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The Market Tort in Private International Law

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I. INTRODUCTION

One hundred years ago, English¹ and United States law were united in their endorsement of the vested rights theory as the basis for resolving choice of law problems. Joseph Story and later Joseph Beale in the United States,² and A.V. Dicey in England³ dominated scholarly endeavor in that area. Today, despite massive differences in paths, both systems still have at least one thing in common: their analytical methods for examining tort choice of law problems are as uncertain as they are dysfunctional. Until very recently, English law suffered the fate of Sisyphus, pushing the twin boulders of doctrinal characterization and the rule in *Phillips v. Eyre*⁴ up a forsaken hill in an intellectually frozen Tartarus. Whether or not recent changes have liberated it from that fate remains to be seen.⁵ American law had to confront the specter of interest analysis, which is very far from being exorcised, perhaps because a theory has not yet emerged with the weight and substance to replace it.⁶

¹ When we refer to "English" law, we include Australian law. There are comparatively few differences, although these are sometimes significant. They are noted where relevant.

² See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (5th ed. 1857); JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935). Beale was, of course, the chief reporter for the RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).

³ See A.V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS (1896).

⁴ 6 L.R.-Q.B. 1 (1870).

⁵ England seems now to have abolished *Phillips v. Eyre* in favor of a presumptive application of the *lex loci delicti*. See *infra* text accompanying note 79.

⁶ The historic account of interest analysis is BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 182 (1963). See also Arthur Taylor von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927 (1975); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS §§ 6.3, 6.32 (2d ed. 1980). In the last two decades, the theory has come under heavy attack. See, e.g., Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980) [hereinafter Brilmayer, *Interest Analysis*]; Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277 (1989) [hereinafter Brilmayer, *Rights*]; Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1 (1984).

Perhaps the most troublesome of all choice of law questions arises when a plaintiff asserts a cause of action for injuries arising from a contractual exchange entered in a market situation. This description embraces some of the most important case types in modern litigation: products liability, securities litigation, industrial accidents, medical negligence, and so on. Outside of private international law cases, these have represented the battlefields of recent tort "crises" and subsequent reforms.⁷ We shall refer to these cases as "market torts". They represent the principal subject of analysis in this work.

It does not take much effort to understand why these tort cases may be the most problematic of all. The antique English approach struggles with the arid question of characterizing the legal issue at stake, which precedes the selection of the choice of law rule: is it a contract case or a tort case?⁸ Contract and tort choice of law rules are very different and rest on different premises.⁹ Thus, a disjunctive choice between them favors one set of premises, and dismisses the other. The use of doctrinal analyses to solve these problems does not make one confident of the consequential merits of the solution. By contrast, an U.S.-style interest analysis is compromised by market torts. Markets, by their nature, coordinate the movement of factors of production to high-valuing uses; the more efficient the market, the greater the potential movements and interactions between a range of jurisdictions. In these cases, many places may have an "interest" in the tort; this in turn makes the ultimate law of the cause unclear. Add to these conceptual problems the fact that both methods implicitly favor forum law, and one has a prescription for indeterminacy, unjust application of laws, and inefficient forum shopping.¹⁰

This essay is not simply the latest in a long line of articles articulating a particular analysis or rule as the basis for determining the law of tort causes. It does, inevitably, recommend an approach. But the specific rules are not the most important part of the paper. Instead, we use law and economics scholarship to clarify the significance of choice of law in market

⁷ See PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1 (1987); PAUL H. RUBIN, *TORT REFORM BY CONTRACT* (1993).

⁸ See WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* ch. 8 (1949); FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* 71-74 (1993). See *infra* Part II.C.3(d).

⁹ See *infra* Part II.

¹⁰ As to forum favoritism in the United States, see JUENGER, *supra* note 8, at 101-03. The *lex fori* was always an express, and often the dominant, part of the rule in *Phillips v. Eyre*, 6 L.R.-Q.B. at 28-29 (1870). *Phillips v. Eyre* remains applicable law in Australia. See McKain v. RW Miller & Co. (S.A.) Pty. Ltd., (1991) 174 C.L.R. 1; Stevens v. Head, (1993) 176 C.L.R. 433. Despite the recent amendment of English law, there is still scope for a judge to apply forum law. See *infra* text accompanying notes 73-79.

torts, and to establish a framework in which one can evaluate different analytical approaches to resolving choice of law problems.

Our starting point is to recognize that market torts involve contract issues and tort issues. The specific rights pleaded by the defendant are associated with tort as a corpus of law, but they also define the property rights that are traded between contracting parties. Thus, the choice of law rules applicable to market torts can be analyzed in terms of how they affect the underlying contracting process. For instance, suitable rules will facilitate the formation of markets, the pricing of goods, and the making of rational choices by consumers and producers. We first demonstrate that tort choice of law rules, both English and U.S., fail by this standard. Their *ex ante* indeterminacy deprives consumers of the ability to make rational choices, and so complicates pricing and market formation.

Since tort choice of law rules are dysfunctional, can contract choice of law methods offer anything better? For at least three decades now, the distinguishing feature of contract choice of law is the reliance, in the first instance, on party choice.¹¹ If there is no choice, or if the law will not enforce a choice, the law falls back to various background rules. These have typically referred the law of the cause to the legal system with the closest connection to the contract. Sometimes, as in the Rome Convention on the Law Applicable to Contractual Obligations, the law makes use of presumptions which assist this inquiry.¹²

The contract choice of law method suggests two important analogies. First, the relation between a choice-based rule and a subsidiary background rule is much the same as the relation between express contract terms and default rules that has been central to the economic analysis of contract law.¹³ We use insights from this fertile literature to examine, first, the circumstances in which permitting the parties to make an effective choice is likely to be an appropriate solution. Although lawyers and scholars have a phobia about the enforcement of terms in standard forms (which will characterize many, although not all market torts), enforcing party choices may

¹¹ See *infra* Part II.

¹² CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS, June 19, 1980 art. 4(2), 1980 O.J. L266/1 [hereinafter Rome Convention].

¹³ See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) [hereinafter Ayres & Gertner, *Filling Gaps*]; Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992) [hereinafter Ayres & Gertner, *Strategic Contractual Inefficiency*]; Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989); FRANK H. EASTERBROOK AND DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 101-15 (5th ed. 1998); Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271 (1992).

be the best approach.¹⁴ Its persuasiveness depends on the costs of information about the choice, the nature of risks, and the efficiency of the market.

The rules that should apply where a choice of law does not exist is a question about the optimal form of default rules. This question can be answered with reference not only to the scholarship of contract default rules, but to the second analogous literature: the economics of adjudication by rules and standards.¹⁵ A choice of law rule is the product of what Cass Sunstein and Edna Ullmann-Margalit describe as a *second-order decision*.¹⁶ A strategy used in order to avoid the need to confront a decision-making situation is a second-order strategy; the choice of such a strategy is a second-order decision. Thus, choice of law rules avoid the need for a judge to choose a rule on the basis of a direct comparison, according to some cost-benefit calculus and the facts of the particular case.¹⁷ Instead, a choice of law rule provides a means to avoid the need for such comparison, by permitting the matter to be resolved according to the approach embodied in the second-order choice of law rule. Thus, choice of law rules can be differentiated according to whether or not the second-order choice of law rule takes a simple, low-cost formulation, and whether or not that rule permits the eventual first-order adjudication (wherein the law of the cause is selected) to be simple and low-cost. We show how choice of law methods can usefully be described by this taxonomy, and how, with the benefit of the economic literature on rules and standards, we might choose between and give content to these approaches.

