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Rights, Fairness, and Choice of Law*

Lea Brilmayer†

One is hard put to find a serious discussion of “rights” in the current academic literature or judicial discussions of choice of law. With a few notable exceptions, the academic talk is all about “policies,” or “interests,” or “functional analysis.”¹ Even in leading constitutional decisions, the validity of the state’s claim to apply its own law is measured primarily in terms of the adequacy of its interest in having its law applied, ap-

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† Nathan Baker Professor, Yale Law School. The author wishes to thank a number of helpful readers for comments, especially Ronald Dworkin, Jane Ginsburg, Jack Goldsmith, Larry Kramer and Russell Weintraub.

1. Three notable exceptions are Dane, *Vested Rights, “Vestedness,” and Choice of Law*, 96 YALE L.J. 1191 (1987), Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity*, 62 N.Y.U.L. REV. 651 (1987), and Maltz, *Visions of Fairness—The Relationship Between Jurisdiction and Choice-of-Law*, 30 ARIZ. L. REV. 751 (1988). Of course, there is also a large literature criticizing the “interest” or “policy” approach. See, e.g., Ely, *Choice of Law and the State’s Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981).

In addition, a growing academic literature discusses fairness in the context of personal jurisdiction, where similar concepts of “purposefulness,” “fairness,” and “state sovereignty” are important. See, e.g., Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987); Stewart, *A New Litany of Personal Jurisdiction*, 60 COLO. L. REV. 5 (1989).

praised in light of the contacts between the state and the controversy.² Talking about rights is like talking about perpetual motion machines, phlogiston, or faeries. “[O]ne may now wonder,” wrote David Cavers in his seminal article *A Critique of the Choice-of-Law Problem*, “how any juristic construct such as ‘right’ could have been accepted as fundamental in the explanation of any important aspect of judicial activity.”³

Are we really ready to consign “rights” to the intellectual dustbin of history? Surely in other areas of law many of us continue, despite Cavers’ admonition, to discuss legal problems in terms of the parties’ rights. We talk about free speech rights, property rights, and the right to equal protection. Some of these rights are constitutional rights, but others, like property rights, are also granted by statute or recognized by common law.⁴ We argue, in addition, about what rights exist as a matter of normative theory, and proponents of particular rights attempt to secure them institutional recognition. What then accounts for the peculiar reticence of conflicts scholars when the topic “rights” is raised? Is their unwillingness to recognize and enforce rights intellectually defensible? And does this choice of phrasing make any difference at the bottom line—when the decision is made, in other words, to apply one state’s law rather than another’s?

There is more at stake than semantics. Choosing to talk in terms of rights rather than policies or interests represents a fundamental jurisprudential commitment which is reflected in the way that concrete problems are resolved. Rights arise primarily in deontological ethical theories while policies and interests are instrumental or consequentialist.⁵ Rights impose limits on state authority, protecting individuals from being forced to sacrifice for the good of society as a whole. They reflect a notion of individual desert that stands above the instrumental advantage to be achieved by the application of some particular state’s substantive law.

The adoption of the modern “policy” terminology came at a point when legal realism was on the rise and legal formalism on the way out.⁶ Several of the academics who launched the general legal realist movement were also involved in setting the stage for the choice of law revolution that

2. In particular, see *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (plurality opinion) (“significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair”). See also B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 188–282 (1963) (discussing constitutional decisions that speak in terms of interests). The cases do mention fairness, however, even while avoiding the term “rights.” See, e.g., *Allstate*, 449 U.S. at 313 (plurality opinion), 449 U.S. at 333 (dissenting opinion); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (discussing fairness).

3. Cavers, *A Critique of the Choice-of-Law Problem*, 47 *HARV. L. REV.* 173, 175–76 (1933), reprinted in D. CAVERS, *THE CHOICE OF LAW: SELECTED ESSAYS*, 1933–1983, at 3, 7 (1985).

4. This is particularly clear in the context of the so-called “new property.” Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

5. See *infra* text accompanying notes 43–46 (comparing deontological theories with consequentialist theories).

6. See *infra* text accompanying notes 18–27.

culminated in Brainerd Currie's work in the 1950's and 1960's. This modern revolution discredited the vested rights approach of Joseph Beale and the First Restatement of Conflicts and offered in its stead a functional theory by which states were advised to further their own interests and substantive policies. The only courts continuing to speak in terms of "rights" are those that still apply the First Restatement, either because of inertia or out of some sense that its replacement is inadequate.⁷ Scholars, by and large, scorn such backward judges.⁸

It does not have to be this way. It is wrong to treat the word "rights" as the sole province of vested rights theorists such as Joseph Beale. There are other conceptions of rights which are more consistent with modern legal thinking, and more appropriate to choice of law analysis. Even a cursory look at the philosophical and jurisprudential literature will show that the policy theorists' understanding of what "rights" must mean is cramped and dismissive. Admittedly, even the most developed theories of rights are likely to have controversial aspects—but what jurisprudential system does not? We should not reject a rights-based approach to choice of law without first trying to discover what the best possible rights-based theory might have to offer.

This article sets out to do exactly that: to outline the most plausible rights-based approach to choice of law. It will not argue that rights analysis by itself will solve all choice of law problems. Rights analysis only establishes what Robert Nozick has called "side constraints," namely principled limits, based on fairness, on what the state may do.⁹ It may turn out that in numerous instances there are several different states whose law might apply without violating the parties' rights. In such cases, policy analysis could properly come into play.¹⁰ The new rights-based analysis of choice of law thus resembles traditional approaches to personal jurisdiction, where any one of several states might act as a permissible forum.

In this respect, the new rights-based analysis differs from the Bealean vested rights approach, which purported to uniquely determine answers to all choice of law questions. This new analysis is different in other important respects. For one thing, the rights are primarily negative rights rather

7. A current listing of which states follow the various theories can be found in Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983). For an empirical analysis of the factors accounting for change, see M. Solimine, *An Economic and Empirical Analysis of Choice of Law* (1988) (unpublished manuscript).

8. Currie wrote that "Walter Wheeler Cook discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another." B. CURRIE, *supra* note 2, at 6. Apparently the only scholar willing to mount even a partial defense of the foundations of the vested rights theory is Dane, *supra* note 1. The First Restatement's approach has been abandoned even by the American Law Institute in its *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* (1971).

9. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 29 (1974).

10. This is not to say that the modern theorists' account of what state policy requires is adequate. For criticism of their view of state policy, see Ely, *supra* note 1; articles cited *infra* note 35.

than positive rights; not swords, but shields.¹¹ By and large, they are rights to be left alone. Their source is also different from the sources that Beale relied upon. They are founded on principles of political fairness that specify the preconditions for the exercise of legitimate state coercion. The rights-based approach applies a model of political rights in the interstate setting.

There are two aspects of this rights-based approach. The first is an argument that rights are important to choice of law analysis; the second is an argument about what rights there are. These two aspects of the theory are separable. One might be convinced by the meta-theoretical arguments below that rights matter because political fairness requires recognition of the rights of individuals, yet disagree about the content of the particular principles of political fairness and the "side constraints" that would be generated. One might agree, in fact, about the general importance of political fairness in the abstract without even having a clear idea of what political fairness might require. Conversely, one might be more wedded to one's own conceptions of political fairness than to any meta-theoretical concept of the importance of rights or fairness generally. This article attempts both to argue in favor of a general theory about why rights matter and to set out some basic principles, consistent with commonly held notions of political fairness, about what rights there are.

The distinctive nature of this political rights-based approach is best appreciated by contrasting it with both the Bealean vested rights theory and the policy-oriented approach that is currently in vogue. For this reason, we start with a discussion of the debate between the vested rights theorists and the policy theorists. This jurisprudential background will set the stage for the development of a new approach to rights in choice of law, one that rests on assumptions of political and moral philosophy rather than formalist jurisprudence. After explaining why a political rights-based approach provides a suitable foundation for constraints on a policy-based analysis of choice of law, the second half of this article spells out some basic features of the choice of law regime to which a theory of political rights could give rise.

11. The discussion below addresses two kinds of rights. The first are purely negative rights in the sense that they specify conditions under which the state may not legitimately coerce an individual. But we will also discuss fairness based on actuarial balance that specifies how otherwise legitimate power may be exercised. *See infra* Part II(C). Even such "mutuality" requirements are negative in the sense that the state might comply simply by leaving the individual completely alone. Bealean vested rights, in contrast, are positive rights because the state has an affirmative obligation to act so as to help people realize their value.

I. PHILOSOPHICAL UNDERPINNINGS

A. *A Bit of Intellectual History*

The history of the modern choice of law revolution has been thoroughly discussed elsewhere,¹² and only a short survey is necessary to highlight those aspects that are relevant to our new theory of rights. The seminal rights-based approach was the vested rights theory that Joseph Beale, the Reporter for the American Law Institute, developed and incorporated into the First Restatement of Conflicts.¹³ Beale's theory of vested rights rested upon a set of territorial assumptions about the proper geographical scope of a state's authority. Each state was said to have exclusive authority over its own territory, and was thought to be utterly without power to affect property or events in other states.¹⁴

How then, one might ask, could a sovereign state feel confident that its laws would be respected in the courts of another sovereign state? If the effect of a state's laws supposedly stopped at its borders, then how could those laws have any force in the forum which was called upon to adjudicate legal claims arising within the first state? The answer provided by the First Restatement was that the forum did not really enforce the first state's laws, as such, but only recognized the rights that were created by those laws. If certain relevant activities occurred in the first state, then rights would vest under its laws and these rights would acquire an extra-territorial effect—a claim for recognition in the courts of another state—that the laws themselves would not have.¹⁵

Beale's approach won judicial support with well-respected jurists. Justice Holmes, in particular, was a proponent of this *obligatio* theory of jurisdiction, and of territorial approaches to choice of law, as well.¹⁶ Cardozo described the vested rights approach in a particularly vivid manner in *Loucks v. Standard Oil Co.*:

A foreign statute is not law in this state, but it gives rise to an obligation, which, if transitory, 'follows the person and may be enforced wherever the person may be found' . . . 'No law can exist as such

12. General discussions of the history of choice of law can be found in Juenger, *A Page of History*, 35 *MERCER L. REV.* 419 (1984), in L. BRILMAYER, J. CORRE, E. ESTY, J. FISCH, J. FIRESTONE, S. GORDON, J. HUTTONHOWER, N. KUCKES, M. MARR, K. PAISLEY & A. SPENCER, *AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM* ch. 7 (1986) [hereinafter L. BRILMAYER, *AN INTRODUCTION*], and in Korn, *The Choice-of-Law Revolution: A Critique*, 83 *COLUM. L. REV.* 772, 802-20 (1983). Discussions of the relation between legal realism and choice of law are contained in L. KALMAN, *LEGAL REALISM AT YALE 1927-1960* (1986), in particular *id.* at 20-29 (discussing Cook, Yntema, Lorenzen, and Beale), and in Dane, *supra* note 1.

13. *RESTATEMENT (FIRST) OF CONFLICT OF LAWS* (1934).

14. 1 J. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* § 1.1 (1935); see also J. STORY, *COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC*, §§ 7-8 (7th ed. 1872).

15. L. BRILMAYER, *AN INTRODUCTION*, *supra* note 12, at 218-20.

16. *Western Union Tel. Co. v. Brown*, 234 U.S. 542, 547 (1914); *Slater v. Mexican Nat'l R.R. Co.*, 194 U.S. 120, 126 (1904).

except the law of the land; but . . . it is a principle of every civilized law that vested rights shall be protected'. . . . The plaintiff owns something, and we help him to get it.¹⁷

This notion of legal rights created by the substantive law of the place where the cause of action arose and honored elsewhere should sound familiar to modern ears. It resembles our current notion of the effect given to a final judgment outside the state of rendition.

The ink was hardly dry on the Restatement when the critical onslaught began. Beale of Harvard was hardly a personal favorite of the legal realists, a group then based in New Haven.¹⁸

To say that Beale's attempt to reduce the entire field of conflict of laws to the twin legal principles of territoriality and vested rights irritated the realists would be an understatement. . . . To [Walter Wheeler] Cook, the syllogistic reasoning that had led Beale to the vested rights theory was 'an outrageous bit of nonsense'. . . .

In his letters [Jerome Frank] referred to Beale as 'the right wing of the right wing.' He delighted in adjectives such as 'Bealy-mouthed' and 'ibealistic' . . . as well as in the poetry which *Law and the Modern Mind* inspired Thurman Arnold to compose:

Beale, Beale, marvelous Beale
Only in verse can we tell how we feel . . .¹⁹

Beale's jurisprudence, clearly, struck a raw nerve.

