the interests of private parties.\textsuperscript{27} In his view, the laws of the several states took account of the interests of the private parties; the role of courts in choice of law cases was to decide whether a particular state interest, which itself incorporated private interests, would be advanced by application in the case at hand.\textsuperscript{28} Moreover, to the extent that he recognized the importance of instrumental goals not embodied in local substantive law—goals like facilitating planning or protecting reasonable expectations—Currie suggested that interest analysis could accommodate those goals if courts were to define state interests narrowly when a broad reading would make planning difficult or frustrate expectations.\textsuperscript{29}

In privileging \textit{forum} interests over those of other states, Currie argued that courts had neither the resources nor the legitimacy to weigh the interests of sovereign states.\textsuperscript{30} Hence, in Currie’s view, the forum court should advance the interests of the forum state by

\textsuperscript{26} See Currie, \textit{Married}, supra note 24, at 246. Currie also questioned whether the vested rights system would, in practice, produce the uniformity cited by its champions. \textit{See id.}

\textsuperscript{27} See Brainerd Currie, \textit{The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws}, 28 U. CHI. L. REV. 258, 280-84 (1961), reprinted in CURRIE, SELECTED ESSAYS, supra note 24, at 584, 610 (“I can find no place in conflict-of-laws analysis for a calculus of private interests. By the time the interstate plane is reached the resolution of conflicting private interests has been achieved; it is subsumed in the statement of the laws of the respective states.”).

\textsuperscript{28} See \textit{id.} at 281.

\textsuperscript{29} See, \textit{e.g.}, \textit{id.} at 270 (stating that if application of forum law insulating married women from liability would frustrate expectations of out-of-state merchants, courts might “define the scope of the state’s interest more narrowly”); \textit{see also} Currie, \textit{Notes}, supra note 25, at 180 (terming “sensible” a Nebraska decision to apply a foreign usury statute to uphold a small loan contract whose terms would have been usurious under the Nebraska statute, and indicating that the case demonstrated “restraint and enlightenment in the determination of what state policy is and where state interests lie” (citing Kinney Loan & Fin. Co. v. Summer, 65 N.W.2d 240 (Neb. 1954))).

\textsuperscript{30} Currie wrote:

\begin{quote}
[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 which should not be committed to courts in a democracy. It is a function which the courts cannot perform effectively, for they lack the necessary resources.
\end{quote}

applying forum law "simply because a court should never apply any other law except when there is a good reason for doing so."31

B. Modern Instrumentalism and the Emergence of Game Theory

While Currie wrote, and for two decades after his death, interest analysis served as the focus for most choice of law scholarship. Some scholars built upon Currie's insights, while others attacked interest analysis with varying amounts of vitriol.32 The vast choice of law literature in this period, however, overwhelmingly shared Currie's instrumental approach to choice of law problems. A number of scholars have explicitly labelled their own approaches "functional"33 or "pragmatic."34 Proponents of choice of law rules argued that rules would be easier to administer than Currie's ad hoc interest analysis system.35 Alfred Hill, among the most thoughtful of Currie's critics, questioned whether wholesale rejection of a

31 Currie, Married, supra note 24, at 261.

32 Criticism of Currie's approach includes John H. Ely, Choice of Law and the State's Interest in Protecting its Own, 23 WM. & MARY L. REV. 173, 212 (1981) (calling for a return to a "rule-oriented approach" to choice of law); Alfred Hill, The Judicial Function in Choice of Law, 85 COLUM. L. REV. 1585, 1622 (1985) [hereinafter Hill, The Judicial Function] (labeling Currie's contention that only internal policies should be looked to as a "prescription for irrationality"); Alfred Hill, Governmental Interest and the Conflict of Laws-A Reply to Professor Currie, 27 U. CHI. L. REV. 463, 479 (1960) [hereinafter Hill, Governmental Interest] (arguing that Currie's view of the function of the courts in conflict of law cases is too narrow); Willis L.M. Reese, Chief Judge Fuld and Choice of Law, 71 COLUM. L. REV. 548, 566 (1971) (advocating a rules-based approach to choice of law); Willis L.M. Reese, Choice of Law, Rules or Approach, 57 CORNELL L. REV. 315, 333 (1972) (stating that developing rules should be an objective in choice of law jurisprudence).

At the same time, interest analysis served as the building block for the comparative impairment approach developed by William Baxter and later embraced by the California Supreme Court. See William F. Baxter, Choice of Law and the Federal System, 16 STAN. L. REV. 1 (1963); see also Bernhard v. Harrah's Club, 546 P.2d 719, 723-24 (Cal. 1976) (adopting the Baxter approach to choice of law).

33 See, e.g., ARTHUR T. VON MEHREN & DONALD T. TRAUTFMAN, THE LAW OF MULTISTATE PROBLEMS 76-79, 492-95 (1965) (suggesting a functional approach that will elaborate and apply the policies and purposes of specific rules and the legal system as a whole); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 48 (3d ed. 1986) (suggesting that the "underlying policies" of choice of law are best served by a functional approach or analysis).

34 See, e.g., Aaron D. Twerski & Renee G. Mayer, Toward a Pragmatic Solution of Choice-of-Law Problems—At the Interface of Substance and Procedure, 74 NW. U. L. REV. 781 passim (1979) (promoting a multistate rule that gives effect to "domestic interests of the contact states without applying the domestic rule of either state").

35 See, e.g., Maurice Rosenberg, Comments on Reich v. Purcell, 15 UCLA L. REV. 551, 644 (1968) ("[T]he present concern [in choice of law] is with high-volume problems in the administration of justice, not in its inspired divination.").
precedent-based system would produce sounder results than incremental modification of traditional rules. Russell Weintraub has emphasized that a choice of law system ought to prevent unfair surprise to parties, in part at least to facilitate transaction planning.

One of the principal instrumental objections to interest analysis has been that Currie's approach takes too little account of multistate policies. Many pages have been written about how choice of law analysis might better incorporate consideration of multistate policies rather than focus only on local policies of the sort Currie emphasized. In the latest chapter of the saga, two prominent scholars, Lea Brilmayer and Larry Kramer, have suggested using game theory to generate optimal choice of law results.

Interest analysis rests on the premise that state courts have a duty in conflicts cases to promote the policies embraced by their state's legislature. Building on this premise, Currie concluded that in any case where the forum state's policy would be advanced by application of forum law, the forum court should apply forum law regardless of any effect on the policies of other states. Using game

---

56 See Hill, The Judicial Function, supra note 32, at 1600-01 (arguing that abandoning the traditional rules for "an essentially ad hoc" approach has brought chaos to this area of law). See generally Hill, Governmental Interest, supra note 32, at 479-81 (questioning Currie's proposal that choice of law rules be scrapped).

57 In a section of his commentary dealing with unfair surprise, Weintraub writes:

"Although a negligent defendant cannot reasonably argue that he would have been more careful if he had known of the eventual resolution of a conflict in favor of liability, it may be that he can reasonably argue that he did not foresee any liability for his conduct and therefore failed to take out liability insurance. . . . If so, then this should certainly be considered by the court."

Weintraub, supra note 33, at 286 (citation omitted); see also id. at 391-93 (discussing unfair surprise generally).

58 Currie himself acknowledged the criticism: "I have been told that I give insufficient recognition to governmental policies other than those which are expressed in specific statutes and rules: the policy of promoting a general legal order, that of fostering amicable relations with other states, that of vindicating reasonable expectations, and so on." Currie, Notes, supra note 25, at 181. His response did not deny the validity of the critique: "If this is so, it is not, I hope, because of a provincial lack of appreciation of the worth of those ideals, but because of a felt necessity to emphasize the obstacles which the present system interposes to any intelligent approach to the problem." Id.

59 See BRILMAYER, supra note 1, at 145-89 (discussing at length the advantages of cooperation); Larry Kramer, More Notes on Methods and Objectives in the Conflict of Laws, 24 CORNELL INT'L L.J. 245, 273-76 (1991) (suggesting that "choice of law is a variable-sum game in which some approaches to conflict resolution are better for both states than others"); Kramer, supra note 1, at 340-44 (using game theory to discuss reciprocity between states).
theory, Brilmayer and Kramer establish that Currie's conclusion does not follow from his premise.

Their point is intuitively simple: because each state cares about the outcome of some cases more than it cares about the outcome of others, all states would be better off if states could somehow trade outcomes to maximize state policy objectives. Currie opposed "weighing" of interests because he could find no appropriate scale for measuring the balance. Brilmayer, by contrast, uses market metaphors to justify interest-weighing: in evaluating a choice of law rule, "[e]ach state would have to compare its current state of affairs against the state of affairs that would result if it adopted this rule, including the gains realized through the cooperation of the other states." 42

As Brilmayer explicitly recognizes, actual bargaining among the fifty states would not be feasible as a means of resolving choice of law problems. Brilmayer and Kramer turn instead to game theory as proof that cooperation is possible even when explicit bargaining proves impossible. Brilmayer notes in particular the studies that have demonstrated the utility of a strategy called "tit-for-tat" in maximizing mutual gains in the "prisoner's dilemma" game. Under this approach, the task of choice of law scholars becomes one of developing institutional arrangements that lead the

40 See BRILMAYER, supra note 1, at 170-71 (noting that potential gains from trade do exist); Kramer, supra note 1, at 340 (asserting that choice of law can be a positive-sum game if states adopt the appropriate choice of law framework). William Baxter first introduced hypothetical negotiations between states as a means of resolving true conflicts. See William F. Baxter, Choice of Law and the Federal System, 16 STAN. L. REV. 1, 10-18 (1963) (developing his comparative impairment variant on Currie's interest analysis).

41 See Currie, Notes, supra note 25, at 176-77 (stating that assessment of competing state values is a political, not a judicial, function).

42 BRILMAYER, supra note 1, at 171-72.

43 See id. at 170 (stating that it is "ridiculous" to propose actual bargaining among states). Thirty years earlier, Currie also considered, and rejected, multistate compacts as a solution to choice of law problems: "No agreement would be very useful unless substantially all of the states were parties to it, and the mechanics of achieving such a many-sided agreement would be prohibitively cumbersome in comparison with available and better ways of attaining the same end." Currie, Married, supra note 24, at 265.

44 BRILMAYER, supra note 1, at 158 (discussing Robert Axelrod's description of cooperative strategies in the prisoner's dilemma game that suggest the value of reciprocity (citing ROBERT AXELROD, THE EVOLUTION OF COOPERATION 31 (1984))); see also Kramer, supra note 1, at 341-43 (stating that the prisoner's dilemma is analogous to the choice of law situation and that game theory would predict states will arrive at cooperative solutions).
states toward cooperative strategies that maximize achievement of state policy objectives.\textsuperscript{45}

Brilmayer suggests a new Restatement of Conflicts, which would provide "focal point solutions" to coordination problems.\textsuperscript{46} Apparently, Brilmayer envisions a Restatement that would, in effect, mimic the market that would exist if states were capable of freely bargaining about results in choice of law cases.\textsuperscript{47} She criticizes the First and Second Restatements for seeking to "derive all of choice of law from a single unifying intellectual principle"\textsuperscript{48} rather than adopting a more pragmatic approach that would "set out directly to identify potential gains from cooperation and trade and to ensure that all states stood to gain from the overall improvement in utility."\textsuperscript{49}

Kramer takes this approach a step further by proposing a set of "canons" for the resolution of conflicts.\textsuperscript{50} Kramer has explicitly designed these canons "to capture . . . potential gains from cooperation."\textsuperscript{51}

Thus, game theory extends the tradition, dominant since the rise of the realists, of evaluating choice of law issues in instrumental terms. Choice of law practices designed to capture "gains from cooperation" do not rest on a foundation of "rights," but rather on a desire to make sound social policy.

C. The Resuscitation of Rights Theory

After decades of instrumentalist hegemony in choice of law scholarship, a number of recent works have advanced "rights-based" choice of law theories.\textsuperscript{52} These rights-based theories tend to have

\begin{itemize}
\item Currie considered and rejected the possibility that reciprocity not based on agreement could resolve true conflicts of interests between states. \textit{See} Currie, \textit{Married}, \textit{supra} note 24, at 263 (asserting that agreements between states involve political considerations beyond the competence of courts).
\item \textit{Brilmayer, supra} note 1, at 185 (quoting Tom Schelling, \textit{The Strategy of Conflicts} 57 (1980)).
\item See \textit{id.} at 187 (suggesting that the "goal is to maximize state policy goals, and to do so in a way that offers sufficient advantages to all states that each will gain by adopting the choice of law system").
\item \textit{Id.} at 186-87.
\item \textit{Id.} at 187.
\item See Kramer, \textit{supra} note 1, at 319-38 (proposing canons that reflect compromises states would likely make with respect to issues of comparative impairment, substance/procedure conflicts, contract conflicts, obsolete laws, and reliance interests).
\item \textit{Id.} at 340.
\item \textit{See, e.g.,} Brilmayer, \textit{supra} note 1, at 219-21 (proposing a rights-based choice of
\end{itemize}
a territorialist bent, but their advocates have not rushed to reinstate Bealean dogmas.\textsuperscript{53} Instead, they have looked to other sources to justify new territorial rules.

Douglas Laycock bases his territorial principles on the U.S. Constitution's Privileges and Immunities Clause\textsuperscript{54} and, more generally, on constitutional principles of federalism.\textsuperscript{55} He argues that the "individual liberty policy" of the Privileges and Immunities Clause prohibits discrimination against citizens of sister states, even if the discrimination would have no discernible effect on consequentialist goals such as fostering national unity and interstate relations.\textsuperscript{56} For Laycock, the Constitution gives each state the power to govern within its borders, and this "territorial allocation of state authority is a fundamental constitutional principle, even though that principle is not attributable to any particular constitutional clause."\textsuperscript{57}

Lea Brilmayer, while using game theory to elaborate an instrumentally based choice of law system, has simultaneously argued that choice of law theory has overemphasized policy and underemphasized rights and fairness.\textsuperscript{58} She attributes this failure to consider rights to the consequentialist bent of the legal realists, who believed that "rights" were nothing more than predictions about the behavior of government officials.\textsuperscript{59} In Brilmayer's view, law theory premised on the concept that a person becomes subject to the law of a state when that person has some opportunity to influence the state's political decisions; Dane, \textit{supra} note 1, at 1243-45 (proposing that choice of law determinations be analyzed in terms of "vestedness," in which a court's role is to discover and enforce whatever set of legal rights applies); Laycock, \textit{supra} note 3, at 265 (linking rights-based theory to Privileges and Immunities Clause).

\textsuperscript{53} \textit{See}, e.g., \textit{BRILMAYER, supra} note 1, at 203 ("Beale's theory of rights is inadequate because it presupposes the answer to the important choice of law question, namely what law is applicable?"); Laycock, \textit{supra} note 3, at 322 (arguing that "Beale's rules were crude" and that "a simple-minded Bealean approach will not work").

\textsuperscript{54} \textit{See} U.S. CONST. art. IV, § 2, cl. 1.

\textsuperscript{55} \textit{See} Laycock, \textit{supra} note 3, at 261-66 (stating that Privileges and Immunities Clause prohibits discrimination on the basis of state citizenship in choice of law decisions); \textit{id.} at 315-22 (discussing more generally the Constitution's territorial division of state authority).

\textsuperscript{56} \textit{See} \textit{id.} at 265 ("Each unjustified discrimination against a citizen of a sister state is a constitutional wrong to that citizen, regardless of the impact on national unity.").

\textsuperscript{57} \textit{Id.} at 318; \textit{see also id.} (asserting that this power "is too deeply embedded in our law to require justification").

\textsuperscript{58} \textit{See BRILMAYER, supra} note 1, at 155-75, 193-203 (developing a game theory justification for territorial choice of law principles, and then criticizing consequentialist thinking as she develops a rights-based theory of choice of law adjudication).

\textsuperscript{59} \textit{See id.} at 196 (discussing argument that "rights" concepts were shorthand for outcome prediction, in that rights had no existence apart from the behavior of judges
however, the realists, with their emphasis on achieving instrumental goals, ignored questions of fairness and desert in developing their choice of law theories. She complains that because consequentialist theories are forward-looking, they treat individuals as a means to an end—the general good of society—without examining whether it would be fair to force the individual to sacrifice her own interests for the greater social good.\

Unlike Laycock, however, Brilmayer is not content to use the U.S. Constitution as the source from which she derives the rights on which to base her choice of law theory. Instead, she turns to political theory and argues that a person has a negative right to be left alone by a state unless that person has had some opportunity—through voice or exit—to influence the state’s political decisions. Thus, she asserts that an individual’s domicile always has power to regulate her behavior, but also concludes that territorial connecting factors, if they are “purposeful” or “volitional,” suffice to justify a state in subjecting an individual to its laws. By contrast, Brilmayer questions the fairness of imposing on an individual a conception of substantive justice developed by a state with whom the individual has had insufficient contact.

Whether the boomlet in rights theory among choice of law scholars represents a lasting shift in direction remains to be seen. That the boomlet developed at all, however, establishes a surprising degree of uneasiness about instrumental theories.

II. THEORY IN THE COURTS: SIGNIFICANT INFLUENCE OR LIP SERVICE?

A. Introduction

From reading judicial opinions and works of scholarship, one could easily conclude that academic theory has been far more influential in the choice of law area than in most other areas of law. Judicial opinions involving choice of law issues are frequently laced with citations to scholarly books and articles. In many jurisdic-

---

\[60\] See id. at 202-03 ("A major problem with strictly consequentialist reasoning is that there are strongly held moral intuitions that human beings . . . must be treated as ends in themselves.").

\[61\] See id. at 218-21.

\[62\] See id. at 220.

\[63\] See id. at 219.

\[64\] The apparent influence of scholarship has extended even to courts not known
tions, no conflicts discussion would be complete without a citation to the Second Restatement of Conflict of Laws. Leading casebooks are often organized not by subject matter but by academic theory, highlighting the supposed importance of theory.65 Leading scholars in the field make it their business to track the adoption of one theory or another by courts in different jurisdictions.66

Has academic theory been as influential as the frequency of citation would indicate? The question is ultimately unanswerable, but I would suggest that, at least in many areas, citation to academic theory has served more as window dressing than as a dispositive factor in deciding choice of law cases. This Section explores the role academic theory has played in choice of law decisions.

B. Consensual Transactions

1. Party Autonomy

Acceptance of party autonomy as a principle for resolving choice of law problems is one of the major successes of modern conflicts theory. The Second Restatement would give contracting parties wide latitude to choose the law that will apply to the contract, so long as the parties' choice would not be contrary to "fundamental policy"67 and the "choice" was not unilaterally imposed by a party for innovation. For instance, in Chambers v. Dakotah Charter, Inc., 488 N.W.2d 63 (S.D. 1992), the South Dakota Supreme Court purported to abandon the lex loci delicti rule in an opinion citing three books on choice of law and eleven law review articles. Some courts have cited academic work even when they have retained traditional choice of law approaches. Thus, in Fitts v. Minnesota Mining & Mfg., 581 So. 2d 819 (Ala. 1991), the Alabama Supreme Court cited one book and five law review articles in an opinion rejecting modern approaches to choice of law problems.

65 See LEA BRILMAYER & JAMES A. MARTIN, CONFLICT OF LAWS CASES AND MATERIALS 221-345 (3d ed. 1990) (surveying variety of choice of law theories, including interest analysis and comparative impairment); ROGER C. CRAMTON ET AL., CONFLICT OF LAWS 188-358 (4th ed. 1987) (surveying interest analysis theory and alternative modern approaches to conflicts).

66 See, e.g., Herma H. Kay, Theory into Practice: Choice of Law in the Courts, 34 MERCER L. REV. 521, 591-92 (1983) (setting out a chart listing choice of law theories adopted by the various state courts).

67 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). Entitled "Law of the State Chosen by the Parties," the section provides:

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is
with greater bargaining power. A wide variety of other scholars, writing both before and after promulgation of the Second Restatement, have also endorsed party autonomy.

one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of sec. 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

Id. See id. § 187 cmt. (b).

Even scholars skeptical of the Restatement position suggest that it does not go far enough to adopt a "rule of validation" even when the parties have not chosen a law that would validate the contract. See WEINTRAUB, supra note 33, at 375 ("[E]xactly the same considerations that would move a court to give effect to the parties' stipulation of validating law should move that same court to choose the validating law whether the parties have done so or not.").