¹⁴The classic article is Friedrich Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943). See also Albert A. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953). But cf. George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981).

¹⁵See Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISCIPLINARY L.J. 1 (1993); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking* 3 J. LEGAL STUD. 257 (1974); Gillian K. Hadfield, *Judicial Competence and the Interpretation of Incomplete Contracts*, 23 J. LEGAL STUD. 159 (1994); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); POSNER, *supra* note 13, at 42–53; Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 J. L. ECON. & ORG. 256 (1995); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995). Law and economics is of course not the only paradigm to consider rules and standards. The area has been much analyzed from jurisprudential perspectives. See, e.g., Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

¹⁶Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, Chicago Working Papers in Law & Economics (2nd) No. 57, 2-3 (June, 1998).

¹⁷However, such a choice of law method has, on occasion, been urged. See JUENGER, *supra* note 8, at 195; Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966) (advocating a “better law” approach).

One of the features of our analysis which we emphasize is that the selection of market tort choice of law rules needs to take into consideration the nature of the transactions it applies to. The likelihood of dysfunctional choice of law rules is greater, we think, the more generic the rule's formulation. Therefore, we lean towards a relatively complex, (higher-cost) second order choice of law rule, complemented by a simple adjudication. This feature makes our analysis decidedly transactional; we embrace this feature illustratively by examining and contrasting products liability cases and securities litigation cases. These are different transactions with different market features, and warrant different choice of law rules. For example, the case for enforcing party choices is much stronger in securities litigation than it is in products liability, because information costs are much lower, markets more efficient, and the traded commodity much more standardized and fungible.

The structure of the article is as follows. Part II is the theoretical core of the article. It discusses the economic significance of choice of law rules. It provides a comparative analysis of English and United States tort methods. Using economic analysis, we can see how unsuitable tort choice of law rules are to market torts. With these conclusions in mind, Part II develops a framework, based on the Sunstein-Ullman-Margalit analysis and the economic literature, for analyzing different choice of law methods that can be applied to market tort cases. Part III uses the theory and analysis of Part II to examine three specific questions: (1) Should express choices of tort law be permitted? (2) If a choice of law is permitted, but no choice is made, what form should the default choice of law method take? (3) If a choice of law is not permitted, because rational choices are unlikely, what form should the mandatory choice of law method take? Part IV uses the choice of law approach established in Part III to show how two specific market torts, products liability and securities litigation, should be analyzed. We come to different conclusions regarding the appropriate form of choice of law method for each tort type, so endorsing our transactional approach. Part V is a conclusion.

II. CHOICE OF LAW RULES: THEORETICAL FUNCTIONS AND ECONOMIC ANALYSIS

Part II of this article is an essentially critical look at the legal theory and doctrinal content of choice of law rules, with reference to market torts. This part concentrates first on general theoretical issues, and then turns to comparative analysis of these problems at the practical, doctrinal level in English, Australian, and United States law. In order to do this, section II.A prepares the way by a brief expository account of the economic analysis of tort law. An understanding of this theory assists us in examining the significance of choice of law rules and in evaluating the present and possible alternative choice of law methods. Section B takes up the question of the economic significance of choice of law rules. It shows that in contract and

market tort cases, choice of law rules play an important part in the definition of property rights between contracting parties. Section C then provides a general treatment of the suitability of choice of law rules to market torts, as a platform for the analysis in part III.

A. The Economics of Tort Law

Economic analysis of tort law examines the relation between tort rules and accident costs, and the manner in which tort rules allocate accident costs between tortfeasors and victims.¹⁸ If social and private costs were always equal, parties would only engage in injury-causing behavior if the marginal social benefit exceeded its marginal social costs. In the absence of legal intervention, some or all of the social costs of injury causing behavior will not be borne by the tortfeasor. The apparent result is too much injury-causing behavior. The great insight of law and economics, first discovered by, and named after, Nobel Laureate R.H. Coase, was that efficiency would nonetheless prevail if tortfeasor and victim could contract with each other, in relation to care and accident prevention, at no cost.¹⁹

The Coase theorem demonstrates that this result would hold irrespective of the existence or form of tort laws. Even in the absence of legal protection, a victim would be prepared to pay up to the amount of the expected private cost of the injury to compel the tortfeasor to take care. If the expected cost of the injury exceeded the tortfeasor's gain from the action — which is the efficiency condition for taking care — both parties would be better off entering a contract obliging the victim to pay the tortfeasor to take care. Efficiency is therefore independent of prior allocations of property rights in a zero transaction cost world.²⁰ Coase recognized that tort rules

¹⁸Comprehensive accounts of the theory are provided in WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987) and STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987). Obviously, use of efficiency as the touchstone of choice of law rules is controversial, both in terms of its suitability to normative analysis of law generally and its relevance to private international law: See Brilmayer, *Rights*, *supra* note 6 (criticizing consequentialism in private international law scholarship); Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUDIES 191 (1980) (criticizing wealth maximization as a basis for analysis of legal rules). On the other hand, a prominent advocate of corrective justice as the proper object of tort law has regarded efficiency as a defensible objective in products liability, the most important of market torts. JULES L. COLEMAN, *RISKS AND WRONGS* 407-29 (1992). Also, the choice of law rules we advocate for market torts are consistent with Brilmayer's emphasis on a defendant's political rights *see Rights*, *supra* note 6, at 1307-08, because they preserve a defendant's right to exit a regime imposing particular laws.

¹⁹R.H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

²⁰The allocation nonetheless has implications for the distribution of wealth between the parties. Distributive unfairness can, however, be corrected by redistribution (*e.g.*, taxes). See Richard Craswell, *Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7-10, 119-27 (2nd ed. 1989); Stewart J. Schwab,

may be needed for efficient investments in accident precautions where transaction costs are positive. Parties may not enter the sorts of bargains possible where contracting is costless. Ideally, tort rules would allocate risks in a way that emulated the bargain that would be entered in a world of costless transacting.

Later scholars examined the use of tort liability rules as a means by which the law caused tortfeasors to internalize the costs of accidents and to take efficient precautions.²¹ This work recognized the difference between legal rules in contracts and torts cases. Although it would be impossible for, say, a pedestrian to contract with every motorist, many "torts" cases, including products liability and professional negligence, are situated within exchange contexts.²² In these cases, transaction costs may prevent consumers and providers wringing out the very last gains from trade. However, provided consumers perceive the risks of harm associated with the exchange, they will be willing to pay for precautions that reduce those risks. In well-functioning markets, providers will be correspondingly prepared to invest in those precautions. Contracts, such as warranties, are a means by which the provider credibly signals that those investments have been made.

Tort law is also important in these contract-based tort cases because, in addition to its capacity to encourage efficient investments in care where contracting is costly, it allocates accident costs between providers and consumers.²³ If care is costly, there will always be accidents, as some accidents cannot be efficiently prevented. Tort laws determine who bears the costs of these accidents. The great revolution of the second half of the century has been the gradual allocation of most losses to providers through substantially changed tort laws embracing strict liability. This allocation is sometimes described as *enterprise liability*, the effect of which is to require the provider to supply the product with an implicit insurance policy covering losses that reasonable care would not avoid.²⁴ The supposed merits of enterprise liability include the fact that it would assist the poor, who would be

Coase Defends Coase: Why Lawyers Listen and Economists Do Not, 87 MICH. L. REV. 1171, 1195-96 (1989); Steven Shavell, *A Note on Efficiency vs. Distributional Equity in Legal Rule-making: Should Distributional Equity Matter Given Optimal Income Taxation?*, 71 AM. ECON. REV. 414 (1981).