Why did Beale's jurisprudence bother the legal realists so much, and what did they propose in its stead? This is no place to discuss the realist movement generally, but those familiar with its basic principles will find its choice of law positions unsurprising. The major realist protagonists in the choice of law field were Cook, Lorenzen, and Yntema.²⁰ Cook's ideas are probably the best developed of the three, and the most influential for later choice of law scholars such as David Cavers and Brainerd Currie.²¹ Cook denied that laws of a sovereign state projected out in space only to be stopped short at the state border.²² More important, he denied the util-

17. 224 N.Y. 99, 110, 120 N.E. 198, 201 (1918).

18. L. KALMAN, *supra* note 12, at 25.

19. *Id.* at 25-26.

20. For discussion of these scholars' role in the realist movement, see generally L. KALMAN, *supra* note 12. For their views on choice of law, see, for example, W. COOK, *THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS* (1942); E. LORENZEN, *SELECTED ARTICLES ON THE CONFLICT OF LAW* (1947); Yntema, *The Historic Basis of Private International Law*, in *SELECTED READINGS ON CONFLICT OF LAW* (M. Culp ed. 1956).

21. Both Cavers and Currie extensively cited Cook's work. Cavers lists Lorenzen and Cook as "the foremost" realist critics of Beale. D. CAVERS, *THE CHOICE OF LAW PROCESS* 7 & n.17 (1965). Currie's view of Cook's work has already been alluded to. See *supra* note 8.

22. W. COOK, *supra* note 20, at 41 ("[L]aw' is not a material phenomenon which spreads out like a light wave until it reaches the territorial boundary and then stops.").

ity of analyzing choice of law problems in terms of the parties' vested rights.²³

To speak in terms of effectuating the parties' vested rights, wrote Cook, was to court confusion. "We must . . . constantly resist the tendency to which we are all subject to reify, 'thingify,' or hypostatize 'rights' and other 'legal relations.'"²⁴ Cook advised his readers to bear in mind that the word "rights" was simply shorthand for a prediction of the actual conduct of judges in deciding the case.²⁵ For Cook, there could be no legal rights until the case was decided.²⁶

'Right,' 'duty,' and other names for 'legal relations' are therefore not names of objects or entities which have an existence apart from the behavior of the officials in question, but terms by means of which we describe to each other what prophecies we make as to the probable occurrence of a certain sequence of events—the behavior of the officials.²⁷

This position raises as many questions as it answers. First, it is not clear why, for Cook, rights might come into existence once a court had decided a case. Given the uncertainties present in judgments enforcement, how could rights come into being before the final judgment was actually paid? A judicial judgment, after all, amounts to nothing but the sort of "property-like" entity that Holmes and Cardozo thought was created by the legal rule itself, a "thing" which could be carried from state to state. Second, as a descriptive matter, it is far from clear that we actually use the word "right" in the manner Cook described. His analysis of the term seems to dismiss entirely the distinctive character of rights-based talk. The whole point of speaking in terms of rights is to make a normative argument about how a judge *ought* to decide a case.

We will return to the notion that people typically refer to "rights" in order to make a normative argument,²⁸ but first we should ask what the realists proposed as a replacement for the vested rights theory of conflicts. Cook himself was not very helpful on this score. At times he seemed to suggest that the proper approach was simply the "scientific" one of describing how courts actually decide choice of law cases.²⁹ This would be consistent with the assertion that the important task of the approach was

23. Even when Cook used the term "rights" he did so very differently than the vested rights theorists. *See, e.g., id.* at 33 (there are as many sets of rights as jurisdictions that might afford relief; court does not enforce foreign rights but ones created by local law).

24. *Id.* at 30.

25. *Id.* at 29-31.

26. *Id.* at 59.

27. *Id.* at 30.

28. *See infra* note 53 and accompanying text; *infra* Part I(C) (to make rights-based argument is to make normative claim that judge or legislator ought to honor right in question).

29. *See, e.g., W. COOK, supra* note 20, at 29.

prophesying case outcomes. This approach also aspired, in a supposedly scientific manner, to avoid the injection of the theorist's own value judgments. This proposal alone, however, would not have led to much of a choice of law revolution. The most influential proposal on the table, after all, was still that of Beale.³⁰ More courts probably followed some variation of the *obligatio* or vested rights theory than any other. A purely "scientific" theory which described the behavior of courts would thus only amount to more vested rights.

Launching a choice of law revolution would require a choice of law theory different from what courts were already doing, one capable of sweeping away the dusty remnants of vested rights that littered the case reports. Value-free descriptive statements about how a judge was likely to decide a particular case were not enough. Into this void stepped Brainerd Currie, who, while not a wholehearted realist, was a wholehearted devotee of Cook's attack on Joseph Beale.³¹ Currie's proposal borrowed in important ways from the realist program. In particular, he accepted Cook's arguments that choice of law should not involve the attempted enforcement of vested rights but was simply a tool to effectuate state policy.³²

The central thesis of the modern approaches to choice of law is that law-making is an instrumental activity. A legislator or common law judge formulates norms in order to achieve some social purpose, not in order to effectuate the parties' pre-existing rights. The focus of adjudication is supposed to be forward-looking, unlike Beale's ideas, which were backward-looking. Choice of law, the modern theorists claim, should reflect this focus as much as any other area of law. In deciding whether a particular law applies in a case with interstate connections, the judge should analyze the purposes underlying the competing legal norms.³³ What benefits were the rules designed to achieve, or what evils were they designed to avert? Once the judge has divined the instrumental purposes underlying the legal rules, he or she can decide whether to apply a particular rule in a particular case.

There are many controversial aspects about the way that this central thesis has been developed and applied since originally formulated. First, identifying the instrumental purpose underlying a rule and deducing its appropriate territorial scope is not as simple as one might think. As the foremost proponent of "interest" or "policy" analysis, Currie argued that one could divine a rule's purposes by the usual processes of domestic stat-

30. Cook himself realized that language in the case law supported vested rights analysis. *See id.* at 42.

31. Dane, *supra* note 1, at 1201.

32. For example, Currie's discussion of state policy relies upon Cook's discussion of illegal contracts. *See* B. CURRIE, *supra* note 2, at 59 & n.140. Currie also acknowledged his reliance upon Cook's ideas in his important discussion of married women's contract cases. *See id.* at 87 n.19.

33. *See id.* at 183-84.

tory construction and interpretation,³⁴ a method which has serious difficulties.³⁵ Another controversial aspect concerns the situation where the judge decides that both states have policy reasons requiring application of their laws; this is the well-known problem of the "true conflict."³⁶ Still a third controversial aspect is whether to focus, as Currie did, on domiciliary contacts in the attempt to effectuate state policy. One might instead turn to territorial connecting factors—the location of particular events—and thus avoid the accusation that a state's choice of law regime discriminates against outsiders.³⁷

These difficulties are all important and arguably fatal to modern policy analysis. They concern how to go about the proposed program of using choice of law to carry out legislative policy. A more fundamental issue is whether this is the enterprise in which choice of law should be engaged. By and large, current scholarship lets the modern analysis escape without serious attention to this underlying jurisprudential assumption.³⁸ My thesis here is that choice of law bears upon much more than the mere effectuation of legislative policies. In particular, there should be limitations on the extent to which a state may use application of local law to multistate cases as a means to a local policy end. The limits exist because the parties have rights—not vested rights in the sense that Beale intended, but rights against the state. The rights-based limitations upon actions by states can best be explained in terms of the philosophical distinction between deontological and consequentialist reasoning.

B. *The Need for a Non-Consequentialist Approach*

Modern choice of law theory is a consequentialist approach to adjudication of cases with interstate elements. Roughly speaking, this means that alternative courses of action are evaluated according to the desirability of their consequences. As a result, the modern theory is both forward-looking and instrumental. Beale's theory of vested rights is both backward-looking and deontological, although as we will see, it is not the only possible deontological one (nor even the most plausible).³⁹

34. *Id.*

35. See Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459 (1985).

36. Where a true conflict existed, Currie initially advised the forum to apply its own law. B. CURRIE, *supra* note 2, at 184. He later advised that in true conflicts, states re-examine their interests to see whether a more restrained interpretation of state interest is possible. See Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 756-58 (1963).

37. See Ely, *supra* note 1, at 173.

38. *But see* sources cited *supra* note 1.

39. "Backward-looking" and "deontological" are not synonymous; Beale's system is both. A redistributive system based on a principle of complete equality could be deontological if its justification were noninstrumental, but it would not be backward-looking. "Backward-looking" is more nearly synonymous with "corrective justice," which is only one form of deontological reasoning. See generally Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 977-81 (1988).

What consequentialism means in this context, and the reasons that it is problematic, can be illustrated informally. A thorny issue in modern choice of law analysis is the proper treatment of cases involving after-acquired domicile. Imagine a tort case in which the plaintiff and defendant were originally both residents of the state where the accident occurred and in which all the relevant events leading up to the tort occurred. After the accident, the plaintiff moved to another state and managed to get jurisdiction over the defendant. The forum has a pro-recovery rule of law. If it applies its own law to the case, the plaintiff will recover, with all the hypothesized beneficial consequences usually cited in the conflicts literature (protection of destitute spouse and children, keeping the injured party off of the local welfare rolls, and so on).⁴⁰ Should it?

There is certainly an intuition that it should not. Even Brainerd Currie balked at applying local law to further local policies in cases of after-acquired domicile; his explanation (avoiding "retroactivity") sounds odd, however, coming from an opponent of the vested rights approach.⁴¹ It is not easy to explain from a strictly consequentialist perspective why it matters whether the plaintiff moved before or after the accident.⁴² Considering only the impact within the state, the cases seem virtually identical, because the future consequences of applying local law are the same. Under the modern approaches, the location of past events is virtually irrelevant, because in a forward-looking system, past events themselves are

(discussing corrective justice).

40. See, e.g., B. CURRIE, *supra* note 2, at 143 (injured party may become public charge), 144 (interests of legatees and creditors), 151-52 (interests of Good Samaritans), 160 (interests of insurance companies).

41. Currie explained his hesitations in terms of vested rights. Assuming that the forum would not apply its pro-recovery rule retroactively in a domestic case, "then [the forum] had not declared a policy to the effect that vested rights must be altered to avoid the state's being burdened with indigent beneficiaries, and so it had no justification for unsettling rights that had been settled by reference to [the other state's] law." B. CURRIE, *supra* note 2, at 621.

Once one admits this sort of reasoning into conflicts cases, one risks sliding backwards into full-scale Bealeanism. While Currie's emphasis on state policies would seem to permit a change of law after a change of domicile, Currie was both unwilling to accept this result and unable to explain his unwillingness in terms of his own theory.

42. There are a variety of ways that one might explain the disregard for the factor of after-acquired domicile from a consequentialist point of view. One might say, for instance, that it would be counterproductive to reward persons who moved into the state to take advantage of favorable local law. This particular rationale might run afoul of the constitutional protection of the right to travel. Cf. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (invalidating tax benefit restricted to persons acquiring local domicile after certain cut-off date). Perhaps more to the point, this example demonstrates the potential subtlety and flexibility of consequentialist reasoning generally. In moral theory, consequentialists have often attempted to show how standard moral intuitions can be explained in consequentialist terms. Sometimes these explanations are convincing and sometimes strained. What seems unmistakable, however, is that the consequentialists find ordinary moral intuitions sufficiently important to attempt to explain them in consequentialist terms, rather than to flatly declare the intuitions mistaken.

The same is true here. Perhaps it is possible to explain the discounting of after-acquired domicile in consequentialist terms. This does not mean that there is no common and apparently deontological intuition to the effect that after-acquired domicile *should* be discounted. Nor does it mean that a choice of law doctrine (such as existing modern approaches) that cannot explain this intuition is acceptable.

irrelevant. The obvious way to distinguish these cases is on the basis of what happened in the past, by explaining why it is *unfair* to allow the plaintiff unilaterally to change the applicable law by moving from one state to another. But such a notion of desert is foreign to consequentialist analysis.

A more precise analysis of the difficulties with consequentialist reasoning in the choice of law context requires a somewhat more precise idea of what consequentialism means. No single definition of the term would seem to command assent from all moral philosophers. However, definitional controversies are not likely to trouble our present enterprise, because our competing theories of choice of law seem to fall squarely within the uncontested meanings of "consequentialist" and "deontological." In the usual context of moral philosophy,

[c]onsequentialism in its purest and simplest form is a moral doctrine which says that the right act in any given situation is the one that will produce the best overall outcome, as judged from an impersonal standpoint which gives equal weight to the interests of everyone. . . . [A consequentialist theory] gives some principle for ranking overall states of affairs from best to worst from an impersonal standpoint, and then it says that the right act in any given situation is the one that will produce the highest-ranked state of affairs that the agent is in a position to produce.⁴³

Probably the best known version of consequentialist moral theory is utilitarianism, which says that the proper action is the one which maximizes overall human happiness. A deontological theory, by contrast, places limits upon the pursuit of the general good by virtue of the intrinsic merits of alternative courses of action. Whether an action is correct does not depend entirely upon its consequences. A deontological system of ethics, according to J.C.C. Smart, "is any system which does not appeal to the consequences of our actions, but which appeals to conformity with certain rules of duty."⁴⁴

In what sense is modern choice of law theory, like much modern realist jurisprudence, consequentialist? The similarity between Brainerd Currie's approach to choice of law and the sorts of theories proposed by philosophical consequentialists lies in the fact that the relevant consideration is the impact of a decision on the general social good, rather than the claims of the instant parties to fair treatment. Both theories counsel the pursuit of social goals—a forward-looking focus—instead of attempting to implement the parties' pre-existing rights—a backward-looking focus resembling that of Beale.

