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Cooney v. Osgood Machinery, Inc.: A Less Than Complete "Contribution"

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COONEY v. OSGOOD MACHINERY, INC.:* A LESS THAN COMPLETE "CONTRIBUTION"

Linda J. Silberman[**]

The recent decision of the New York Court of Appeals in *Cooney v. Osgood Machinery, Inc.*[1] invites a reassessment of constitutional limits in choice-of-law decisionmaking.[2] The other two commentators in this Symposium,[3] and the New York Court of Appeals itself, focused attention on whether applying the more liberal New York rule—which would permit a contribution claim by a joint tortfeasor against an employer after payment from the Missouri compensation fund—would run afoul of the constitutional standard. The Court of Appeals ultimately held that even though the application of New York

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* 81 N.Y.2d 66, 612 N.E.2d 277, 595 N.Y.S.2d 919 (1993).

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[1] 81 N.Y.2d 66, 612 N.E.2d 277, 595 N.Y.S.2d 919 (1993).

[2] There is an extensive body of scholarship exploring these limits. *See, e.g.*, Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function* 26 U. CHI. L. REV. 9 (1958), *reprinted in* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 188-282 (1963); Frederic L. Kirgis, Jr., *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94 (1976); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992); James Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1976); Gene R. Shreve, *Interest Analysis as Constitutional Law*, 48 OHIO ST. L.J. 67 (1988); Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67 (1988); Russell J. Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449 (1959); *see also* Symposium, *Choice of Law Theory After* Allstate Insurance Co. v. Hague, 10 HOFSTRA L. REV. 1 (1981) (contributions by David F. Cavers, Jack Davies, Robert A. Leflar, James A. Martin, Willis L.M. Reese, Robert A. Sedler, Linda Silberman, Aaron D. Twerski, Arthur von Mehren and Donald T. Trautman, and Russell J. Weintraub). For a general review of the constitutional cases, see RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 511-72 (3d ed. 1986).

[3] Robert A. Sedler, *Interest Analysis, Party Expectations, and Judicial Method in Conflicts Torts Cases: Reflections on* Cooney v. Osgood Machinery, Inc., 59 BROOK. L. REV. 1323 (1994); Aaron D. Twerski, *A Sheep in Wolf's Clothing: Territorialism in the Guise of Interest Analysis in* Cooney v. Osgood Machinery, Inc., 59 BROOK. L. REV. 1351 (1994).

law would be constitutional, an appropriate analysis of conflict-of-law principles directed a choice of Missouri law. Curiously, neither the Court of Appeals nor my conflicts colleagues thought it necessary to comment on the constitutionality of the choice-of-law actually selected by the court. But my own reading and analysis of the case suggests that it is the choice of Missouri law that actually poses the more interesting constitutional dilemma.

I begin with a brief review of the *Cooney* facts. The plaintiff-employee, Dennis Cooney, a Missouri resident, was injured on the job while cleaning a piece of machinery at the plant of his Missouri employer, Mueller, Inc. The machine in question was a sixteen-foot-wide "bending roll" manufactured in New York sometime in 1957 or 1958 by a now-defunct manufacturer and sold by Osgood, a New York sales agent, to a New York company, American Standard. Many years later, the machine was obtained in an unknown manner by a third company which, prior to going out of business, sold it to the Mueller Company.

After his injury, Cooney filed for and received workers' compensation benefits from Mueller. Although barred from bringing any additional action against his employer under Missouri law, Cooney was permitted to bring a tort action against *other* third parties,[4] and he commenced such an action against Osgood, the original sales agent, in New York. The suit was brought in New York apparently because Osgood is a New York company with insufficient activity in Missouri to be subjected to jurisdiction there.[5] Having been sued, Osgood then sought contribution from Mueller, Cooney's Missouri employer,[6] which apparently conducts sufficient business

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[4] Allowing suit by the employee against third parties other than the employer is the rule in all jurisdictions. *See* 2A ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 71 (1992).

[5] The New York Court of Appeals called attention to this point. *Cooney*, 81 N.Y.2d at 70, 612 N.E.2d at 279, 595 N.Y.S.2d at 921. This apparent lack of jurisdiction over Osgood is a point to which I will return in connection with the constitutional choice-of-law analysis.

[6] Apparently Osgood also joined American Standard (to whom Osgood had sold the bending roll) and Hill Acme (the successor in interest to the manufacturer) as defendants in the contribution action. *Id.* No further developments with respect to claims for contribution against the other defendants are mentioned in the Court of Appeals' opinion.

activity in New York to render itself amenable to jurisdiction there. Mueller invoked the Missouri workers' compensation statute, which shields employers from both direct claims by employees and contribution claims by others. Osgood argued for the application of New York law, which allows a defendant that pays more than its fair share of a judgment, as apportioned by the fact-finder in terms of comparative fault, to recover the difference from a third-party joint-tortfeasor, including an employer that has paid workers' compensation benefits. Thus, under New York law, the fact that the contribution claim seeks relief from the employer does not bar the claim.