²¹ See GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); LANDES & POSNER, *supra* note 18.

²² Shavell, *supra* note 18, at 51-64.

²³ See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1537 (1987).

²⁴ See generally ALBERT A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951); VIRGINIA E. NOLAN & EDMUND URSIN, *UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY* (1995); George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301, 2301 (1989).

unable to insure otherwise. The cost of the extra insurance would be passed through to all consumers in prices.

Although enterprise liability has merits if liability is appropriately defined, it has been shown to create potentially severe problems.²⁵ Any form of insurance, whether first-party or tort-based third-party insurance, relies on the ability of the insurer — the provider in the case of enterprise liability — to segregate insureds into narrowly defined risk classes.²⁶ It is much harder in general for a manufacturer to segregate risks, since it typically must sell to anyone prepared to pay the price. This makes the risk pool a heterogeneous one. George Priest also demonstrates that the award of substantial damages for non-pecuniary loss, for which first-party insurance markets have never formed, and the lack of controls on losses after an accident, further increase the variance and heterogeneity of the risk-pools. As the variance of risk pools rise, prices increase substantially. Over time the market may unravel, because lower risks progressively find they are paying too much for their coverage.²⁷ If the law permits it, contract may serve a role in responding to this problem. By changing the scope of liability exclusions, it can reduce risk pool variance and hence prices.²⁸

With this understanding of the economic analysis of tort law, and its relation to contract law in mind, we can now turn to examine the economic function and significance of choice of law rules.

B. The Economic Significance of Choice of Law

Start with an easy question: are choice of law rules significant in a world of zero transaction costs? No. The parties will exploit all possible efficiency gains by contract, and allocate unpreventable losses to the lower cost bearer. To do that, the contract would be *contingently complete*; that is, it would specify actions and payoffs for all possible future states of the world.²⁹ The only possible role for choice of law would be in matters of interpretation and enforcement. In the real world, however, where contracts

²⁵Priest, *supra* note 7; Priest, *supra* note 23. The analysis below draws substantially from Priest's analysis.

²⁶Priest, *supra* note 23.

²⁷George A. Akerlof, *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism*, (1970) 84 Q.J. ECON. 488.

²⁸Alternatively, the extent of tort liability may be reduced, so that extensions beyond that point are left to contract. Tort reforms in the United States have mostly favored this option. For analysis of these reforms, see Joseph Sanders & Craig Joyce, "Off to the Races": *The 1980s Tort Crisis and the Law Reform Process*, 27 Hous. L. Rev. 207, 218-23 (1990). For theoretical analysis and critique, compare Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193 (1989) and RUBIN, *supra* note 7, with Mark Geistfeld, *The Political Economy of Neocontractual Proposals for Products Liability Reform*, 72 TEX. L. REV. 803 (1994) and Peter A. Bell, *Analyzing Tort Law: The Flawed Promise of Neocontract*, 74 MINN. L. REV. 1177 (1990).

²⁹Ayres & Gertner, *Strategic Contractual Inefficiency*, *supra* note 13, at 730.

are either nonexistent or incomplete, choice of law rules have important substantive functions. To consider what these are, we first move incrementally away from a world of zero transaction costs to a world in which transaction costs are not zero, but they do not preclude contracting between the parties. We then creep up the transaction cost scale incrementally, by looking first at market torts where contracts do, by our definition, exist, but where the definition of the property rights traded between the parties is drawn from tort law. To close this section, and as a means of completing the larger picture, we then look at non-market torts where transaction costs overwhelm any gains from trade.

1. *Contracts Cases*

The role of choice of law rules in contract depends on our conception of the general functions of contract law. Economists generally take the view that contract law supplements contracts with terms that contracting parties want, but which they will omit from their agreements because negotiation is costly, and therefore limited. The law facilitates the contracting process by filling gaps in agreements in suitable ways.³⁰ Implicit in this view is a premise that contract law should not override party agreement. This assumption of consumer sovereignty or contractual freedom requires contract law rules to take *default* form that parties may agree to exclude. Likewise, the rules that establish the proper law of the contract should have two features. First, they should reinforce, not thwart, what the parties have *agreed*. Second, they should fill the gaps the parties have *left* with terms from a system of contract law in a way that decreases transaction costs.

It is worth foreshadowing at this point that the means by which the law should fulfill the second of these imperatives is not immediately apparent. The first imperative is simple enough, as it implies the parties should have substantial autonomy to make contractual choices of law, and that where they have not done so, the validation of express agreement should be a weighty factor in choosing between competing legal systems.³¹ But what is the optimal choice of law *default*? The literature on defaults in contract is remarkably variable, as different considerations affect the choice. We synthesize this literature with other relevant literature in part III of this paper. It is worth noting that although there are a substantially larger number of possibilities, the default rule literature implies that there are two choice of law methods most likely to satisfy an efficiency objective. One is a case-specific attempt to select the law of the cause based on a consideration of the legal rules parties are most likely to choose, had they the opportunity to

³⁰For principal references on the law's gap-filling function, see *supra* text accompanying note 13.

³¹In Part IV, we consider whether there are persuasive reasons *not* to enforce the parties' choice. See also *infra* Part III.A.2(a).

bargain. This involves consultation with a hypothetical bargain the parties might have entered, known as a *tailored* default.³²

The alternative is to use a more generally applicable gap-filling method that reflects the preferences of a majority of similar contracting parties. This sort of choice of law method would shift focus from *ex post* tailoring to *ex ante* rule-setting. The primary object of this approach is to provide default law choices that are clear at the time of contracting, which should facilitate party choices, and hence, market formation. This form of default can be described as *untailored*.³³

2. Market Tort Cases

We can extend this analysis of choice of contract law to cases where injury arises from the performance of a contract; that is, a market tort. We saw in section II.A that contracts have real value in tort cases. They permit providers to signal consumers that valuable investments in care have been made. They also provide a means by which parties can agree to redistribute the risks that each bears, since there are reasons to believe that third-party liability under tort rules may sometimes be inefficient insurance arrangements. If this is so, choice of law rules should, as in contract cases, *not* select laws that would thwart or stultify the parties' express contractual agreement regarding compensation, product insurance and safety precautions. Of course, specifying a contingently complete contract is almost impossible when dealing with a manufacturer's acceptable safety precautions. Hence, we do not observe contracts that use terms obliging the manufacturer to take all measures that cost no more than the expected harm, because they would be immensely difficult for a court to interpret or enforce.³⁴ Neither do we observe contracts that predicate on specific actions taken in product design or manufacture, because these may often be unobservable. On the other hand, there are many express terms in the forms of warranties and exclusions. Unless a commitment to consumer sovereignty is inefficient in the case of market torts, choices of law should validate and enforce these express terms.

Second, the choice of law method will also be responsible for selecting the basic tort liability rules applicable to the contracts in question. This is a substantially similar problem to the selection of gap-filling rules in contract

³² Ayres & Gertner, *Filling Gaps*, *supra* note 13, at 91-2.