43. Scheffler, *Introduction*, in *CONSEQUENTIALISM AND ITS CRITICS* 1 (S. Scheffler ed. 1988).

44. Smart, *An Outline of a System of Utilitarian Ethics*, in *UTILITARIANISM: FOR AND AGAINST* 5 (1973).

Despite the strong similarities, modern choice of law theory is consequentialism of a distinct sort. The differences between most consequentialist theories and Currie's choice of law approach arise primarily out of two facts: First, for choice of law purposes, we are concerned with a theory of adjudication rather than a theory of personal morality, and second, our context is multistate problems. Because the modern choice of law approaches deal with judicial implementation of legislative goals through adjudication, the judge is advised not simply to pursue "happiness" (or some other social good) directly. In terms of our earlier definition of consequentialism, one might imagine that the legislature draws up a list ranking the possible states of affairs of the world from "best" to "worst" according to its own system of values, and then the judge decides the case to try to achieve the best possible state of affairs on the list. The judge, in other words, maximizes the legislatively-chosen values.

The second fact—that choice of law deals with multistate problems—matters because the legislature, according to modern policy analysis, sets out only to maximize the benefit to its own state. To use Smart's terminology, the calculation of benefits is "localized in space."⁴⁵ In choosing which social values to pursue, a state is supposed to think in terms only of the needs of its own citizens and of costs and benefits incurred upon its own territory.⁴⁶ Judges deciding choice of law cases are not supposed to see their function as universalistic. If they were to maximize the global benefit according to the legislature's definition of desirable states of affairs, they would apply local law to all cases that came before them. A consequentialist theory need not focus on local matters, as Currie's approach did, even in a multistate context. Under a universalistic consequentialist theory, a state might adopt that substantive policy which it thinks is best for the world at large. This is not, however, what the modern choice of law theorists had in mind.

So one might identify the consequentialist component of modern choice of law theory as its principle that if the values in the local statute would be furthered within the state by applying the law, then the state has a policy reason or "interest" in having its law applied. The relevant questions are: Which state will bear the long-range social consequences of the judicial decision? Will application of a particular statute prevent those consequences (if they are evil) or help to promote them (if they are beneficial)?

That modern choice of law theory is consequentialist is supported by several additional arguments. First, the terminology chosen by choice of law theorists is suggestive. Modern choice of law theory is said to involve

45. *Id.* at 63. Smart contrasts "generalized benevolence" that motivates typically utilitarian theory with benevolence that is localized in space. The latter he characterizes as ethics of the tribe or race.

46. Indeed, this is the source of some criticism; it raises the question of whether interest analysis is "discriminatory." See Ely, *supra* note 1.

the implementation of state policy choices. Recent writing by authors such as Ronald Dworkin on the jurisprudence of adjudication sets up the contest between deontological and consequentialist reasoning by using very similar phrasing: Adjudication based on "principle" is said to effectuate the parties' *rights*, and adjudication based on "policy" is said to further collective social *goals*.⁴⁷ We should perhaps not place too much weight, however, upon this coincidence of terminology. The modern choice of law theorists have themselves not addressed explicitly the issue of the desirability of consequentialist reasoning, and conversely, current jurisprudential writing does not purport to address choice of law directly. Other aspects of the modern theories of choice of law, however, strongly reinforce the suspicion of a bias towards consequentialism. Two deserve mention here.

One is the willingness to consider the interests of persons who are not formal parties to the instant litigation. For example, a typical torts case involves a plaintiff who is seeking recovery and a defendant who resists being required to pay. It is fairly standard in interest analysis opinions and literature to allude to the needs of local nonparties whose economic interests will be affected by the decision. Discussions are peopled by hypothetical medical creditors, destitute spouses and children, insurance companies, and the like.⁴⁸ This solicitude for persons who are not, technically speaking, parties to the litigation suggests that the court is engaged in some overall maximizing of social benefits and burdens as part of its choice of law analysis.

Considering the second aspect involves a closer look at the jurisprudential premises of the policy analysts' critique of the vested rights approach. Their analysis demonstrates a lack of concern with what the parties might deserve as a result of their past actions. The realists' attack, as we saw earlier, belittled the ideas of vested rights and territoriality on which the Bealean analysis rested. In the course of his critique, Cook gave an illuminating hypothetical example.⁴⁹ He asked the reader to imagine that England might pass a law criminally punishing the commission anywhere in the world of what England considered murder.

Aside from questions of practicability in execution, it seems to be in keeping with the idea that the object of the criminal law is not to satisfy the thirst for revenge but rather to protect society from persons whose overt conduct reveals dangerous and anti-social tendencies. . . . It would seem that only a clinging to the crude and primitive idea that the sole object of the criminal law is 'punishment' for an 'offense' against the 'sovereign' could lead to the opposite conclu-

47. R. DWORIN, *TAKING RIGHTS SERIOUSLY* 90-100 (1976) (comparing rights, goals, principles, and utility); *id.* at 82 (contrasting principles and policies).

48. *See supra* note 40.

49. W. COOK, *supra* note 20, at 15-16.

sion [that such a law is impermissible]. . . . Whether similar laws passed by American states would violate the constitutional requirement of [the] 'due process' clause is of course a still different question, upon which also no opinion is offered at this place, other than to say that apparently only a blind following of unsound territorial notions would lead to the conclusion of unconstitutionality as distinguished from social desirability.⁵⁰

The instrumental character of this analysis of the criminal law is unmistakable. Cook did not rely in any way upon the fact that homicide might also be criminal in the nation or state where the relevant activities or injuries occurred. What seemed important to Cook was that England was concerned with protecting English society from dangerous persons. The idea that the criminal law might be designed to effect retribution struck Cook as primitive and crude. Of course, retribution is a backward-looking concept, and deterrence, rehabilitation, and the protection of society are forward-looking. This seems precisely the reason that Cook found retribution such an unconvincing explanation, thereby rejecting the possibility that English law of homicide should be limited to homicides that in some part, at least, transpired upon English soil.

What Cook has done is precisely to reject the main deontological explanation for criminal prosecution. The different possible explanations for criminal punishment have quite different philosophical overtones.⁵¹ Theories of rehabilitation and of general and specific deterrence have a consequentialist character; they propose that punishment is proper either when it would deter criminal activity generally or when it would reduce the likelihood of a specific individual committing further criminal acts. Retribution is deontological; it asks merely whether the particular defendant *deserves* to be punished.

What should also be clear from the philosophical literature on criminal law is that instrumental or consequentialist reasoning is highly problematic as a basis for punishment.⁵² Consequentialist reasoning might permit or even require a judge to punish someone who was quite innocent in the factual sense. If the community believed that the defendant was guilty, then deterrence might be served by punishment regardless of the defendant's real guilt or innocence. By the same token, consequentialist reasoning would permit or require preventive detention of someone who had never committed any crime, simply on the grounds that he or she was a danger to society. When criminal law is divorced from the backward-

50. *Id.* at 15-16.

51. See in particular H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968).

52. See H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in *id.* at 1. In particular, see *id.* at 8-21. See also J. COLEMAN, MARKETS, MORALS, AND THE LAW 164 (1988) ("[I]n crimes the question is whether the state has the right to deprive a particular person of his liberty by incarcerating him.").

looking reasoning about what the defendant actually deserves, it becomes enormously morally problematic.

And the same is true of choice of law reasoning. Recalling our example of after-acquired domicile, the problem with consequentialist reasoning is that it is indifferent to what the parties deserve. The defendant, who is required to pay simply because the plaintiff moved to another state, is in a situation similar to that of the innocent defendant sent to jail for deterrent purposes. The problem with consequentialist approaches to choice of law is that the individual is treated merely as a means to an end.⁵³ Indeed, this is a principal philosophical objection to consequentialist reasoning in general. It can on occasion require or permit the sacrifice of the claims of one individual to the general good of society, without regard for whether imposing this sacrifice is fair. A major problem with strictly consequentialist reasoning is that there are strongly held moral intuitions that human beings are not just means to an end, but must be treated as ends in themselves. This is one basis of a moral theory of rights. It is also the basis of a rights-based theory of adjudication, generally, and of adjudication of choice of law cases, specifically.

C. *Rights in Multistate Cases*

To this point, one might expect that Joseph Beale would have been sympathetic. The goal of choice of law adjudication, in Beale's view, was to enforce the parties' rights, not just to effectuate legislative policies. But where do we find these rights? Beale saw the rights as vested legal rights arising out of the applicable state's substantive law. This response is inadequate, but not because (as some realists argued) the idea of rights is nonsense. Beale's theory of rights is inadequate because it presupposes the answer to the important choice of law question, namely, what law is applicable?

Of course, Beale had an answer to this question. One determined what rights the parties had after ascertaining the applicable law through a variety of territorial rules. For instance, torts cases were governed by the place

53. In all fairness, one should acknowledge both the efforts to salvage consequentialist theories from these objections and the objections to deontological theories themselves. One effort to explain common moral intuitions in instrumental terms is known as "rule utilitarianism." Generally speaking, it is desirable to have a society in which important human interests such as liberty and bodily integrity are respected. This belief supports giving such interests special protections, for instance by adopting rules that these interests shall not be violated. One problem with rule utilitarianism is whether it affords adequate protection in cases where the benefits of violating the rule would be substantial.

Deontological reasoning, of course, has its own problems. In particular, there seem to be cases where a small violation of rights would be acceptable in order to save the lives of millions of innocent persons. Obviously, assessing the relative merits of a refined version of consequentialism and of deontological reasoning is no easy task. A huge philosophical literature exists. My point is simply that the sort of simple-minded consequentialism that motivates much choice of law analysis is grossly inadequate. Whether a refined consequentialism would be satisfactory is beyond the scope of this discussion, although I tend to doubt it. The difficulties in turn of developing an adequate deontological account are manifest in Part II, *infra*.

where the last act giving rise to a claim occurred—that is, the place of injury.⁵⁴ Contract rights vested under the law of the place where the contract was formed.⁵⁵ Note, however, that the concept of “rights” itself did not supply these territorial rules; the territorial rules, instead, defined the rights. Territoriality was derived from a notion of state sovereignty that was not itself rights-based.

There is an alternative conception of rights that does not require prior identification of the applicable substantive law. That alternative conception supplies the foundation for a new rights-based model of choice of law. It is more nearly analogous to common notions of individual fairness and thus more successfully avoids the defects of consequentialist reasoning. It follows directly from the notion that states are limited in their pursuit of the common good at the expense of the individual. These rights are political rights because they concern the political relationship between the state and the individual. One’s rights to resist the imposition of a personal burden for the common good are political rights, though not necessarily recognized substantive legal rights.

A general political theory of rights both defines situations in which a state is entitled to coerce individual citizens for the general good of others and identifies situations in which the individual is not obliged to obey. Although it is not common now to speak of litigants having rights to judicial recognition of some pre-existing substantive legal claims (as Beale and Dworkin do) it is not at all unusual to speak of individual rights against the state in somewhat different circumstances. For example, we might speak of a right of free speech, or a right of property, or a right to equal treatment. In the post-realist world that we inhabit, the word “rights” lingers even though most of us tend not to describe adjudication in terms of judicial enforcement of vested legal rights.

Political rights of this sort have something of a constitutional flavor, and indeed it is in constitutional adjudication that we find talk of rights to be most prominent. Yet this does not mean that the only rights that can be meaningfully discussed are constitutional rights. One might also believe in political rights that were not recognized by the framers of the Constitution. These rights are still relevant to legal discourse in that one might attempt to secure them institutional recognition. One might try to persuade a constitutional convention or a legislature of the existence of animal rights, for instance, or of fetal rights, or of rights against discrimination on the basis of sexual preference, regardless of whether one believed that these already were reflected in the Constitution. Similarly, one might make arguments about such rights in an effort to influence courts in interpreting an ambiguous statute or formulating a common law rule. To

54. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377.

55. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 311, 323, 325.

make a rights-based argument is to make a normative claim that a judge or legislator ought to honor the right in question.⁵⁶

A political right that has not been institutionally recognized presents a difficult personal decision for a judge who feels bound by positive law that violates that right. For choice of law purposes, however, we need not resolve what a judge should do when confronted by unambiguous authoritative instructions that disregard rights that the judge believes to exist. The reason is that there is little explicit legislative guidance about how to decide choice of law cases. Typically, the common law judge is left without explicit instructions to decide the territorial reach of a statute; there is plenty of room in this inquiry for a rights-based analysis. Deontological analysis of parties' rights finds its most important expression in such cases.