Although Brainerd Currie did not write extensively about party autonomy, what he did write suggests that he was one of the few "modern" scholars who lacked enthusiasm for party autonomy. Currie wrote:

The rule that the law intended by the parties shall govern . . . accords to the incapacitated party the power to contract out of her disability—a privilege she may be assumed not to enjoy in a purely domestic case; and the result is pro tanto the subversion of the interest of the state to which she belongs. Similarly, a rule permitting the selection of the law of any state having a connection (in terms of the given factors) with the case, so long as that law gives validity to the contract, must to some extent impair the apparent interest of a state which has, and has asserted, an interest in protecting the incapacitated party.

Currie, Married, supra note 24, at 248.
Courts have shown affinity for the Restatement formulation, and for party autonomy principles in general, even when the result is displacement of forum law.\(^{70}\) In recent years, those few cases in which courts have refused to honor choice of law clauses have involved contracts of adhesion or areas subject to extensive state regulation—particularly franchise agreements.\(^{71}\) In franchise cases, courts have typically applied franchise-protection statutes of the state in which the franchise is located even if the franchise agreement specifies application of the law of another state, and have cited the Restatement formulation to justify the result.\(^{72}\)

Has choice of law scholarship generated the modern willingness to enforce choice of law clauses? Cause and effect is difficult to prove, especially in light of arguments by some scholars that American courts have long endorsed party autonomy.\(^{73}\) But choice of law clauses were a less common feature of the legal landscape


\(^{71}\) A recent case purporting to deny effect to a choice of law clause involving a classic contract of adhesion—a car rental agreement—actually presented a false conflict. In Van Vonno v. Hertz Corp., 841 P.2d 1244 (Wash. 1992), a car rented in Oregon collided in Washington with an uninsured vehicle. The rental contract specified that the rental company, Hertz, would provide the minimum uninsured motorist coverage required by the state in which the accident occurred. See id. at 1246. A Washington statute required uninsured motorist coverage, but the statute's terms applied only to vehicles registered or principally garaged in Washington. Hence, Hertz argued that no uninsured motorist coverage was required. See id. The court said it would not honor the choice of law clause, and applied Oregon law to give the car renter relief against Hertz. See id. In fact, however, both Oregon and Washington had policies requiring uninsured motorist coverage. See id. at 1247. Moreover, the parties had not relied on application of Washington law, since the accident could have occurred in any state. Van Vonno thus cannot reasonably be read as a rejection of party autonomy.

\(^{72}\) See Wright-Moore Corp. v. Ricoh Corp., 308 P.2d 128, 132-33 (7th Cir. 1990) (applying Indiana franchise law to protect Indiana franchisee despite choice of law clause calling for application of New York law). In Rutter v. BX of Tri-Cities, Inc., 806 P.2d 1266 (Wash. Ct. App. 1991), the court applied Washington's "franchisee bill of rights" despite a choice of law clause selecting California law. See id. at 1268. The court cited comment g of § 187 of the Second Restatement in its decision, which states that "[A] fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power." Id.

\(^{73}\) See, e.g., ALBERT A. EFRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 467-68 (1962) ("American law, like the laws of other countries, has always permitted parties to a contract to 'legislate' . . . and expressly to stipulate the applicable law.").
until the last few decades, at least in part, one suspects, out of fear that they would not be enforced. The First Restatement of the Conflict of Laws, largely drafted by Beale, included no provision on party autonomy, and Beale had no use for the concept. Beale's treatise stated that the "fundamental objection" to party autonomy "in point of theory is that it involves permission to the parties to do a legislative act," and went on to conclude that because courts would be unable to set predictable limits on party autonomy, lawyers would be unable to draft choice of law clauses with any confidence that they would be enforced. Beale himself recognized that his own antipathy to choice of law clauses was not universally shared by courts, but distinguished judges (Learned Hand among them) shared Beale's view that choice of law clauses should not be enforced.

At the very least, modern choice of law scholarship has swept away the conceptualist thinking that condemned choice of law clauses as impermissible private legislation, making it easier for parties to draft choice of law clauses with greater confidence in their enforcement.

---

74 2 BEALE, supra note 18, at 1079.
75 See id. at 1086.
76 See id. at 1080-81 (discussing cases in which courts were willing to enforce choice of law clauses established by a bona fide agreement of the parties).
77 In E. Gerli & Co. v. Cunard S.S. Co., 48 F.2d 115 (2d Cir. 1931), for instance, a court composed of Judges Learned Hand, Thomas Swan, and Augustus Hand refused to enforce a choice of law clause in a shipping agreement. Judge Learned Hand wrote:

People cannot by agreement substitute the law of another place; they may of course incorporate any provisions they wish into their agreements—a statute like anything else—and when they do, courts will try to make sense out of the whole, so far as they can. But an agreement is not a contract, except as the law says it shall be, and to try to make it one is to pull on one's bootstraps. Some law must impose the obligation, and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crimes.

Id. at 117.
78 Willis Reese, the reporter for the Second Restatement, offered the classic response to the view that choice of law clauses constitute improper private legislation:

The forum must decide in each case what law shall be applied to determine the validity of a contract and the rights created thereby. There is nothing to prevent the forum from adopting a choice of law rule that the governing law shall, in the ordinary case, be that chosen by the parties. When the forum adopts such a rule, the chosen law is applied not because the parties are legislators but simply because this is the result required by the choice of law rule of the forum.

Reese, supra note 69, at 51.
79 Russell Weintraub, in expressing concern about inadvertent stipulations to apply
2. Contracts Without Expectations

Party expectations may be relevant even when contracts do not include choice of law clauses, and the "presumption of validity" endorsed by scholars, and somewhat less regularly by courts, recognizes the importance of satisfying those expectations. In many contract cases, however, the parties have no discernible expectations about resolution of particular issues. Neither party autonomy rules nor a presumption of validity are useful in resolving these cases.

In false conflict cases, courts have little need to focus on party expectations, because these cases are easily resolvable even if the parties never considered the matter at hand. Thus, when an Ohio insured's executor sought to recover under the uninsured motorist law that would invalidate the contract, has suggested that "choice-of-law clauses are becoming ubiquitous boiler plate in commercial contracts." WEINTRAUB, supra note 33, at 373. Proponents of party autonomy have argued that reduced litigation is an important reason for enforcing choice of law clauses. See Reese, supra note 69, at 51 ("[T]o the extent that the parties can and do choose the governing law, the court is spared the pains of decision. This is not an insignificant consideration in an area such as contracts, where choice of the governing law may present many difficulties.").

The Second Restatement of Conflict of Laws provides:

Parties entering a contract will expect at the very least, subject perhaps to rare exceptions, that the provisions of the contract will be binding upon them. Their expectations should not be disappointed by application of the local law rule of a state which would strike down the contract or a provision thereof unless the value of protecting the expectations of the parties is substantially outweighed in the particular case by the interest of the state with the invalidating rule in having this rule applied.

RESTATEMENT (SECOND) CONFLICT OF LAWS § 188 cmt. (b) (1971); see also EHRENZWEIG, supra note 73, at 465-485 (discussing the "Rule of Validation"); WEINTRAUB, supra note 33, at 387 (stating that a "rebuttable presumption of validity has the merit of focusing on a policy that all states share—making commercial transactions convenient and reliable"). Of course, as the Restatement provision indicates, the "presumption" gives way in the face of strong public policies.

In endorsing the presumption of validity, these scholars have rejected the conceptualism of Beale illustrated by the following passage:

The rule is based on the necessity of some law to raise an obligation between parties to a promise; of this necessity there can be no question. If two parties agree between themselves to do a thing, their agreement does not and cannot create any binding obligation to do it. . . . It is only when the law affixes to the promise a legal obligation of performance that the parties can be said to have entered into a contract in a true sense. In the legal sense, all rights must be created by some law.

2 BEALE, supra note 18, at 1090.

A number of recent cases have applied some version of a rule of validation in holding insurance companies liable to indemnify insureds against punitive damage awards despite statutes which, in some states, prohibit insurance against punitive damage claims. See cases cited infra notes 83-85.
provisions of the deceased-insured's Ohio insurance policy, even a West Virginia court had little difficulty rejecting the insured's argument that, because the accident occurred in West Virginia, he was entitled to the more generous uninsured motorist coverage mandated by West Virginia law. But in other cases, especially insurance contract cases (which are among the most frequently litigated contract cases to raise choice of law problems), courts often invent party expectations to justify particular results.

Consider three recent cases—Meijer, Inc. v. General Star Indemnity Co., Stonewall Surplus Lines Insurance Co. v. Johnson Controls, Inc., and American Home Assurance Co. v. Safeway Steel Products Co.—raising the same question: Must an insurer indemnify the insured party for punitive damages when the insurance contract includes no exception for punitive damages, but where the law of the state in which the insured risk was located prohibits contracts to indemnify against punitive damages?

In Meijer and American Home Assurance, the courts held the insurer liable on the contract; in Stonewall, the court excused the insurer from liability. More interesting than the results, however, is the disparity in treatment of party expectations. In Meijer, the court simply assumed that the parties expected that punitive damages would be covered by the policy. In American Home Assurance, the court relied in part on a rule construing ambiguous insurance policies against the insurer, and then cited the Restatement in support of a rule of validation. By contrast, in Stonewall, the court concluded that insured and insurer would have expected

---

82 See Nadler v. Liberty Mut. Fire Ins. Co., 770 F. Supp. 294 (S.D. W. Va. 1990). Although the Nadler court did quote from another case which mentioned the "reasonable expectation[s] of the parties," id. at 297, the court held that "West Virginia's public policy regarding uninsured and underinsured motorist coverage is not applicable to the dispute at bar," id. at 299.


84 17 Cal. Rptr. 2d 713 (Ct. App. 1993).


86 The Meijer court wrote:

To hold that punitive damages are not recoverable would create, in effect, an exclusion for which the parties did not negotiate and allow insurance companies to collect premiums for coverage of a risk that they voluntarily assumed and then escape their obligation to pay on a claim by a mere judicial declaration that the contract is void by reason of public policy.

Meijer, 826 F. Supp. at 247 (emphasis added).

87 See American Home Assurance, 743 S.W.2d at 698-99.

88 See id. at 700-01.
that the invalidating law of the state in which the risk was located would apply to the insurance contract.\textsuperscript{89}

An exclusion of coverage for punitive damages would have resolved the question finally, express inclusion of coverage for punitive damages would at least have made party expectations clear, and would have eliminated an attractive argument for absolving the insurer of liability.\textsuperscript{90} That none of the contracts in any of the three cases addressed indemnification for punitive damages suggests that none of the parties had considered punitive damages when the insurance contracts were drafted and that none of them had formed significant expectations about the insurer's liability for punitive damages.

It should come as no surprise that the courts in these cases failed to acknowledge the absence of party expectations. Satisfying party expectations provides a neutral principle for resolving choice of law disputes, a principle (like party autonomy, which is but an application of the principle of satisfying party expectations) that facilitates planning and reduces the need for courts to choose between conflicting state policies. When parties have no expectations—when they have not planned for the eventuality that has occurred—the case is not, for choice of law purposes, significantly different from a tort case. And in many tort cases, as we shall see, courts find little reason to depart from forum law, or from their own predilections about the case at hand.

In each of the three punitive damage coverage cases the courts applied forum law.\textsuperscript{91} In \textit{Meijer}, the Michigan federal court applied

\textsuperscript{89} The \textit{Stonewall} court wrote:

\cite{Stonewall}: [W]e believe Johnson Controls and its insurers would reasonably expect not only that the corporation's liability to a third party might be governed by the law of a state with significant interests at stake, but that Johnson Controls's right to indemnity for such a claim might also be governed by that state's law.

\textit{Stonewall}, 17 Cal. Rptr. 2d at 720.


\textsuperscript{91} Moreover, from reading the opinions, one gets the definite sense that the opinion-writing judge in each case considered forum law to be better than the alternative. Indeed, in \textit{Meijer} and \textit{American Home Assurance}, the court virtually made up forum law that had not been developed in previous cases. In \textit{Meijer}, the court conceded that no Michigan case had squarely decided whether an insured would be entitled to recover punitive damages for an insurer and ultimately decided that no Michigan policy prevented recovery. See \textit{Meijer}, 826 F. Supp. at 247. Had the district
Michigan law permitting punitive damage claims against the insurer even though the insurance policy, issued in Michigan, covered an Ohio risk. In Stonewall, the California state court applied California law prohibiting indemnification for punitive damage claims even though the policy covered a corporate insured headquartered in Wisconsin, where indemnification was permissible. The risk that led to liability was located in California. Finally, in American Home Assurance, the Texas state court applied Texas law permitting indemnification when the risk was located in Texas, but the policy was issued by the insurer in New York, which prohibits indemnification.

Judges have demonstrated a more general tendency to follow their own predilections, or to apply forum law, when the expectations of the contracting parties are unclear. Consider another contemporary issue: What liability do insurers bear for the insured's environmental cleanup costs? Courts in two recent choice of law cases—Gilbert Spruance Co. v. Pennsylvania Manufacturers' Association Insurance Co. and Potomac Electric Power Co. v. California Union Insurance Co.—have construed insurance contracts which arguably insured against environmental torts by applying forum law. Moreover, in the Potomac case, the forum essentially had no developed law, so the judge developed it in deciding the case.

In Gilbert Spruance, the insured, a Pennsylvania paint manufacturer, sought to recover from the insurer for the cost of cleaning up New Jersey sites at which paint wastes had been dumped, despite a judge believed it inappropriate to permit indemnification for punitive damages, she could easily have construed Michigan law to be identical to Ohio law, and have concluded that Michigan public policy prevented indemnification. See also supra note 86 (quoting from the opinion in which the court indicates its disapproval of a rule that would prevent indemnification).

Similarly, the court in American Home Assurance, after deciding that Texas law should apply, treated as a question of first impression whether Texas public policy prevented indemnification for punitive damages. See American Home Assurance, 743 S.W.2d at 697, 703-05. As in Meijer, if the court believed it inappropriate to permit indemnification, the court could have decided, as a matter of Texas law, that indemnification was impermissible.

---

92 See Meijer, 826 F. Supp. at 246-47.
93 See Stonewall, 17 Cal. Rptr. 2d at 718-20.
94 See id. at 718-19.
95 See American Home Assurance, 743 S.W.2d at 696-98.
98 See id. at 974.
pollution exclusion clause in the insurance contract.\textsuperscript{99} Under the law of Pennsylvania, where the wastes were generated and the insurance policy was issued, the pollution exclusion clause would have been construed to cover discharge of waste materials.\textsuperscript{100} The court, however, applied New Jersey law, which would have construed the pollution exclusion clause more narrowly.\textsuperscript{101}

In \textit{Potomac Electric}, the insured, an electric utility company, deposited wastes in Maryland. When the insured was required to clean up the site,\textsuperscript{102} it sought to recover on an insurance policy covering "'damages' arising from the destruction of property."\textsuperscript{103} Under Maryland law, as construed by the Fourth Circuit, environmental cleanup costs were not "damages" within the meaning of the policy.\textsuperscript{104} The court, unlike the court in \textit{Gilbert Spruance}, chose not to apply the law of the state in which the environmental wastes were discharged, but instead applied the law of the District of Columbia, as the insured's principal place of business.\textsuperscript{105} Since there were no District of Columbia cases on the issue, the court applied "general principles of insurance contract interpretation existing under District of Columbia law"\textsuperscript{106} to conclude that the insurer was liable under the policy.

Thus, although the two courts purported to apply different choice of law rules—the place of the dumpsite in \textit{Gilbert Spruance}, and the place of the insured's principal place of business in \textit{Potomac}—in both cases the court applied the law of the forum (as creatively constructed by the court) and permitted recovery against the insurer.

Taken as a group, these recent cases suggest that whatever courts say about choice of law, once they become satisfied that no party expectations will be frustrated, courts are likely to apply forum law or what they regard as the "better" law.

\textsuperscript{99} See \textit{Gilbert}, 603 A.2d at 62.
\textsuperscript{100} See \textit{id}.
\textsuperscript{101} See \textit{id} at 62, 65.
\textsuperscript{103} \textit{Id.} at 971.
\textsuperscript{104} See \textit{id} at 972 (citing Maryland Casualty v. Armco, Inc., 822 F.2d 1348, 1352-54 (4th Cir. 1987), \textit{cert. denied}, 484 U.S. 1008 (1988)).
\textsuperscript{105} See \textit{id} at 973.
\textsuperscript{106} \textit{Id.} at 974.
C. Torts

Tort cases figured prominently in the choice of law revolution of the 1960s and early 1970s. Guest statutes and wrongful death limitations were the backdrop against which courts purported to embrace new choice of law theories. A generation later, it is worth considering the impact of choice of law theory on decided tort cases.

1. What Courts Say

Although scholars have often emphasized that one can more reliably derive choice of law principles from the results courts reach than from the language they use, judicial language remains of some value in measuring the influence of choice of law theory. To the extent that language in opinions is indicative, neither modern rights theory nor modern consequentialism, based largely on game theory, has yet had any impact on choice of law practice.

107 For cases applying guest statutes, see Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972) (applying Kentucky guest statute to case involving automobile accident in Ohio); Neumeier v. Kuehner, 286 N.E.2d 454 (N.Y. 1972) (applying Ontario guest statute on behalf of deceased Ontario resident, based on rules that the place of injury is the substantive law that should govern unless the host-driver and guest-passenger are domiciled in the same state); Tooker v. Lopez, 249 N.E.2d 394 (N.Y. 1969) (applying New York guest statute to case involving Michigan automobile accident); Dym v. Gordon, 209 N.E.2d 792 (N.Y. 1965) (finding Colorado guest statute applicable even though parties are domiciled in New York); Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1965) (applying New York guest statute to case involving automobile accident in Ontario); Cipolla v. Shaposka, 267 A.2d 854 (Pa. 1970) (utilizing Delaware guest statute to decide case brought by Pennsylvania resident based on Delaware accident); see also Macey v. Rozbicki, 221 N.E.2d 380 (N.Y. 1965) (accepting choice of law principles established in Babcock).


108 See, e.g., EHRENZWEIG, supra note 73, at 511-16, 323-26 (arguing that dogmatic assertions of doctrine have long obscured the pattern of results reached by courts).

109 With respect to rights theory, for instance, no reported case has yet cited Lea Brilmayer's 1989 article, Rights, Fairness, and Choice of Law, 98 YALE L.J. 1277 (1989), or the corresponding chapter in her book, Conflict of Laws: Foundations and Future Directions, see Brilmayer supra note 1, at 191-230. Similarly, no reported case has cited...
Whether the passage of time will bring an increase in citation to this work remains to be seen.