In addressing the choice-of-law question, the New York Court of Appeals first considered whether the application of New York law was even permitted under the Due Process Clause of the Fourteenth Amendment of the Constitution. Identifying a number of contacts with New York, including the third-party defendant's general business activities, the domicile of the third-party plaintiff and the alleged tortious conduct of the third-party plaintiff in New York, the Court of Appeals held that, under the test of *Allstate Insurance Co. v. Hague*, New York had "sufficient interest in the litigation."[7]

Perhaps it is the Court of Appeals' characterization of the legal standard—sufficient interest in the litigation—that explains why it did not proceed to question whether application of Missouri law would likewise be constitutional. There is little doubt that Missouri's workers' compensation legislation is directly tied to its rule prohibiting all claims, including claims for contribution against the employer. But "interest in the litigation" is only one part of the constitutional test. After all, choice-of-law rules are applied to particular parties, and here Osgood—the initial defendant in the suit and the party

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[7] The Court of Appeals stated that:

> New York's contacts . . . are, in the aggregate, sufficient to satisfy the constitutional threshold. Osgood has alleged that Mueller has a substantial presence in this State, and there is indication in the record that Mueller does business in New York. Additionally, Osgood, which seeks contribution under New York law, is a domiciliary of this State. Finally, Osgood's alleged tortious conduct with respect to the machine arose in New York, where the machine was ordered, operated for several years, and eventually shipped out of State.

Cooney, at 71, 612 N.E.2d at 280, 595 N.Y.S.2d at 922.

seeking contribution—did nothing to subject itself to Missouri law whatsoever. Indeed, the Court of Appeals recognized Osgood's lack of connection with Missouri by its statement that Osgood probably was not subject to jurisdiction in Missouri.[8] And although never directly addressed, it is most likely New York law that provided Cooney, the employee, with a right to proceed against Osgood at all. Osgood was a New York defendant who allegedly participated in the New York product distribution chain resulting in injury to the plaintiff in Missouri. Thus, it is not at all clear that Missouri liability law constitutionally could have reached Osgood.[9]

Before focusing on the constitutional problem, however, an examination of why the Court of Appeals opted to apply Missouri law on the contribution issue as a choice-of-law matter is useful. To some degree, the court concluded that the *Neumeier* rules control and that the case invited an application

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[8] Though the New York Court of Appeals does not cite it by name, the Supreme Court's decision in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), provides support for that proposition. In *World-Wide Volkswagen*, a regional distributor and New York dealer locally sold an Audi to a New York resident, who was later injured in an accident in Oklahoma as a result of the car's alleged defective gas tank and fuel design. The Supreme Court held that because the defendants had not directly or indirectly attempted to serve the Oklahoma market, jurisdiction by the Oklahoma courts over them was constitutionally prohibited.

[9] This argument is based on a view that due process limits on adjudicatory jurisdiction inform the relevant constitutional limits on legislative jurisdiction, i.e., choice of law. I have made this claim in several prior articles. *See, e.g.*, Andreas F. Lowenfeld & Linda J. Silberman, *Choice of Law and the Supreme Court: A Dialogue Inspired by* Allstate Insurance Co. v. Hague, 14 U.C. DAVIS L. REV. 841, 852 (1981) (suggesting that the jurisdictional limits of *World-Wide Volkswagen v. Woodson* are more appropriate as constraints on applicable law); Linda J. Silberman, *Reflections on* Burnham v. Superior Court: *Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 590 (1991) (distinguishing the consequences of jurisdictional and choice-of-law rules and underscoring the importance of meaningful choice-of-law restraints); Linda J. Silberman, *Can the State of Minnesota Bind the Nation? Federal Choice-of-Law Constraints After* Allstate Insurance Co. v. Hague, 10 HOFSTRA L. REV. 103, 119-29 (1981) (identifying cases in which courts appear to require party to engage in purposeful activity in a state as a condition for that state to apply its law to that party) [hereinafter Silberman, *Federal Choice-of-law Constraints*]; Linda J. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978) ("[t]o believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether") [hereinafter Silberman, *End of An Era*].

of Rule 2.[10] New York provides a remedy to limit the loss of its New York tortfeasor while Missouri immunizes its resident-employer. Under the *Neumeier* rules, the conflict in split-domicile cases is resolved by applying the law of the place of the accident. In host-guest cases like *Neumeier* itself, this tie-breaker rule—the place of accident—makes sense since the locus state is the place with which both parties have voluntarily associated themselves. In the context of workers' compensation and contribution claims, the court acknowledged that such a rule works less well and conceded "some validity"[11] to Osgood's argument that it did nothing to affiliate itself with Missouri.