Whatever the merits of consequentialist reasoning in moral theory or as a general theory of adjudication, there are special reasons to find it wanting as an approach to choice of law. The state's authority over litigants is most tenuous in multistate cases. The claims of one of the parties are being sacrificed to further the general good of a community of which he or she may not even be a part. If a local citizen challenges a consequentialist local rule on the grounds that it unfairly sacrifices his or her rights to the common good, there may at least be the response that the rule is a product of political processes in which the individual has participated. In cases where one or both of the litigants may hail from other states, this response may not be available. The question then arises whether there is a legitimate basis to require the individual's contribution.

In the choice of law context the purported justifications for a system of adjudication that maximizes the total good to society are least persuasive. Perhaps the best known justification of such a system of adjudication is the theory of the efficiency of the common law, which is defended by some on the ground that it increases the total amount of wealth to society. One defense of this theory of "wealth maximization" is that by increasing the total wealth available to society, it increases the expectations of all of society's members.⁵⁷ But it is one thing to defend consequentialism on the

56. Moreover, there is nothing peculiar about arguing that state law ought to recognize the rights of non-citizens to be free from local authority even when the Constitution does not, strictly speaking, require it. Admittedly, such rights arise from the fact that our states exist within a federal system. But this does not mean that they are only cognizable in the federal constitution. The fact that a state is free constitutionally to apply its law does not mean that it ought not to be respectful of the claims of other states and their inhabitants: The federal constitution only sets a floor below which no state may go. While there is no guarantee that a state will be persuaded by arguments about interstate rights, this should not prevent us from making such arguments and believing in them.

57. R. POSNER, *THE ECONOMICS OF JUSTICE* (2d ed. 1983); see also Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking*, 61 J. POL. ECON. 434 (1953); Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309 (1955). Posner, of course, distinguishes carefully between wealth maximization and utilitarianism. R. POSNER, *supra*, at 6-87. His ethical defense of wealth maximization relies on the grounds of *ex ante* compensation, among other things. *Id.* at 94. To the extent that this argument

theory that when the pie is enlarged, each person's share is likely to be more generous. It would be quite another to expand the pie at the expense of someone who is not entitled to demand a piece at all.

The point here is merely that there are normative difficulties in applying consequentialist reasoning in cases that transcend state borders. Whatever the merits of adjudicative efforts to further social policy, one cannot simply take for granted the fairness of using the litigant in a multi-state case as a means to that end. One must show that the individual is properly subject to the state's authority before he or she can be called upon to contribute to the state's social good. The existence of choice of law rights should, for this reason, be even less controversial than the existence of domestic rights.

Choice of law rights arise out of the fact that the state's legitimate authority is finite and the state ought to recognize this.⁵⁸ A state is entitled to coerce because it has satisfied the standards of political legitimacy that define the situations in which state coercion is proper. An overly simplified example will illustrate the argument well enough for present purposes. Assume that the only acceptable basis for state coercion is that the coerced individual is a member of the voting population. If this is the case, this standard defines the situations where state coercion is permissible, because the state is then entitled to coerce only individuals who possess the right to vote in its elections. When cases involve individuals who cannot vote, the state's law may not apply to burden them. A political theory based on electoral participation thus translates into a choice of law principle.

When a judge decides that it is permissible to apply local law to a multistate controversy, he or she is necessarily deciding a question of political legitimacy at the same time. The choice of law decision rests upon an assumption that the criteria for legitimate political authority have been

works, it is because to say that some system is wealth-maximizing is to say that the costs would be higher under other systems; this is the reason that *ex ante* compensation, and consent, can be assumed. *Id.* at 95. For an excellent critique, see J. COLEMAN, *supra* note 52, at 164-65 (1988).

58. Choice of law rights may be usefully compared to other sorts of rights that can arise in either the interstate or international setting, such as international human rights. These rights, such as the right against torture or genocide, are typically rights that one would have against one's own government that are also accorded international protection. They arise simply because one is a human being.

The political rights discussed here have a somewhat similar normative ground. The distinctive feature of these choice of law rights is that one is more likely to have a good claim against a foreign government than against one's own government, because it is less likely in the former case that the conditions for legitimacy have been met. Political rights therefore take on a distinctive interstate importance, since they are more likely to matter in the interstate context. Human rights are called *international* human rights, in contrast, in order to emphasize that there is a basis for international recognition and enforcement, even though the violation might appear to be a purely domestic matter involving a citizen's claims against his or her own government. International human rights do not have a different content simply because they are international.

Little depends upon this distinction, because both international human rights and our political rights are grounded in principles of political fairness and supply normative arguments about what states should do. Violations of international human rights are, of course, more likely to be seriously morally objectionable than violations of choice of law rights.

met. Satisfaction of the criteria for legitimate authority is necessary to make the application of local law fair. Principles of political fairness supply the criteria for the legitimate exercise of authority. While the discipline of political philosophy addresses numerous other issues of state authority, one of the central issues that political philosophers have considered is the necessary and sufficient criteria for creating in the individual an obligation to obey. This issue is central to a political rights model of choice of law, as well.

The central role of political legitimacy in this model is the reason for calling these rights *political* rights. While some political rights are rights that arise within a political relationship, such as a right to fair treatment by one's own government, this view is unnecessarily narrow. Another sort of claim is that the individual *lacks* the necessary political connection with the state to make the exercise of its authority legitimate. Negative rights to be left alone may also be political rights. For instance, if an anarchist denied that any government might ever exercise legitimate coercive authority, the individual's right to resist could be said to arise out of the anarchist's political philosophy. Principles of political fairness give rise to both positive claims to certain sorts of treatment and negative claims to be left alone.

Before we move on to the obviously difficult program of spelling out what rights might be thought to exist in the choice of law context, it is worth noting the substantial ways in which this idea of rights differs from the vested rights envisioned by Joseph Beale. The key differences are two: The rights are mostly negative rights instead of positive rights, and they are vertical rights that the individual possesses against the state directly, rather than horizontal rights against the other party to the litigation.

It is easy enough to see why rights to remain unmolested by a state that has no legitimate source of authority are negative rights,⁵⁹ while the rights that interested Joseph Beale and (for the most part) Ronald Dworkin should be characterized as positive rights.⁶⁰ Vested rights are positive rights because the forum (absent one of a few recognized exceptions⁶¹) is

59. The requirement of mutuality, *see infra* Part II(C), seems at first to be more than a negative right because it requires that a state bestow benefits if it is going to impose burdens. Despite this aspect, the requirement can be seen as negative because a state can satisfy it by leaving an individual completely alone. The requirement is that an individual be free from imbalanced choice of law rules.

60. For similar usage of the term "negative" versus positive or "affirmative" rights, see Narveson, *Contractarian Rights*, in *UTILITY AND RIGHTS* 161 (R. Frey ed. 1984). *Cf.* *DeShaney v. Winnebago County Dept. of Social Services*, 57 U.S.L.W. 4218 (U.S. Feb. 22, 1989) (Fourteenth Amendment does not impose affirmative duty on state to protect individuals from one another). My claim here, unlike the majority opinion in *DeShaney*, is not that the Constitution provides no general affirmative rights. First, *DeShaney* involved federal constitutional law while the subject at issue here is state-created rights. Second, the point here is merely that negative rights are typically easier to demonstrate than positive rights, rather than that the latter do not exist at all. *Cf.* I. BERLIN, *TWO CONCEPTS OF LIBERTY* (1958).

61. One exception is the rule on "public policy," which allows the forum to disregard the otherwise applicable law if it is seriously contrary to local moral principles. *See* RESTATEMENT (FIRST) OF

obligated to help the litigant in some affirmative way. A political rights model recognizes also that persons have rights to be left alone.

Note that while Bealean vested rights are supposedly present in every case—one party or the other has an affirmative right to prevail—in some cases no political rights-based constraints may be present. It is entirely possible that more than one state whose laws could be applied may have the sort of relationship with the litigants and the controversy so that there is no political unfairness. In this respect, rights to be free of state law are similar to rights against assertion of state adjudicative jurisdiction. The fact that state A is entitled to assert adjudicative jurisdiction says virtually nothing about whether state B is entitled to do so as well. Similarly, the mere fact that state A may fairly apply its law does not mean that state B may not. In other words, there is no reason to expect that a particular choice of law will uniquely satisfy political rights requirements. A rights-based analysis of choice of law, like an analysis of personal jurisdiction, merely imposes a threshold fairness test for the burdensome application of a law that might be met by one state or by several. Unlike personal jurisdiction, however, this right can be possessed by either the plaintiff or the defendant, because either one might complain about a coercive application of state A's law.⁶²

The analogy to personal jurisdiction should also help to clarify the second distinction between Bealean and political rights. One's choice of law rights are, like personal jurisdiction rights, held against the state directly. They are not rights against the other party to the lawsuit (although, of course, they will affect one's legal claims). Nor are political choice of law rights possessed by sovereign states against one another. Because the possibility that states might possess sovereignty rights against one another has led to some confusion in the Supreme Court's personal jurisdiction cases, it is worth pausing a moment to describe the relationship between arguments of individual fairness and this potential argument about state sovereignty.⁶³

The political rights-based argument is related to the issue of state sovereignty in that the individual's claim of immunity from state law is a claim that the state would be exceeding its legitimate sovereignty if it were to apply its law. It is unfair (and thus a violation of individual rights) for a state to exceed the legitimate scope of its sovereign power. To say that a

CONFLICT OF LAWS § 612.

62. Of course, it is most likely that the defendant will complain, since the plaintiff selected the forum and may have taken choice of law into account in making this decision. *But see, e.g.,* Lienthal v. Kaufman, 239 Or. 1, 395 P.2d 543 (1964) (plaintiff chose Oregon court in which to collect promissory notes despite existence of Oregon spendthrift laws protecting defendant).

63. Confusion occurs in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), in which the Court apparently assumed that personal jurisdiction could either involve an individual right *or* a claim based on federalism and state sovereignty. *Id.* at 702 n.10. For an interesting discussion of the relationship between individual fairness and state sovereignty, see Stein, *supra* note 1.

claim invokes the finite nature of state sovereignty does not mean, however, that it involves an assertion that the state transgresses against the sovereignty of some other state. Indeed, this discussion of political rights does not rely in any way on the rights of other states. Our sovereignty-related claim concerns fairness to individuals, not fairness to other states.

Such an approach to sovereignty is "vertical" in the sense that the focus is on the relationship between the state and the individual, rather than on the relations between equal sovereign states. Analysis of the relations between equal sovereign states is "horizontal."⁶⁴ While our political rights theory certainly involves issues of state sovereignty, it is primarily concerned with the right of individuals not to be subjected to unfair treatment.

To this point, of course, we have said very little about what political rights exist, and what fairness may require of choice of law doctrine. At most we have argued that there is an approach to rights which sounds more plausible to modern ears than Bealean vested rights, and that these rights to be treated as more than merely the means to the end of some other community's social good stem from principles of political fairness. The next, and larger, task is to say something about what such rights might look like. What rights do we have?

II. A POLITICAL RIGHTS MODEL OF CHOICE OF LAW

A political rights model of choice of law requires a state to justify its exercise of coercive authority over an individual aggrieved by the application of the state's law. This right of the individual litigant to a justification for state coercion need not have constitutional status; to claim such a right is to make a normative argument that may or may not have been recognized institutionally. A legal decision by the forum to recognize this right by not applying its own law resembles adoption of a state long-arm statute. A state long-arm statute might deliberately be written so as not to extend to the limits tolerated by the federal constitution, in order to respect what the state saw as nonconstitutional fairness claims of defendants. By the same token, a state might recognize claims of individual rights and fairness to a greater degree in choice of law issues than the minimal standard imposed by due process.

This model of rights requires close attention to the state's purported justification for the exercise of coercive power. The first task of a political rights model is to identify the circumstances under which the state has, or lacks, an adequate justification for coercion. Political choice of law rights derive from the limited nature of such political justifications. What sorts of justifications would satisfy our standard of fairness? Here we encounter

64. L. BRILMAYER, JUSTIFYING INTERNATIONAL ACTS 2-3 (1989).

difficult questions that have proved troublesome to political philosophers. The best that we can do here is to outline the most convincing solutions yet offered to the problem of political justification.