³³ *Id.* In an earlier work, we compared tailored and untailored choice of law defaults, as they apply to contract cases: Michael Whincop & Mary Keyes, *Putting the "Private" Back Into Private International Law: Default Rules and the Proper Law of the Contract*, 21 MELB. U. L. REV. 515, 535 (1997) [hereinafter Whincop & Keyes, *Proper Law of the Contract*]. Not simply because we are considering a different subject here, our views on the subject of tailoring have changed somewhat from those expressed there.

³⁴ Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 367-68 (1988).

cases. However, the “gap-filling” tort rules are less likely to be defaults than those rules conventionally associated with the corpus of contract law. Again, it is not immediately apparent whether the method used to select tort rules should operate on a tailored, case-by-case basis, or an untailed, rule-like basis.

3. *Non-market Tort Cases*

In cases where there are no contractual or exchange relations between the plaintiff and defendant, the economic analysis of choice of law becomes quite different.³⁵ It is obvious that the notion of upholding contracts has no relevance to non-market torts. It is a basic premise of economic analysis that the effect of tort rules on accident precautions by tortfeasors and victims depends on the deterrent effect of the liability.³⁶ Different legal rules may have different deterrent probabilities. It may seem to follow that choice of law rules should select the laws that most efficiently deter negligent behavior. However, we have argued that this is likely to be incorrect.³⁷ Choice of law would have this effect only where the parties could have some expectation that they would be subject to a different liability rule than the one applied to cases that do not involve multistate elements. It seems very likely that non-market torts only occasionally involve multistate elements, and the fact that a case has multistate elements is only apparent after parties make investments in care. If these conditions hold, as they probably do in most automobile accidents or running-down cases, the ex post selection of a more efficient law is not likely to have any efficiency effects.³⁸ Thus, choice of law probably has no effect on accident precautions. We argue that a choice of law rule applicable to non-market torts should do two things. First, it should minimize the variation of judgments between forums, in order to minimize forum shopping and the costs of litigation. Second, the rule should permit parties to ascertain what liability rules will apply to their conduct, in order to permit them to make decisions regarding their level of injury-causing activity, and the extent to which they should purchase insurance.

C. The Suitability of Choice of Law Rules to Market Torts

Now that we understand the economic significance of choice of law rules across the full contract-tort spectrum and understand the ways in which economics suggests these rules should operate, we can examine the

³⁵This section draws substantially on our article on non-market torts, Michael Whincop & Mary Keyes, *Economic Analysis of Conflict of Laws in Torts Cases: Discrete and Relational Torts*, 22 MELB. U. L. REV. 370 (1998) [hereinafter Whincop & Keyes, *Torts*].

³⁶See, e.g., SHAVELL, *supra* note 18, at 5-18.

³⁷See Whincop & Keyes, *Torts*, *supra* note 35.

³⁸It may affect the distribution of wealth between the parties, because different liability rules affect the size of any judgment.

choice of law methods which might be suited, or which might not be suited, to the efficient resolution of multistate market torts. Because market torts involve the application of tort rules to contract cases, it is useful to think first about the proper forms of contract choice of law rules and then about tort choice of law rules.

1. Contract Choice of Law Method

We have said that a contract choice of law rule should, first and foremost, uphold the parties' agreement and permit the parties substantial autonomy to make their own choices of law. English, Australian, and U.S. law give very substantial freedom to the parties to choose the proper law of the contract, which is typically done by way of a choice of law clause.³⁹ There are, however, some limits on contractual choices of law. English law professes to limit the enforcement of contractual choices of law to those which are "bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy."⁴⁰ These qualifications are rarely invoked, though both English and Australian courts have on occasion refused to enforce a choice of law that would avoid a statutory rule.⁴¹ However, this unwillingness has arisen only with respect to mandatory rules of *the forum*, not those of other jurisdictions.⁴²

United States law's limits on contractual choice are somewhat more expansive, perhaps a holdover effect of that country's historical antipathy.⁴³ The RESTATEMENT (SECOND) OF CONFLICT OF LAWS provides that the contractual choice should not be enforced if:

³⁹ See, e.g., *Vita Food Products Inc. v. Unus Shipping Co.*, 1939 App. Cas. 277, 290; *Akai Pty. Ltd. v. The People's Ins. Co. Ltd.*, (1996) 188 C.L.R. 418; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

⁴⁰ See *Vita Food Products*, 1939 App. Cas. at 290. As to bona fide choices, see *Golden Acres Ltd. v. Queensland Estates Pty. Ltd.*, 1969 Qd. R. 378.

⁴¹ See *Akai*, 188 C.L.R. 418; *The Hollandia*, [1982] 3 All E.R. 1141 (H.L.). See generally J. J. Fawcett, *Evasion of Law and Mandatory Rules in Private International Law*, 49 CAMBRIDGE L.J. 44 (1990). But see Michael J. Whincop & Mary E. Keyes, *Statutes' Domains in Private International Law: An Economic Theory of the Limits of Mandatory Rules*, 20 SYDNEY L. REV. 435 (1998) [hereinafter Whincop & Keyes, *Statutes*].

⁴² *Vita Foods* is an example, as are the English proceedings in *Akai Pty. Ltd. v. People's Ins. Co. Ltd.*, [1998] 1 Lloyd's Rep. 90 (Q.B.). England has refused to adopt article 7 of the ROME CONVENTION, which permits the giving of effect to foreign mandatory rules. CONTRACTS (APPLICABLE LAW) ACT (U.K.), §2(2) (1990).

⁴³ See, e.g., 2 JOSEPH H. BEALE, CONFLICT OF LAWS § 332.2 (1935). An alternative economic explanation is that choice of law clauses provide a low-cost means of exiting state regulation. See Bruce H. Kobayashi & Larry E. Ribstein, *Federalism, Efficiency and Competition* (Nov. 16, 1997) (unpublished manuscript, on file with author). It may be that states within a federation such as the United States have a stronger interest in constraining exit than a unitary state does, as constraining exit provides greater coverage for state regulation. On the other hand, Australia is also a federation of states, yet it embraced the English rules.

- (i) there was no effective choice by the parties;⁴⁴
- (ii) the chosen state has no substantial relationship to the parties and there is no reasonable basis for the choice;⁴⁵ or
- (iii) application of the choice of law would be contrary to a fundamental policy of a state with a materially greater interest whose law would apply in the absence of the choice.⁴⁶

Provided that the first qualification does not interfere with the enforcement of standard form contracts simply because they are not negotiated, neither it nor the second qualification is likely to create major inefficiencies. The third qualification is more expansive than the Anglo-Australian approach, which is limited to local mandatory rules.⁴⁷ This third qualification presents somewhat more of a problem. First, it invokes the concept of state interests, which are often vague and indeterminate. The existence and relative significance of state interests can only be resolved on an ex post basis, which is fatal to certainty at the time of contracting. Second, state interests may be inimical to efficiency. Laws may service the demand of private interest groups active in the political process, at the expense of contracting parties generally.⁴⁸ If interest group legislation fails the (weak-form) criterion of Kaldor-Hicks efficiency,⁴⁹ the elevation of state interests above party autonomy will have substantial social costs. It is worth noting that this so-called public policy exception really has but one effect: it increases the costs of exiting from a state's regulation, since it suggests that contracting parties with closer substantive connections to a state are more likely to be able to enforce their preferred laws.⁵⁰ In general, the weaker position of mandatory rules in English law is preferable to the position in the United States.