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[10] Those rules were developed through a series of New York host-guest statute cases decided by the New York Court of Appeals: Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), was followed by Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965), Macey v. Rozbicki, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966), Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969), and, finally, Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). Rule 2, which covers the situation where the host is domiciled in an immunity state and the guest in a state that permits recovery, provides:

> When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.

Id. at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70.

The *Neumeier* rules have been extended to issues other than host-guest statutes, sometimes less categorically. *See, e.g.*, Schultz v. Boy Scouts of Am., Inc., 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985) (applying the *Neumeier* rules to the issue of charitable immunity and using interest analysis to bolster the result). For a description of the present contours of New York conflicts law, see Patrick J. Borchers, *Conflicts Pragmatism*, 56 ALB. L. REV. 883, 904-11 (1993) (New York law has moved away from the conflicts pragmatism of *Babcock* to a "new formalism"); Friedrich K. Juenger, Babcock v. Jackson *Revisited: Judge Fuld's Contribution to American Conflicts Law*, 56 ALB. L. REV. 727, 740 (1993) (characterizing *Schultz* as "unbridled eclecticism" in adopting Judge Fuld's rules, interest analysis, multilateralist values of comity and predictability, condemnation of forum shopping and public policy); Gary J. Simson, *The* Neumeier-Schultz *Rules: How Logical a "Next Stage in the Evolution of the Law" After* Babcock?, 56 ALB. L. REV. 913, 916 (1993) (*Neumeier-Schultz* rules do not lead to any degree of consistency in application). For an earlier and comprehensive review of the New York case law, see Harold Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983).

[11] *Cooney*, 81 N.Y.2d at 77, 612 N.E.2d at 283, 595 N.Y.S.2d at 925.

Turning to an assessment of interests, the Court of Appeals found competing interests in both New York and Missouri and pronounced them "irreconcilable."[12] In choosing between such "irreconcilable" interests, the Court of Appeals returned to the same *Neumeier* default rule, rationalizing that the place of injury rule is traditional and neutral, and that it eliminates forum shopping.[13] However, the Court of Appeals remained troubled—and properly so—in that the place of injury rule is an attractive one precisely because it is often the place with which both parties voluntarily have associated themselves.[14] On the *Cooney* facts, Osgood had no relationship whatsoever to Mueller or to Missouri and hardly could have anticipated subjecting itself to this regime of Missouri law. Nonetheless, the Court of Appeals relied on the reasonable expectations of the parties to justify its choice of Missouri rather than New York law. The court rationalized that Osgood's allegedly tortious activity occurred in 1958, substantially before principles of full contribution were part of New York law and, therefore, that Osgood could not have justifiably relied on the New York principle of full contribution.[15] The Court of Appeals failed to take into

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[12] The Court of Appeals explained:

> To the extent we allow contribution against Mueller, the policy underlying the Missouri workers' compensation scheme will be offended. Conversely, to the extent Osgood is required to pay more than its equitable share of a judgment, the policy underlying New York's contribution law is affronted. It is evident that one State's interest cannot be accommodated without sacrificing the other's, and thus an appropriate method for choosing between the two must be found.

Id. at 76, 612 N.E.2d at 283, 595 N.Y.S.2d at 925.

[13] *Id.* at 76-77, 612 N.E.2d at 283, 595 N.Y.S.2d at 925.

[14] The Court of Appeals conceded:

> In this case, there is some validity to Osgood's argument that it did nothing to affiliate itself with Missouri. Indeed, a decade after Osgood's last contact with the bending roll, the machine wound up in Missouri through no effort, or even knowledge, of Osgood. Moreover, the record establishes that Osgood was not in the business of distributing goods nationwide, but limited its activities to New York and parts of Pennsylvania, and thus Osgood may not have reasonably anticipated becoming embroiled in litigation with a Missouri employer.

Id. at 77, 612 N.E.2d at 283, 595 N.Y.S.2d at 925.