Interest analysis has had more apparent impact on judicial discourse, but few courts have endorsed Currie's choice of law approach wholeheartedly. In the District of Columbia, regarded as a citadel of interest analysis, recent cases have suggested using interest analysis to identify the jurisdiction with the most significant relationship to the dispute and have engaged in interest weighing—uses of interest analysis Currie would have abhorred. In one case, a District of Columbia federal court, while endorsing interest analysis, also used renvoi principles to justify application of forum law. In New Jersey, another supposed stronghold of interest analysis, a recent opinion not only weighed the interests of two states, but went so far as to say that New Jersey's "status as the forum state is irrelevant." Similarly, in its most recent choice of law decision, the New York Court of Appeals has indicated that in true conflict cases, the law of the situs of the tort should generally be applied as a "tie breaker" in order to rebut any "inference that the forum State is merely protecting its own domiciliary or favoring its own law." Other recent New York
cases have transformed interest analysis into a set of jurisdiction-selecting rules of the sort Currie deplored.\textsuperscript{116}

In other jurisdictions, courts have considered and explicitly rejected interest analysis in favor of other approaches to choice of law.\textsuperscript{117} Counting cases in which courts have endorsed interest analysis would, however, significantly understate Currie's influence on choice of law discourse. A number of courts recognize Currie's most basic principle: the forum court should always apply its own law until one of the parties advances a reason for departing from forum law.\textsuperscript{118} Even when courts purport to use some other framework for deciding choice of law cases, assessing state policies and purposes is often a critical step in the process.\textsuperscript{119} Indeed,

\begin{itemize}
  \item Missouri statutes to accident suffered by Missouri resident in Missouri while working with equipment manufactured in New York).
  \item In Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679 (N.Y. 1985), the Court of Appeals, while purporting to engage in interest analysis, announced that when conduct-regulating rules are involved, the law of the place of the tort should generally govern, but when loss-allocating rules are involved, the law of the parties' domicile should govern. See id. at 684-85.
  \item Recent cases have embraced the language of Schultz, or the choice of law rules announced earlier in Neumeier v. Kuehner, 286 N.E.2d 454, while purporting to engage in interest analysis. See Mascarella v. Brown, 813 F. Supp. 1015, 1018-20 (S.D.N.Y. 1993) (indicating that interest analysis is appropriate method for deciding case and then distinguishing conduct-regulating from loss-allocating rules (citing Schultz and Neumeier)); Fiske v. Church of St. Mary of the Angels, 802 F. Supp. 872, 877 (W.D.N.Y. 1992) (stating that "the law of the jurisdiction having the most significant contacts and the greatest interest in the litigation will be applied," and that New York labor code provision is conduct-regulating and should apply to New York accident); In re DES Cases, 789 F. Supp. 552, 566-67 (E.D.N.Y. 1992) (discussing Neumeier and Schultz); Reale v. Herco, Inc., 589 N.Y.S.2d 502, 505-06 (App. Div. 1992) (applying law of situs of tort after citing Neumeier rule indicating that, absent special circumstances, situs law should be applied when parties are from different states); Salsman v. Barden & Robeson Corp., 564 N.Y.S.2d 546, 548 (App. Div. 1990) (stating that New York labor law provision is conduct-regulating and should not, therefore, apply to Massachusetts construction accident); LaForge v. Normandin, 551 N.Y.S.2d 142, 142-43 (App. Div. 1990) (stating that loss-allocating rule of situs should generally apply when parties are from different jurisdictions).
  \item See, e.g., Robinson v. U-Haul Co., 785 F. Supp. 1378, 1379 (D. Alaska 1992) ("It is clear that the Alaska courts will apply the law of Alaska unless there is a substantial reason to apply the law of another state.").
  \item See, e.g., Allison v. ITE Imperial Corp., 928 F.2d 137, 143-44 (5th Cir. 1991) (analyzing respective policies of Tennessee and Mississippi in course of an opinion embracing Second Restatement of Conflicts); Lee v. Delta Air Lines, 797 F. Supp. 1362, 1368-71 (N.D. Tex. 1992) (analyzing respective interests of Texas and Florida
\end{itemize}
section 6 of the Second Restatement itself contemplates evaluation of state interests in determining which state has the most significant relationship with the issue at hand.\(^{120}\)

Of those courts that have decided choice of law cases in recent years, by far the largest number have endorsed the Second Restatement of Conflicts.\(^{121}\) As others have noted, however, this judicial affinity for the Second Restatement may reflect nothing more than the open-endedness of the Second Restatement's formulations; a court can reach virtually any result in any choice of law case and find some support for the result in the Second Restatement.\(^{122}\) The predominance of Second Restatement citations, then, probably reflects less the victory of a particular theory than the preference of common-law courts for making choice of law decisions without the constraint of a comprehensive theory.

Examination of judicial language reveals much less about law than examination of result. In many choice of law cases, any of several competing approaches would lead to the same result. In cases like these, a judicial statement that the court has adopted a particular approach is not entitled to much weight. Consider two recent cases: \textit{Black v. Leatherwood Motor Coach Corp.},\(^{123}\) in which the court purported to apply the First Restatement's lex loci approach, and \textit{O'Connor v. Busch Gardens},\(^{124}\) in which the court purported to

\(^{120}\) See \textit{Restatement (Second) of Conflict of Laws} § 6(2)(b), (c) (1971).

\(^{121}\) Others have noted the widespread adoption of the Second Restatement. See, e.g., Gregory E. Smith, \textit{Choice of Law in the United States}, 38 Hastings L.J. 1041, 1046 (1987) ("The Second Restatement is the most popular of the modern choice of law theories."). For some recent cases purporting to follow the Restatement, see \textit{Allison}, 928 F.2d 137, 143-45 (5th Cir. 1991) (following the Second Restatement in applying Tennessee law to an electrical fire caused by a defective circuit-breaker involving a Mississippi resident in Tennessee); \textit{California Union Ins. Co. v. Therm-o-Disc, Inc.}, 1993 Ohio App. LEXIS 239, at *18-21 (Ct. App. Jan. 21, 1993) (applying Second Restatement in ruling that Michigan law governs in Ohio proceeding); \textit{Brazones v. Prothe}, 489 N.W.2d 900, 904 (S.D. 1992) (applying Second Restatement in determining that South Dakota law should apply to Iowa petroleum storage tank explosion involving South Dakota resident); \textit{Hataway v. McKinley}, 830 S.W.2d 53, 59 (Tenn. 1992) (following Second Restatement in decision to apply Tennessee law to scuba diving accident suffered by Tennessee resident in Arkansas).


use interest analysis. In *Black*, residents of Virginia and the District of Columbia brought an action in Maryland against a Virginia bus company for injuries suffered in a New Jersey accident that occurred while plaintiffs were passengers on a trip to Atlantic City. After a jury returned substantial verdicts in favor of plaintiffs, the bus company sought reduction of the jury's award pursuant to Maryland's $350,000 "cap" on noneconomic damages. The court, purporting to apply the First Restatement's lex loci rule, held the cap inapplicable because New Jersey, not Maryland, was the situs of the accident. Of course, the court could have reached precisely the same result using interest analysis by concluding that Maryland had no interest in limiting the passengers' recovery against a Virginia corporation.

Conversely, in *O'Connor v. Busch Gardens*, the court, purportedly applying interest analysis, held that Virginia's contributory negligence rule should apply in an action for injuries suffered by New Jersey tourists while visiting a Virginia amusement park. It ought to be obvious that the court would have reached the same result had it applied the First Restatement's "place of the wrong" approach. *Black* and *O'Connor* illustrate the general problem: even fundamentally different approaches sometimes generate identical results, and when they do, one cannot be sure how committed the court is to the particular approach it has nominally embraced.

Moreover, not all cases in which courts purport to apply foreign law are cases in which the supposed choice of law has any impact on the court's decision. Thus, a court may, for whatever reason, choose to apply foreign law, and then conclude that foreign law and forum law are equivalent. Or, the court might suggest that foreign law is applicable after applying other principles, only tangentially related to choice of law, which mandated a particular decision.

125 See *Black*, 606 A.2d at 296.
126 See id.
127 See id. at 300-05.
128 See *O'Connor*, 605 A.2d at 775.
129 See Shawmut Worcester County Bank v. First Am. Bank & Trust, 731 F. Supp. 57, 64 (D. Mass. 1990) (applying Florida law, even though parties have agreed that Massachusetts law should govern, and concluding that Florida law, like Massachusetts law, would follow the American Law Institute's Proposed Article 4A of the Uniform Commercial Code).
The point, then, is that judicial language purporting to embrace one or another approach to choice of law may be little more than post hoc rationalization. Language alone is a poor indicator of the method the court actually used to reach its result. Let us turn, then, to an examination of case results to see what patterns have emerged. As a starting point, we may assume that a court generally applies its own law unless confronted with a reason to apply some other law. We can then examine cases to see what circumstances are present in those cases where courts have chosen not to apply their own law. The focus will be on recent cases, decided since the beginning of 1990. After demonstrating that in some tort cases courts have a sense of conflicts justice, I hope to show that in many other tort cases ordinary conflicts principles are irrelevant to the results courts reach.

2. Parties' Agreement to Application of Foreign Law

One reason courts depart from forum law is that the parties themselves have agreed, at some stage before or during the proceeding, that a foreign state's law should apply. So long as courts permit parties to settle cases, there appears to be little reason to prevent them from narrowing the issues before the court. And, indeed, in at least one recent case applying a foreign state's law, the parties had agreed to application of that law.

---

131 Of course, extracting principles from case results is not without its own problems. Every first-year law student is taught that case facts and holdings can be characterized in different ways to suit a client's position. One person's rule may be another's exception.

132 In preparation for this Article, I attempted to examine all choice of law cases decided since 1990. My starting point was a LEXIS search with the following input: "choice pre/3 law or conflict pre/3 laws and date > 1989." That search, initially conducted in April 1993, generated about 300 cases, many of which involved choice of law issues only tangentially or not at all. After reading all cases in which choice of law was an issue, I supplemented the LEXIS search with recent cases cited in the cases generated by the search.

133 See Moore v. Ronald Hsu Constr. Co., 576 A.2d 734, 737 (D.C. Cir. 1990). In Moore, after both parties had relied on a Maryland statute, the trial court's decision cited only a District of Columbia case. Quite naturally, on appeal, the winning party "retreated somewhat from its position below, i.e., that the Maryland Act applies." Id. at 737 n.2. Nevertheless, the D.C. Court of Appeals reversed and held Maryland law applicable. See id. at 738.
3. Personal Injuries Resulting from Localized Activity

Many of the tort cases that generated the choice of law revolution of the 1960s and 1970s—Kilberg v. Northeast Airlines, Babcock v. Jackson, Reich v. Purcell, Bernhard v. Harrah's Club—arose out of airplane and automobile accidents. Multi-state cases like these had grown far more common with the increasing mobility of American society. Similarly, product liability cases, in which parts and finished goods cause injuries far from the state in which culpable conduct occurred, highlighted the imperfections in a choice of law system that focused exclusively on the location of the victim's injury.

Despite the re-evaluation of choice of law principles these cases induced, recent case law demonstrates remarkable consistency in tort cases involving localized activity. Where one party to a tort action has engaged in activity localized in her home state, and her home state's law protects her, the law of the state in which she has acted will protect her, regardless of the forum in which the case arises and the choice of law method the court purports to follow.

134 172 N.E.2d 526, 529 (N.Y. 1961) (rejecting application of Massachusetts wrongful death limitation to case decided under Massachusetts negligence law).
136 432 P.2d 727, 730-31 (Cal. 1967) (en banc) (holding that Ohio wrongful death statute should apply to Ohio residents killed in an automobile accident in Missouri while en route to California).
137 546 P.2d 719, 720-22 (Cal.) (holding that California law should govern action against Nevada tavern owner by California resident injured in California by a third party who purchased alcohol in Nevada), cert. denied, 429 U.S. 859 (1976).
139 The results in these cases parallel the first two "Principles of Preference" advanced by David Cavers, without relying on Cavers's principles. See DAVID CAVERS, THE CHOICE OF LAW PROCESS 139-46 (1965). Cavers's first principle provides:

Where the liability laws of the state of injury set a higher standard of conduct or of financial protection against injury than do the laws of the state where the person causing the injury has acted or had his home, the laws of the state of injury should determine the standard and the protection applicable to the case, at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing their relationship.

Id. at 139 (emphasis omitted). His second principle provides:
Perhaps the clearest cases of localized activity are those in which an out-of-state visitor seeks to hold a landowner liable for injuries suffered on the landowner’s land. In these cases, courts consistently apply the law of the state in which the land is located if that law would protect the landowner. For example, in *O’Connor v. Busch Gardens*, a New Jersey court, purporting to apply interest analysis, held that Virginia’s contributory negligence rule would apply to a claim by a New Jersey resident injured at a Virginia amusement park.\(^{140}\) In *Reale v. Herco, Inc.*,\(^ {141}\) a New York court, following the choice of law “rules” developed by the Court of Appeals in *Neumeier v. Kuehner*,\(^ {142}\) applied Pennsylvania law to permit a Pennsylvania camp to seek contribution on a negligent parental supervision theory from the parents of an injured camper who had sued the camp for negligence.\(^{143}\) And in *Laport v. Lake Michigan Management Co.*,\(^ {144}\) an Illinois court, applying its rule that the state of injury governs unless Illinois has a more significant relationship with the occurrence, held that Wisconsin law was properly applied to determine a restaurant owner’s liability for injuries suffered in the bathroom of a Wisconsin Pizza Hut restaurant.\(^ {145}\) In each of

Where the liability laws of the state in which the defendant acted and caused an injury set a lower standard of conduct or of financial protection than do the laws of the home state of the person suffering the injury, the laws of the state of conduct and injury should determine the standard of conduct or protection applicable to the case, at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing the relationship.

*Id.* at 146 (emphasis omitted).

Although Cavers distinguishes between localized activities and motor vehicle accidents, courts tend to apply a version of Cavers’s principles even to motor vehicle accidents so long as the activity of one of the parties has been purely local. See, e.g., *De Rose v. New Jersey Transit Rail Operations*, 565 N.Y.S.2d 305 (App. Div. 1991). *In De Rose*, a child was killed by a New Jersey transit commuter train while crossing the tracks near his New York home. See *id.* at 306. Although the commuter train operated through both New York and New Jersey, the child’s activity was purely local. See *id.* In the action by his estate, the court refused to apply New Jersey’s tort claims act, which prescribed conditions precedent to any action against public entities and barred recovery if the injured party's negligence exceeded 50%. See *id.*

\(^{140}\) See *O’Connor*, 605 A.2d at 775 (rejecting application of the New Jersey comparative negligence statute).


\(^{142}\) 286 N.E.2d 454, 457-58 (N.Y. 1972) (developing three rules upholding the principle that the place of injury is the substantive law that should govern, unless the host-driver and guest-passenger are domiciled in the same state).

\(^{143}\) See *Reale*, 589 N.Y.S.2d at 507.


\(^{145}\) See *id.* at *13-*15.
these cases, the court protected the property owner by applying the law of the state in which the property was located, not the law of the injured party's domicile.\footnote{See Pascente v. Pascente, No. 91 Civ. 8104 (SS), 1993 U.S. Dist. LEXIS 1779, at *1-*2 (S.D.N.Y. Feb. 16, 1993) (holding that Connecticut's contributory negligence and collateral source rules are applicable to New York plaintiffs allegedly injured by Connecticut defendants acting in Connecticut). The opinion does not detail the nature of the alleged injuries or negligence.}

The reasons courts have offered for focusing on the state in which the land is located are not entirely persuasive. For instance, although the O'Connor court wrote of Virginia's interest in deterring negligent behavior,\footnote{The court stated: "Virginia's legitimate interest in discouraging unsafe local property conditions and unsafe conduct is directly related to the substantive issue of comparative-vs.-contributory negligence on which the conflicts question focuses." O'Connor, 605 A.2d at 775.} it strains credulity to contend that an amusement park tourist would investigate contributory negligence rules before deciding how carelessly to behave. In Reale, the court focused on the camp operator's reasonable expectations,\footnote{See Reale, 589 N.Y.S.2d at 507.} but it is hardly likely that the camp operator had given a moment's thought to its right to implead a child's parents if the child were injured at camp. If the landowners' liability insurers could show that they had set rates based on assumptions about state law, perhaps they might be able to advance a plausible "expectations" argument, especially since the risk in these cases, unlike in automobile cases, is localized in a particular state. Expectations arguments advanced by insurance companies, however, rarely get a sympathetic hearing.\footnote{Cf. WEINTRAUB, supra note 33, at 287 (analyzing arguments about unfair surprise to insurance companies and concluding that "to talk of 'surprising' the insurer is very likely to be talking nonsense").}

Somehow, a widely shared sense of fairness appears to require application of the law of the landowner's home state. Territorial boundaries remain important in our federal system, and when a landowner conducts localized activities in his home state, scholars share the courts' reluctance to subject the landowner to the home state law of a visitor injured on the land, at least when the landowner and visitor had no prior connection.\footnote{See, e.g., CAVERS, supra note 139, at 146 (explaining second principle of preference where "liability laws of the state in which the defendant acted and caused an injury set a lower standard of conduct or of financial protection than do the laws of the home state of the injured party"); WEINTRAUB, supra note 33, at 342 (stating that even if defendant is not unfairly surprised, "it is likely that the defendant will..."}. Even interest analysts...
would concede that the law of the landowner's home state should apply if suit were brought in that state. The instinct of most courts and scholars to apply that law even when suit is brought elsewhere no doubt reflects an aversion to forum-shopping by manipulative plaintiffs.  

The tendency to apply the law of the state of injury in cases of localized activity has not been limited to actions brought against landowners. *Cooney v. Osgood Machinery*, recently decided by the New York Court of Appeals, reflects a similar approach for cases involving employment injuries: if an employee is injured at a fixed work site in a state which immunizes the employer from liability, the employer will not be subjected to liability under the law of some other state.  

In *Cooney*, the plaintiff employee was injured while cleaning a machine at his regular place of employment in the defendant employer's Missouri plant. The employee received workers' compensation benefits and then brought a products liability action in New York against the machine's sales agent. The sales agent then served a third-party complaint against the employer, who moved to dismiss based on Missouri's worker compensation statute, which (unlike New York's statute) immunizes employers not only from direct actions by injured workers, but also from contribution claims by tort defendants. The Court of Appeals granted summary judgment to the employer, characterizing the case as a true conflict and holding that the law of the place of injury should perceive his treatment as unfair if the plaintiff's state applies its law to him for no other reason than that his victim is a resident of that state").

Recent cases appear willing to go further, applying the law of the place of injury even when the injury arose in an on-the-job accident where the landowner had substantial connection with the forum state. *See Baedke v. John Morrell & Co.*, 748 F. Supp. 700, 702 (N.D. Iowa 1990) (applying South Dakota law on loss of consortium and contributory negligence to injury suffered by Iowa resident while working at the South Dakota site of a multi-state corporation that operated plants in many states, including Iowa); *Salsman v. Barden & Robeson Corp.*, 564 N.Y.S.2d 546, 547-48 (App. Div. 1990) (refusing to apply New York labor law statute to aid Pennsylvania resident injured at Massachusetts construction site, despite fact that injured plaintiff was hired by defendant-contractor in New York).  

151 In *O'Connor*, for instance, the court noted that the plaintiff had first brought suit in Virginia, and then dismissed the suit to proceed in New Jersey. *See O'Connor*, 605 A.2d at 774.


153 *See id.* at 281.

154 *See id.* at 279.

155 *See id.*

156 *See id.*
The court emphasized the local nature of employer's activity, writing that the employer "could hardly have expected to be haled before a New York court to respond in damages for an accident to a Missouri employee at the Missouri plant." 

Similarly, in other recent New York cases, both state and federal, courts have indicated that a New York statute making landowners and contractors strictly liable for injuries suffered at construction sites should be applied for the benefit of injured employees when, and only when, the accident occurs at a New York worksite. Thus, in Salsman v. Barden & Robeson Corp., the court held that a Pennsylvania worker could not invoke the New York statute against a New York general contractor for injuries suffered at a Massachusetts construction site. And in Brewster v. Baltimore & Ohio Railroad Co., the court even denied the statute's protection to a New York worker injured at a Pennsylvania job site. By contrast, in Fiske v. Church of St. Mary of the Angels, involving a New York construction site, the court permitted a contribution action to proceed against a Pennsylvania subcontractor even though the injured worker was an employee of that subcontractor and had accepted workers' compensation benefits in Pennsylvania. If one can generalize from these New York cases, they suggest, taken together, that the law of the state of injury will generally apply to jobsite injuries arising at a stationary workplace.

157 See id. at 283.
158 Id. at 284.
162 But cf. Brazones v. Prothe, 489 N.W.2d 900 (S.D. 1992), a recent South Dakota case in which the court applied South Dakota law to deny recovery to South Dakota residents injured in an employment related injury at an Iowa worksite. See id. at 903. In Brazones, the injured workers were based in South Dakota while they served their employer in more than one state. The court focused on the South Dakota employment relationship in applying South Dakota's workers' compensation statute, which permitted tort recovery only for intentional torts. See id. at 904-05.

Although in many respects the facts in the Brazones case resemble those in Fiske, the Brazones court applied the law of the state in which the employment relation was centered, not the state of injury.

In Fiske, for instance, the court took pains to distinguish earlier cases dealing with work injuries suffered outside New York and cases in which the location of the injury was "fortuitous" because it resulted from an airplane crash. See Fiske, 802 F. Supp. at 879-80.