English and U.S. law also proceed in a similar fashion in the absence of a choice of law. When the vested rights school was at its zenith, both English and U.S. law tended to rely on rule-like choice of law methods which referred the problem to the law of the place of contracting and the

⁴⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

⁴⁵ *Id.* § 187(2).

⁴⁶ *Id.*

⁴⁷ See Robert A. Sedler, *A Real World Perspective On Choice Of Law*, 48 MERCER L. REV. 781, 803-04 (1997).

⁴⁸ Kobayashi & Ribstein, *supra* note 43.

⁴⁹ That is, the winner's gains exceed the loser's losses sufficiently to permit, in theory, compensation of the latter by the former. See, e.g., POSNER, *supra* note 13, at 523 ("Although the correlation is far from perfect, ... [rules] made by the legislature tend to be efficiency-reducing."). *But cf.* Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983).

⁵⁰ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f (1971).

law of the place at which the contractual obligations would be performed.⁵¹ These methods are similar to untailored defaults, which apply in a generic and (in theory) determinate manner. Over time, and with the benefit of realist critiques,⁵² presumptive and rule-based methods fell out of favor. Their place in both England and Australia was taken by a choice of law method which ascertains the jurisdiction which has the "closest and most real connection," or the "most significant relationship" to the contract.⁵³

In section II.B we referred to the possibility of tailored choices of law. Tailored defaults are ascertained *ex post*, perhaps according to standards such as "reasonableness." The most significant relationship test is a species of tailoring. However, it is best to regard it as only a semi-strong form of tailoring. It only seeks to choose the most closely connected jurisdiction. It does not ask the further question of which set of substantive rules would the parties have preferred had they been able to negotiate a choice of law clause. So far as we are aware, no legal system actually adopts such a method. However, its fingerprints are discernible in cases where the court has resolved a choice of law issue in a way which is most likely to uphold the parties' bargain.⁵⁴

There is a significant difference between the semi-strong and strong forms of tailoring. The crucial difference is that the former concerns itself with a jurisdiction-based choice on grounds that may not emphasize party interests.⁵⁵ The latter would counsel the judge to select between rules according to a judgment about their relative appeal to the parties at the time of the contract. It may be that this difference reflects the fact that the calculus of semi-strong tailoring is more reliant on state interests than it is on party interests. A "most significant relationship" criterion ignores the possibility that there may not be a high correlation between the laws that maximize the welfare of parties and the jurisdictions with contracts are most closely con-

⁵¹ See, e.g., *Lloyd v. Guibert*, (1865) 1 L.R.-Q.B. 115; *Merwin Pastoral Co. Pty. Ltd. v. Moolpa Pastoral Co. Pty. Ltd.*, (1933) 48 C.L.R. 565; *The Assunzione*, 1954 P 150, 176 (P. Div'l Ct. 1954); RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 332, 358 (1934); EDWARD I. SYKES & MICHAEL C. PRYLES, *AUSTRALIAN PRIVATE INTERNATIONAL LAW* 607-08 (3rd ed. 1991).

⁵² See, e.g., Walter Wheeler Cook, "*Contracts" and the Conflict of Laws*, 31 ILL. L. REV. 143 (1936).

⁵³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971). See *ROME CONVENTION*, art 4(1); *Bonython v. Commonwealth of Australia*, 1951 App. Cas. 219 (appeal taken from Austl.); *Akai Pty. Ltd. v. The People's Ins. Co. Ltd.*, (1996) 188 C.L.R. 418, 440-42.

⁵⁴ See *Coast Lines Ltd. v. Hudig & Veder Chartering N.V.*, [1972] 2 Q.B. 34, 44; *Seaman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 407-08 (1927); Peter E. Nygh, *The Reasonable Expectations of the Parties as a Guide to Choice of Law in Contract and in Tort*, 251 RECUEIL DES COURS 268, 340-46 (1995); ALBERT A. EHRENZWEIG, *A TREATISE ON THE CONFLICT OF LAWS* § 174 (1962).

⁵⁵ David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 194 (1933).

nected. This may be because contracts may be primarily connected with a jurisdiction with an undeveloped legal system,⁵⁶ or because some jurisdictions create unsuitable or inefficient laws. On the other hand, semi-strong tailoring may be preferable if the greater adjudicatory discretion inherent in a rule-selection process is used for spurious objectives, such as protection of local citizens, or the externalization of costs on out-of-state firms.

The purpose of this article is to contribute both to the scholarship of choice of law and the analysis of alternative methods — such as tailored and untailored choices of law. It is possible, of course, to proceed straight to an economic analysis. However, before we do that, we want to provide a framework in which these comparisons can be made. Ideally, that framework should not itself be a product of economic analysis, since those rejecting such analyses will reject the framework, and so deprive scholars from competing traditions of a common starting point. To establish such a framework, we borrow from Professors Sunstein and Ullmann-Margalit's recent work on second-order decisions.⁵⁷ The premise of their analysis is that much decision-making does not proceed according to the classical paradigm of comparing costs and benefits, because of the substantial costs of doing so, limited data, and the bounded rationality of some individuals, amongst other reasons. Accordingly, people make second-order decisions, which are particular forms of strategy by which to minimize the burdens and risks of error in the making of the basic first-order decision.⁵⁸

Choice of law problems are a form of decision. Conflicts cases by definition raise an issue for decision: what legal rule must be chosen? Unless one believes, and we doubt anyone now does, that there is an answer to a choice of law question, the validity of which is always apodictic, then it follows that a decision, without an obvious answer, must be made. Likewise, many scholars will agree that the decision, or, at least, the way in which such decisions as these are made, should be defensible in consequential terms.⁵⁹ The calculus of consequence will differ from theory to theory, but the notion of optimizing some sort of objective function is common to all of these approaches. A choice of law rule requires that the law of the cause be selected to conform with some previously identified method. Thus, committing to a choice of law method is a second-order decision.

Professors Sunstein and Ullmann-Margalit describe eight possible strategies for resolving a second order decision: rules, presumptions, stan-

⁵⁶ See, e.g., *Amin Rasheed Corp. v. Kuwait Ins. Co.*, 1984 App. Cas. 50, 63 (H.L.).

⁵⁷ Sunstein & Ullmann-Margalit, *supra* note 16.

⁵⁸ *Id.* at 3.

⁵⁹ See Brillmayer, *Rights*, *supra* note 6, at 1284-91 (discussing and critiquing consequentialism in conflicts scholarship). Naturally, a law and economics approach is consequential in nature.

dards, routines, small steps, picking, delegation, and heuristics.⁶⁰ It is possible to compare these strategies across two dimensions: (1) to what extent does a strategy minimize costs ex ante at the time the second order decision is made (i.e., when the choice of law rule is formulated) and (2) to what extent does a strategy minimize costs ex post at the time of the eventual first order decision (i.e., when the judge decides the choice of law problem).⁶¹ Some will have low ex ante costs but high ex post costs (low-high); some will be the opposite (high-low). A few may minimize costs at both levels (low-low), and hopefully none will be high at both levels (high-high).