[15] [I]n ordering its business affairs Osgood could have had no reasonable expectation that contribution would be available in a products liability action arising out of the sale of industrial equipment. Indeed, Osgood's activity in connection with the bending roll occurred in 1958, some 14

account, however, that in 1958 a participant in a chain of distribution, such as Osgood, would not have had any expectation of exposure to strict liability product claims *at all*.[16]

Professors Twerski and Sedler approve the Court of Appeals decision in *Cooney* for different reasons. Professor Sedler expressly disclaims the importance of the "expectations" of Osgood, the New York distributor, stating that he does not believe that the result should or would be any different if the product had been manufactured at a time when New York did recognize contribution.[17] Rather, Professor Sedler argues that the Missouri employer's expectations are the ones that count, and that immunity from contribution is an integral part of Missouri workers' compensation policy at stake in any Missouri work-related injury.[18] Therefore, he favors a choice-of-law approach emphasizing the expectations of the employer that has taken out workers' compensation insurance in return for a limitation on its liability.[19]

As a general matter, I, too, favor a set of rules that eliminates the ad hoc quality involved in the evaluation of

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> years before *Dole* was decided and the principles of full contribution were introduced into our law.

Id., 612 N.E.2d at 284, 595 N.Y.S.2d at 926.

[16] The expansion of strict product liability rules to manufacturers, sellers, and others in the distribution line did not occur until the early 1960s. *See* Vandermark v. Ford Motor Co., 391 P.2d 168 (Cal. 1964); Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1963); *see also* William L. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960). For a general overview, see RESTATEMENT (THIRD) OF TORTS § 1 commentary and Reporter's Note at 1-9 (Tentative Draft No. 1, Apr. 12, 1994) (Commercial Seller's Liability for Harm Caused by Defective Products).

[17] *See* Sedler, *supra* note 3, at 1342.

[18] *Id.* at 1342-43.

[19] In an earlier article, Professor Sedler identified "rules of choice of law" for tort cases which are based on actual case decisions. *See* Robert A. Sedler, *Rules of Choice of Law Versus Choice of Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975 (1977). Revising his "ninth 'rule of choice of law'" now to include the problem of contribution in workers' compensation cases, Professor Sedler recasts the rule as follows:

> The tort liability of an employee who is covered by workers' compensation and the liability of the employer for contribution to a third-party tortfeasor in a claim involving that employee is determined by the law of the state where the employer has taken out workers' compensation to cover the particular employee.

See Sedler, *supra* note 3, at 1338-39.

interests. And in most cases involving contribution, the manufacturer and/or distributor will have had sufficient voluntary association with the place of injury so that application of that state's contribution rule should not pose a problem. But in cases like *Cooney*, where a party has done nothing to affiliate itself with a particular regime of law, a principle of non-unilateralism embraced by choice-of-law theory generally or by the Constitution specifically should offer a limitation on the application of that law.[20] Thus, I have no problem with Professor Sedler's "Ninth 'Rule of Choice-of-law'" as a general proposition,[21] but I would argue that this rule may be applied only if a party has undertaken action that brings it within the regime of the locus state's law.[22] A local New York distributor that has not put itself in the *interstate* distribution chain should not be subject to such a unilateral imposition of law.[23] Moreover, Professor Sedler, like the Court

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[20] Silberman, *Federal Choice-of-Law Constraints*, *supra* note 9, at 110-14, 130-32. Limitations of this type have been proposed by others. *See, e.g.*, Lea Brilmayer, *Rights, Fairness and Choice of Law*, 98 YALE L.J. 1277, 1301 (1989) (territorial factor chosen for choice-of-law determination should reflect aggrieved party's voluntary submission to law that is chosen); David Cavers, *The Proper Law of Producer's Liability*, 26 INT'L & COMP. L.Q. 703, 728-29 (1977) (proposing that state of harm or state of product acquisition and harm be applied unless the "producer established that he could not reasonably have foreseen the presence in that state of his product which caused harm to the claimant or his property"); P.J. Kozyris, *Justified Party Expectations in Choice-of-Law and Jurisdiction: Constitutional Significance or Bootstrapping?* 19 SAN DIEGO L. REV. 313, 338-39 (1982) (arguing that factual expectations of the parties as considered in the due process limits on jurisdiction should be part of the due process in choice of law); Russell J. Weintraub, *An Approach to Choice of Law That Focuses on Consequences*, 56 ALB. L. REV. 701, 711-12 (1993) (party upon whom state's law is imposed should have nexus with that state).

[21] In this Symposium, Professor Sedler states the rule as follows: "The tort liability of an employee who is covered by workers' compensation and the liability of the employer for contribution to a third-party tortfeasor in a claim involving that employee is determined by the law of the state where the employer has taken out workers' compensation to cover the particular employee." *See* Sedler, *supra* note 3, at 1338-39; *see also supra* note 19.

[22] The Supreme Court suggested as much in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), in which it held unconstitutional the application of Kansas law in a Kansas class action to claims by non-resident plaintiffs against an out-of-state corporation involving oil and gas leases in other states: "When considering fairness in this context, an important element is the expectation of the parties. . . . There is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control." *Id.* at 822.