A. *Consent and Domicile*

The two most intuitively acceptable bases for state coercion are probably express consent and the domicile of the party burdened by the applicable law. Express consent is well recognized both by political theorists⁶⁵ and the judges who have written choice of law⁶⁶ and personal jurisdiction⁶⁷ opinions, although we will see below that standing by itself, consent may not be adequate. Similarly, most political philosophers investigating the problem of the state's rights to coerce have assumed that citizenship or domicile is one of the strongest possible justifications for state authority; the paradigm case of political authority, in fact, has been the obligation of the citizen to his or her own government.⁶⁸

There has, of course, been substantial dispute about why, as a philosophical matter, citizenship is an adequate basis for state coercion.⁶⁹ As a matter of choice of law, however, it seems that we cannot afford to be as concerned as professional philosophers about such scruples. Anarchism does not have a promising future as a basis for judicial decision making in choice of law cases, any more than in any other sort of substantive dispute; thus *some* basis for political obligation must be found. In the purely domestic arena, we seem content to point to the right to participate in political processes.⁷⁰ If this is adequate for domestic cases, then it would seem adequate for conflicts cases as well.

What ought to be the relevant affiliating characteristics of corporations? Corporations are not automatically ineligible to be the possessors of rights, although it should not be assumed that they will necessarily have the same rights as natural persons.⁷¹ There would seem to be few objections, either as a matter of case law⁷² or otherwise, to subjecting the corporation to the

65. A survey of explanations of political obligation is found in A. SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* (1979). Simmons concludes that express consent is an adequate explanation in theory but is rarely satisfied in fact.

66. Choice of law contractual clauses, which are usually enforced, are the most obvious example of consent to the application of a particular law. *See, e.g.*, E. SCOLES & P. HAY, *CONFLICT OF LAWS* 632-36 (1982).

67. *See, e.g.*, *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964) (personal jurisdiction can be based upon consent expressed in choice of forum clause).

68. Simmons phrases the problem this way, and in dismissing the usual justifications, decides that no one has any more obligation to his or her own government than to the state in which one is present. A. SIMMONS, *supra* note 65, at 3-4.

69. For a thorough critique, see R.P. WOLFF, *IN DEFENSE OF ANARCHISM* (1970).

70. This is one foundation, in constitutional challenges, for the judge's rejoinder that the complainant should "take it to the legislature."

71. They do not possess rights under the privileges and immunities clause, for example. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1984). However, they do have due process rights; much due process litigation involves corporate entities.

72. In choice of law, for example, the internal affairs doctrine applies the law of the state of

law of its state of incorporation. As a creature of that state's laws, absent considerations of federal constitutional or statutory law objections, the corporation can have only such rights and obligations as the state's laws bestow. This does not mean that the corporation lacks relevant affiliations with other states. Perhaps most significantly, corporations often exercise considerable political clout in states other than the state of incorporation. In some instances, it might be reasonable to treat a foreign corporation as functionally analogous to an individual voter.⁷³

We can proceed on the assumption, then, that domicile, incorporation, and the right to participate politically are adequate justifications. These might loosely be referred to as domiciliary connections, and they supplement express consent as an adequate political justification for the exercise of state power. This domiciliary principle reveals an important distinguishing feature of the political rights approach to choice of law. In the historical dispute between the vested rights theorists and the interest analysts, the important dispute sometimes seemed to be between those who would base decisions upon territorial connecting factors and those who would base decisions upon domiciliary connecting factors.⁷⁴ The Bealeans seemed to take a rule's scope as territorial unless clearly such would be unreasonable, while the interest theorists took a rule as domiciliary unless clearly proven otherwise. Our discussion of the use of domiciliary factors under a political rights model shows that these are not the only two alternatives.

The reliance upon domiciliary factors in a political rights analysis is different in the following way. Unlike the Bealean system, in a political rights analysis domiciliary connecting factors are of front-line importance, not secondary to territorial connecting factors. More important, under the political rights model, domiciliary factors function solely as a justification for the imposition of burdens; it is the party who is burdened that must have a local domicile. Under Bealean theory, domiciliary factors are not limited in this way; it is not relevant which party benefits. Traditional vested rights analysis is "jurisdiction-selecting" in that it does not require the court to ascertain the content of the law before deciding whether it is

incorporation on matters of internal corporate governance. E. SCOLES & P. HAY, *supra* note 66, at 890. This doctrine has received something of an imprimatur in the Court's commerce clause cases, e.g., *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987); *Edgar v. Mite Corp.*, 457 U.S. 624 (1982); Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CALIF. L. REV. 29 (1987); Pinto, *The Constitution and the Market for Corporate Control: State Takeover Statutes After CTS Corp.*, 29 WM. & MARY L. REV. 699 (1988).

73. See Brilmayer, Haverkamp, Logan, Lynch, Neuwirth & O'Brien, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 742 (1988) [hereinafter Brilmayer, *A General Look*].

74. Of course, this oversimplifies. The Bealean approach relied upon domiciliary connectors in certain situations, such as some rules of family law or estates and trusts, see RESTATEMENT (FIRST) OF CONFLICTS OF LAWS § 137 (legitimacy), § 295 (trusts), while the modern interest theories have occasionally relied upon territorial connectors, for instance in situations where a legal rule is clearly conduct-regulating. See Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980) (discussing conduct-regulating rules).

applicable.⁷⁵ The Bealean rules on family law or validity of wills do not depend upon whether the law advantages or disadvantages the local person. By the same token, most statutory choice of law rules that rely upon domiciliary connections do so without asking whether the local person will be helped or hurt; they too are jurisdiction-selecting.⁷⁶

The function of domiciliary factors as burdening links in the political rights model also differentiates it from interest analysis. In interest analysis, domiciliary factors matter when they establish that application of local law will benefit one of the state's own people. For example, a guest statute is presumed to create an interest when its application would work to the benefit of a local party, namely the defendant in a tort suit.⁷⁷ Whether application of local law would burden a local person is not directly relevant to modern choice of law approaches.⁷⁸ There is assumed to be no reason that a state would set out to burden its own people. While there may be situations where the burdened individual is a local (in all purely domestic situations this will be true, for instance), this is not the desired goal but simply an unavoidable byproduct of the desire to help the other party to the litigation. In the modern approach, pro-plaintiff laws are only implicated when the plaintiff is a local person, and pro-defendant laws are only implicated when the defendant is a local person.

The political rights model is different from both traditional and modern choice of law theories because, while it inquires into the content of the rule, the relevant question is whether the *burdened* party is local. Although we will see below that some versions of a rights-based approach, taken as a whole, might be jurisdiction-selecting,⁷⁹—and that interest analysis itself, when applied consistently, is jurisdiction-selecting as well⁸⁰—the simple domiciliary principle that we have so far identified is not. It depends upon the law's content. So does the determination whether an interest exists, although the two are very different: the political rights-based approach relies upon content in a way that is the opposite of the way that policy or interest analysis does. Instead of finding a reason for the law's applicability in the fact that a local would benefit, one finds a justification for the law's applicability in the fact that a local would be burdened.

It is no coincidence that political rights analysis and policy analysis are

75. This was the foundation of early and influential criticisms of vested rights analysis. An early essay by Cavers criticized the traditional rules for their content-blindness. See D. CAVERS, *supra* note 21, at 9. He later explained this essay as an attempt to mount an attack on "jurisdiction-selecting rules." D. CAVERS, *supra* note 3, at 3.

76. A survey of choice of law statutes can be found in Brilmayer, *supra* note 74, at 424-29.

77. See Ely, *supra* note 1, at 178-79 (listing authors who adhere to proposition that interests are designed to "help the locals").

78. *Id.* at 198 & n.66.

79. See *infra* text accompanying note 112 (mutuality requirement satisfied by jurisdiction-selecting rules).

80. See *infra* Part II(D).

so different. The divergence is a direct consequence of the differences between their foundations. Whenever a law is applied it will work to the advantage of one party to the litigation and to the disadvantage of the other. Choice of law at the adjudicative stage is a zero sum game; what advances the cause of the plaintiff simultaneously imposes costs on the defendant, and vice versa. This is as true in purely domestic cases as in conflicts cases. A theory of adjudication that is forward-looking focuses on one side of this balance, namely the good that can be done and how best to attain the goal that the law is designed to achieve. In the choice of law context, this approach results in a focus on whether the benefits that would be produced by the application of a law are the intended ones, that is, benefits to local persons. A theory of adjudication that is backward-looking, by contrast, focuses on whether the parties deserve their treatment, and it must therefore ask about the appropriateness of the placement of burdens. The question is not whether the benefits are intended, but whether the burdens are justified.

A model of political rights and the modern policy approach to choice of law are mirror images of one another; the rights analysis looks at *burdening* links and the policy analysis looks at *benefiting* links. Using burdening links, the rights analysis divides cases into categories that resemble the interest analysis categories of true conflicts, false conflicts, and unprovided-for cases. As with interest analysis, some cases are false problems; these occur when the parties either share a common domicile or hail from states that have the same substantive law.⁸¹ Assume, for instance, that both parties are Connecticut domiciliaries. Connecticut law must be to the disadvantage of either the plaintiff or the defendant; whichever it is, that party has sufficient connection with Connecticut so that his or her rights are not violated by application of Connecticut law. There is no rights-based objection because whichever is the aggrieved party, he or she is a local domiciliary. This reasoning mirrors the interest analysis reasoning that where both parties are from Connecticut, then Connecticut must have an interest in having its law applied. The substance of the law need not be consulted because whether it helps the plaintiff or the defendant, Connecticut helps the local.

In cases of mixed domicile, the political rights analysis also results in a mirror image of interest analysis. Assume that New York law and Connecticut law differ and that one party is from New York and the other is from Connecticut. There are two possible configurations: Either both are relatively favored by the laws of their respective states or both are disadvantaged. Consider first the case in which each party would benefit by application of his or her home state's law.

81. In this and much of the discussion immediately following, I borrow from John Ely's excellent treatment. See Ely, *supra* note 1, at 200-01.

In interest analysis terminology, this is a true conflict and therefore a hard case. Each state has a policy reason for applying its own law, because application of local law would help the local person relative to the application of the other state's law. Under a rights-based analysis, this case is indeed a hard case, but the reason is very different. The problem is not that there are two good connecting links, each of which would justify application of local law—namely, the link between Connecticut and its party and the link between New York and its party. Instead, the problem is that there are no connecting links to justify the burdensome application of either law. Connecticut lacks a link with the party that would be burdened by its local law, while New York lacks a link with the party that would be burdened if New York law were applied. Thus, from a political rights perspective, it seems that the modern theorists are correct about which cases are simple and which cases are hard; it's just that they explain their classification in what seems to the rights theorist to be precisely the wrong way.

Now consider the other possibility: cases of mixed domicile in which neither party would benefit by the application of his or her own law. Each party, in other words, would prefer the law of the other party's home state. An interest analyst would classify this situation as an unprovided-for case because no links rationalize the application of either state's law. Because policy analysts would be searching for benefiting links rather than burdening ones, they would view this case as a vacuum. A rights-based analysis, in contrast, would apply the domiciliary principle and find two adequate links which would support the application of either New York law or Connecticut law, since application of either would disadvantage only the local person. Neither the modern approach nor the rights-based domiciliary principle can provide a unique and satisfying choice of one state's law over the other.

The structure of the problem, then, appears very similar under interest analysis and a political rights approach; analysis of a case might reveal either no justifying link, one justifying link, or two justifying links. Under either approach, the hardest case is the case of mixed domicile in which each party would benefit from application of his or her own state's law. Does this mean that a rights analysis founders on the same shoals as governmental interest analysis, namely on the existence of true conflicts? Not necessarily. First, there is a default position. When there is no justification for either state's intervention, the proper solution is to remain at the status quo.⁸² Moreover, we have not yet exhausted the list of potential justifications. We must return to our original question, namely what can give a state the ability to exercise coercive power in a legitimate fashion. So far,

82. The reason would be that no state has a right to disturb the existing distribution. The default position in Currie's system was to apply forum law. See *infra* note 123 and accompanying text.

we have investigated only one possible answer to this problem, namely that the burdened party is a domiciliary or a local corporation. Other possibilities exist.

B. *Territoriality*

Territoriality would seem to be an obvious candidate for dealing with the hard cases. It yields a compromise between giving either party the benefit of his or her home state's law. Indeed, it may supply an alternative justification for state authority, not merely a device called in to break ties. Admittedly, its association with the old-fashioned vested rights approach has given it something of a bad name, but this association is unnecessary and misleading. Territoriality need not involve an effort to single out a unique location where "the rights vest." Nor need we interpret it to require that the aggrieved party have been personally present within the state. As an initial matter, we will loosely define it as merely meaning that the location of events matters for choice of law decisions.

Despite the fact that territoriality is currently out of fashion, there can be little doubt that territoriality plays some role in a state's right to exercise coercive authority. Regulatory jurisdiction, generally, is pegged to the local occurrence of events.⁸³ Criminal law and taxation depend upon a nexus with the territory of the state.⁸⁴ In international law, application of American statutes depends upon the occurrence of conduct or impact within the United States.⁸⁵ In resolving legal problems involving transactions between individuals from different states, the party who stayed at home seems intuitively more entitled to claim the benefit of local law than the party that ventured away from home, thereby willingly leaving the protection of his or her own home state. When in Rome, one does as the Romans do. Furthermore, one apparently subjects oneself to foreign law when one causes consequences in another state.