Within this framework, strong form tailored choices of law are most likely to be low-high, since they require a complex adjudication which requires substantial data if it is not to mistake the parties' preferences. Untailored choices of law, such as a *lex loci contractus* rule, would seem to be low-low, though they may become high-low if a generic rule is abandoned in favor of setting different rules for different types of transactions. However, higher rule-setting costs may be offset if transaction-type rules are better than generic rules at approximating party preferences. Conversely, ex post adjudication costs may be higher if a generic untailored rule is reduced to a presumption, rebuttal of which is permitted under certain conditions.

In addition, there are two other low-low methods, besides generic untailored rules. One low-low method is to apply only the *lex fori*. The other method is to defer to the parties' choice of law agreement where one exists. In simple contract cases, a high-high strategy might involve a tailored approach, but the legislature may give detailed specifications for how courts are to go about exercising their apparent discretion. Presumably, high-high will be fairly rare. These strategies are depicted in tabular form in Table 1.

Table 1: Costs of Second Order Choice of Law Strategies

	Low ex ante decision costs	High ex ante decision costs
Low ex post decision costs	Low-low: — apply parties' choice of law; — <i>lex fori</i> ; — generic untailored rule.	High-low: — transaction-type untailored rule.
High ex post decision costs	Low-high: — tailored approaches; — generic untailored presumption.	High-high: — tailored approaches with detailed specification of method.

⁶⁰ Sunstein & Ullmann-Margalit, *supra* note 16, at 5-13

⁶¹ *Id.* at 18-21.

The advantage of setting out the possibilities this way is that it permits a broad view of choice of law methods within a tightly organized framework. It also permits comparisons to be drawn between the costs of rule-setting and adjudication and between these forms of costs and the likelihood that the ultimate choice of law will maximize whatever objective function (efficiency, government interests) one specifies. Our analysis returns to this framework on a number of occasions.

2. Tort Choice of Law Method

We now turn to consider choice of law rules in torts cases. We stated in section II.B.3 that the effects of choice of law on accident precautions should be negligible in non-market tort-cases. On the other hand, the choice of law rule applicable to torts should do two things. First, it should minimize the variance of judgments between forums, in order to minimize forum shopping and therefore the costs of litigation.⁶² Second, the rule should allow parties to ascertain what liability rules will apply to their conduct. This will in turn allow them to make decisions regarding their level of injury-causing activity and the extent to which they should purchase insurance.⁶³

The choice of law method most obviously inimical to variance minimization is the *lex fori*. A number of choice of law rules can minimize variance. A *lex loci delicti* rule should do so, provided the *locus delicti* is determined in similar ways across forums.⁶⁴ However, rules which base a selection on one or more pre-accident criteria (e.g., the defendant's domicile) will also do so. Nonetheless, party domicile is deficient according to the second criterion, that of permitting the parties to know the standards applicable to them under tort liability rules. Although a different rule is arguably appropriate where there is a substantial relationship between defendants,⁶⁵ the lack of any pre-accident relationship between the parties would make it impossible for a party to ascertain the applicable tort rules where these were selected on the basis of the other party's attributes. Thus, in these cases, a rule that allows both parties to know in advance which law

⁶²In saying this, we are ascribing to a multilateralist theory of conflicts, in which conflicts rules are administered in substantially similar ways across jurisdictions, in order to obtain substantial uniformity. *But cf.* Scott Fruehwald, *A Multilateralist Method of Choice of Law*, 85 Ky. L.J. 347 (1996); JUENGER, *supra* note 8, at 13-14; Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271, 282-84 (1996).

⁶³Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 12-13 (1991).

⁶⁴*See* Alabama Great Southern R.R. v. Carroll, 11 So. 803 (Ala. 1892); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378 (1934). *But cf.* Distillers Co. (Biochemicals) Ltd. v. Thompson, 1971 App. Cas. 458 (H.L.).

⁶⁵In stating this, we note the famous succession of "guest statute" cases. *See, e.g.*, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963). For economic analysis, see Whinop & Keyes, *Torts*, *supra* note 35, at 369-72.

will be selected is preferable. Furthermore, both choice of law criteria favor the use of the *lex loci delicti* for non-market torts.⁶⁶

Believers in the positive hypothesis of economic analysis of law (i.e., believers in the idea that the common law tends toward efficiency⁶⁷) may not be surprised that U.S. and English law both initially adopted the *lex loci delicti* as the basis of tort choice of law. However, in 1870 the choice of law rule in England fused the *lex loci delicti* to the *lex fori*. In a judgment that has caused over a century of scholarly head-scratching, Willes J., in the case of *Phillips v. Eyre*, stated that the wrong alleged must be “actionable” had it been committed in the forum and must not be “justifiable” by the *lex loci delicti*.⁶⁸

We have argued elsewhere that the rule in *Phillips v. Eyre* could be an efficient rule under two conditions.⁶⁹ First, forum law would have to be used only to *cut down* the extent of the claim permitted by the *lex loci delicti*.⁷⁰ The basis for this argument is that courts are more likely to make mistakes in applying foreign law the greater the differences between forum law and the *lex loci delicti* because of their greater lack of familiarity. The rule in *Phillips v. Eyre* would therefore require substantial similarity between the two bodies of law if recovery were to be permitted, which would decrease the number and cost of judicial errors.⁷¹

Because such a rule creates a disincentive to litigate outside the *locus delicti*,⁷² the second efficiency condition is that the *locus delicti* would have to be the forum in which the parties’ costs to settle the litigation are minimized. If that is not so, the rule may be inefficient even if it minimizes the cost of errors in the application of law.

Alas, experience showed that the rule in *Phillips v. Eyre* was not to be a tougher version of the *lex loci delicti* but simply a more confusing version of the *lex fori*. This came about in three ways. First, some cases gave flimsy definitions of justifiability in the *lex loci delicti*, making that an illu-

⁶⁶We do not analyze intentional torts here, but perhaps the *lex fori* has appeal as a deterrent in intentional tort cases. See, e.g., *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679 (N.Y. 1985).

⁶⁷See, e.g., Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

⁶⁸6 L.R.-Q.B. 1, 28-29 (1870).

⁶⁹Whincop & Keyes, *Torts*, *supra* note 35.

⁷⁰*Stevens v. Head*, (1993) 176 C.L.R. 433, 441 (Mason, J., dissenting) (recommending the *lex loci delicti* approach).

⁷¹Stanley E. Cox, *The Interested Forum*, 48 MERCER L. REV. 727, 733 (1997). This should, in turn, increase the predictability of litigation, and therefore the likelihood of settlement. On the settlement of litigation, see Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

⁷²Because differences count against the plaintiff.

sory obstacle for the forum shopper.⁷³ Second, other cases claimed that *Phillips v. Eyre* was only a threshold requirement that established justifiability in a forum and that therefore the *lex fori* was the real choice of law rule.⁷⁴ Third, English and Australian courts regularly used escape devices, most notably the substance-procedure distinction⁷⁵ and a so-called flexible exception.⁷⁶ The rule has been, in short, a disaster.⁷⁷ It remains the law in Australia.⁷⁸ English legislation appears to have abrogated it in favor of the *lex loci delicti*, but the escape devices remain.⁷⁹

United States courts never had to grapple with *Phillips v. Eyre*, but dissatisfaction with the *lex loci delicti* mounted.⁸⁰ The problem lay in the fact that Beale (and Justice Story before him) claimed that the powers of a sovereign were strictly defined in a territorial way such that a court never applied foreign law. Instead a court applied local law to recognize a right that had vested elsewhere. The latter point was easy to debunk as formalistic piffle. However, that still left the first half: that courts should apply their own law, not foreign law. In other words, the rejection of vested rights caused scholars, foremost among them Brainerd Currie, to shift their horizons back to the forum and the application of its laws. Hence, Professor Currie argued that the only reason a forum should apply foreign law is if, in substance, it did not have any interest in the case. The application of foreign law thwarts forum policies.⁸¹

⁷³ See, e.g., *Machado v. Fontes*, (1897) 2 Q.B. 231 (C.A.) ("Justifiable" means neither "tortious" nor "legally innocent" but something in between).