[23] The Supreme Court has identified this factor in modern cases establishing

of Appeals, analyzes the constitutionality of applying New York law, but ignores the possibility that it is the application of Missouri law itself that might be unconstitutional.

Professor Twerski, a scholar of both torts[24] and conflicts, is somewhat more troubled by, and gives slightly more attention to, the lack of "bilateralism" in the choice of Missouri law.[25] He is also less convinced than the Court of Appeals and Professor Sedler that application of New York law would be constitutionally sound.[26] As he explains, although Mueller is formally "doing business" in New York and is therefore subject to jurisdiction there, its contacts with New York are unrelated to the contribution claim against it.[27] As a self-confirmed territorialist, however, Professor Twerski does not find the arguments equally compelling. According to Professor Twerski, the close connection of the contribution claim to Missouri, the state of employment and injury, is sufficient. As he puts it, "A state that was the locus of the events relevant to the dispute has the right to speak to its fair resolution."[28]

At the same time, however, Professor Twerski is somewhat inconsistent. Although he writes in his conclusion that *Cooney* is a very good decision,[29] he complains that constitutional arguments must be taken seriously and that a suggested choice-of-law approach sometimes may be unconstitutional.[30]

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constitutional limits on the assertion of adjudicatory jurisdiction. *See* Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). The principle that a party must have a purposeful connection with a state in order to be subject to that state's law can be extracted from several early Supreme Court cases on choice of law. *See* John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936); Home Ins. Co. v. Dick, 281 U.S. 397 (1930). I explore this point more extensively in Silberman, *Federal Choice-of-Law Constraints*, *supra* note 9, at 119-29; *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (discussed *supra* note 22).

[24] Professor Twerski is a co-author of a major casebook on products liability, JAMES A. HENDERSON & AARON D. TWERSKI, PRODUCTS LIABILITY, PROBLEMS AND PROCESS (2d ed. 1992), and he and his co-author, Professor James Henderson, are Reporters for the America Law Institute's project on Products Liability. *See* RESTATEMENT (THIRD) OF TORTS (Tentative Draft No. 1, Apr. 12, 1994).

[25] Twerski, *supra* note 3, at 1355 (conceding that the activities of the respective parties do not have interstate connections and that "[t]here is no bilateralism of any kind").

[26] *See* Twerski, *supra* note 3, at 1362-65.

[27] *See id.* at 1354-55

[28] Twerski, *supra* note 3, at 1365.

[29] *Id.* at 1366.

[30] *Id.*

Though Professor Twerski takes seriously and analyzes the possibility that the application of *New York* law in *Cooney* might be unconstitutional, he gives less credence to the complaint that application of *Missouri* law also might be unconstitutional.[31] His only reason: Missouri is the place of injury.[32]

Although I often find myself allied with Professor Twerski in conflicts debates, I part company with him here. As an initial choice-of-law rule, the use of the place of injury rule in contribution-type claims is attractive, but it is not sacrosanct. If constitutional limitations on choice-of-law are to be taken seriously, then depending on the circumstances, any particular choice, including the place of injury, is subject to those limitations. It is true that a choice-of-law determination grounded upon events rather than domicile is likely to have affiliating connections with both parties so that it will withstand constitutional challenge.[33] But in circumstances like *Cooney*, where the no-contribution regime of liability in the injury state is imposed on a party that has no connection with that state, constitutional limitations come to the fore.

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[31] He contrasts the Allstate v. Hague, 449 U.S. 302 (1981), decision with *Cooney*, suggesting that the application of New York law would be more troublesome than the choice of Minnesota law in *Hague*. Twerski, *supra* note 3, at 1362-65. Professor Twerski argues that in *Cooney*, the employer, Mueller, had a more tenuous relationship with New York than the insurance company in *Allstate v. Hague* had with Minnesota. But he de-emphasizes other relationships such as the fact that in *Hague*, the insurance contract covered an automobile owned by a Wisconsin, not a Minnesota, resident and which was garaged in Wisconsin, whereas in *Cooney*, the machine causing the injury was produced in New York, and may have even been purchased by Mueller from a New York company. I say "may have" because the New York Court of Appeals states only that the "history of the bending roll is obscured until 1969, when Crouse Company—which obtained the equipment in some unknown manner—sold the machine to Paul Mueller Co., a Missouri domiciliary." 81 N.Y.2d 66, 69-70, 612 N.E.2d 277, 279, 595 N.Y.S.2d 919, 921 (1993). The location of Crouse Company and the circumstances under which the bending roll was obtained by Mueller are not mentioned by the Court. Here again, I am closer to the Court of Appeals than to Professor Twerski in thinking that application of New York law would not be unconstitutional.