To describe a common intuition is not to give the arguments for why a particular rule may seem fair, however. Territoriality has not received a great deal of attention as an explicit assumption.⁸⁶ Yet well-known treatments of the problem of political obligation rest on highly territorial assumptions, sometimes phrased in terms of implicit or "tacit" consent. The best known is probably that of Locke, who argued that one consented to the exercise of state authority when one resided or travelled upon a state's territory.⁸⁷ This argument should have a very familiar ring to civil proce-

83. See, e.g., *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986) (commerce clause prohibits regulation of out-of-state transactions).

84. L. BRILMAYER, *AN INTRODUCTION*, *supra* note 12, chs. 11, 13.

85. *Id.* at 301-14.

86. *But see, e.g.*, M. WALZER, *SPHERES OF JUSTICE* ch. 2 (1983).

87. J. LOCKE, *SECOND TREATISE OF GOVERNMENT* §§ 119-21 (J. Gough ed. 1946) (3d ed. 1698).

dure teachers; it reflects the same assumptions as certain well-known personal jurisdiction cases.⁸⁸ Locke's account even matches some of these cases in detail, such as where he argued that using the state's highways amounted to consent—the precursor to modern non-resident motorist statutes!

Despite its familiarity and prestigious associations, this reasoning begs important questions. Most obviously, this "consent" is usually purely fictional.⁸⁹ Furthermore, theories of tacit consent assume almost exactly what they set out to prove. Could England decide to infer tacit consent to English authority from an individual's French residence or use of the French highways? Presumably not. Allowing England to do so would allow it to assume authority over persons everywhere.⁹⁰ Indeed, even if England were to notify the world in advance that it would infer tacit consent to the laws of England from entry into France, popular expectation that England would do this (if it could somehow find the means) would not make assertion of English authority legitimate.

There are limits on what the state may infer, and these limits are themselves territorial. England may infer tacit consent from the act of walking upon English soil only because England has sovereign authority over English territory. It was precisely such difficulties with theories of tacit consent that led the Supreme Court in *International Shoe Co. v. Washington*⁹¹ to reject implied consent as a basis of adjudicative jurisdiction. Under *International Shoe*, the forum may only infer consent when doing so would be fair; the implied consent theory adds nothing to the calculus, and one is better off to proceed directly to the fairness question and skip all discussion of consent.⁹²

Another attempt to explain territoriality might focus on the benefits that an individual receives upon initiating purposeful contact with the state.⁹³ Submission to state authority is then something of a quid pro quo. This argument, also, surfaces in judicial opinions: purposeful behavior and receipt of benefits have been central elements in the Supreme Court's personal jurisdiction analysis. The argument seems consistent with liberal assumptions that political obligations should be assumed by individuals voluntarily, rather than thrust upon the unwilling.⁹⁴ But the problem of circularity is not solved. Whether phrased in terms of voluntary assumption of obligations or express or tacit consent, what remains unexplained

88. See, e.g., *Hess v. Pawloski*, 274 U.S. 352 (1927) (upholding non-resident motorist statute based on implicit consent).

89. This has not gone unnoticed in the personal jurisdiction literature. Stein, *supra* note 1, at 735.

90. L. BRILMAYER, *supra* note 64, at 62.

91. 326 U.S. 310 (1945).

92. *Id.* at 316.

93. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Compare A. SIMMONS, *supra* note 65, at 107-08 with Stein, *supra* note 1, at 735-36.

94. A. SIMMONS, *supra* note 65, at 69 (arguing that consent theory is liberal theory because it protects freedom to choose).

is the fact that a state apparently may impose conditions upon some types of voluntary behavior but not others. The attachment of conditions presupposes that the state already has power over an individual, namely the power to attach certain conditions to the individual's actions. Furthermore, only voluntary actions that are in some way connected to the state's *territory* impose obligations. Behaving voluntarily towards France does not typically obligate one towards England.⁹⁵

Territoriality cannot be fully explained in terms of the standard arguments about consent, voluntary behavior, or receipt of benefits, because these arguments are themselves based on territorial assumptions. The problem is that the state cannot simply bootstrap itself into authority over an individual.⁹⁶ It is almost impossible for some entity with no pre-existing authority to justify assertions of political authority over an individual. If the justification is based upon the exchange of a *quid pro quo*, then where does the state obtain this "quid" to exchange? How can it explain its alleged ability to withhold benefits absent the individual's assumption of political obligation when the state has not already been shown to possess some such authority? As critics of law and economics have long argued, arguments based upon the parties' consent depend upon a prior assignment of entitlements.⁹⁷

The modern choice of law theorists should not be too quick to celebrate the obvious difficulties of territoriality. To a certain extent, territoriality must simply be taken as axiomatic for choice of law purposes. Indeed, like the vested rights approach, modern policy analysis is permeated with territorial assumptions. Not only is it well accepted that conduct-regulating norms operate territorially,⁹⁸ but the foundational emphasis on the wel-

95. L. BRILMAYER, *supra* note 64, at 66-68. See also K. GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 124-27 (1987) (criticizing "fair play" argument).

96. A state is in something of a catch-22. If it receives consent without promising something in return, then it is subject to the charge that the "bargain" is too one-sided to be fair. On the other hand, if it promises something in exchange, the question arises of the source of the initial power over that asset which enables the state to have a right to withhold it from individuals. This issue is discussed at greater length in Brilmayer, *Contract, Consent, and Territory*, 74 *MINN. L. REV.* 1 (1989) (forthcoming).

97. See, e.g., J. COLEMAN, *supra* note 52, at 109. One response is that the "contract" is not with the state, *per se*, but with the citizens of the state. A group of individuals have a social contract with one another, and their grant of authority to the state bestows upon it some assets or power that can be "traded" to other individuals not yet obligated to obey. Whatever the merits of such an explanation, it cannot avoid the reliance upon territorial presuppositions. Once the initial group members attempt to impose the state's will on persons who were not original signatories, they must do so in territorial ways. The community is still defined by its territorial scope. Persons become members of the community by being born there, or fall under the sway of its authority by coming onto its land. Original signatories might be allowed to terminate political obligations by leaving the state to reside elsewhere. Indeed, the domiciliary principle itself rests upon territorial assumptions; territory defines who is in the voting pool. No state could subject a person to its authority by simply extending that person an opportunity to participate in its elections. The forced exchange of a right to vote for the obligation to obey only works with those already committed to the state territorially, whether by domicile or residence.

98. See generally Brilmayer, *supra* note 74, although, as John Ely notes, interest analysts often forget or brush aside their own proviso. Ely, *supra* note 1, at 194 & n.59.

fare of local residents reflects territorial assumptions.⁹⁹ Who else could comprise the group that (according to modern policy analysis) is to be benefited, besides those domiciled within the state? The consequences that a statute is designed to bring about or prevent, by hypothesis, are those experienced locally. Clearly there is no way to formulate a choice of law regime other than to found it upon territorial assumptions of some sort. Nor should there be, despite occasional hints to the contrary.¹⁰⁰ State lines are all that distinguish one state from another, and the people of one state from another. Choice of law necessarily turns upon the contacts between the controversy and the various states.

What differentiates the rights-based approach to choice of law from the modern policy approach is not territoriality, but rather territory's philosophical treatment, for the rights-based approach treats territory as part of a deontological justification, while policy analysis treats territory as part of a consequentialist justification. A political rights analysis asks whether an individual's connections with a state are such as to make it fair to impose upon him or her the state's conception of substantive justice. A policy or interests approach asks how to promote the most desirable state of affairs within a state's territory, with desirability defined in terms of the state's substantive preferences. The dispute between the two methods is not over the importance of territory, but over what use to make of territorial assumptions within the competing jurisprudential frameworks.

Given that consequentialist choice of law reasoning also relies on territoriality, one must ask how a rights-based account of territoriality would be distinctive. At this point, the importance of arguments about express consent, tacit consent, and purposeful action becomes explicit. If the point of a rights-based account is to protect the parties' rights—to treat the parties as they deserve—then a party's volitional affiliations with the state are clearly relevant.

99. See generally Ely, *supra* note 1.

100. It is not clear that it was ever seriously suggested that territorial connections can be ignored, though Justice Stevens's concurrence in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981) comes close. Stevens interpreted fairness as being violated if the rule discriminated against nonresidents, if it was a dramatic departure from the rule in force in other states, or if the rule was substantively unfair. Only the first of these has any interstate aspects at all—and it clearly does not require territorial connections in the usual sense.

The oddness of Stevens' interpretation of fairness is that on the facts of that case, factor two (at least) and maybe factor three would prohibit application of the distinctive Wisconsin law on the *Allstate* facts, though Wisconsin was the state where the accident occurred and where all the parties were domiciled at the time.

Indeed, factor two would prohibit any state from adopting substantive rules *even for purely domestic purposes* that were substantively different from those of other states. One suspects that Justice Stevens must have had some notion of territorial connections in mind.

Of course, to say that territoriality matters is not to say that states have complete and dictatorial powers within their own territories. This is particularly true in our federal system, where the states lack many of the attributes of sovereign states. A state cannot, for example, control immigration from other states. See *Edwards v. California*, 314 U.S. 160, 173 (1941). This suggests that a state may also not impose unreasonable conditions upon entry, such as by requiring that an individual obey forum law while present in other states.

Where the state's connection with the aggrieved individual is that the individual is domiciled in the state, this connection need not be purposeful or deliberate. Some persons take the initiative to choose their own domiciles, but others are "passively" domiciled in a state simply by having been born there.¹⁰¹ Domiciliaries are also connected, however, by their opportunity to vote. Since non-domiciliaries lack the opportunity to participate in electoral processes, some sort of purposeful action towards the territory by the individual is necessary to justify the exertion of state authority. Absent such a volitional act, there would be no way at all to influence the legal norms that governed one's behavior.

There are, in short, two ways to influence the political decisions that govern one's life, namely voice and exit.¹⁰² In this context, voice is *ex ante* influence while exit (or entrance) is *ex post*. Voice means input into the decision before it is made, while the exit option allows one to choose among alternative pre-existing legal schemes. The affiliation between a state and non-domiciliaries must be purposeful to assure a minimal level of individual control over the legal norms to which the individual will be subjected.

This prompts one serious criticism of the vested rights approach from a political rights-based perspective. Because it focused on particular territorial connecting factors divorced from consideration of political rights, the vested rights approach sometimes called for application of the law of a state with which the complaining party had no voluntary connection. Assume, for example, that a buyer and seller negotiate the major portion of a contract in their common home state. The contract is to be performed there as well, but before accepting the deal the buyer travels to another state (chosen for its law advantageous to buyers), and while in that state drops the acceptance into the mailbox. Under First Restatement rules, the contract would be subject to the law of that second state because that is where the acceptance was mailed.¹⁰³

The usual criticism of this First Restatement analysis would be that this is completely arbitrary.¹⁰⁴ Perhaps it is. But note that there is another objection, based upon the parties' political rights. The seller, in this scenario, has no voluntary affiliation with the second state at all; that state was chosen unilaterally by the buyer and it therefore has no right to impose its law upon the seller.¹⁰⁵ Such difficulties arise in virtually every area of the

101. One can acquire a domicile not only by choice but also automatically, such as by being born or through the operation of law. See generally E. SCOLES & P. HAY, *supra* note 66, at 197-98.

102. Cf. A. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

103. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 326.

104. B. CURRIE, *supra* note 2, at 86-87.

105. An interesting argument would be that if the state is applying its own choice of law rules to a local party, then there is no unfairness since it is *local authority* that subjects the party to the foreign law. While this is not the appropriate place to digress upon this possibility, which resembles the "local law" approach of Cook, see W. COOK, *supra* note 20, at 26, it should be noted that often the forum is not the aggrieved party's home state. It is, instead, a foreign court with which the com-

First Restatement's rules, which characteristically fail to relate the chosen territorial connecting factor to the purposeful action of the party protesting application of local law.¹⁰⁶

For this reason, the new rights-based approach differs from the vested rights theory not only in foundation but in practice as well. Territoriality, under the aspects of the rights-based approach already described, does not mean that a state can simply assign a particular territorial factor talismanic significance, even if that factor represents the mythical "last act" of vested rights fame. The territorial factor that is chosen must reflect the aggrieved party's voluntary submission to the law that is chosen.

C. *Mutuality*

We have described at least two different theories for the fair application of state law. Even within one theory (territoriality), more than one state may have adequate connections with a dispute. A rights-based approach leaves open a wide range of permissible options. It would seem to be the rare case in which analysis of rights would narrow the range of possibilities and leave only a single fair application of one state's law. The forum is left with a choice that must be made on some other basis than the parties' negative political rights.