Even when an employment-related injury was suffered during an airplane crash, at least one recent case has applied the law of the place of the injury. See Fitts v.
4. Discouraging Blatant Forum Shopping

In most tort cases, including the cases discussed in the preceding Section, the tort plaintiff brings suit either at home or in a state with which the defendant has a significant affiliation—generally, the state of the defendant’s domicile or incorporation, or the state in which the defendant maintains its principal place of business. When a plaintiff sues in some other forum, recent cases suggest that the forum will depart from its own law if it suspects that a plaintiff has chosen the forum only in the hope of securing application of a more favorable law. For example, in *New England Leather Co v. Feuer Leather Corp.*, a Massachusetts partnership formed to sell leather hides to the furniture industry contracted with a New York corporation to supply leather to the partnership’s customers. The negotiations between the two took place in New York, orders were transmitted to the supplier in New York, the hides were warehoused in New York, and then shipped to customers in at least eleven states. Yet, when a dispute arose about the quality of the hides shipped, the Massachusetts partnership brought suit, not in New York or Massachusetts, but in North Carolina to take advantage of a North Carolina unfair competition statute that provided for treble damages and attorney’s fees. The Fourth Circuit refused to apply North Carolina law, emphasizing the potential for manipulation if the plaintiff were entitled to choose whatever law proved most favorable. Similarly, in *Selle v. Pierce*, one Nebraska resident brought a defamation action against another Nebraska resident in a South Dakota court, apparently intending to take advantage of South Dakota’s rule permitting punitive damages in defamation actions. The court cited South Dakota’s interest in

164 942 F.2d 253 (4th Cir. 1991).
165 See id. at 254, 256.
166 See id. at 254.
167 See id. at 256. Plaintiff, the Massachusetts partnership, had argued that North Carolina law should apply because its ability to do business in North Carolina was harmed, and that North Carolina was therefore a place of injury. In rejecting this argument, the court wrote: “NELC’s [New England Leather Co.] proposed choice of law rule is rife with opportunities for manipulation. For example, if NELC perceived that it had a greater chance of recovery on its claims under Indiana law, it could argue that Indiana law should apply because hides were shipped into that state.” *Id.* The court also rejected the partnership’s argument that North Carolina law should apply because North Carolina is the heart of the nation’s furniture industry. See *id.*
168 494 N.W.2d 634 (S.D. 1993).
discouraging forum shopping as a basis for concluding that Nebraska law should be applied. ¹⁶⁹

5. The Absence of Conflicts Injustice: Substance Becomes All

As the last two Sections have demonstrated, there are cases, even tort cases, in which courts have a strong sense of conflicts justice: they believe that because of the location of certain actors or events, particular rules should apply regardless of the substantive merits of those rules. It would be a mistake, however, to believe that courts have a strong sense of conflicts justice about all cases. Particularly in cases involving automobile and airplane accidents, as well as products liability litigation, courts might reasonably apply more than one state's law without working any un unfairness to the parties. The parties have developed no expectations about the rules that would apply to their actions, and the inherently multistate nature of the activity makes it difficult to argue that the expectations of insurance companies, or insurance rates, will be affected by a choice of law decision in a particular case. ¹⁷⁰ Frequently in these cases, courts do what Currie suggested they should do: apply forum law. In those cases where they depart from forum law, the evidence suggests that they do so more because they approve the substantive result that foreign law will produce rather than out of a sense of conflicts justice. ¹⁷¹

¹⁶⁹ See id. at 637. The defamation plaintiff in the case had alleged that allegations made by defendant, sent to a third party in South Dakota, had impaired his business reputation in South Dakota. The court wrote:

Though Selle may desire to punish monetarily, there is no indication that South Dakota's law would be furthered by its use rather than the law of Nebraska. South Dakota, as do all states, has an interest in discouraging forum shopping. To allow Selle to use his business ties to this state as a way to punish Pierce, would be counterproductive to that end.

Id.

¹⁷⁰ But cf. Joseph Singer, A Pragmatic Guide to Conflicts, 70 B.U. L. Rev. 731, 743 (1990) ("I refuse to accept the idea that expectations arguments are necessarily weak in the torts context."). In this article, Singer catalogues expectations arguments available in a variety of cases, but these expectations often carry little weight. See, e.g., id. at 781-83 (cataloguing expectations arguments for each side in particular cases, but not using those arguments to resolve the cases).

¹⁷¹ See Singer, supra note 6, at 59. Singer writes:

In practice, it is quite clear that what courts ordinarily do in conflicts cases is to apply forum law. Whatever the scholars say about it, the judges seem to understand that the point of law is to do justice, and, to the extent they view themselves as the moral voice of their community, they are likely to understand forum interests as outweighing nonforum interests.
Consider *Hanley v. Forester*. An intoxicated Mississippi resident drove his Corvette into oncoming traffic on a Florida highway, killing himself and four other people, and seriously injuring a Louisiana resident. The driver's $70,000 insurance policy was inadequate to satisfy all claims, and the driver's estate was virtually insolvent. The injured Louisiana resident brought an action in Mississippi federal court against the driver's father, a Mississippi resident listed as a co-owner on the Corvette's certificate of title. Under Florida law, a co-owner of a vehicle may be liable for the driver's negligence if the car is driven with the co-owner's consent; by contrast, under Mississippi law, an owner is liable only if the owner is negligent in entrusting the car to the driver. The Fifth Circuit's choice, therefore, was this: hold Florida law applicable and permit the injured victim's claim against the driver's father (and presumably his insurance company) to stand, or hold Mississippi law applicable and deny relief to the victim. Not surprisingly, the appellate court held Florida law applicable.

One might, of course, argue that the result was simply wise application of ordinary choice of law principles, having nothing to do with the substantive result in the case. After all, the accident did

---

*Id.; see also Kramer, supra note 122, at 466 ("[I]n deciding choice of law cases, judges really do seem driven by their desire to apply a preferred substantive law without regard for independent choice of law considerations.").

172 903 F.2d 1030 (5th Cir. 1990).

173 See id. at 1031.

174 See id. at 1031 nn.1-2.

175 The father had also cosigned the note financing the car. See id. at 1031.

176 See id. at 1031-32.

177 The trial court had granted the father's summary judgment motion, holding that the victim had not made a prima facie showing that the father had been negligent in entrusting the car to his son. See id. at 1031.

178 See id. at 1034. Of course, if a state supreme court prefers the substantive law of another state, there is no need to use choice of law principles to apply that law; instead, the court could simply change forum law to reflect its preferences. That option is not, however, available to state trial or intermediate appellate courts, nor is it available to federal courts. Moreover, even a state supreme court may prefer to act incrementally rather than deciding that a pre-existing rule should be abandoned for all future cases. See, e.g., I.J. Weinrot & Son, Inc. v. Jackson, 708 P.2d 682, 685, 691 (Cal. 1985) (abandoning an 1872 statute because the doctrine for which the statute stands was "obsolete, archaic and outmoded"); Offshore Rental Co. v. Continental Oil Co., 583 P.2d 721, 728 (Cal. 1978) (declining to apply California law over Louisiana law because "California's interest in the application of its unusual and outmoded statute is comparatively less strong than Louisiana's corollary interest, so lately expressed in its prevalent and progressive law").
occur in Florida, and the Mississippi Supreme Court had said that the law of the place of injury should govern in tort cases unless some other state has a more significant relationship with the issue. But neither the plaintiff nor the defendant in Hanley was a Florida resident, and in an earlier case, the Fifth Circuit, applying Mississippi choice of law rules, had refused to apply the place of injury rule to an airplane accident case when the state of injury had no relationship to the crash other than the circumstance that the plane crashed there. Moreover, the deterrence argument advanced by the Hanley court rings hollow; denying recovery to this victim would be unlikely to have any effect on the safety of Florida highways. The inference is strong, then, that the court was motivated at least in substantial measure by the desire to afford recovery to the victim, and application of Florida law was the easiest route to take.

Tort plaintiffs do not invariably benefit from the tendency of courts to examine substantive results in the process of deciding choice of law cases. Often, the substantive result the court favors may be one that benefits the defendant. In particular, where forum law would permit a plaintiff to recover damages without demonstrating any pecuniary loss, or to recover punitive damages, a number of courts have gone out of their way to apply the law of another state to limit the plaintiff's damages.

Fitts v. Minnesota Mining & Manufacturing Co. illustrates the antipathy to super-compensatory damages. An entire Alabama family—husband, wife, and their three children—was killed when the private plane piloted by the husband crashed after takeoff in Florida on the family's return from a vacation. The wife's father, on behalf of the wife and children, brought an Alabama wrongful death action against the designer and manufacturer of the plane and the designer and manufacturer of a flight instrument. He sought application of Alabama law, because under Florida law funeral expenses would have been the only compensatory damages available

179 See Hanley, 903 F.2d at 1032 (citing Mitchell v. Craft, 211 So. 2d 509, 516 (Miss. 1968)).
180 See Chain v. Thompson, 818 F.2d 1204, 1208 (5th Cir. 1987).
181 The court wrote: "The State of Florida has a manifest interest in preserving the integrity and safety of its highway system and preventing the type of injuries which resulted from this tragic accident." Hanley, 903 F.2d at 1033.
183 See id. at 819.
184 See id.
on behalf of the wife and children, who were not earning income at
the time of their death. The Alabama Supreme Court held
Florida law applicable, declining to abandon its lex loci rule "on the
facts of the present case." That very formulation indicated an
openness to changing the established choice of law rule in other
cases, but offered little support for the damage claim of this
plaintiff who had suffered no pecuniary loss.

_Lee v. Delta Air Lines, Inc._ illustrates how antipathy toward
punitive damages might color choice of law analysis. A Florida
resident, employed by Delta Air Lines as a flight attendant, died in
a plane crash at the Dallas/Fort Worth airport. Her husband
filed for workers' compensation benefits in Florida, but the claim
was denied, except for funeral benefits, because the husband was
not a dependent of the deceased employee. The husband then
brought a tort action in Texas, seeking actual and exemplary
damages. In granting summary judgment to Delta, the court
noted that in Texas, as in Florida, workers' compensation would
generally provide the exclusive remedy for a deceased employee; the
only significant difference between Texas law and Florida law was
that in Texas, the survivors of a deceased employee were entitled to
exemplary damages if death was caused by the employer's willful
acts or gross negligence. On this issue, the court, purporting
to apply the Second Restatement, held that Florida law applied, and
denied relief to the employee's husband.

In _Lee_, a Texas federal court applied Florida law to deny
recovery to a Florida resident for death occurring outside Florida;
by contrast, in _Fitts_, an Alabama court applied Florida law to deny
recovery to a non-Florida resident killed in Florida. What unites the
cases is the substantive law result: in each case, plaintiffs who had
suffered no pecuniary loss as a result of the allegedly wrongful
death were denied the opportunity to persuade a jury to make a
substantial award.

---

185 See id. at 820 n.1.
186 Id. at 823.
188 See id. at 1364.
189 See id.
190 See id. at 1363.
191 See id. at 1369.
192 See id. at 1372-74.
193 Cf. _Selle v. Pierce_, 494 N.W.2d 634, 637-38 (S.D. 1993) (applying Nebraska law
to bar plaintiff's punitive damage claim in defamation action).
It is not possible to prove rigorously that courts focus on substantive results in deciding many choice of law cases. The language courts use in their opinions always draws on choice of law cases and principles, and most opinions offer a respectable choice of law rationalization for the result the court has reached. But just as vested rights doctrine afforded courts enough escape hatches to permit them to reach almost any result in any case,\(^\text{194}\) modern choice of law theory provides ample authority to permit a court to reach virtually any result in any litigated case.\(^\text{195}\) What opinions do not generally reveal is how courts choose from among the panoply of choice of law principles. The cases discussed in this Section—and others\(^\text{196}\)—suggest that achieving the substantive result

194 For example, leading conflicts casebooks provide examples of judicial use of escape devices to avoid results seemingly dictated by the First Restatement. See Lea Brilmayer & James A. Martin, Conflict of Laws 120-82 (3d ed. 1990); Roger C. Cramton et al., Conflict of Laws 39-83 (5th ed. 1993); Willis Reese et al., Conflict of Laws 462-78 (9th ed. 1990).

195 See Kramer, supra note 122, at 466 ("[I]n deciding choice of law cases, judges really do seem driven by their desire to apply a preferred substantive law without regard for independent choice of law considerations.").

196 See, e.g., Allison v. ITE Imperial Corp., 928 F.2d 137 (5th Cir. 1991), in which South Central Bell contracted with a Mississippi corporation to inspect, clean, and test switch equipment located in Tennessee. During the process, a Mississippi employee was injured when a part fell off a circuit breaker he was trying to remove, causing an electrical fire and explosion. See id. at 138. When the employee and the Mississippi corporation brought a products liability action against the Pennsylvania manufacturer of the breaker, the Fifth Circuit, applying Mississippi law, held the claim time-barred by Tennessee's 10-year statute of limitations on products liability actions. See id. at 145.

From the perspective of interest analysis, the court's conclusion is ludicrous. If the law of the forum, the plaintiff's home state, would give the plaintiff a recovery, and if the defendant's home state (Pennsylvania) would not protect the defendant from liability (the court never indicated what statute of limitations was applicable in Mississippi or Pennsylvania), then there would be little reason to bar the claim based on a Tennessee statute. Moreover, so long as the defendant manufactures the breakers in Pennsylvania, and that state would not bar the claim, the defendant cannot have any claim that its expectations would be frustrated by allowing the claim to proceed. Presumably, other breakers sold in other states, including Pennsylvania, could have exhibited the same supposed defects.

Moreover, statutes of limitations were historically treated as "procedural," and hence to be governed by forum law. See Restatement (Second) of Conflict of Laws § 142 cmt. c (Proposed Revisions 1986) (indicating that even at the time of the First Restatement, courts usually characterized statutes of limitation as procedural). Indeed, the court's emphasis on Tennessee's strong interest in "insuring that products liability actions are brought within a reasonable time frame while evidence is still available," Allison, 928 F.2d at 144, is curious because it would appear to reinforce the procedural nature of the statute: one of Tennessee's concerns is that its courts not be burdened with cases marred by stale evidence.

The Allison court, then, went out of its way to bar this claim, despite the fact that
favored by the judge plays an important role in that choice.

6. Case Management Concerns

When choice of law questions reach appellate courts, fact disputes are rarely significant. If the appeal is of a judgment on the pleadings or of a summary judgment determination, the appellate court may generally assume a set of facts in considering whether the lower court's choice of law decision was legally "correct"; if the appeal comes after trial, the appellate court may well be bound by the findings of fact below. It should not be surprising, then, that many leading conflicts theorists, who have focused largely on appellate cases, have underemphasized the role of choice of law determinations in the case management process. ¹⁹⁷

Typically, however, trial courts make initial choice of law determinations, and case management concerns frequently predominate. Thus, in cases involving many parties and common issues, applying different rules of law to each plaintiff or defendant would create an administrative nightmare that courts would endure only for reasons more compelling than those usually advanced in choice of law cases. ¹⁹⁸

both traditional and modern choice of law theory could easily have permitted the claim to proceed. One's strong surmise is that the court agreed with the premises behind the Tennessee limitation statute, and sought to apply the statute broadly. ¹⁹⁷ Neither in the First Restatement nor in his three-volume treatise, see BEALE, supra note 18, did Beale discuss at what stage in its proceedings a trial court should make a choice of law determination. Currie's discussions of interest analysis assumed an established set of facts; he did not explicitly consider the impact interest analysis might have on the fact-finding process. See e.g., Currie, Married, supra note 24, at 228 (considering the facts of Milliken v. Pratt, 125 Mass. 374 (1878), as established, for purposes of further analysis). The Second Restatement, too, largely ignores questions of case management.

The American Law Institute has not ignored these questions altogether. The ALI's Complex Litigation Project does deal with these issues. See Complex Litigation Project-Proposed Final Draft, 1993 A.L.I. 386-93. Interestingly, however, that project has not been directed by conflicts scholars.

¹⁹⁸ Judge Weinstein's opinion in In re DES Cases, 789 F. Supp. 552 (E.D.N.Y. 1992), explores the reasons for applying a single rule of law in mass tort cases. Plaintiffs, who had been exposed to diethylstilbestrol ("DES") in utero, sought damages against manufacturers and distributors of the drug, which had been used in the 1950s and 1960s to prevent miscarriage but was later linked to a variety of disorders, some serious. See id. at 558-59. Defendant manufacturers sought application of the law of the manufacturers' home states in order to avoid New York's enterprise liability rule, which would hold a manufacturer liable even if the manufacturer could demonstrate that it had not marketed the drug in New York and could not therefore have been the cause of a New York plaintiff's injuries. See id. at 563-64 (citing Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y.), cert. denied, 493
Even in cases involving fewer parties, the timing of choice of law determinations can shape much of the litigation. If a court makes a choice of law determination early in the litigation process, it may foreclose litigation about facts that would be relevant only if a particular state's law were applied to the issue at hand. Indeed, in some cases, an early choice of law determination might permit resolution of the entire case on the pleadings or on summary judgment motion.

*Baedke v. John Morrell & Co.* illustrates the desire of parties and courts to limit the scope of litigation by resolving choice of law questions early. In *Baedke*, an Iowa resident died after he ingested toxic gases when his breathing apparatus failed while he was cleaning out sewage lines at a South Dakota meat packing plant. In an action for damages against the plant operator, the plant operator sought partial summary judgment on whether South Dakota or Iowa law should apply to three issues: the availability of damages for loss of consortium, the effect of contributory negligence on plaintiff's claim, and the applicability of the two states' wrongful death acts. All parties agreed that the summary judgment motion was an appropriate vehicle for resolving the issues, and the court determined that South Dakota law applied to the first two issues.

Consider the parties' motivations on the contributory negligence issue: if contributory negligence were an absolute bar to recovery, defendant would have an incentive to pour resources into investigating decedent's behavior and into proving contributory negligence, no matter how insignificant a contributing factor decedent's behavior might have been. By contrast, if a comparative negligence rule applied, defendant might not find it worthwhile to prove that

---

199 U.S. 944 (1989)). Judge Weinstein held New York law applicable to all claims brought by New York plaintiffs: "A finding that the law of each defendant's state applies would not merely cripple the New York courts in their attempt to process DES litigation efficiently; it would undermine the very policy that Hymowitz and subsequent cases have developed." *Id.* at 568. Even if the substantive policy concerns cited by Judge Weinstein were peculiar to the DES cases, the judicial economy rationale for applying the same law to related cases is of much broader application.

200 See *id.* at 701.

201 See *id.* at 701-02.

202 See *id.* at 702.

203 See *id.* at 705-08. The parties had not explained to the court what differences there were between the two wrongful death statutes. Hence, the court declined to resolve that question. *See id.* at 708.
decedent's negligence had contributed to the accident unless the decedent's conduct was a substantial contributing factor. If the court had refused to make a choice of law determination until all the facts were developed at trial, both parties might have been compelled to expend resources litigating an issue that might otherwise have proven irrelevant to the result in the case.\textsuperscript{204}

In cases like \textit{Baedke}, an early choice of law determination serves to focus further litigation. In other cases, like \textit{Hanley v. Forester},\textsuperscript{205} an early choice of law decision can put an effective end to the litigation—at least if the court decides the choice of law question in a particular way. In \textit{Hanley}, a drunk driver's victim brought an action against the driver's father, who shared title to the car.\textsuperscript{206} Under the law of Florida, where the accident occurred, a car's owner is liable for the negligence of the driver; under the law of Mississippi, where the driver and his father lived, the owner is liable only if he negligently entrusted the car to the driver.\textsuperscript{207} The Fifth Circuit, clearly sympathetic to the victim, had three choices: (1) hold Florida law applicable, (2) hold Mississippi law applicable, or (3) refuse to make a decision until after trial. By deciding that Florida law was applicable, the court set the stage for a quick recovery by the injured victim.\textsuperscript{208} Either of the other alternatives might have involved a protracted trial over the father's negligence.\textsuperscript{209}

\textsuperscript{204} Sometimes the parties, by structuring their pleadings, can compel an early choice of law determination. \textit{Grudoff v. American Airlines}, No. 90-C-7462, 1991 U.S. Dist. LEXIS 14583 (N.D. Ill. Oct. 7, 1991), is illustrative. The plaintiff, seeking damages from an employer who had fired him, pleaded three identical counts for breach of contract and three identical counts for intentional infliction of emotional distress, one under the law of each of three states. \textit{See id.} at *3-\textsuperscript{4}. Plaintiff also pleaded two other identical counts for negligent infliction of emotional distress, and two separate counts under a particular state's statutes. \textit{See id.} at *4. When the employer moved to dismiss under Rule 12(b)(6), the court had to determine whether, on the facts pleaded, each count stated a claim as a matter of law. As a result, the court dismissed nine of plaintiff's ten counts. \textit{See id.} at *10.

\textsuperscript{205} 903 F.2d 1030 (5th Cir. 1990). For a discussion of \textit{Hanley}, see \textit{supra} notes 172-81 and accompanying text.

\textsuperscript{206} \textit{See id.} at 1031.

\textsuperscript{207} \textit{See id.} at 1031-32.

\textsuperscript{208} The court did indicate that the court below would have to consider whether Florida law would permit recovery against a co-owner, and whether Florida would adhere to existing case law. \textit{See id.} at 1034. Nevertheless, the court's decision certainly enhanced the victim's chance of obtaining a quick settlement.