[32] Twerski, *supra* note 3, at 1365.

[33] See, for example, a post-*Cooney* decision, Ray v. Knights, 194 A.D.2d 131, 605 N.Y.S.2d 536 (3d Dep't 1993) (contribution rule of New York rather than immunity rule of New Jersey may be applied against New Jersey employer involved in New York construction project and subsequent automobile accident in New York; because employer voluntarily associated himself and his enterprise with New York, choice of New York law is appropriate).

Nor am I impressed with Professor Twerski's acceptance of *Cooney* as a potentially "constitutionally unprovided-for" case.[34] What happens if Professor Twerski is correct that New York law is unconstitutional as applied to Mueller and I am right that Missouri law cannot constitutionally reach Osgood? Have we thus reached the point where the emperor wears no clothes?[35] Professor Twerski confesses that he is not distressed. Citing Professor Larry Kramer,[36] he recharacterizes the situation as one in which the plaintiff (Osgood) has failed to make out a case for contribution against the defendant (Mueller); if New York law does not apply, then the plaintiff's claim merely fails. Missouri law has not been unconstitutionally applied; it merely has not been applied at all. No law reaches this case.[37]

This explanation is much too facile. After all, as I queried earlier, under what law does liability attach to Osgood in the first place? There is no discussion of this point in the Court of Appeals' opinion or by Professor Twerski. One initial response might be that it does not matter. Both Missouri and New York impose tort liability for parties in the chain of distribution. If Missouri, however, is constitutionally disabled from applying its law to Osgood, then Cooney's main third-party claim against Osgood—if grounded in Missouri law—will fail because

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[34] Twerski, *supra* note 3, at 1365. The argument is that the law of neither jurisdiction can apply because to do so would invoke the law of a jurisdiction that has no reasonable connection with a party to whom it is being applied.

[35] The illogic of the "unprovided-for" case once prompted Professor Twerski to remark about the structure of interest analysis: "The emperor indeed stands naked for all to see." *See* Aaron D. Twerski, Neumeier v. Kuehner: *Where Are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104, 108 (1973).

[36] *See* Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301 (1989).

[37] Twerski, *supra* note 3, at 1365-66. Even if one accepts "dismissal" as a choice-of-law solution for the "unprovided-for" case, *see* Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 304-07 (1990), I find it more difficult to understand how no state's law can be said to reach the case as a constitutional matter. My view is premised on an assumption that tort law, in the absence of federal regulation or intervention, is a matter of state power and that *some* state must have the power to regulate the parties' conduct. My colleague, Professor Larry Kramer, disagrees with that assumption and analogizes "constitutionally unprovided-for" cases to the dormant commerce clause cases where no state can reach the activity even when Congress has not acted, *see* H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949). Conversation with Professor Larry Kramer (Apr. 13, 1994).

Missouri law cannot provide a cause of action on behalf of Cooney against Osgood.[38] Nor can New York law fairly fill the gap to impose full liability on Osgood. If looked at comprehensively, the New York liability scheme is not intended to impose the costs of complete liability upon Osgood in these circumstances. The liability rule in New York is inextricably tied to a particular mitigation of joint and several liability fulfilled by the role of contribution. Part of the New York rule's purpose is to allow parties with a less-than-total share of the responsibility for the accident to share liability with others who are more responsible.[39] Therefore, Osgood's relative fault should be relevant to any liability that New York imposes. New York law does not purport to hold Osgood jointly and severally liable for the entire cost of the injury; thus, to fail to protect Osgood by limiting its share of damages because an out-of-state employer-tortfeasor is involved would be inconsistent with the general tort law scheme in New York.[40] The New York Court of Appeals and Professors Twerski and Sedler all fail to see this aspect of depeçage at work in *Cooney*.[41]

Another recent conflict-of-laws contribution case, *Soo Line Railroad Co. v. Overton*[42] highlights the interrelationship of

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[38] That is, even under Professor Twerski's analysis, it is not Osgood who fails to come forward with law that imposes liability on Mueller, but it is Cooney who will be unable to sustain a claim under Missouri law against Osgood.

[39] *See* Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

[40] Ironically, the New York Court of Appeals considered whether the choice of Missouri law violated New York "public policy," indicating that a "public policy exception" might trump a choice-of-law result directed by application of the "*Neumeier* rules" and/or "interest analysis." However, the Court looked only to the differences in the New York and Missouri contribution rules and never focused on the question of which state's law controlled with respect to the imposition of liability on Osgood in the first place.