⁷⁴ See, e.g., *Anderson v. Eric Anderson (Radio & T.V.) Pty. Ltd.*, (1965) 114 C.L.R. 20.

⁷⁵ See *McKain v. R.W. Miller & Co. (So. Austl.) Pty. Ltd.*, (1991) 174 C.L.R. 1 (holding "limitation of actions" statute procedural); *Stevens v. Head*, (1993) 176 C.L.R. 433 (holding "recoverable heads of damage" statute procedural).

⁷⁶ *Boys v. Chaplin*, 1971 App. Cas. 356; *Red Sea Ins. Co. Ltd. v. Bouygues S.A.*, [1995] 1 App. Cas. 109.

⁷⁷ The rule was heavily criticized in LAW COMMISSION, PRIVATE INTERNATIONAL LAW: CHOICE OF LAW IN TORT AND DELICT, Working Paper No. 87 (1984).

⁷⁸ See *McKain*, 174 C.L.R. at 1; *Stevens*, 176 C.L.R. at 433.

⁷⁹ See Private International Law (Miscellaneous Provisions) Act 1995 ch. 42, §§ 11, 12 (U.K.).

⁸⁰ A number of states adhere to it nonetheless. For recent cases, see *Holman v. McMullan Trucking*, 1996 WL 652639 (Ala. 1996) and *Blais v. Allied Exterminating Co.*, 482 S.E.2d 659, 1996 WL 716714 (W. Va. 1996). See Symeon C. Symeonides, *Choice of Law in the American Courts in 1996: Tenth Annual Survey*, 45 AM. J. COMP. L. 447, 458-60 (1997) (noting that, as of the end of 1996, twelve jurisdictions adhere to *lex loci delicti*).

⁸¹ CURRIE, *supra* note 6, at 183, 278. Not every advocate of interest analysis thinks that it needs to favor the forum. See, e.g., Russell J. Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases*, 46 OHIO ST. L.J. 493 (1985).

We do not intend to recount the many variations on interest analysis.⁸² The basic premise of interest analysis has fatal flaws.⁸³ Even a case such as *Babcock v. Jackson*, thought to exemplify interest analysis, makes little sense. It is difficult to comprehend the justification for saying that state A has no interest in litigation between two residents of state B when the litigation arises out of an accident occurring in state A.⁸⁴ If a person drives negligently, he may expect to injure a passenger, but it is just as likely that he will injure an in-state resident.⁸⁵ If one believes, as economists do, that tort law is about deterrence,⁸⁶ state A has a strong interest in applying its law to persons driving within its territory.⁸⁷ A significant portion of the expected costs of negligence will fall on in-state residents.

There are other significant economic criticisms of interest analysis. Judge Posner argues that interest analysis may impair the economic capacity of whichever state has the advantage in formulating regulations that are sensitive to conditions within its borders (which state is logically the *locus delicti*).⁸⁸ Professors Kobayashi and Ribstein argue that interest analysis extends the effect of deals cut by rent-seeking interest groups, which, as noted above,⁸⁹ are likely to be inefficient.⁹⁰

Most of these comments apply also to the approach to torts conflicts described in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS.⁹¹ The RESTATEMENT (SECOND) is somewhat incoherent here. It claims to be guided by a range of principles such as "the relevant policies of the forum" and "certainty, predictability, and uniformity of result" which even it admits cannot all be accommodated.⁹² Its approach to tort cases is not dissimilar to

⁸² See Friedrich K. Juenger, *General Course on Private International Law*, 193 RECUEIL DES COURS 119, 219 (1983).

⁸³ See Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 461 (1985).

⁸⁴ See Friedrich K. Juenger, *Choice of Law: How it Ought Not To Be*, 48 MERCER L. REV. 757, 758 (1997) ("[T]here is an almost inexhaustible array of moves and countermoves available to keep [interest analysts] entertained. Thus, any run-of-the-mill traffic accident can serve as the basis for a long and erudite analysis of the policies and interests at stake.").

⁸⁵ See generally Larry Kramer, *The Myth of the "Unprovided-For" Case*, 75 VA. L. REV. 1045 (1989).

⁸⁶ See generally Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 U.C.L.A. L. REV. 377 (1994).

⁸⁷ See generally Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997) (suggesting significant similarities between deterrence and corrective justice); see also *Gantes v. Kason Corp.*, 679 A.2d 106, 111-12 (N.J. 1996) (affirming deterrence as a factor in products liability case).

⁸⁸ See POSNER, *supra* note 13, at 646. See also RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 305-06 (1985).

⁸⁹ See *supra* text accompanying note 49.

⁹⁰ Kobayashi & Ribstein, *supra* note 43.

⁹¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

⁹² *Id.* at § 6.

its contract approach, because it focuses on the state with "the most significant relationship to the occurrence and the parties"⁹³ in terms of a range of relevant contacts of variable importance.⁹⁴ This approach has been adopted at least to some extent by a substantial number of states.⁹⁵

One of the difficulties with such a broad-based approach to selecting the law is that it increases the costs of information for parties wanting to ascertain the *lex causae* in order to determine the applicable liability rules and the appropriate response to them. The more relevant factors involved, the more information required. The uncertain importance of any one of the factors mentioned in the RESTATEMENT (SECOND) increases the likelihood that outcomes will be indeterminate. This will complicate rational choices by the parties and will affect the precautions parties take against loss.⁹⁶

Like interest analysis, which it partially embraces, the application of the RESTATEMENT (SECOND) often turns out to have significant biases towards the *lex fori*.⁹⁷ As explained earlier, this increases forum shopping, which is inefficient because it requires parties to outlay higher costs than they would if judgments were substantially invariant across forums. Additionally, the *lex fori* makes it impossible, not just difficult, to know the applicable liability rules.

Thus, despite much criticism, the *lex loci delicti* rule seems superior the alternative choice of law rules that we have discussed. However, so far we have only spoken in very general terms about torts. The next section analyzes the case of the market tort in detail. As we shall see, the superiority of the *lex loci delicti* substantially deteriorates on analysis, while the interest-based methods remain just as unattractive as before.

3. A Method For Market Torts

We said in part II.B.2 that a choice of law method applying to market torts should do two things. In the absence of market failure problems, it should uphold the parties' bargain in relation to matters of care and cost bearing, where such a bargain exists. Second, it should select liability rules that facilitate contracting and the formation of markets. We examine possible methods, assessing each one's ability to perform these tasks, and we examine some of the choice of law problems that have emerged in previous

⁹³ *Id.* at § 145(1).

⁹⁴ *Id.* at § 145(2).

⁹⁵ See Symeonides, *supra* note 80, at 458.

⁹⁶ See generally Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J. L. ECON. & ORG. 279 (1986). *But cf.* Marcel Kahan, *Causation and Incentives to Take Care Under the Negligence Rule*, 18 J. LEGAL STUD. 427 (1989). This comment applies equally to interest analysis.