\textsuperscript{209} Although the trial court had concluded that the victim had failed to make a prima facie showing of negligent entrustment, and had therefore granted summary judgment to the owner-father, the Fifth Circuit noted that "[t]here was conflicting
In still other cases, an early choice of law determination may be designed to stimulate settlement by reducing the uncertainty surrounding the course of the litigation. Consider Mascarella v. Brown,\textsuperscript{210} in which a New Jersey employee of E.R. Squibb brought an action against an independent New York radiologist to whom Squibb had sent her mammogram files for reading. When she brought an action against the radiologist for negligence in failing to diagnose cancer, the radiologist filed a third-party complaint against Squibb.\textsuperscript{211} The court denied Squibb's summary judgment motion, which had been based on New Jersey worker compensation laws precluding third-party contribution claims against the employer of an injured employee.\textsuperscript{212} Rather than simply denying the motion on the ground that facts presented might make New York law applicable, and therefore permit contribution, the court wrote an opinion essentially holding New York law applicable.\textsuperscript{213} As a result, the court reduced the uncertainty the parties would have faced had the court left the choice of law question open. This reduction in uncertainty might have increased the chance of settlement.

On the other hand, by delaying a choice of law determination, a trial court might avoid ever deciding a potentially knotty choice of law issue. The facts might unfold in a way that would produce liability, or preclude liability, under the law of each of the competing states.\textsuperscript{214} Even if the court ultimately has to make a choice of law decision, it may be able to do so with more information about factors potentially relevant to the decision: party expectations, state policies, or even the location of particular events. Finally, deferring a choice of law determination, like accelerating the decision, has the evidence as to whether Forester had reason to know or suspect that Tommy had a propensity to operate a vehicle while under the influence of intoxicants."

\textsuperscript{210} 813 F. Supp. 1015 (S.D.N.Y. 1993).
\textsuperscript{211} See id. at 1017.
\textsuperscript{212} See id. at 1017-20.
\textsuperscript{213} See id.
\textsuperscript{214} See Coar v. National Union Fire Ins. Co., No. 92-357, 1992 U.S. Dist. LEXIS 19713, at *4 (E.D. La. Dec. 12, 1992) (deferring choice of law decision until the cause of the accident, and the location of the conduct causing the accident, had been determined at trial). By declining to make the choice of law determination, the court might have set the stage for settlement or for a resolution of fact questions at trial that would have made a choice of law decision unnecessary.
potential to influence settlement negotiations between the parties. Since either decision affects the potential duration of the litigation, not to mention the ultimate outcome, one party or the other may be more eager to settle depending on the course of action the court takes.

Choice of law theorists have generally ignored these case management concerns, concentrating instead on how to advance state interests, protect party expectations, or enforce choice of law "rights." To judges, by contrast, case management concerns are often paramount. As we have seen, both the substance and the timing of choice of law decisions can have a significant impact on case management; when and how choice of law decisions are made may determine the duration and direction of litigation. So long as choice of law theory focuses only on what state's law should be applied to particular facts, theory cannot possibly capture the considerations that inform judicial choice of law decisions.

III. THE DISMAL FUTURE OF CHOICE OF LAW THEORY

I have argued that the liberal citation of choice of law theory in recently decided cases overstates the significance of choice of law principles. Those principles determine case results only when courts have an intuitive sense that justice requires application of the law of a particular state. Most choice of law cases, however, do not generate that intuitive sense of conflicts justice. In the ordinary choice of law case, choice of law principles take a back seat to the substantive results that are generated by the competing rules and the effect competing rules might have on litigation complexity and settlement negotiations. Does this "failure" of choice of law theory stem from inadequacy in the approaches developed so far, or is the problem inherent to choice of law theory? In other words, are all comprehensive choice of law theories doomed to failure?

My argument is that most of the premises and principles that underlie any given choice of law theory are sufficiently unimportant to courts that any attempt to implement a comprehensive theory is doomed. In this respect, choice of law policies and principles differ from those that underlie our systems of civil, criminal, and administrative procedure. Considerations of substance often color decisions on procedural issues, just as substance informs choice of law decisions. But courts recognize that procedural requirements perform an essential function in any legal system; without a core of procedural rules, adjudication and administration is impossible.
Hence, substance is not all; courts and administrators recognize that substantive results must be balanced against the harm to the system that would result if procedures were entirely ignored. By contrast, the state policies that serve as the focus of consequentialist choice of law theories rarely rise to the significance necessary to induce a judge to abandon a substantive result she might prefer; the choice of law "rights" emphasized by rights theorists are not so fundamental that they command allegiance when they seem inconvenient to a judge seeking to do justice between the competing parties.\textsuperscript{215}

### A. Choice of Law and the Common-Law Process

Many choice of law theorists share the view that courts resolve, or should resolve, choice of law questions before applying the applicable law to determine liability on the facts of the case. The jurisdiction-selecting rules of the First Restatement, authored by Beale, certainly operated on the premise that the choice of law determination is a separate and temporally earlier step in the process of deciding a case.\textsuperscript{216} Contemporary rights theorists accept the same premise. Douglas Laycock, for instance, has argued for choice of law rules that would be "applied to all cases within [their] scope, without regard to which state is the forum and without regard to who is helped or hurt."\textsuperscript{217} Perry Dane's plea for

\textsuperscript{215} Cf. Singer, supra note 6, at 6 (arguing that multistate cases should "ordinarily be resolved by application of what the forum considers to be the better law").

\textsuperscript{216} For instance, the First Restatement described how a court should determine the place of contracting in order to determine, under § 311, which state's law should govern questions concerning the formation of a contract:

Under its Conflict of Laws rules, in determining the place of contracting, the forum ascertains the place in which, under the general law of Contracts, the principal event necessary to make a contract occurs. The forum at this stage of the investigation does not seek to ascertain whether there is a contract. It examines the facts of the transaction in question only so far as is necessary to determine the place of the principal event, if any, which, under the general law of Contracts, would result in a contract. \textit{Then, and not until then, does the forum refer to the law of such state to ascertain if, under that law, there is a contract. . . .}

\textsuperscript{217} Laycock, supra note 3, at 324. Laycock argues that state interests should be considered in formulating choice of law rules, but not in what he regards as the analytically separate step of applying those rules:

I would consider each state's interest in regulating potential disputes. But I would consider state interests only as a step to selecting a particular person, thing, relationship, act, or event that will be controlling in locating the dispute within a territory. The goal is to specify a choice-of-law rule that
"vestedness" in choice of law determinations assumes that in choice of law cases, "a court's role is to discover and enforce whatever normative structure—that is, set of legal rights—applies in the case at hand."  

The assumption that a choice of law determination is analytically separate from other aspects of a case is not limited to rights theorists. Currie himself—the leading consequentialist among choice of law scholars—assumed that courts would start by investigating the laws of the competing states and the policies that underlie those laws in order to determine which states had an interest in application of their own policies. Even Larry Kramer, who seeks to debunk the notion that the choice of law process is significantly different from the process of determining which domestic rules are applicable and who argues that "'choosing' and 'applying' are not analytically distinct processes," nevertheless suggests that a court's first task in deciding a choice of law case is "to determine whether each law applies to the particular dispute." Kramer's proposed analysis—like those of rights theorists and most interest analysts—is heavily law-centered; he suggests that the first step in his analysis could produce any of three results—"no law may confer a right, only one law may confer a right, or several laws may confer rights."  

However widely shared this law-centered approach to the choice of law process may be among conflicts scholars, the approach is at odds with our most persuasive descriptions of the judicial decision-making process. Our best common-law judges do not decide cases deductively, starting with major premises and then applying those premises to the facts at hand. Instead, they start

---

will then be applied to all cases that fall within the rule, without regard to any state's interest in a particular case.

Id. at 330.

218 See Dane, supra note 1, at 1242-72.
219 Id. at 1245.
220 See Currie, Notes, supra note 25, at 183-84.
221 Kramer, supra note 1, at 290-91.
222 Id. at 291; see also Larry Kramer, More Notes on Methods and Objectives in the Conflict of Laws, 24 CORNELL INT'L L.J. 245, 253 (1991) ("[T]he court should begin by examining the laws in issue to determine whether both may potentially apply—i.e., to determine whether there is a conflict.").
223 Kramer, supra note 1, at 304.
224 Joseph Singer is a notable dissenter. Singer argues that the court's initial focus in choice of law cases should be "on the basic considerations of substantive justice and social policy that underlie the area of law at issue . . . ." Singer, supra note 6, at 79.
with the facts before them, form a tentative judgment about which party deserves to win, and then use precedent and other sources of authority as a background against which to check, or rethink, their conclusions.

In an annual unpublished lecture to first-year students at Cardozo Law School, the late Charles D. Breitel, formerly chief judge of the New York Court of Appeals, used to explain that judges first approached cases by asking themselves which party deserved to win. Only after ascertaining where justice lies in the individual case do judges move on the next question: What harm to the jurisprudence will result if I do justice in the individual case?

Judge Breitel's description of the judicial process is consistent with those offered by other respected—and sometimes revered—judges. Cardozo wrote that "[t]he common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars."225 Jerome Frank, later a distinguished federal judge,226 wrote that:

talks with candid judges have begun to disclose that, whatever is said in opinions, the judge often arrives at his decision before he tries to explain it. With little or no preliminary attention to legal rules or a definite statement of facts, he often makes up his mind that Jones should win the lawsuit, not Smith... 227

Others have echoed similar themes:228

225 IE N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 22-23 (1921). Cardozo went on to quote Munroe Smith for the proposition that the common law is essentially an experimental process:

The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered.

Id. at 23 (quoting MUNROE SMITH, JURISPRUDENCE 21 (1909)).

226 Jerome Frank sat on the United States Court of Appeals for the Second Circuit from 1941 to 1957.


228 Justice Brennan, for instance, has written that "[s]ensitivity to one's intuitive and passionate responses, and awareness of the range of human experience, is therefore not only an inevitable but a desirable part of the judicial process, an aspect more to be nurtured than feared." William J. Brennan, Jr., Reason, Passion, and "The Progress of Law," 10 CARDOZO L. REV. 3, 10 (1988). Justice Brennan went on to describe how a modern judge might approach the problem faced by the Supreme Court in Lochner v. New York, 198 U.S. 45 (1905). Noting that the approach in Lochner flowed from a premise of "negative liberty," while a different result might
The structure of the trial and appellate processes supports the notion that courts consider facts first and law second in reaching their decisions. Lawyers invariably start their briefs with a statement of facts, not an analysis of law. Discussion of legal issues appears only after the advocate has conditioned the judge to a view of the facts most favorable to her client. Works on trial and appellate advocacy emphasize the importance of facts.229

occur if a court started with a premise of positive liberty, Justice Brennan went on to write:

But how do we arrive at a new concept such as positive liberty? Although we might get here by a process of abstract philosophical reflection, most of us would initially take a different route. The concept of positive liberty is easily arrived at by considering the plight of an employee whose only “choice” is between working the hours the employer demands or not working at all. Such a choice strikes us, intuitively, as no choice at all. Upon reasoned reflection, we are able to give rational expression to this intuitive response by means of the concept of positive liberty.

Id. at 11. In other words, the process starts with intuition—imagination—and the intuitive result is then subjected to reason as a check. Thus, Justice Brennan notes that a particularly brutal crime may generate a “visceral temptation to help prosecute the criminal,” a temptation the judge must resist in order “to preserve the values and guarantees of our system of criminal justice.” Id.; see also Jack G. Day, How Judges Think: Verification of the Judicial Hunch, 1 J. CONTEMP. LEG. ISSUES 73, 82-101 (1988) (suggesting that gestalt theory provides a helpful explanation of the judicial decision-making process).

229 Judge Albert Tate has written:

The statement of the facts is regarded by many advocates and judges as the most important part of the brief . . . . [L]aw and legal principles are designed to produce fair and socially useful result when applied to facts. This fundamental aim of law lurks in the mind of the judge. If the application of the given legal principle produces a result deemed unfair by the judge, he will wish to study carefully whether indeed the given principle was truly intended to apply to the particular facts before him.

Albert Tate, Jr., The Art of Brief-Writing: What a Judge Wants to Read, in PETER J. CARRE ET AL., APPELLATE ADVOCACY 103, 106 (1982); see also ROBERT J. MARTINEAU, FUNDAMENTALS OF MODERN APPELLATE ADVOCACY 153 (1985) (“Perhaps the greatest weakness in most appellate briefs is the writer’s failure to use the facts of his case in the argument section to demonstrate the basic justice of his client’s cause.”); Malcolm L. Edwards, Briefs on the Merits, in CARRE ET AL., supra, at 131, 135-36 (emphasizing importance of statement of facts in brief writing).

John W. Davis, perhaps the leading appellate advocate of his generation, wrote:

[I]t cannot be too often emphasized that in an appellate court the statement of the facts is not merely a part of the argument, it is more often than not the argument itself. A case well stated is a case far more than half argued . . . . The court wants above all things to learn what are the facts which give rise to the call upon its energies; for in many, probably in most, cases when the facts are clear there is no great trouble about the law. Ex facio oritur jus, and no court ever forgets it.

None of this suggests that legal rules or doctrines are irrelevant in the decision-making process. Even Jerome Frank recognized that the process of determining facts is intertwined with determining what rules should apply to those facts. As Karl Llewellyn put it, "judges are law-conditioned." In Charles Yablon's words, "the existence and apprehension by the judge of various doctrinal materials might well be one of the background conditions of the ruling."

Even beyond the background impact legal norms might have in developing a judge's sense of the case, legal rules and doctrines act as a constraint on judicial decisions. Judges typically use rules and precedent to check their inclinations. Frank wrote:

The conscientious judge, having tentatively arrived at a conclusion, can check up to see whether such a conclusion, without unfair distortion of the facts, can be linked with the generalized points of view theretofore acceptable. If none such are discoverable, he is forced to consider more acutely whether his tentative conclusion is wise, both with respect to the case before him and with respect to possible implications for future cases.

But legal rules—especially those developed through the common-law process—are rarely so precise that they preclude interpretation to reach the judge's preferred result. In those cases where an established legal rule is incompatible with the decision the judge believes best, how the judge will decide is uncertain.

---

230 See JEROME FRANK, LAW AND THE MODERN MIND 134-35 (1935) (stating that judges select facts which will make their decision logical).
231 KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 201 (1960). Llewellyn also wrote of Roman judges "that they got controlled by Law at a deeper level, with greater effectiveness, and with finer results than ever has been achieved by mere conscious Rules of Law." Id. at 203.
233 FRANK, supra note 230, at 131. In a footnote, Frank quoted Balfour on formal logic: "[I]t never aids the work of thought, it only acts as its auditor and accountant-general." Id. at 131.
234 In Llewellyn's words:

[T]he form of words in which a rule is normally cast is very likely, thanks to the looseness of language, to be subject to a range of readings which not only rove in scope from the perverse literalistic all the way to the semigenerative, but also swing through various compass points according to diverse definitions or flavors of the constituent terms. . . . In our law, the rule rephrases of itself, almost, to adjust a notch or three, a compass point or four, to the call of sense . . . .

LLEWELLYN, supra note 231, at 180-81.
235 Llewellyn, drawing upon Fuller's figure, wrote:
Larry Kramer has argued that choice of law cases are not fundamentally different from domestic cases. If he is right, one would expect judges to approach choice of law cases as they do domestic cases: by using judgment, derived from background values, experience, training, and a myriad of other factors, to develop a sense of who should win. Choice of law cases are not, however, cases in which choice of law is the only issue; choice of law cases are primarily tort cases, contract cases, or estates cases. When the judge develops a sense of who should win, the substantive aspects of the case are likely to predominate—unless ignoring choice of law issues would offend the judge's sense of justice by, for instance, frustrating expectations on which a party relied or promoting forum-shopping. To persuade the judge to alter her initial conclusions because those conclusions violate choice of law principles, a choice of law scholar (or a practicing litigator) would have to demonstrate that application of the choice of law principle

If you pen an animal in an enclosure too close for comfort, you can be sure it will try hard to get out, but to predict whether it will succeed (much more: how it will, if it does) calls for knowledge of more factors than just the "desire" and the "corral."

Id. at 180.

See Kramer, supra note 1, at 290. Kramer argues:

The only difference is that some of the facts are connected to different states, and the court must determine if that affects whether the law or laws at issue confer a right. While this determination may be difficult, it does not alter the nature of the problem confronting the court, which remains to decide what rights are conferred by positive law.

Id.

See Paul A. Freund, Chief Justice Stone and the Conflict of Laws, 59 Harv. L. Rev. 1210, 1215-16 (1946) (arguing that choice of better law in choice of law cases is not significantly different from choices judges make in purely domestic cases); see also Singer, supra note 170, at 733 (1990) ("It often seems—quite correctly—that decisionmakers have initial intuitions about the correct result and simply manipulate the factors to justify reaching that result.").

See Singer, supra note 6, at 79 (stating that conflicts "cases present ordinary issues or tort, contract, property, family, and corporate law"); Weintraub, supra note 7, at 156 (stating that "the heart of the problem of mass tort litigation lies not in the conflicts problems, but in our law of torts, in the distribution of legal services, and in the civil jury trial").

See Terry S. Kogan, Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity, 62 N.Y.U. L. Rev. 651, 681 (1987) (contending that most important constitutional values at issue in choice of law are "those related to fairness to the litigants"); Singer, supra note 6, at 79-80 (concluding that decision-makers should consider unique aspects of choice of law cases, such as state interest and party reliance on other state law, when making their substantive analysis of the case to determine which law to apply).
is necessary either to promote some more broadly defined social policy or to vindicate some fundamental right, and that the policy or right is sufficiently important to justify sacrificing the judge's initial conception of justice in the case at hand. In the next two Sections, I shall argue that this burden is a nearly impossible one for the choice of law scholar to carry.

B. Developing a Choice of Law Theory to Achieve State Policy Objectives

For consequentialist theorists, the objective of choice of law theory is, in the words of Lea Brilmayer, "to maximize all of the objectives that states have chosen for themselves—whatever they might be." For modern consequentialists, as we have seen, Currie's brand of interest analysis is deficient because it focuses only on maximizing the forum state's domestic policies and ignores multistate policies shared by many states. The consequentialist objection to an approach that seeks only to do "justice" for the parties in the individual case would be similar: courts should not forfeit the opportunity to develop a broader framework that would more consistently advance state policies.

Thus, Larry Kramer emphasizes "the need for states to compromise with one another in order to maximize the extent to which they can successfully implement their domestic and multistate policies." Lea Brilmayer writes that "[s]tates have much to gain if they can find a way to pursue their interests cooperatively." Both Kramer and Brilmayer suggest that game theory provides a framework for increased cooperation in choice of law cases. Kramer develops what he calls illustrative "canons of construction" for true conflict cases, and uses game theory to argue that it will be in the long-term interest of all states to adopt the canons rather than pursuing self-interest in choice of law cases. Brilmayer makes no effort to advance particular choice of law rules

240 BRILMAYER, supra note 1, at 150.
241 See supra part I.B.
242 Kramer, supra note 1, at 315; see also Kramer, supra note 222, at 275 ("What we need, then, is a set of interpretive rules designed to maximize state interests.").
243 BRILMAYER, supra note 1, at 155.
244 Kramer, supra note 1, at 319-38.
245 See id. at 342-43.
or "canons," but argues that institutions could be developed to ensure cooperation between states.\footnote{See Brilmayer, supra note 1, at 181-89.}

In this Section, I hope to demonstrate: (1) that neither courts, nor Restatements, nor even legislatures provide much hope for institutionalizing "cooperative" choice of law solutions; and (2) that in the most intractable areas of choice of law, cooperation would yield few gains even if we had institutions suitable for developing and implementing cooperative solutions.

1. The Inadequacy of Case Law as a Tool for Enforcing Cooperation

Consider the difficulties in using the common-law process to institutionalize cooperation in choice of law. It is true, of course, that state courts develop state policy all the time, even in the absence of legislative action. That development, however, is generally incremental, and incrementalism is ill-suited to the problem at hand. Choice of law cases first reach trial courts. Why should any single California trial judge sacrifice forum state policy, or her own notions of justice to the parties before her, in the name of greater cooperation among states without knowing that her California colleagues will follow the same course? Unless her colleagues are committed to the same cooperative strategy, the attempt by a single California judge to pursue cooperative solutions is doomed to failure, because judges in other states have no reason to believe that a lone California trial court decision commits the California courts to a policy of reciprocity.\footnote{Larry Kramer alludes to this problem in a footnote, conceding that "successfully implementing a tit-for-tat strategy requires coordination among many judges within each state." Kramer, supra note 1, at 343 n.228.}

For a state court system to make any credible commitment to a policy of cooperation, then, the commitment must come from the state's supreme court, whose decisions bind all of the state's judges. But how can a supreme court make such a commitment? Over any reasonable time period, too few choice of law cases reach any state supreme court for the court to develop, through the common-law process, a set of comprehensive cooperative choice of law rules.\footnote{Geoffrey Smith has noted that in a 13-year period, the New York Court of Appeals did not decide a single choice of law case, and during that period, every judge on the court was replaced. See Smith, supra note 121, at 1041 n.8. In fact, the court did decide one choice of law case, albeit without an extensive opinion and on pleading and proof grounds. See Cousins v. Instrument Flyers, Inc., 376 N.E.2d 914}
The court could, of course, simply announce that it plans to adopt a cooperative approach to choice of law problems, but a statement at that level of generality will not generate confidence among judges in other states that the announcing state's conception of cooperation is similar to their own.