Does fairness have anything further to say about this choice? Is the subject exhausted once one concludes that the state whose law is applied has enough connections to fairly exercise political authority? On closer examination, there may be more to rights than simply viewing in isolation the connections between the individual and the state whose law is chosen. Different conceptions of political fairness will obviously give rise to different additional principles, but one that comes to mind involves assessing the fairness of the overall pattern of choices made by the choice of law rule (or method, or approach). This is not a simple question of a negative right to be left alone, in the sense described above, but of a right to fair treatment, even by a politically authoritative state.¹⁰⁷

An analogy will illustrate the difference between assessing the individual fairness of an action and assessing the overall pattern of results. Contrast the concerns of substantive constitutional protections such as the First Amendment with distributional provisions such as the equal protection clause. Under the requirement of equal protection, one need not argue that some benefit is unconditionally guaranteed to an individual. In isolation, the conclusion might be that the individual's rights have not

plaining party has little connection. Thus, it can only rarely be argued that the complaining party is subject to foreign law by virtue of the party's home state choice of law rules.

106. The tort rules of the First Restatement, for example, asked only where the injury occurred; the plaintiff might purchase a defective good, take it to some distant state, and suffer injury there. *See, e.g., Alabama Great S.R.R. Co. v. Carroll*, 97 Ala. 126, 11 So. 803 (1892).

107. *See supra* note 11.

been violated because the individual had no constitutional right to the benefit in the first place. This does not, however, answer the question whether the overall distribution of benefits is fair, which is the question posed by equal protection analysis. One argues instead that if the benefit is given to individual A, then it must also be given to individual B.

Similar issues arise in choice of law. Even though there may be no individual guarantee that a party not be subject to the law of state A, perhaps he or she nonetheless should not be subject to the law of state A, because this treatment would compare unfavorably either with that received by other people or with the way that same individual might be treated in other cases. If one imagines an extreme example of distributional unfairness, one can see how a choice of law rule might be unfair even though the end result was the application of a law that had adequate connections with the parties under the aspects of the rights-based approach already described. Assume that the forum adopts a choice of law rule that says, "First identify all of the state laws that could be applied without violating any of the parties' negative political rights, and then apply the one that is the most advantageous to the local person and disadvantageous to the foreign person." While objection to this rule cannot be based upon the negative claims of right that we have outlined, it certainly seems unfair nonetheless.

The problem with the hypothesized rule is that it imposes the burdens of a substantive rule on people without allowing them the corresponding benefits. In the usual domestic context, an individual would expect to experience both the benefits and the costs of a rule over the long run. Substantive rules, in other words, are actuarially fair,¹⁰⁸ because an individual

108. While usually rules that are actuarially fair also are both jurisdiction-selecting and pass the mutuality test, in theory these three things are slightly different. The relationship between actuarial fairness and mutuality is as follows: A rule might be actuarially fair if it was sometimes loaded against one party and sometimes loaded against the other, so long as the bias evened out over the long run. For example, it would be actuarially fair to choose the rule that favored the younger of two parties to the litigation, so long as it was just as likely that one's opponent would be older as younger. Such a rule would not pass the mutuality test, however, because in any *particular* case the rule would not be as likely to help the particular party as to hurt him or her. Thus, an individual would not be held to the burdens of a rule except in situations where it could help him or her if the tables were turned.

The test of mutuality therefore more nearly resembles the old-fashioned idea that certain rules are jurisdiction-selecting. A rule is jurisdiction-selecting when the choice of which substantive rule to apply does not depend upon the content of the competing substantive rules. If the choice does not depend upon content, then it does not depend upon the outcome that the rule would dictate if applied. Thus, if the choice of law rule is jurisdiction-selecting, the probability of a particular substantive rule's being applied does not vary depending upon whether the rule helps or hurts a particular party.

I have chosen to suggest a test of mutuality rather than to require that a choice of law rule be jurisdiction-selecting, because I do not wish to suggest that a judge be completely blind to the contours of the competing rules, but only that the decision not turn upon which side the rule happens to benefit. The word jurisdiction-selecting is ambiguous as to whether it requires complete ignorance of the substantive content of the rules. *See infra* note 117. If a rule must be completely blind to content to be jurisdiction-selecting, then this requirement is too restrictive. The test of actuarial fairness is perhaps not quite restrictive enough, however, as it does not require that the rule be balanced on a case-by-case basis, but only over the long haul. The mutuality requirement reflects a certain concep-

is eligible, in theory, to gain as much by application of the rule as he or she would lose if the tables were turned. To make a class of individuals ineligible to receive the benefits under a rule, while allowing the rule's burdens to be imposed upon them, results in an actuarial imbalance, because over the long run the rule cannot be expected to work out evenly.¹⁰⁹ The point is not merely a comparison of how insiders and outsiders are treated, although these are also problems of a distributional type.¹¹⁰ Rather, the problem is that of a single individual and his or her overall expectation of benefits and burdens.¹¹¹

Choice of law systems that are actuarially out of balance have a redistributive effect; they cannot be explained purely in terms of corrective justice.¹¹² The probability of some particular substantive rule's applicability varies according to whether the rule works to the benefit or to the detriment of the particular litigant. Under a choice of law method in which it is not legally relevant whether an individual stands to benefit, these probabilities are, formally at least, identical. Rules that are jurisdiction-selecting, in the old-fashioned sense, are actuarially balanced because whether the rule is applied does not depend upon the content of the rule, and therefore is independent of whether the content of the rule helps or hurts a particular party.

The domiciliary principle of our new rights-based approach, however, is not actuarially balanced, since it allows the application of a state's law when it burdens a local citizen but does not automatically allow application of the same law when it would work to a citizen's benefit. The only

tion of impartiality, namely that the outcome of a particular case not be biased in favor of one party over the other. Whether a particular rule of substantive law applies in a case does not depend upon whom it benefits and whom it burdens.

Mutuality also possesses the following attractive characteristic. When a rule's applicability does not depend upon whom it benefits, then the state's claim to apply its law does not turn on whether the other state's law is more favorable or less favorable to recovery. Assume that state A's rule is very favorable to defendants, state C's law is very favorable to plaintiffs, and state B's law falls somewhere in between. Then if the applicability of the B law turns on whether it benefits some one of the parties, then its applicability turns on whether it is being compared to the law of state A or state C. If state B has adequate connections with both the parties to the litigation, then the claim to apply B law does not stand or fall depending on which other state's law it is being compared to.

109. Informal substantive imbalance is possible where the rule works to the advantage of one class of society (say, creditors) and to the detriment of another (debtors). The imbalance occurs where an individual expects to be a debtor more often than the creditor, or vice versa. The rule is *formally* balanced, but as a practical matter, will not work out that way. Without denigrating the importance of such bias, one might simply note that the situation that we are addressing is not even formally balanced.

110. For example, a rule would be imbalanced if it treated some outsiders differently from others, redistributing wealth (for instance) from Alaskans to Arizonans.

111. This reasoning about balance is not consequentialist, even though it turns on the likely run of events over a period of time, as the rule is applied in a series of cases. First, the emphasis is not on overall consequences, but rather on the expected potential impact on the aggrieved party. The impact of the balanced rule on other people is not a relevant consideration. Second, the essence of the claim is for treatment that is intrinsically fair, because it offers the aggrieved party as much opportunity for benefit as for burden. This is no more a consequentialist argument than any other claim for equal distribution.

112. On the difference between redistributive and corrective justice, *see supra* note 39.

instances in which a local rule would be applied to a citizen's benefit would be when some other basis for state authority existed; e.g., the burdened party was also a citizen. The definition of state interests in interest analysis is likewise not actuarially balanced, as it takes into account whether the benefit that the substantive rule is designed to achieve will fall into the hands of a local person.

Actuarial balance is desirable, because choice of law seems an unpromising area of law in which to effect wealth redistribution. In the interstate arena, a state's authority is at its most tenuous. However, if choice of law rules are to have redistributive consequences, at least they are better directed against insiders than outsiders. This is the effect of the domiciliary principle, because the state is granted the right to coerce its own people or business entities by imposing burdens upon them. Ideally, a choice of law rule would be actuarially balanced; however, a state's choice to redistribute wealth away from its own people is not automatically illegitimate. Such a law is unnecessarily generous, but so long as the burdens are self-imposed, the state may legitimately choose to do so. The decision-maker imposing such a rule should be certain, however, that the costs are considered and found to be acceptable.

An example of such redistribution occurs in current choice between American state tort law and foreign tort law. In cases with international elements, American pro-recovery law has sometimes been applied to American defendants who injure foreigners abroad.¹¹³ American manufacturers are thereby held to the higher standards of liability, even though they cannot necessarily rely upon American law when it is to their advantage, since foreign individuals cannot be sued in the United States nor held to U.S. law. As one might expect, this situation is politically unpopular and has brought about calls for legislative reform.¹¹⁴ A state might understandably hesitate to adopt a choice of law rule such as the domiciliary principle because it would systematically work to the disadvantage of local persons. Arguably, a state's doing so is politically fair, in the sense discussed above, because it is imposing the costs on its own people. And whether to adopt such a substantively unfair rule is no different from the question of whether to adopt a rule of torts or contracts that is substantively unfair. But for precisely that reason, such a choice of law regime is not ideal. Adoption of such a regime should be a carefully considered choice, even if only local persons are disadvantaged.

To implement the notion of actuarial fairness, one might want to follow

113. For example, if an American corporation injures someone abroad, the foreign plaintiff is likely to have a choice between suing at home (if that legal rule is advantageous) or, more likely, suing under United States tort law within the U.S. Application of American law has a redistributive effect because it usually would not be fairly applicable to the foreigner's disadvantage.

114. See S. 1996, 100th Cong., 1st Sess. § 1, 133 CONG. REC. S18,806 (daily ed. Dec. 21, 1987); H.R. 3662, 100th Cong., 1st Sess. § 1, 133 CONG. REC. H10,659 (daily ed. Nov. 19, 1987).

a general principle of mutuality.¹¹⁵ Mutuality 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. This idea of "mutuality" resembles the concept of mutuality of estoppel in the context of judgments enforcement.¹¹⁶ Mutuality prohibits obviously unbalanced rules such as "choose the law that favors the local party." More subtly, it requires a judge to inquire into whether the law could fairly be applied to both parties, rather than simply whether it can fairly be applied to the aggrieved individual.

Jurisdiction-selecting rules satisfy mutuality because they do not depend upon the content of the substantive rule selected in the sense of *which* party will benefit. The content of the substantive rule may matter insofar as it describes relevant territorial factors, but one need not know whether it favors the plaintiff or the defendant.¹¹⁷ A jurisdiction-selecting rule will satisfy the mutuality requirement while simultaneously protecting political rights when it selects a state that has adequate connections with both parties. In such cases, one can select that state's law in the jurisdiction-selecting way—that is, without knowing what result the law, once examined, will dictate.

The ability to satisfy mutuality while respecting political rights may in fact be the distinguishing feature of the most successful applications of the old-fashioned territorial rules. Most territorial rules were adopted at a time when a greater proportion of cases, such as actions in tort or contract, involved face-to-face transactions or interactions. Under such circumstances, one could be relatively certain that the transaction could be assigned a location such that the rights "vested" in a state with which both parties had connections. That assignment might very well be arbitrary, in that other equally relevant events might have occurred in other states, yet at least a law was selected that could be applied without unfairness to either party. Today, however, it is much more common for business deals to be entered into over the phone, for products liability cases to be brought against defendants from a distant state, and for the acquisition of stock to be made through interstate tender offers. When transactions are spread out across a number of states, such a territorial assignment not only might be more arbitrary but also might be more likely to violate one

115. This rule of mutuality is not, mathematically speaking, the only way to actuarially balance a choice of law rule. *See supra* note 108.

116. The mutuality rule says that a party may take advantage of a prior ruling only if he or she would have been bound had the ruling gone the other way. *See, e.g.*, F. JAMES & G. HAZARD, CIVIL PROCEDURE §§ 11.24–11.25, at 631–37 (3d ed. 1985). The requirement of mutuality is less defensible in the context of *res judicata* than in choice of law, because the losing party was involved in the first suit, and therefore was able to present his or her case.

117. For example, a choice of law rule might treat the scope of a contracts rule differently from a torts rule (they would be triggered by location of different events) and thus depend upon the content of the substantive rule. Whether a rule ceases for that reason to be jurisdiction-selecting is unclear, given the ambiguities of present usage. *See supra* note 108.

or more party's rights. The arbitrariness stems from the fact that one cannot assume that the contract is negotiated, signed, and performed in the same location; to choose one factor over the others in determining a location seems hard to defend. The potential violation of rights stems from the possibility that one of the parties may have little or no contact with the state where the contract was actually formed, in the technical sense of offer and acceptance. Under modern conditions, Bealean rules are increasingly unlikely to satisfy both mutuality and negative rights.