[41] Depeçage refers to a situation in conflict of laws where different rules are used to determine different issues. In certain contexts, two or more rules of the same state are so related in purpose that they should be "applied in tandem or not at all." *See generally* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 72-78 (3d ed. 1986). This is the effect in *Cooney*, as New York may allow the imposition of full liability on a manufacturer because the manufacturer can seek contribution from the employer.

[42] 992 F.2d 640 (7th Cir. 1993). Professor Symeon C. Symeonides noted the case in his survey of recent choice-of-law cases for the American Association of Law Schools Conflict of Laws Fall 1993 Newsletter. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 1993: A Preliminary View*, 42 AM. J.

liability and contribution rules. In *Overton*, a wrongful death action resulting from a car-train collision in Indiana was brought on behalf of Indiana residents against a Minnesota railway company in a Minnesota state court.[43] Minnesota apparently was chosen because its wrongful death statute provides more generous remedies than the Indiana counterpart.[44] The Minnesota railroad impleaded the Indiana owner of the vehicle involved,[45] who also happened to be the father of one of the victims. The third-party action was severed from the main case and, thereafter, removed to federal court.[46] The railroad settled the wrongful death action with the beneficiaries, and the third-party action was then transferred to the federal court in Indiana.[47] The choice-of-law issue facing that court in the third-party action was whether Minnesota law (which permits contribution) or Indiana law (which does not) should apply to this third-party claim. The choice-of-law decision was complicated by the fact that Minnesota law initially makes every co-defendant liable as a joint-tortfeasor for the full amount of injury whereas Indiana law does not impose joint and several liability, but makes each tortfeasor liable only for the percentage of its own fault in causing a plaintiff's injury.[48] Thus, both states attempt to avoid holding one tortfeasor completely liable for the entire claim, but in quite distinct ways.

Without much attention to the depeçage point, the district court in Indiana found that Indiana law should apply because the contribution-defendant car owner's contacts with Minnesota were constitutionally insufficient to permit the application of Minnesota law.[49] The Court of Appeals for the

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COMP. L. (forthcoming 1994).

[43] 992 F.2d at 642.

[44] *Id.*

[45] The issue of Minnesota's jurisdiction over this Indiana party is not analyzed by the Seventh Circuit opinion, other than noting that Soo Line had been unable to obtain personal jurisdiction over the owner because he had no contacts with Minnesota, and that the Minnesota state court had granted a request to have him deposed in Minnesota, whereupon he was served following completion of a truncated deposition. The Seventh Circuit added that the issue of this service is not before the court. *Id.* at 642 n.3.

[46] *Id.* at 643.

[47] *Id.*

[48] *Id.* at 645 n.6.

[49] *Id.* at 644-45.

Seventh Circuit affirmed, reasoning that certain litigation contacts with Minnesota—and the possibility that Minnesota law might have been used with respect to the wrongful death action—were unimportant because there had been no judicial decision applying Minnesota law to the underlying wrongful death action.[50] Nonetheless, the Seventh Circuit recognized that in other circumstances, the interrelationship of the general liability rule and the role of contribution could be critical: "If Soo Line had been identified as a tortfeasor and held liable under Minnesota statutes, Minnesota would have had a stronger interest in permitting Soo Line to lessen the onerous financial burden of Minnesota's provisions for joint and several liability by pursuing contribution claims against joint tortfeasors."[51] In the *Overton* litigation, the majority did not find fundamental unfairness in the application of Indiana law despite Soo Line's contention that it had entered into a settlement on the assumption that it "'faced . . . the *nearly certain* prospect based on the [state] court's prior comments and ruling that the court would apply Minnesota rather than Indiana substantive law with respect to joint and several liability. . . .'"[52] The Court of Appeals believed that in agreeing to settle,

> Soo Line gave up its rights to continue litigating the case, to protest the application of Minnesota law, and to appeal any judgment in the tort action that might have been crafted under the law of Minnesota. Soo Line settled even though the constitutional permissibility of applying Minnesota law to the wrongful death action was undetermined by the state court and the burden of Minnesota's liability statutes had not been imposed.[53]

In dissent, Judge Ripple went further, arguing that it was unrealistic to ignore the owner's relationship with the underlying action and the fact that the settlement took into account the probability that Minnesota law would apply. He argued that when the liability and contribution rules were viewed together,

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[50] *Id.* at 646.

[51] *Id.*

[52] *Id.* at 647 (quoting Soo Line's Memorandum in Opposition to Motion for Summary Judgment).