In light of these difficulties, it is difficult to credit Lea Brilmayer's suggestion that case reports can serve both to communicate a state's strategy and to commit the state to that strategy. Ultimately, Brilmayer herself concedes that common-law adjudication "is not the best solution where states really wish to coordinate their actions." She suggests, instead, a modified Restatement that would provide "focal point solutions." And Larry Kramer, rather than arguing that courts could or should develop a set of cooperative rules through the common-law process, appears to see the judicial role as one of accepting or rejecting cooperative "canons" generated externally.

2. Restatement as a "Focal Point" Solution

a. Drafting Difficulties

Lea Brilmayer has suggested that choice of law cooperation can best be achieved by having a neutral body—she suggests the American Law Institute, through a new Restatement—draft (N.Y. 1978) (per curiam).

Nevertheless, as a general matter, Smith is right; choice of law cases rarely reach state supreme courts. The LEXIS search "choice pre/3 law or conflict pre/3 laws and date > 1980," run on September 7, 1993, generated one case decided by the California Supreme Court and two each by the New York Court of Appeals and the Texas Supreme Court. Of course, the LEXIS search may not discover all choice of law cases decided by a court within the designated period, but it should nevertheless indicate that choice of law cases are rare at the state supreme court level.

See BRILMAYER, supra note 1, at 159 (suggesting that in the choice of law context, in contrast to other game theory phenomena such as the prisoners' dilemma, communications problems are less severe because states' choice of law decisions are reported publicly and are available among the states).

See id. (suggesting that a decision by a state appellate court on a choice of law issue is a "commitment to the future," because it instructs lower courts (and subsequently the same appellate court) to follow one particular choice of law theory).

Id. at 182.

Id. at 185; see also THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 57-59 (1980).

See Kramer, supra note 1, at 340-44 (discussing whether it is in the interest of particular states to adopt the canons Kramer proposes).

See BRILMAYER, supra note 1, at 185-89; see also Larry Kramer, On the Need for a Uniform Choice of Law Code, 89 MICH. L. REV. 2134 (proposing that a Uniform
complex and precise choice of law solutions. She contemplates that the drafters would “make estimates about what is most likely to be subjectively advantageous to most of the states,” and that the estimates would later be scrutinized in each individual state by a state policymaker, to assure that the solutions are in the state’s subjective interest.

Two problems plague Brilmayer’s model. First, she does not explain how Restatement drafters are to divine the subjective interests of the states. Second, in her attempt to minimize the first problem by leaving it to state decision-makers to “opt out” of the Restatement if the drafters have misjudged state interests, she jeopardizes the entire project. A Restatement provision can only provide a focal point solution if it is adopted widely, if not universally. Without widespread adoption, an individual state has no reason to subordinate its interest in a particular case, because the state has no commitment that other states will subordinate their interests in other cases. So, if individual states choose to opt out of the Restatement scheme, Brilmayer’s coordination advantages disappear.

Of course, Brilmayer might envision a process in which successive modifications of the Restatement provide rules that do advance the interests of all states. Indeed, she does suggest, for somewhat different reasons, that frequent updating of a conflicts Restatement would be important. But unless we assume that each state attaches the same value to application of its own law in a given fact situation—an assumption Brilmayer is wisely unwilling to make—there is no reason to assume that even frequent modification will ultimately produce a choice of law rule acceptable to all states.

Choice of Law Code be drafted).

255 See Brilmayer, supra note 1, at 184 (recommending that the drafting process be conducted by individuals “outside the particularized adjudication of cases” and who are not “politically authoritative”).

256 Id.

257 See id. (asserting that the drafting function should be separate from the adopting function, thereby requiring a drafting estimate to be “scrutinized for policy approval before it is put into effect”).

258 See id. at 188 (suggesting constant updating in order to overcome the charge that the Restatement is both too rigid and too amorphous, generating divergent judicial conclusions among the states).

259 See generally Kay, supra note 66, at 591-92 (presenting a table of choice of law theories followed by the states).
Consider an example drawn from the guest-host cases so familiar to conflicts teachers and students. Suppose states \( A \) and \( B \) have identical statutes which preclude guests from recovering for the negligence of motorist-hosts. Suppose, however, that the policies that underlie the two statutes are different: \( A \)'s guest statute is designed to protect domiciliary motorists against fraudulent claims, but \( B \)'s rule is designed to promote gratitude within the state's borders. The goal of a Brilmayer-like Restatement would be to provide a choice of law rule that would advance the policies of both states more often than our current system of choice of law "anarchy," which would permit each state to apply its own rule in its own courts, so long as the accident occurred within the state, one of the parties is domiciled in the state, or the car is registered in the state.

Suppose then that a Restatement drafter proposes a rule, like the rule suggested by Judge Fuld in *Tooker v. Lopez* and *Neumeier v. Kuehner*, providing that when guest and host share a common domicile, and where the car is registered in that state of common domicile, the law of the common domicile should apply. The proposed rule is, for state \( A \), an improvement over anarchy because it assures that state \( A \) motorists will be protected against claims by state \( A \) guests wherever the litigation takes place. By contrast, under the current anarchic system a court of state \( C \), which has no guest statute, might permit the \( A \) guest to recover from the \( A \) host.

The same proposed rule, however, might be worse than anarchy for state \( B \). Because the rule would require the courts of state \( B \) to ignore its own guest statute if one \( C \) resident offered another \( C \) resident a ride in \( B \), state \( B \) would be less free to advance its policy than under "anarchy." Moreover, the rule would provide no commensurate gain for \( B \) because, by hypothesis, \( B \) is not concerned about the domicile of driver and guest—only about the place in which the guest-host relationship was established. In this circums-

---

260 See Babcock v. Jackson, 191 N.E.2d 279, 284 (N.Y. 1963) (citing a Canadian guest statute as intended to "prevent the fraudulent assertion of claims by passengers, in collusion with the drivers, against insurance companies" (citation omitted)).
261 See Neumeier v. Kuehner, 286 N.E.2d 454, 455 (N.Y. 1972) (stating that one purpose of the Ontario guest statute "was to protect owners and drivers against suits by ungrateful guests" (quoting Willis L.M. Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 558 (1971)); Dym v. Gordon, 209 N.E.2d 792, 794 (N.Y. 1965) (stating that one of the three underlying policies of Colorado's guest statute is "the prevention of suits by 'ungrateful guests'").
stance, when A and B have vastly different reasons for enacting identical rules, no single Restatement provision will produce gains from trade for both states.\textsuperscript{264}

One might object, of course, that even if not every individual Restatement provision produces gains from trade, each state might nevertheless find the Restatement as a whole an improvement over anarchy. Indeed, Professor Brilmayer appears to concede as much when she lists, as an advantage of Restatements, that "they can cover a broad enough range of topics to link issues on which some states stand to benefit with issues on which the others do."\textsuperscript{265} It is far from apparent, however, that one could draft a Restatement that, on balance, produces gains from trade for each state.

Here is Professor Brilmayer's problem: she believes that a scheme promoting choice of law cooperation among the states would be more efficient than a system of choice of law anarchy. In the lingo of law and economics, she is confident that cooperation is efficient in the Kaldor-Hicks sense.\textsuperscript{266} But even if she is correct, she has provided no basis for every state to agree to the scheme unless she can prove that the move toward cooperation is Pareto-superior—that it will improve the position of each of them.\textsuperscript{267} Of course, if the cooperation scheme were indeed efficient in the Kaldor-Hicks sense, the states that benefit most from the scheme

\textsuperscript{264} In the text I have demonstrated only that Judge Fuld's proposed rule does not produce gains from trade. But the same analysis can be applied to rule out similar rules. Thus, if the Restatement rule were to dictate that the law of the place where the guest picked up the host should govern, the rule would be better than anarchy for state B, but worse than anarchy for state A, because an A guest would be permitted to recover from an A guest so long as the pick-up occurred in state C. Under anarchy, the A court would be permitted to advance its policy by denying recovery in this case, and the A guest would be able to frustrate A policy only if she could obtain jurisdiction over the host in C, and could persuade the C court not to apply A's law.

\textsuperscript{265} BRILMAYER, \textit{supra} note 1, at 185.

\textsuperscript{266} In the words of Professor John Hanks, "Kaldor and Hicks defined a potential economic move as efficient if, after the move, the winners gain more than enough to compensate the losers." John L. Hanks, \textit{On a Just Measure of the Efficiency of Law and Governmental Policies}, 8 CARDOZO L. REV. 1, 1 (1986); see also J.R. Hicks, \textit{The Valuation of the Social Income}, 7 ECONOMICA 105, 110 (1940); Nicholas Kaldor, \textit{Welfare Propositions of Economics and Interpersonal Comparisons of Utility}, 49 ECON. J. 549, 550 (1939).

\textsuperscript{267} Again, in the words of Hanks, "[t]he Pareto definition holds that a proposed move is efficient if at least one person believes himself better off after the move and nobody believes himself worse off." Hanks, \textit{supra} note 266, at 1-2; see also \textit{VILFREDO PARETO}, \textit{MANUAL OF POLITICAL ECONOMY}, 369-75 (A. Schwier trans., Augustus M. Kelley 1971) (1927).
could make the losers better off by making cash payments in return for an agreement to abide by the scheme. But if we assume that no state is about to make cash payments to sister states for adoption of a Restatement, the cooperation scheme will be Pareto-superior (and therefore acceptable to each state) only if the Restatement itself makes each state better off than anarchy. Drafting such a Restatement would prove formidable, if not impossible.

Suppose, for instance, the Restatement drafters produced rules that, for both states A and B, would be better than choice of law anarchy, and that would maximize the gains from trade for the two states. This set of rules, however, might not be better than anarchy for state C, or might be only insignificantly better than anarchy. To gain C's acceptance, then, the drafters will almost certainly have to change some of the rules, thus denying A and B some of the gains from trade generated by the original rules. As the number of states involved approaches fifty, it will become increasingly difficult to produce a single set of rules that makes each state better off than choice of law anarchy.\(^{268}\)

The problem is compounded by problems of forum selection. As Professor Brilmayer recognizes, any state with a plaintiff-favoring rule has little incentive to cooperate with other states if, assuming

\(^{268}\) Of course, some states might find that the Restatement, minus a few objectionable provisions, would be better than anarchy. But if states were free to "defect" from individual Restatement provisions, the Restatement's coordination advantages would begin to disappear. Once each state recognized that its sister states were not committed to the Restatement as a whole, there would be less reason for any state to subordinate its own interest in the case at hand to gain the supposed benefits provided by the Restatement framework.

Professor Kramer, recognizing some of these problems, nevertheless concludes that cooperation is "plausible." Kramer, supra note 112, at 1027. He invokes the notion that "individuals and organizations tend to satisfice rather than maximize interests," and suggests that "cooperation is probably more beneficial than always applying forum law." Id. at 1025. He also relies on "diffuse reciprocity" to "encourage and buttress a regime based on cooperation," while recognizing that diffuse reciprocity will not help foster cooperation that is not in a state's interests. Id. at 1027. Finally, Kramer relies on institutional considerations to bolster the argument that judges may cooperate even if not in the interest of their states:

[T]he judges' sense of making decisions for members of a federation generates a sense of obligation not to exploit sister-states, as does the great number of interdependent interests in other areas and the personal relationships of judges in different states. The result is a judicial culture that emphasizes fairness to the interest of other states alongside self-interest. Id. Kramer does not, however, explain why abstract considerations such as fairness to the interest of other states will be more important to judges than their sense of fairness to the litigants before them.
anarchy, the plaintiff-favoring is always applied because plaintiffs always choose the plaintiff-favoring state as a forum. This fact itself does not doom Brilmayer's Restatement approach; it merely suggests that the Restatement rules will be plaintiff-oriented if the plaintiff-favoring states are to receive any gains from trade for cooperating. But, as Professor Brilmayer also recognizes, a plaintiff-favoring state can only apply its own rule in cases where it can obtain jurisdiction over a defendant. Because large states typically have more bases for asserting jurisdiction over more defendants, large states have less reason to cooperate than do smaller states. As a result, if any set of Restatement rules does not track closely the rules that would otherwise be applied by large, plaintiff-favoring states, those states will have little incentive to adopt the Restatement.

Indeed, the existing choice of law situation illustrates the difficulty in convincing large, plaintiff-oriented states to accept Restatement-like principles. Although, as Brilmayer points out, a great majority of states purport to adhere, at least in some form, to one of the two Restatements, New York and California are not among that majority; they have traditionally used their own verbal formulations in choice of law cases.

---

269 See BRILMAYER, supra note 1, at 178 (noting that states, especially those with important commercial centers and the ability to both assert jurisdiction and encourage filings because of laws favoring plaintiffs, gain little from the adoption of a modest choice of law rule).

270 See id. (stating that a "plaintiff-favoring law is of no use to a plaintiff if jurisdiction cannot be obtained over the defendant").

271 Moreover, some states might decide that even if the Restatement would be better than anarchy, selective rejection of unfavorable provisions would leave the state even better off. Professor Brilmayer recognizes the point when she notes that a Restatement-like solution, even if it were to leave each state better off than under anarchy, might unequally divide gains from trade. See id. at 185 n.66. Professor Brilmayer speculates that a state that has not, in its view, obtained its fair share of gains from the Restatement "might still feel pressure to go along, because there is no other attractive proposal on the table that could supplant the one that is biased." Id. of course, a state—especially a large state with less to lose from an anarchic system—could react in the opposite way, threatening to hold out, and make the entire scheme less valuable, unless the unfavorable provisions were altered. But if enough states chose to "hold out" in this way, the chance for ultimate agreement would be minimal.

272 See id. at 186 n.70 (noting that New York and California were the first states to cleanly break away from the First Restatement approach).

273 See, e.g., CURRIE, SELECTED ESSAYS, supra note 24, at 132 (referring to a "vigorous" California Supreme Court and the "sound construction" results it reached); Harold L. Korn, The Choice-of-Law Revolution: A Critique, 83 COLUM. L. REV. 772, 776 (1983) (focusing on the development of New York choice of law history since Babcock v. Jackson, 191 N.E.2d 279, 284 (N.Y. 1963), and concluding that the
b. **Drafting a More Modest Restatement**

Even if it were impossible to generate a comprehensive Restatement that would command universal adherence, it might be possible to formulate a shorter list of rules or principles that would facilitate coordination in at least some set of cases. Larry Kramer's "canons of construction" are illustrative. Kramer's canons "cover only a fraction of the cases and do not address some important and controversial subjects," but the canons are nevertheless designed to capture gains from cooperation among states.

Kramer is undoubtedly right in stating that some choice of law rules or canons will gain widespread acceptance and generate gains from cooperation. One of his own canons is simply a party autonomy canon, reflecting a principle held in high regard by courts and scholars long before Kramer developed his canons. Another holds that courts should respect actual reliance interests.

One must be careful, however, not to generalize from the particular. Simply because it is possible to articulate some widely shared choice of law policies, like protecting party expectations, it does not follow that all choice of law cases can be resolved by reference to generally accepted multistate policies. Thus, Kramer concedes that his canons do not even address most tort cases—the cases in which, I have suggested, existing choice of law theories have proved least helpful in deciding cases.

In other words, it is certainly possible to develop a set of choice of law principles that would resolve some cases by reference to multistate values. Game theory, however, provides no basis for believing that anyone could draft a set of principles that would (1) resolve all choice of law cases; (2) command widespread acceptance; and (3) enable states to coordinate. Nevertheless, it is better to try than not to try.

---

1. "rise and fall of interest analysis could be traced and explained entirely through New York decisions").
2. See Kramer, supra note 1, at 322.
3. Id.
4. "A Canon for Contract Cases" reads: "In contract cases, true conflicts should be resolved by applying the law chosen by the parties, or, if no express choice is made, by applying whichever law validates the contract." Id. at 329.
5. See supra part II.B.1.
6. "A Canon for Actual Reliance Interests" reads: "Where two laws conflict, but the parties actually and reasonably relied on one of them, that law should be applied." Kramer, supra note 1, at 336.
7. See supra part II.C.4.
acceptance; and (3) produce gains from trade when compared with choice of law anarchy.

c. Enforcement Problems

Assume for a moment that, somehow, the collective wisdom of conflicts scholars generated a Restatement that did resolve all cases, command widespread acceptance, and produce gains from trade. What would prevent a particular state court, when faced with a concrete case, from deciding to depart from the Restatement’s rule in order to apply forum law or the judge’s own sense of justice? In game theory terms, why should a particular court not “defect” rather than cooperate? Professor Kramer, creating an analogy to indefinitely repeated prisoners’ dilemma, argues that so long as each state knows that the other is likely to retaliate for any defection, each state has an incentive to cooperate in order to avoid losing all gains from trade.280

Reciprocity, however, would provide an implausible basis for many courts to adhere to Restatement provisions. Consider a Montana court deciding whether to apply New York law in a case where the Restatement would make New York law applicable. Kramer’s version of game theory would suggest that the Montana court should apply New York law to assure that, in the future, New York’s courts would apply Montana law in cases where the Restatement would make Montana law applicable. Montana’s court would fear that in some future case, New York’s courts would use a tit-for-tat strategy, and apply New York law in a case where the Restatement would dictate application of Montana law. This fear would keep Montana’s court in line with the Restatement, because, by hypothesis, Montana’s interests would be advanced more significantly if Montana law were applied whenever the Restatement so provided than under a regime where Montana and New York each apply their own law whenever some local interest would be advanced by doing so.

This analysis is flawed at several levels. First, as a matter of game theory, the incentive to cooperate rather than to defect diminishes if we introduce the concept of a discount rate. The entire game theory model assumes that the two states are seeking to reap gains from trade.281 If we assume that future gains—the

280 See Kramer, supra note 1, at 342-43.
281 Recognizing this point, Larry Kramer takes a step away from game theory and
benefit of a "favorable" New York decision several years from now—are worth less to Montana than the benefit of a similar decision today, then it is not clear that Montana's court should decide the current case by applying New York law, as the Restatement would dictate. Montana might be better off defecting, and applying its own law, because it discounts the benefits that might accrue in some future New York case. This is especially true if relatively few New York cases involve Montana law, and vice versa, because years may pass before a New York court has any opportunity to retaliate for Montana's defection.

Second, game theory assumes a set of players each seeking to maximize her own utility. To treat the multitude of state court judges as a single player representing the state in a game seeking to maximize gains from trade is simply ludicrous. How is a Montana court to treat a decision by a single New York trial court judge who refuses to apply Montana law in a case where Montana law would be required by the Restatement? Is that a defection even if, in the last ten years, twenty other New York judges have meticulously followed the Restatement's rules? Using game theory as a framework for choice of law problems ignores the complexities inherent in a system in which each state is represented by numerous individual decision-makers, many of whose decisions are never reviewed by a more authoritative decision-maker.

Third, even if the discounting problem were somehow solved, and even if there were a way to develop a reciprocity rule that accounted for internal inconsistencies among the judges within a single state, a reciprocity regime—enforcing compliance with the Restatement by using a tit-for-tat strategy against defecting states—ignores the fact that the brunt of the retaliation is faced not by the defecting judge, but by the litigants in a private case who had nothing to do with the defection. Suppose, for instance, that in a tort case, an Oklahoma court had applied Oklahoma law in violation of a Restatement provision that directed application of Texas law. In a subsequent usury case, in which the Restatement would validate

suggests that even when self-interest will not generate cooperation, "cooperation often is fostered by the 'diffuse reciprocity' that arises in situations of complex interdependence between states." Kramer, supra note 112, at 1026.

See ERIC RASMUSEN, GAMES AND INFORMATION 92 (1989) ("With discounting, the present gain from finking is weighted more heavily and future gains from cooperation more lightly.").

See id. at 92 (defining a game's players, and specifying that "[e]ach player's goal is to maximize his utility by choice of actions").
a loan agreement providing for interest permitted by Oklahoma law, should a Texas court punish the Oklahoma court's defection by applying Texas law to the case, perhaps causing the Oklahoma lender to forfeit both interest and principal? That would appear to be the result dictated by a tit-for-tat strategy, but it is hard to imagine any court with a sense of justice reaching such a conclusion.