The familiar territorial vested rights regimes would not be the only conceivable way to achieve the goal of both mutuality and protection of negative rights. Savigny pioneered a choice of law theory based on the "seat of the relationship" of the parties, which tried to assign a situs to the parties' legal transactions. While this often had consequences similar to vested-rights-style territoriality,¹¹⁸ the systems were far from identical. The "center of gravity" approach¹¹⁹ is similar to Savigny's. By searching for the seat of the relationship or the center of gravity, one would with any luck find a state with which both parties were connected, because this would be a state where the parties' activities intersected. As with the vested rights approach, Savigny's system achieved the goals of political fairness and mutuality better in those days where most transactions involved at least some face-to-face dealings. Given modern communications technology, the existence of some relatively direct prior dealings between the parties can no longer be taken for granted.

D. *Interest Analysis and Fairness*

We have made mention at several points of the defects of the vested rights theory from a political rights-based perspective. We have also discussed the ways in which modern policy analysis differs from the rights-based approach at the foundational level. But as our discussion of the vested rights theory also shows, it is possible for a choice of law system to have strengths that were not deliberately planned.¹²⁰ At this point, one might well ask how well the modern policy analysis fares in practice at the protection of political rights, however little it intends such protection.

First, and most obviously, the fact that interest analysis does not explicitly inquire into fairness allows it to apply the law of a state which has no political relationship with the aggrieved party. By focusing on the benefits bestowed by the rule's application, interest analysis fails to require justification for the burdens that it imposes. In this respect, it is in the

118. F. VON SAVIGNY, *PRIVATE INTERNATIONAL LAW* 27 (1869) (solution to conflicts cases turns on "ascertain[ing] for every legal relation (case) that law to which, in its proper nature, it belongs or is subject"); *id.* at 94-95 (specifying how to discover seat of legal relation).

119. *Auten v. Auten*, 308 N.Y. 155, 160-61, 124 N.E.2d 99, 101-02 (1954) (discussing 'center of gravity' or 'grouping of contacts' approach).

120. See *supra* text accompanying note 117-19.

same boat as the vested rights theory. This difficulty arises, however, only in true conflict and unprovided-for cases. It does not arise in false conflict cases because, as John Ely has demonstrated, these cases involve situations where the parties share a common domicile or hail from states with identical laws on the issue in question.¹²¹ False conflict cases result in no unfairness because the aggrieved party is subject to the law of his or her own home state. These conditions satisfy the domiciliary test.¹²² Surprisingly and virtually by coincidence—given its foundational differences—interest analysis thereby satisfies the political rights test on an important subset of disputes.

True conflicts and unprovided-for cases involve individuals from different states. Whether the modern approaches violate political rights in these cases depends upon whether one accepts Currie's solution to the true conflict and unprovided-for cases, or whether one seeks some other solution. Currie argued at one point that one should simply apply forum law.¹²³ But it is not at all clear that the forum can fairly apply its law to any case before it. First, there are many ways of obtaining personal jurisdiction, and not all of them answer the fairness question posed by choice of law. One might be subjected to jurisdiction, for example, because one was "tagged" while simply passing through.¹²⁴ Perhaps jurisdiction based upon mere presence should be considered fundamentally unfair and done away with as a matter of constitutional law. Arguably, once this is done the forum should automatically be allowed to apply its own law. Whether or not the wisdom of this proposal will ultimately be recognized, however, there remains the question of what we should do with choice of law in the meantime.

Moreover, there are ways of getting personal jurisdiction besides "tagging" which are less obviously unfair, yet may present the same fairness problem for a rights-sensitive choice of law theory. A defendant might consent to jurisdiction because the locale is not an inconvenient place to litigate: Perhaps it is reasonably close by and the defendant has access to good legal counsel there. Consent might occur *ex ante*, by contractual provision, or after the litigation is filed. Why should this consent automatically extend to choice of law as well? Alternately, one could unwittingly waive one's right to object to personal jurisdiction by failing to raise the issue at the right time. This seems eminently sensible and undoubtedly

121. See *supra* text accompanying notes 80-81.

122. This analysis is complicated only slightly where conduct-regulating policies are taken into account. As we noted earlier, interest analysts recognized such territorial contacts in theory but usually downplayed them in practice. See *supra* text accompanying note 74. A false conflict might arise out of an unprovided-for case plus a conduct-regulating factor; but if the aggrieved party acted within the state, then he or she could not complain about applications of local law and thus there would be no unfairness.

123. B. CURRIE, *supra* note 2, at 184.

124. See Brillmayer, *A General Look*, *supra* note 73, at 748-55.

constitutional from the point of view of personal jurisdiction doctrine, but says nothing about whether the forum ought to be allowed automatically to apply its own law.

If we conclude that the mere fact that a state is the forum does not automatically give it the right to apply local law, then one must reject Currie's solution to the true conflict and unprovided-for cases on the grounds that applying forum law may violate one of the parties' rights. The other potential problem with Currie's system of interest analysis is whether it meets the requirement of actuarial fairness. It has been noted that the definition of state interests upon which Currie relied has the effect of discriminating against nonresidents because his idea of state interests did not recognize an interest in helping outsiders.¹²⁵ This aspects of "interest" seems at first to create a possibility of loading the choice of law process against outsiders, because outsiders are held to the burdens of local law whenever the state has an interest in applying its law, but there is no corresponding interest in applying local law to their benefit.

The definition of interests that Currie prescribed does indeed have this characteristic. The method as a whole, however, avoids this consequence if consistently applied,¹²⁶ because the concept of an interest turns out not to be necessary to the application of a state's law. It is perfectly possible to apply local law even when the state has no "interest," because forum law will apply unless both parties are from a state that has the different rule. That is, although the existence of an "interest" turns on who is benefited, application of a state's law does not turn on whether there is an interest. The probability of being benefited by local law, therefore, is the same as the probability of being burdened by it, because the probability of forum law not being applied does not depend upon whether it is helpful or harmful; all it depends upon is whether one happens to be transacting with an individual from a state with the same law. Modern policy analysis, in other words, passes the mutuality test, but only by coincidence; local law is sometimes applied even when there is no "interest." For this reason, it appears that as a method, Currie's version of policy analysis is jurisdiction-selecting—that is, whether a law applies does not depend upon its content.

This conclusion is sufficiently startling that it warrants a closer look. Assume that there are two states, the forum, F, and the alternative state, A. There are four possible alternative patterns of affiliation of the two parties, plaintiff, P, and defendant, D:

125. Ely, *supra* note 1.

126. It isn't always applied consistently, however. For example, there is a tendency to find "interests" in penalizing corporations but to be less willing to find such interests in protecting them. Note, *Interest Analysis Applied to Corporations: The Unprincipled Use of a Choice of Law Method*, 98 YALE L.J. 597, 603-609, 614-15 & n.98 (1989) (authored by J. Goldsmith).

	F	A
Case 1	P,D	
Case 2	P	D
Case 3	D	P
Case 4		P,D

Cases 1 and 4 are cases of common domicile, while cases 2 and 3 are cases of different domicile.

Now, a choice of law case arises because the states' laws differ. In variation I, assume that F has the pro-plaintiff law and A has the pro-defendant law. The outcomes are as follows:

VARIATION I

	F(pro-P)	A(pro-D)	outcome
Case 1	P,D		F
Case 2	P	D	F
Case 3	D	P	F
Case 4		P,D	A

In case 1, F's law is applied because it is a false conflict; in case 4, A's law is applied for the same reason. In cases 2 and 3, F's law is applied because they are a true conflict and an unprovided-for case, respectively.

In variation II, we switch the two laws so that F's law favors defendants and A's law favors plaintiffs. The outcomes are as follows, for reasons that are directly analogous to those in variation I:

VARIATION II

	F(pro-D)	A(pro-P)	outcome
Case 1	P,D		F
Case 2	P	D	F
Case 3	D	P	F
Case 4		P,D	A

The important point is that the outcomes are exactly the same as in variation I. This means that we do not need to know anything about the policies underlying the two laws to determine which law to apply. The Currie method is jurisdiction-selecting because it amounts to a command to apply forum law unless the parties share a common domicile (or come from a state with identical laws). One need know no more about the content of

the competing rules than one would need to know to apply the First Restatement.

The only possible exception to these diagrams would be the case in which a territorially-triggered conduct-regulating rule was present. Such a rule would increase the number of "interests" if it were designed to deter or encourage conduct within the state and the events occurred there. While such an increase has no effect on true conflicts (which are decided according to forum law), it will turn some false conflicts into true conflicts and some unprovided-for cases into false conflicts.¹²⁷ But the irony of this is that the only way to make the result turn on anything other than shared domicile is to make some rather old-fashioned territorialist assumptions about the concern of states with regulating activities occurring within their territories—hardly the sort of assumption designed to warm the modern policy theorists' hearts.

Interest analysis therefore satisfies the test of political fairness in surprising ways. It satisfies the mutuality requirement because on close examination the method turns out to be jurisdiction-selecting. And in false conflict cases it also satisfies the requirements of negative political rights—although the reason is that the burdened party is a local, which is quite coincidental to policy analysis. The method does not necessarily satisfy negative political rights where the forum applies its law to mixed domicile cases, since there is no guarantee of an adequate connection between the forum and the aggrieved litigant. A fairer solution to unprovided-for and true conflict cases, therefore, is to apply the law of some state with adequate territorial connections to both parties.

127. For example, in variation I, where the forum has a pro-plaintiff policy and the alternative state has a pro-defendant policy, adding a territorial factor brings about two further variations, depending on whether it is an event in state F or in state A.

VARIATION IA: EVENT IN F

	F(pro-P)	A(pro-D)	outcome
Case 1	P,D,T		F
Case 2	P,T	D	F
Case 3	D,T	P	F
Case 4	T	P,D	F

VARIATION IB: EVENT IN A

	F(pro-P)	A(pro-D)	outcome
Case 1	P,D	T	F
Case 2	P	D,T	F
Case 3	D	P,T	A
Case 4		P,D,T	A

Thus, the addition of the territorial, conduct-regulating interest alters the result in case 4 under variation IA and in case 3 under variation IB.

III. CONCLUSIONS: TOWARDS AN IDEAL CHOICE OF LAW APPROACH

While these observations do not dictate a unique choice of law on all occasions, they indicate that limits should be placed on what a state should feel entitled to do in pursuit of state policy. These rights-based limits are grounded in the observation that a state must be able to justify the burdens that it imposes, as well as to explain the benefits that it seeks to achieve, when it applies its law. A rights-based theory consists of two related parts. First, it must specify what rights are and why they matter. The theory of rights developed in Part I of this article is different from Joseph Beale's, because the rights are not vested substantive rights but political rights. The justification for imposing burdens is not that a court must help enforce the pre-existing legal rights that the parties bring into the forum from other states, but that the state whose law is applied may fairly use this case to further local policy. Second, a rights-based theory must give some guidance about what rights exist. For Joseph Beale, this meant elaborating territorialist rules. For a political rights model, this means defining the circumstances in which interstate political authority may legitimately be applied. Part II of this article sets out a basic outline.

A state law of choice of law that took seriously the notions of political rights and fairness would address the following questions. First and foremost, what is the connection between the state and the party protesting the application of state law? There could be an adequate connection where the party is a local domiciliary, has consented to application of local law, or has voluntarily affiliated with the state by engaging in local activities or conduct with foreseeable legal consequences. Satisfaction of any of these alternatives must be gauged by reference to appropriate assumptions of territorial sovereignty. Second, what is the connection between the state and the individual who stands to benefit? Is there the sort of connection that would allow application of local law if the tables were turned and he or she thus stood to lose? If not, how can the state justify the redistributive impact? From a number of perspectives, the most attractive solution would be to select the law of a state with connections to both parties. A rule which chooses the state of common domicile satisfies the principle of mutuality; so does a rule choosing a state in which the parties have had face-to-face transactions.

What is perhaps the most surprising consequence of this analysis is the extent to which existing theories meet these standards, purely by inadvertence. Vested rights theory did not set out to meet the test of mutuality, yet because its rules are jurisdiction-selecting, they do have that characteristic. Even more surprising, interest analysis turns out to adhere to mutuality as well, because the concept of an interest turns out to be less central to the analysis than it first appears. Both theories fail most prominently in their lack of concern for the sort of purposeful conduct that makes submis-

sion to state authority fair; but often, personal jurisdiction by coincidence supplies the missing element. If it were not for these coincidences, would we have tolerated these approaches this long?

Whatever the unexpected advantages of vested rights and policy analysis, their protection of political rights is too haphazard. On some occasions, they simply fail to protect these rights at all. "Rights" is a meaningful concept for choice of law analysis, and it is important to frame choice of law analysis in these terms. Regardless of the specific contours that a rights-based analysis might take—whether it analyzes rights in territorial or in domiciliary terms—"rights" should not be allowed to slip into choice of law obscurity. The obligation to treat litigants fairly—to protect rights—is an obligation of state judges formulating state law as well as judges faced with constitutional challenges. Our jurisprudential tradition of insistence on fairness to the parties is important even in this post-realist world.