[53] *Id.*

> [t]he result of both approaches, however, is to reduce the likelihood that one tortfeasor will be subject to complete liability for the plaintiff's entire claim; the sharing of responsibility is consistent with both states' approaches. The result of Mr. Overton's position is a "mix-and-match" of legal rules, which is inconsistent with the result that either an Indiana or a Minnesota court would have reached.[54]

There are substantial differences between *Cooney* and *Overton* with respect to the constitutionality of the applicable law. On the issue of general liability—not contribution—in *Overton*, Minnesota imposed liability on one of its own and required its own resident/domiciliary to pay compensation at a higher level than would have prevailed at the place of injury; the result might well be "bad" choice-of-law theory, but it is hardly unconstitutional. The application of Minnesota law to require contribution from the *Indiana owner* would be much more problematic because the Indiana owner had no affiliating *transactional* relationship with Minnesota. The Seventh Circuit so held, but made it clear that had the Minnesota liability rule actually been applied, the outcome might well have been different.

Cooney presents an even clearer case that the constitutional line has been overstepped. Osgood had no connection with Missouri and had been a completely local actor in New York. Under *Hague*, *Shutts* and, perhaps, now *Overton*, Missouri law cannot reach Osgood, the New York sales agent, whether in a product liability suit by the employee (Cooney) to impose liability on Osgood, or to impede a claim by Osgood for contribution against the Missouri employer, Mueller. And to the extent that New York law is the source of the initial liability claim against Osgood because the bending roll had been manufactured in New York and because Osgood had participated in the New York distribution chain, such liability should be viewed within the context of New York's scheme of full contribution.[55]

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[54] *Id.* at 651 (Ripple, J., dissenting).

[55] As a practical matter, fact-finders often merge determinations of liability and measurements of damages. Kaeo v. Davis, 719 P.2d 387 (Haw. 1986), provides one interesting example. A jury apportioned the responsibility for an accident, holding the judgment-proof, intoxicated driver 99% responsible and the city 1% responsible. The verdict was overturned on appeal because the jury had not been instructed that joint and several liability would make the city responsible for the entire

Cooney is a very unusual case amidst the extensive line of constitutional choice-of-law cases. The common scenario in this set of cases is that a forum court attempts to apply *its own law* despite a thin constitutional basis. *Home Insurance v. Dick*,[56] *John Hancock Mutual Life Insurance Co. v. Yates*,[57] *Allstate Insurance Co. v. Hague*[58] and *Phillips Petroleum Co. v. Shutts*[59] all fit this category. In *Cooney*, the forum state, New York, not only had adjudicatory jurisdiction over Osgood, but also had a basis for applying its own law due to Osgood's New York connections. Nonetheless, the forum chose to apply the law of a different state—Missouri—which had a constitutionally tenuous connection to the New York party, Osgood. Though I do not believe the Supreme Court has ever addressed the situation, the protections on choice-of-law emanating from the Due Process Clause should not depend on which forum makes the choice. Missouri had neither adjudicative nor legislative authority over Osgood; New York may have had adjudicative authority but it had no greater power to choose Missouri law than did Missouri itself.

I also repeat here what I have suggested in several other places—that constitutional limitations on jurisdiction are not an effective substitute for constitutional choice-of-law constraints.[60] While in many cases limitations on jurisdiction will prevent a forum from having the opportunity to apply its own law, those jurisdictional limitations do nothing to impede another state from applying a potentially unconstitutional regime of law. For that reason, a requirement that a defendant engage in sufficient conduct as to have submitted to a particular legal regime must be a component of the Constitution's contribution

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amount. On remand, the jury then found the city not liable. The case is noted in Victor P. Goldberg, *Litigation Costs Under Strict Liability and Negligence*, 16 RES. IN L. & ECON. (forthcoming 1994).

[56] 281 U.S. 397 (1930).

[57] 299 U.S. 178 (1936).

[58] 449 U.S. 302 (1981).

[59] 472 U.S. 797 (1985).

[60] *See* Lowenfeld & Silberman, *supra* note 9, at 848-49; Silberman, *End of an Era*, *supra* note 9, at 84-88; Silberman, *Federal Choice-of-Law Constraints*, *supra* note 9, at 116. *But cf.* Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 2 AM. J. COMP. L. 249, 280-90 (1991) (arguing that constitutional limits on jurisdiction will serve as appropriate constitutional restraints on choice of law once general jurisdiction is abolished).

to choice-of-law. It is this part of the constitutional test that is not met or explored in the New York Court of Appeals' decision in *Cooney*.

Territorialists like Professor Twerski may be particularly unhappy with this approach because such a requirement may on occasion frustrate the application of the place-of-injury rule on liability and contribution issues. However, the orthodoxy of Joseph Beale came undone for quite good reasons the first time around; attempts to resurrect similar presumptive rules for particular kinds of cases—as both Professors Sedler and Twerski suggest—are helpful but do not fit all cases. Concerns for expectations and fairness to define the legitimate reach of legislative authority must also play a role.