Finally, the analysis so far has assumed that one court can tell whether another has defected from a relevant Restatement provision. In fact, as Professor Kramer has recognized in a footnote, this assumption is highly questionable. Even a Restatement as rigid as the First Restatement of Conflicts proved subject to frequent manipulation through use of a variety of now-familiar escape devices; it is hard to imagine any form of Restatement that would generate clear answers to each of the potentially infinite fact situations that might develop. Hence, even if a court were inclined to employ a tit-for-tat strategy, it may often be difficult to determine whether a state has defected. Consider, for instance, the problem facing the Supreme Court in *Sun Oil Co. v. Wortman*, in which the Kansas Supreme Court, prohibited by an earlier decision of the U.S. Supreme Court from applying Kansas law to questions regarding interest rates on lease royalties, applied the laws of Oklahoma, Texas, and Louisiana, only to "find" that the laws of these states were identical to Kansas law. Did the Kansas court defect?

A tit-for-tat strategy, then, proves ill-suited even in theory, and unworkable in practice, as a mechanism for enforcing choice of law cooperation among states. And without a mechanism for enforcing cooperation, there is little reason for any court to cooperate if the result of cooperating offends the court's sense of substantive justice.

3. Legislation

The discussion so far has explained why the common-law process, even if augmented by a Restatement-like formulation of

---

284 See Kramer, *supra* note 1, at 343 n.228 ("[S]ince cooperation depends on the ability to punish defection, courts must be able clearly to discern whether another state has defected. This may be the most difficult condition to satisfy, since courts may be able to manipulate the canons in ways that hide defection to forum law.").

rules, is poorly suited for developing of a choice of law framework based principally on cooperation between states. For a judge convinced that one of the parties in the case before her ought to win, the goal of future cooperation by other states in other cases seems, and should seem, too remote to justify sacrificing substantive justice in the case at hand. But if case law development and Restatements are inadequate to the task, why not compel judges to act cooperatively, by legislation either at the state or federal level?²⁸⁶

By giving choice of law rules the imprimatur of an authoritative state policymaker, legislation would eliminate some of the enforcement problems that would plague a Restatement solution to the coordination problem. Judges who might otherwise defect from the cooperative solution because defection appeared to produce the “better” substantive result, or to advance state policy, would now cooperate because defection is illegitimate in light of the statutory command.

Legislation would not, however, eliminate all enforcement problems. Legislation in this area would inevitably have an open texture; determining whether a court has reached the cooperative solution contemplated by the legislature would remain difficult. On this point, legislation enjoys no advantage over a Restatement.

Finally, the drafting difficulties that make a Restatement-like solution impractical²⁸⁷ are no less serious when a legislative solution is proposed. Drafting a statute that leaves each of fifty states better off than they would be under choice of law anarchy is a virtually impossible task unless the gains to be realized by a statute that promotes cooperation are substantial. As the next Section demonstrates, in many cases, especially tort cases, the gains are likely to be modest if they exist at all. As a result, legislation, like the Restatement alternative, is not a promising avenue for assuring cooperative behavior.

²⁸⁶ If a Restatement could be drafted to incorporate cooperative principles, the same document could presumably be enacted by the several states as a sort of Uniform Choice of Laws Code. Professor Brilmayer discusses the possibility of uniform legislation before turning to the Restatement as an institutional mechanism for choice of law cooperation. See BRILMAYER, supra note 1, at 183-84. Brilmayer never quite endorses legislation.

²⁸⁷ See supra part III.B.2.
4. Identifying Gains from Trade

A cooperative choice of law system—one in which individual states, or individual courts within those states, subordinate their own notions of justice in the individual case in the hope of maximizing overall advancement of state policy objectives—has potential to generate two forms of gains from trade. First, cooperation enables the states to implement multistate policies that would be ignored if courts focused only on the case at hand and sought purely to maximize advancement of state policy objectives in that case. Second, cooperation might enable each state to assure that its domestic policies were implemented in those cases in which the state has greatest concern. As we shall see, however, the gains that cooperation might generate, are not evenly distributed across all classes of cases, and in many tort cases, the potential gains are negligible.

a. Multistate Policies

Consider first the multistate policies that all states share. All states have an interest in enabling parties to plan their activities without fear that application of unexpected legal rules will set those plans awry. The flip side of facilitating planning is protecting justified expectations; parties who have planned their activities with a particular legal rule in mind ought not be surprised by the application of a different rule unless they had some reason to expect the application of that different rule.

These values—facilitating planning and protecting justified expectations—exert a powerful influence in cases where they are applicable, but in a wide range of cases it would be absurd to believe that a court decision that comes out one way rather than another would inhibit planning or would upset expectations formulated by any of the parties. Party autonomy rules, which have gained broad support among both courts and scholars in contract cases, operate both to facilitate planning and to protect expecta-

---

288 See generally BRILMAYER, supra note 1, at 152 (“If a state adopts a particular domestic rule, then it might conclude also that some particular... territorial application is the most sensible given purely substantive goals.”); Kramer, supra note 1, at 340 (“[S]tates share the desire to advance multistate policies and to minimize the social costs of forum shopping, which makes it advantageous to apply another state’s law in some true conflicts. More important, ... states want their law applied more in some true conflicts than in others.”).

289 See supra part II.B.1.
tions. But even among contract disputes, many arise out of events not planned for by the parties, and about which the parties had developed no expectations.290

When tort cases are involved, planning and expectations are even less likely to be persuasive factors. First, unlike contract cases, tort cases do not revolve around a document assented to by both parties in which they have memorialized their expectations. As a result, there is rarely any evidence of the parties' joint expectations; instead, there are only assertions about the expectations of one party or the other. The extent to which tort rules operate to condition people's behavior continues to be a matter of lively debate,291 but there is little chance that a particular choice of law decision will have significant impact on the behavior of potential tortfeasors. The parties involved in garden-variety auto accidents are hardly likely to know about choice of law decisions. More sophisticated repeat players—manufacturers of potentially dangerous products, for instance—already face potential liability in enough different states and foreign countries that a decision in a single choice of law case is unlikely to cause them to take less or greater precaution in manufacturing their products.

Cooperation among states would advance another multistate policy: avoidance of forum shopping. But what constitutes forum shopping and why we should eliminate it remain controversial questions. As one commentator has recently put it, "the policy against forum shopping is not a principled distinction between legitimate and illegitimate actions, but rather a discretionary tool by which a court may constrain actions or motives it finds distaste-ful."292

Perhaps the most objectionable form of forum shopping involves a plaintiff who chooses a forum with little or no connection to

290 See supra part II.B.2.


the dispute at hand in the hope that the forum will apply its own law, which appears to be more favorable to the plaintiff than the law of the states more closely connected to the dispute. Coordination among states, however, is unnecessary to constrain this type of forum shopping; a variety of existing doctrines limit plaintiffs' opportunity to forum shop in this manner. First, constitutional limits on personal jurisdiction require that the chosen forum bear a reasonable connection to the defendant and the events leading to liability. Second, constitutional limitations on choice of law prevent a forum from applying its own law to a transaction with which the forum has no connection. Of greater practical significance than the constitutional limitations, however, is the antipathy state and federal courts have shown to claims brought in a particular state solely to take advantage of the state's plaintiff-favoring law. Given the state of existing law, then, cooperation among states appears unnecessary to constrain this most blatant form of forum shopping.

The more common case of forum shopping involves a plaintiff who chooses the most favorable forum from among those with a significant connection to the parties and the dispute at hand. If this sort of forum shopping is objectionable, the objections are presumably of two sorts: first, forum shopping gives plaintiffs, who choose the forum, an unfair advantage, and second, forum shopping generates uncertainty, and hence, inefficiency.

Consider the plaintiff-bias created by forum shopping. The power to choose a forum with favorable law is only one element of plaintiff-bias. Plaintiffs routinely choose fora out of personal convenience (or to inconvenience the defendant), to obtain more complete discovery, to take advantage of a particular court's expertise (or lack of expertise), or to take advantage of a legal

---

293 See, e.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) (reaffirming the principle that state courts may exercise personal jurisdiction over a nonresident defendant only if "minimum contacts" exist between the defendant and the forum state).

294 See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 280-21 (1985) (reversing the Kansas Supreme Court's decision to apply its own law primarily out of fear that permitting Kansas to apply its own law would encourage blatant forum shopping, especially among class action plaintiffs); see also id. at 823-45 (Stevens, J., concurring).

295 See supra part II.C.4.
climate that might include relatively high jury verdicts. Even if choice of law rules were free of any trace of forum preference, then, forum shopping would not disappear. Is it unfair to accord plaintiffs the advantages that come with the power to select a forum? As Kramer has pointed out, one problem involves determining the appropriate baseline: "The argument that allowing plaintiffs to pick is unfair apparently assumes that the "correct" baseline is a random distribution," but, of course, there is little reason to take randomness as a baseline. Moreover, even the plaintiff-bias generated by the right to choose the forum would be unfair in isolation, forum selection cannot be evaluated in isolation. Our system provides countervailing advantages to defendants: plaintiffs bear the burden of proof, and plaintiffs' choice of forum is always subject to jurisdictional limitations. If we were to remove one weapon—forum selection, with consequent power to influence the law applied—from plaintiff's arsenal, it is not clear that the result would be "fairer" without making other changes in the litigation system.

The efficiency argument against forum shopping is equally problematic. If the charge is that shopping for a forum that will apply a favorable law increases uncertainty, and hence increases the potential for litigation, the charge appears baseless. A well-advised plaintiff will inevitably choose the forum most likely to permit recovery. Hence, defendant faces no significant uncertainty; both parties can assume that plaintiff will choose that forum, and may make their decisions about settlement and litigation accordingly.

A generation of American lawyers has been conditioned to think of forum shopping as an evil. That conditioning has come largely from the Supreme Court's construction of the Rules of Decision Act and the Rules Enabling Act—particularly in Guaranty

---

297 See Kramer, supra note 1, at 313 n.117.
Trust Co. v. York, Byrd v. Blue Ridge Electric Corp., and Hanna v. Plumer. But the prime reason to attack forum shopping in those cases was that Congress had directed federal courts to apply state substantive rules. By contrast, in cases involving horizontal choice of law questions, Congress has provided no direction. No method is apparent for determining which state's right to apply its own law should be sacrificed in the name of conformity; in the Erie cases, conformity was to be achieved, if at all, by application of state law. As Erie made clear, the federal courts have no independent common-law lawmaking authority, and there is no statutory or constitutional basis for requiring state courts to apply federal rules. By contrast, state courts do have such general common-law authority, and have less reason to defer to the policies of sister states.

Even accepting the prevailing wisdom that forum shopping is an evil, and that curbing forum shopping is a goal that all states share, some states stand to lose more from a cooperative solution than others. In particular, to large plaintiff-oriented states, losing the power to apply their own law may cause significant frustration of state policy at relatively little gain. If these states were not to assent to the cooperative solution, the solution would be of little value to the remaining states. But to obtain the consent of a large, plaintiff-oriented state, any cooperative solution might well have to guarantee that the rules of that state apply with great frequency;

---

299 326 U.S. 99 (1945). The court found that the intent of the Erie decision: was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.  

Id. at 109.

300 356 U.S. 525, 538 (1958) (articulating the objective that "litigation should not come out one way in the federal court and another way in the state court").

301 380 U.S. 460, 468 (1965) (describing "discouragement of forum-shopping" as one of the "twin aims of the Erie rule").


304 See id. at 78.

305 See supra text accompanying notes 268-73.
otherwise, the state will reap no gains from trade. But a choice of law rule that favored the law of the plaintiff-oriented state might be worse than no rule at all from the standpoint of other states, thus causing any cooperative solution to crumble.

b. Domestic Policies

William Baxter’s comparative impairment principle\(^{306}\) is based on the intuition that a state’s policies are not equally implicated in all cases. Baxter surmises that in a hypothetical negotiation among the several states, an agreement would arise to resolve true conflicts in a way that would maximize application of each state’s policies.\(^{307}\) More recently, Lea Brilmayer and Larry Kramer have built on Baxter’s work, suggesting that a cooperative approach to choice of law problems would enable states to achieve optimum implementation of state policies.\(^{308}\)

There are, of course, cases in which failure to apply a particular state’s law would seriously frustrate that state’s policy. Consider a variation on the facts of *Burger King Corp. v. Rudzewicz.*\(^{309}\) Suppose that Michigan enacts a statute requiring a franchisor to demonstrate good cause for terminating a franchise. The hypothetical statute is clearly designed to protect Michigan franchisees: either Michigan residents, or perhaps out-of-staters who own franchises within Michigan. Burger King, a Florida corporation with its principal place of business in Miami, drafts a franchise agreement which (1) permits Burger King, the franchisor, to terminate the franchise at will; (2) provides that Florida law shall govern all rights and obligations between Burger King and the franchisee; and (3) gives Florida courts jurisdiction to resolve all disputes between the parties. In this situation, if Florida courts were to apply Florida

---


\(^{307}\) See id. at 7-8.

\(^{308}\) Although they build on his insights, neither Brilmayer nor Kramer endorse Baxter’s comparative impairment analysis. See *Brilmayer,* supra note 1, at 146-47 (characterizing Baxter’s analysis as rigid and difficult to apply); Kramer, *supra* note 1, at 317-18 (criticizing complexity of comparative impairment approach).

Nevertheless, Brilmayer accepts the notion that each state would trade application of its own law in some cases for application in other cases that would more seriously affect state policy. See *Brilmayer,* supra note 1, at 170. Similarly, Kramer argues that cooperation is important “because states want their law applied more in some true conflicts than in others.” Kramer, *supra* note 1, at 340.

law to permit termination of a Michigan franchise, they would effectively obliterate Michigan's ability to regulate franchises within the state. All franchisors would incorporate in Florida (unless other states proved equally generous to franchisors), and would draft similar agreements with Michigan franchisees. Even if Florida has an interest in protecting Florida franchisors who seek to avoid litigation costs over "good cause," Florida and Michigan might both be better off if Florida courts applied Michigan law to protect a Michigan franchisee in return for some other concession Michigan might make to Florida law.

But how often do choice of law rules have such a significant impact on state policy? In the franchise hypothetical, a Florida decision applying Florida law would change the behavior of future actors: franchisors would incorporate in Florida or like states, would draft agreements like the one hypothesized, and would be encouraged to terminate Michigan franchises without hard evidence of good cause.

It is much less clear, however, that choice of law decisions will have any impact on future behavior, especially in tort cases. First, tort law itself may have marginal impact on the behavior of many actors in the society. Potential injury victims, for instance, appear unlikely to adjust their exposure to risk as the possibility of compensation rises. That is, drivers do not appear likely to drive less, or to drive more carefully, if state law were to limit recovery for wrongful death or to adopt a comparative negligence rule. Potential airplane passengers may take the train to avoid the risk of an aircrash, but few would take the train because legal rules limit compensation for death resulting from a crash.


Posner acknowledges the argument that "it is unrealistic to expect people who are not deterred from careless conduct by fear of bodily injury to be deterred by fear of a money judgment, or, in the case where the negligence of the victim is a bar to recovery, by inability to obtain compensation for the injury from the injurer." Id. at 204. Posner does not reject the argument, but merely limits its scope, noting that negligence has a much broader domain than automobile accidents, and that "[v]ery few commentators think that medical malpractice or products liability has no effect on the behavior of doctors and manufacturers respectively." Id.
For sophisticated potential tort defendants, at least some tort law rules have a definite impact on behavior. Hospitals and manufacturers of potentially dangerous products, for instance, undoubtedly take greater precautions, do more testing, and dispense more warnings than they would if potential tort liability were less significant.\(^{312}\) For other potential defendants—drivers, for instance—expansive tort liability has a different impact: they purchase more insurance. And if expanded tort liability leads to more recoveries, insurance companies will certainly change their behavior by increasing rates.\(^{313}\)

Even if a state's tort law implements a regulatory policy that affects the behavior of potential tort defendants and insurers, it does not follow that choice of law rules will have any impact on party behavior. Consider first a manufacturer of goods sold nationwide. A choice of law rule could require that the manufacturer's liability for personal injuries caused by the product should always be determined by either the law of the place of manufacture or the place of incorporation. The manufacturer could then take appropriate precautions given the tort law of that state. But such a rule would almost certainly lead to a "race to the bottom," with individual states relaxing tort law rules to attract business, industry, and jobs.\(^{314}\) And few states would be willing to adhere to a rule that left their own citizens uncompensated because of a defendant-oriented tort rule adopted by a state that has made itself a haven for manufacture of dangerous products. But any other choice of law rule would inevitably subject the manufacturer of nationally distributed products to the tort law of many states. The manufacturer could not, then, adjust its behavior in accordance with the tort law of any particular state. Hence, choice of law rules would be unlikely to affect the manufacturer's behavior.

Choice of law decisions are similarly unlikely to affect the rates charged by insurance companies who insure activities that are inherently mobile or that are conducted on a nationwide basis. Given the uncertainties in the contours of tort law within each state, together with uncertainties about the frequency with which events

---

\(^{312}\) See id. at 204-05.

\(^{313}\) Posner argues that high premium rates will, in turn, discourage some risky drivers from driving, and therefore have some effect on the incidence of accidents. See id. at 203-04.

\(^{314}\) These same states, by virtue of low population plus tax revenues from the new business, could then compensate their own citizens' injuries out of general tax revenues.
will occur in various locales, even a series of unexpected choice of law decisions is likely to have minimal impact on the rates charged by an insurer.\textsuperscript{315}

The point, then, is that even if it were possible to draft and enforce a set of cooperative choice of law rules or canons in a wide range of cases, the cooperative regime would not substantially advance the domestic regulatory policies of the several states. In many cases, particularly tort cases, choice of law rules would have no effect on the primary behavior of citizens, and so a cooperative scheme would generate minimal gains from trade.

C. The Empty Promise of “Rights” and “Fairness” as a Foundation for Choice of Law Theory

The preceding Section undermines the central premise of modern consequentialist choice of law theories. “Efficiency”—pursuit of economic gain through adoption of a cooperative choice of law system—provides little basis for courts or legislatures to depart from their own inclinations about justice between the parties in the dispute at hand. What, then, of “rights” and “fairness” as a basis for choice of law theory? Lea Brilmayer has argued that courts and scholars have paid too little attention to choice of law rights.\textsuperscript{316} She and others—most notably Douglas Laycock\textsuperscript{317} and Perry Dane\textsuperscript{318}—have focused on the importance of “rights” as a constraint on judges faced with choice of law cases.

\textsuperscript{315} See C. Robert Morris, Jr., Enterprise Liability and the Actuarial Process, 70 YALE L.J. 554, 575 (1961) (concluding that a single claim by a guest against a host “will have no appreciable effect upon insurance rates”).

For localized activities conducted within a state, insurance companies may well charge rates that reflect an expectation that domestic law will be applied to liability claims. But, as we have seen, those are precisely the cases in which courts, without the aid of a cooperation scheme, have been most certain to apply the law of the place of injury. That is, for injuries suffered on real property within a state, or suffered as a result of employment at a site within the state, courts tend to apply the law of the state of injury. However, as Morris observed, even for defendants who act locally, insurance companies may set rates based on nationwide loss experience because “the credibility of their experience on a state-by-state basis would be too low to set reliable rates.” \textit{Id.} at 570. When Morris wrote in 1961, insurance companies had developed separate product liability rate classifications for New York state, but not for the other states in the nation. Even if the practice has changed substantially in the intervening 30 years, for small states at least, loss experiences for many risks are likely to be too small to enable insurers to develop rate classifications for a single state.

\textsuperscript{316} See BRILMAYER, supra note 1, at 193-96.

\textsuperscript{317} See Laycock, supra note 3, at 261-88.

\textsuperscript{318} See Dane, supra note 1, at 1242-75.
Choice of law “rights” are a peculiar breed because, to be taken seriously, they must trump other common-law “rights.” Suppose, for instance, that the legislature and courts of the state of Maine have established a “right” of a creditor to recover against a guarantor of a debt, so long as the guarantor is an adult of sound mind. When a Maine creditor brings an action against a guaranty executed in Massachusetts by a Massachusetts married woman of apparently sound mind, a Maine court might well conclude that the creditor has a right to recover. A choice of law right that requires application of Massachusetts law, and thereby denies relief to the creditor, would supersede any tort right created by Maine law. By what authority do choice of law rights supersede other rights derived from substantive law? Professor Laycock has argued that the federal constitution creates choice of law rights. Professor Brilmayer, by contrast, has looked to political theory and basic fairness as sources of choice of law rights. This Section considers these sources of authority for choice of law rights, and concludes that in many cases, they do not provide a basis for persuading a common-law judge to abandon her notions of justice between the parties in the case at hand.

1. The Federal Constitution

Douglas Laycock has most extensively developed the thesis that the federal constitution removes from the states virtually all power to develop their own choice of law rules. He contends that the federal constitution permits only a single set of choice of law rules applicable in both the state and federal courts. That set of rules, according to Laycock, must be territorially based.

Laycock draws his thesis from the structure of the Constitution—principally from the Privileges and Immunities Clause, which prohibits discrimination against out-of-staters, and the Full Faith and Credit Clause, which, in his view, requires that each state apply the same law to a given set of facts.

---

519 See Laycock, supra note 3, at 261-337.
520 See Brilmayer, supra note 1, at 191-230.
521 See Laycock, supra note 3, at 297 (“[O]nly a single determinate set of choice-of-law rules can implement the Full Faith and Credit Clause.”); see also id. at 331-36 (arguing that Congress and the federal courts, not the states, have authority to develop choice of law rules).
522 See id. at 331 (“I have argued that our fundamental law allocates state authority territorially and that this allocation should drive choice of law.”).
523 See id. at 297.
Laycock recognizes that his thesis is inconsistent with existing constitutional practice. Justice Stone's landmark opinion in *Pacific Employers Insurance Co. v. Industrial Accident Commission* emphatically rejected the notion that only a single state's law may apply to a particular set of facts. More recent Supreme Court opinions, particularly *Allstate Insurance Co. v. Hague*, have given states nearly absolute constitutional freedom to apply their own law. Although the Court hinted in *Phillips Petroleum Co. v. Shutt* that it might restore some teeth to constitutional limits on choice of law, the Court quickly retreated in *Sun Oil Co. v. Wortman*, indicating that even in those instances where one state's court was constitutionally required to apply the law of another state, the Supreme Court would defer to the forum state's questionable conclusion that the other state's law was identical to the law of the forum.

In the absence of Supreme Court compulsion, state courts are unlikely to embrace Laycock's constitutional theory. To the extent that Laycock rests his thesis on protection of individual liberties, his arguments appear too abstract to gain widespread support. Consider his principal liberty-based argument: "[U]njustified discrimination against a citizen of a sister state is a constitutional wrong to that citizen, regardless of the impact on national

---

324 Indeed, in the first paragraph of his article, he contends that "[w]e took a fundamental wrong turn at the very beginning of modern choice-of-law scholarship." *Id.* at 250.
326 Justice Stone explains:
While the purpose of [the Full Faith and Credit Clause] was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states, the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.
*Id.* at 501.
330 Laycock's principal arguments are structural, but where his structural arguments appear weak or inconclusive, he tries to rely on individual liberties arguments. *See* Laycock, *supra* note 3, at 336. Thus, he discusses the individual liberty justification for prohibiting discrimination in response to a critique asserting that choice of law cases have no real impact on national unity or interstate relations. *See id.* at 264-65.
In Laycock's view, the constitutional prohibition against discrimination invalidates choice of law rules that depend on the citizenship of the parties. He supports the rule by demonstrating the supposed unfairness of any other rule in a series of guest statute hypotheticals. Interest analysts would characterize Laycock's hypotheticals as "true conflicts." Laycock rejects the concept of "false conflicts," but if Laycock had used false conflict hypotheticals instead of true conflict hypotheticals, his conclusions would have appeared far less attractive.

Suppose, as Laycock does, that Delaware has a guest statute but Maryland does not. On Laycock's view, if a Maryland guest were to bring an action against a Maryland host for injuries suffered as a result of the host's negligence on an automobile trip in Delaware, the Maryland court would be constitutionally compelled to deny recovery, at least so long as the parties formed their relationship in Delaware. That is, a Maryland court whose sense of justice demands recompense for injuries caused by negligence would be prevented from vindicating that sense of justice, even though the only parties conceivably burdened by recovery would be a Maryland defendant and Maryland insurance company. The likelihood

---

531 Id. at 265.
532 See id. at 278.
533 See id. at 276-77.
534 Id. at 275.
535 Laycock does not argue for any particular territorial rule. Presumably, he has not yet decided whether the Constitution compels the Maryland court to apply the law of the seat of the relationship or the law of the place of the accident, or some other law. He is clear, however, that the court may not decide the case based on the citizenship, or domicile, of either of the parties. See id. at 278.
536 On Laycock's analysis, if the Maryland court were to grant recovery to the Maryland guest, the court would also have to grant recovery to a Delaware guest injured in an otherwise identical accident. Since, under Laycock's theory, a Delaware court would have to reach the same result as a Maryland court, the Delaware court, too, would have to grant recovery in that case. But the Delaware court would not be permitted to discriminate against a Maryland host, so Laycock's principle would require the Delaware court to grant recovery even to a Delaware guest against a Delaware host. Since the last conclusion is patently ridiculous (Delaware court permitting recoveries for a Delaware accident where both parties were from Delaware, despite existence of Delaware guest statute), the initial premise—that a Maryland court would be permitted to grant recovery to a Maryland guest against a Maryland host—must be incorrect.

By the same token, Laycock's analysis would require a Delaware court to grant recovery to a Delaware guest injured by a Delaware host if the parties had met in Maryland and suffered an accident there—even though the Delaware court is concerned about fraudulent claims against Delaware insurers, or affronted by ungrateful guests suing their benefactor-hosts.
that a Maryland court will deny recovery to plaintiff guest out of obeisance to an abstract antidiscrimination principle appears quite small, at least absent some compulsion from Congress or the Supreme Court.

Even if the state courts do not voluntarily adopt Laycock's constitutional vision, and even though the Supreme Court has essentially rejected it, Laycock's thesis cannot simply be dismissed. His argument, after all, is that existing case law is wrong, and that courts should embrace territorial principles as a matter of constitutional law. Laycock derives his argument in part from the text and structure of the Constitution, and in part from his own intuitions about political theory, law, and justice. This is not the place for a thorough critique of Laycock's work, but it is worth noting that the textual and structural arguments, while plausible, are hardly compelling. Laycock does not argue that the framers contemplated and explicitly precluded the possibility of discrimination in choice of law, he argues instead that the principal policy that led the framers to include the Privileges and Immunities Clause—the need to promote national unity—requires a broadly inclusive reading of the clause. But even Laycock recognizes that discrimination in choice of law poses no current threat of disunion. Forces unknown to the framers promote national unity today more effectively than constitutional restriction on choice of law ever could. The interdependence of state economies, fed by improvements in transportation and communication, together with the enormous growth of federal power over the past two centuries, make it difficult to accept Laycock's argument that discrimination in choice of law, perhaps "amplified by interaction with some new source of interstate tension," could threaten national unity.

Given the tenuous textual and structural foundation for Laycock's constitutional argument, courts have little reason to invoke the Constitution to overturn the existing system of "choice

537 Laycock does quarrel with the proposition that Anglo-American law had no concept of choice of law at the time the Constitution was drafted. See id. at 306-08. He does not, however, advance the proposition that the framers drafted the Privileges and Immunities Clause and the Full Faith and Credit Clause with a particular choice of law vision in mind.

538 See id. at 263.

539 See id. at 264.

540 Id. at 265. Indeed, Laycock immediately seeks to buttress his argument by postulating an "individual liberty" basis for the Privileges and Immunities Clause. See id.; supra notes 330-34 and accompanying text.
of law chaos" unless there are strong instrumental reasons for doing so, or unless political theory or fairness requires departure from the existing regime.\footnote{Laycock himself advances both instrumental and fairness-based justifications. He emphasizes, in particular, predictability and uniformity of result, see Laycock, supra note 3, at 318-20, the need to give people an incentive to learn and obey the law, see id. at 320, and the intuitive injustice of discrimination against citizens, see id. at 267.} We have already seen that in many cases, instrumentalism provides no basis for substituting order for "chaos"; now we turn to arguments from political theory and fairness.

2. Political Theory and Basic Fairness

Lea Brilmayer, herself a major contributor to policy discussion about choice of law, has also argued that choice of law theory has overemphasized policy at the expense of rights and fairness.\footnote{See BRILMAYER, supra note 1, at 193-210.} Unlike Laycock, Brilmayer does not look to the Constitution as a source for rights;\footnote{See id. at 192.} she argues for common-law development of "principled limits, based on fairness, on what the state may do."\footnote{Id. at 194.} She also looks to political theory as a guide for determining what choice of law rules are fair.\footnote{Id.}

Professor Brilmayer argues from political theory that a person has a negative right to be left alone by a state unless given some opportunity—through voice or exit—to influence the state’s political decisions.\footnote{Id. at 194.} Thus, she concludes that an individual’s domicile always has power to regulate her behavior, but she also concludes that territorial connecting factors, if they are "purposeful" or "volitional," suffice to justify a state in subjecting an individual to its laws.\footnote{Id. at 220.}

Brilmayer questions the fairness of imposing on an individual a conception of substantive justice developed by a state with whom the individual has had insufficient contact.\footnote{Id. at 219.} In our complex federal system, this concern appears farfetched. Because our system is federal, all citizens have at least some input—through congressional and presidential elections—into both the substantive law and the choice of law rules applied in each state. Hence, Brilmayer’s
abstract political theory concerns about the bases for state coercion appear somewhat misplaced. Any state that inappropriately coerces citizens of another is answerable to political processes in which each state’s citizens do have a voice. Moreover, because our system of laws is so complex, the very notion that each citizen has input into all the laws that govern his behavior is, on a practical level, ludicrous. Choice of law cases rarely involve the fundamental political decisions that define a state. They often involve issues as peripheral as charitable immunity, burdens of proof, or guest statutes—issues that, in some cases, the political processes have never addressed, and that, in any event, most citizens have never heard of or thought about. To rely on an individual’s input into political processes as a basis for subjecting him to a state’s laws on issues like these is to resort to the most fictional of fictions.

Moreover, Brilmayer concedes that her political-rights perspective will often leave a “wide range of permissible options.” She then looks beyond the negative right to be left alone, and seeks to develop “a right to fair treatment, even by a politically authoritative state.” Brilmayer’s emphasis on this sort of fairness in the choice of law process is somewhat peculiar. The current chaos in choice of law thinking has produced at least one distinct advantage: it has permitted judges great discretion to pursue fairness in the individual case, unbound by any significant statutory or common-law constraints. Courts and judges instinctively react to unfairness, in choice of law as elsewhere. When a litigant can demonstrate that application of a particular rule of law would disrupt settled expectations, the litigant is virtually certain to persuade the court not to apply that rule. Indeed, Justice Stevens has suggested that protection against unfair surprise might rise to constitutional dimensions. The problem for choice of law theory, then, is not

349 Id. at 221.

350 Id. at 222.

351 An exception to this observation might be appropriate in the case of insurance companies. Unfairness to insurance companies, however, is hard to measure because of the imprecision with which insurance companies capture particular risks. As Morris put it, “[a] very fine analysis is not attempted.” Morris, supra note 315, at 574. Morris notes, for instance, that if out-of-state guest claims “occur only infrequently, they will have practically no effect upon insurance rates.” Id. at 575. And if the insurance company would not have increased its rates to take account of the risk of occasional liability, it is difficult to label liability unfair to the insurance company. Moreover, as Morris also notes, if there are many guest claims, insurance companies will take account of those claims in setting rates. See id. at 576.

eliminating unfair results. On the contrary, the problem in many cases is choosing among several "fair" results.

Brilmayer recognizes, correctly, that ordinary notions of fairness (roughly embodied in Brilmayer's "negative rights") are inadequate for resolution of many choice of law issues. She then develops other, more abstract and rarefied conceptions of fairness, conceptions she calls "actuarial fairness" and "mutuality." According to Brilmayer, "[m]utuality would require that the substantive rule not be applied to an individual's detriment unless the individual would be eligible to receive the benefits if the tables were turned." She offers a similar, although not identical, explanation for her "actuarial fairness" principle.

Brilmayer also recognizes that these principles, like her negative rights, operate only as a constraint on courts; they do not provide unique solutions for most choice of law problems. Moreover, Brilmayer's abstract discussion of her principles often leaves their practical import unclear. She differentiates her "mutuality" and "actuarial fairness" principles from a requirement that rules be jurisdiction-selecting. She would not require that a choice of law rule be "completely blind to content," but her mutuality requirement would require that "the decision not turn on which side the rule happens to benefit." I find this statement incomprehensible. If Brilmayer means to allow judges to consider the content of substantive rules only in order to pick and choose among the available jurisdiction-selecting choice of law rules, then her mutuality requirement is, contrary to her assertion, equivalent to a requirement that rules be jurisdiction-selecting. Thus, she might permit courts in guest statute cases to decide whether liability should be determined according to the law of the place of accident, or the law of the seat of the relationship, or the law of the common domicile, if any, of the guest and host. Each of these rules, and many combinations of the rules, are jurisdiction-selecting.

(noting that the "desire to prevent unfair surprise to a litigant has been the central concern in this Court's review of choice-of-law decisions under the Due Process Clause").

See Brilmayer, supra note 1, at 221-22.

Id. at 221-27.

Id. at 225.

See id. at 222-23 n.93.

See id.

Id.
If, on the other hand, Brilmayer's mutuality requirement would permit a court to develop rules that are not jurisdiction-selecting, then the rules will almost inevitably favor one party over the other. Consider, for instance, the eminently sensible choice of law rule embodied in section 2-506 of the Uniform Probate Code:

A written will is valid if executed in compliance with Section 2-502 [written wills] or 2-503 [holographic wills] or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or death the testator is domiciled, has a place of abode or is a national.\textsuperscript{359}

Assume such a rule were not mandated by statute, but were proposed instead for a Restatement. Would this "rule of validation" meet Professor Brilmayer's "mutuality" test? The rule clearly favors those persons who would benefit under wills over those persons who would take by intestate succession if the will were invalid. It does so for good reasons: persons who write wills often move from jurisdiction to jurisdiction, and so long as formalities differ, often trivially, among jurisdictions, only a rule of validation can accomplish a goal common to all jurisdictions—effectuating the intent of the testator. Brilmayer does not provide concrete examples that would flesh out her principles, but if her mutuality test would preclude rules like section 2-506 of the Uniform Probate Code, I would suggest that the problem is with the mutuality test, not with the rule of validation.\textsuperscript{360}

That Brilmayer's abstract fairness concepts are difficult to decipher and apply is only part of the problem. The more abstract


\textsuperscript{360} Also consider section 203 of the Second Restatement:

The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188.

\textsc{Restatement (Second) of Conflict of Laws} § 203 (1971). Would such a rule—which appears to favor lenders over borrowers (at least if viewed from the time of litigation rather than the time of the transaction) meet Brilmayer's "mutuality" or "actuarial balance" tests? At one point, Brilmayer distinguishes "formal" from "informal" imbalance, and suggests that a rule that favors creditors over debtors would be formally balanced because an individual might be either a creditor or a debtor, but informally imbalanced because an individual might expect to be a debtor more often than a creditor, or vice versa. See \textsc{Brilmayer, supra} note 1, at 223 n.94.
a conception of choice of law fairness, the less likely that courts will embrace it. If a litigant can establish reliance on a particular legal rule, or frustration of expectations, a court is likely to avoid unfairness to the litigant, even if that would require application of a substantive rule that the court believes unwise, or that has been rejected by the forum’s legislature. But if the litigant’s only fairness argument is couched in abstractions, focusing on potential differences in treatment when the litigant compares himself with other, hypothetical litigants, a court is more likely to focus on the merits of the competing substantive law rules.

Consider an example. Suppose a judge in state A has before her a case in which lender seeks to recover on a note. Borrower’s defense is that the loan agreement violated the usury limitation of state B, the borrower’s home state. The loan transaction had connections with both state A and state B, and the interest rate was one percent higher than state B’s legal limit. State A’s legislature has repealed its usury limitations, on the ground that usury limits unfairly deny credit to poorer borrowers. The judge has before her §203 of the Second Restatement of Conflict of Laws, and is deciding whether to adopt that section’s qualified rule of validation. The borrower argues that the section is unfair, not because borrower had an insufficient connection with state A, and not because borrower had relied on the law of state B, but because a hypothetical borrower would not be able to prevail under state B’s usury limit even if all connections with the two states were reversed. Against this abstract fairness argument, however, the judge marshals two facts: (1) she, and her state’s legislature, believe that usury statutes unfairly and inefficiently reduce the availability of credit to poor persons, and (2) she believes that it is unfair for a borrower to take the lender’s money and then assert his own contract’s illegality as a basis for refusing to repay. My guess is that abstract principles of fairness—principles like Brilmayer’s mutuality principle—will not prevail in cases like this.

The central problem for choice of law, then, is this: in many multistate cases, particularly tort cases, no persuasive fairness or

561 Perry Dane, an advocate of what he calls a “Norm-Based” theory of law, views respecting settled expectations as “the defining goal of the enterprise of law.” Dane, supra note 1, at 1258. Dane acknowledges, however, that even those who do not share his view—those who hold to a “Decision-Based” theory of law—recognize the importance of respecting expectations. Id.

562 Brilmayer’s discussion of choice of law rights is not the only one plagued by undue abstraction. See id. at 1205.
instrumental concerns compel application of one law or another. In those cases, judges quite naturally focus on substantive law values rather than on choice of law. Because choice of law theory becomes largely irrelevant to the decision-maker in these cases, choice of law is perpetually in chaos. This may dismay conflicts teachers and conflicts students, but the system has only one major cost: it increases uncertainty among those who have been victims and perpetrators of wrongdoing, and hence increases the volume of litigation. But since no individual judge or court can eliminate that uncertainty, "choice of law chaos" remains the best alternative in each individual case. As we have seen,\textsuperscript{363} designing a cooperative system to eliminate that uncertainty is likely to be an impossible task. But to focus instead on rights and fairness is to lose sight of the problem at hand.

**CONCLUSION**

Much of modern choice of law scholarship is premised on the notion that better thinking will lead to a more coherent approach to choice of law. Even those theorists who have abandoned the notion that a comprehensive set of principles can resolve all choice of law cases\textsuperscript{364} continue to search for approaches that will generate unique solutions to choice of law cases.

My thesis has been that this search is misguided. In a wide range of cases, especially tort cases, no set of choice of law rules or principles will eliminate the existing regime of "choice of law chaos." In these cases, no choice of law principles are sufficiently compelling to cause judges to exalt choice of law considerations over concerns about the facts and substantive law issues involved in the individual case.

What has led choice of law scholarship astray? In part, the problem has been scholarship that starts from general principles (sometimes derived from political theory) and operates deductively to arrive at choice of law conclusions.\textsuperscript{365} This deductive approach

\textsuperscript{363} See supra part III.B.

\textsuperscript{364} See Brilmayer, supra note 1, at 186-87 (criticizing Restatements because they "set out to derive all of choice of law from a single unifying intellectual principle"); Kramer, supra note 1, at 321 ("[I]t is a mistake to try to derive a comprehensive system of rules from a single choice of law theory.").

\textsuperscript{365} See, e.g., Dane, supra note 1, at 1205 (developing notions of "vestedness" from a norm-based theory of law, but devoting little attention to tangible choice of law issues).
to choice of law stands in sharp contrast to the common-law method, which makes real-life facts the starting point for analysis. Professionalism furnishes another explanation for the continuing quest for conflicts principles to resolve all choice of law cases. If choice of law principles are not sufficiently important to override concerns about substantive outcomes, what role is left for conflicts scholars\textsuperscript{566}.

The truth—that choice of law principles are often irrelevant in deciding cases with multistate conflicts—poses no real threat to the professional self-interest of conflicts scholars. Choice of law principles sometimes are and should be critically important—but only sometimes. Much work remains to be done in identifying areas where choice of law principles should influence the decision-making process. But to pretend that choice of law principles should be determinative in all multistate cases is to increase obfuscation in an area already characterized more by mud than by crystal.

\textsuperscript{566} Cf. BRILMAYER, \textit{supra} note 1, at 106 (suggesting that Currie himself engaged in normative analysis when identifying state interests, noting that “[i]f scholars were really to eschew normative thinking, they would have very little to say”).

In his later years, David Cavers, one of the century’s most significant choice of law scholars, wrote in a tribute to Brainerd Currie’s work: “Conflict of laws . . . has not been central to my interests, and I wonder if it would have remained so for Brainerd Currie. I suspect that in time he would have looked to other fields to bring to order.” David F. Cavers, \textit{A Correspondence with Brainerd Currie, 1957-58}, 34 MERCER L. REV. 471, 498 (1983).