⁹⁷ See Symeonides, *supra* note 80, at 457. Of course, some states simply adopt the *lex fori*. See generally Albert A. Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori" Approach*, 18 OKLA. L. REV. 340 (1965).

market tort litigation. This leads us to propose the elements of a contractarian approach to market torts.⁹⁸

(a) Interest Analyses and the *Lex Fori*

There is no reason to believe that interest-based or *lex fori* approaches become any more suitable when one limits one's analysis to market torts. As we said in Part I, market torts often involve an increased number of jurisdictions relevant to the case, further multiplying the number of identifiable interests.⁹⁹ The *lex fori* approach continues to encourage forum shopping. If plaintiffs can invoke the law of their preferred forum, the effective liability rules to which the defendant corporation is subject become more onerous, which shifts supply curves to the north-west and increases equilibrium prices. Because price discrimination is either practically or legally impossible, all consumers will pay the same higher price, even consumers in that proportion of the population (which will rise as the expected costs of forum shopping rise) that would have preferred to pay less and shift the risks they bear by obtaining first-party insurance.

Public choice theory has been used in two recent, very interesting analyses of choice of law in products liability cases.¹⁰⁰ The arguments in both cases are based on the premise that states want to favor local residents at the expense of those from out-of-state. Michael McConnell argues that this dynamic leads states to expand the scope of their substantive products liability. Interest analysis, he states, intensifies this effect by increasing the choice of liability regimes available to a plaintiff.¹⁰¹ Professor McConnell's substantive argument, with which we agree, is that this problem would best be solved by a choice of law rule favoring the law of the place where the product is sold.¹⁰² This would decrease the effect of cost externalization on substantive reforms.

Bruce Hay's argument is that substantive and conflictual rules are not mutually reinforcing, contrary to Professor McConnell's claim. Professor

⁹⁸The use of contractarian approaches to economic analysis of law is an ever-expanding field. For representative examples of its applicability to other fields, see EASTERBROOK & FISCHER, *supra* note 13 (corporate law); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995) (trusts); Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditor's Bargain*, 75 VA. L. REV. 155 (1989) (bankruptcy); Schwartz, *supra* note 34 (products liability).

⁹⁹See Shimon A. Rosenfeld, *Note: Conflicts of Law in Product Liability Suits: Joint Maximization of States' Interests*, 15 HOFSTRA L. REV. 139, 147 (1986).

¹⁰⁰See Bruce L. Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 GEO. L. J. 617 (1992); Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, in NEW DIRECTIONS IN LIABILITY LAW 90 (Walter Olson ed., 1988).

¹⁰¹McConnell, *supra* note 100, at 93-94.

¹⁰²*Id.* at 98. See also Erin O'Hara & Larry E. Ribstein, *Interest Groups, Contracts and Interest Analysis*, 48 MERCER L. REV. 765, 769-70 (1997).

Hay argues that a state's best position is to prefer a pro-plaintiff conflictual rule, thereby permitting not only a wider choice of liability regimes for use against out-of-state defendants but also a products liability standard that is less demanding of manufacturers. A state with such a standard would use interest analysis to permit its consumers to benefit from the relatively stringent laws of other states, yet it would not increase its manufacturers' liability exposure to out-of-state plaintiffs.¹⁰³ This is an ingenious counter argument¹⁰⁴ but it does not contradict the inherent tendency of interest analysis to permit forum shopping and cost-externalization. Very likely, from the public choice perspective we have adopted, Professor McConnell's argument is correct considering that the interest analysis method may well be demanded by in-state lawyers in order to attract litigation from out-of-state plaintiffs on the basis of the outside states' favorable laws.¹⁰⁵

(b) The *Lex Locus Delicti*: American and English Variants

Earlier in part II.C.2, we stated that *lex loci delicti* has much to recommend it because it minimizes variance across forums and permits mutual ascertainment of applicable liability rules. However, this advantage does not apply to all torts equally. It has strong appeal in non-market torts involving personal injuries. Nevertheless, the more efficient the market in which the tort arises, the less suitable the *lex loci delicti* becomes. As transaction costs fall, markets coordinate the flow of resources across an increasingly wide geographical area. It is common for analyses of choice of law in products liability to refer to hypothetical cases where a manufacturer incorporated in A manufactures products in B, and puts them into the stream of commerce in C. A consumer domiciled in D buys them in E, and is injured in F.¹⁰⁶ Almost all of these jurisdictions have some relevance to the tort. The law comes to depend on a method for determining the *locus delicti*. The vested rights school argues that the right could only vest on the occurrence of the last event comprising the tort; hence, the place of the last event was dispositive.¹⁰⁷ The problem is that, except for goods which are consumed at much the same time as the sale, the "last place" can be very difficult for the manufacturer (and the consumer) to predict at the time of the sale.

In contrast, Anglo-Australian law rejected the last event rule. Instead, it embraced a theory that the *locus delicti* will be within a particular juris-

¹⁰³ Hay, *supra* note 100, at 632-38.

¹⁰⁴ Which, ultimately, should be resolved empirically. For anecdotal evidence, see Gottesman, *supra* note 63, at 44.

¹⁰⁵ Richard A. Epstein, *The Political Economy of Product Liability Reform*, 78 AM. ECON. REV. 311, 313 (1988).

¹⁰⁶ See, e.g., McConnell, *supra* note 100, at 93; C.G.J. Morse, *Products Liability in the Conflict of Laws*, CURR. LEGAL PROB. 167, 171-73 (1989).

¹⁰⁷ See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934).

diction if the act of the defendant that gives the plaintiff his cause of complaint occurs there.¹⁰⁸

Perhaps this theory is superior in that it is less influenced by events that occur after the transaction between the parties, but it has a complementary flaw. In applying this rule, English and Australian products liability cases have tended to differentiate two case types. One case type involves a general flaw in design or manufacture. The other involves a product that, though not defective, creates particular hazards for a certain type of consumer, for example, thalidomide for a pregnant woman. In the first case type, the *locus delicti* will typically be the place of design or manufacture. In the second case type, the *locus delicti* is likely to be the place the consumer should have received a warning.

This is a dysfunctional rule. As a matter of policy, it is unclear why the victim of a generally unsafe product should be subject to (typically) foreign law while the other type of victim will typically be able to rely on local law. The distinction has real consequences because the plaintiff will not know under which law his rights will fall. To know the rights would imply, absurdly, a knowledge of the form of the negligence. Subjecting the plaintiff's rights with respect to defective manufacture to foreign law also imposes costs of information as to the content of that law. Given that the matter can only be resolved in court, uncertainties will bedevil pricing in product markets and insurance arrangements. These problems reflect the inadequacy of doctrinal solutions to policy problems.

(c) A Contractual Solution to Market Tort Choice of Law?

If extant tort solutions are dysfunctional, can contract choice of law methods offer anything better? Recall that contract approaches typically refer to the law agreed on by the parties. If there is no, or no valid, choice, the proper law of the contract is usually referred for decision to the jurisdiction with the most significant relation to the contract and the parties, although other methods are possible.

The suitability of party choice of law to market torts depends on the extent to which parties make rational, welfare-maximizing choices between possible contract terms. If parties did make rational choices, its appeal as a choice of law method would be considerable. It would make for substantial uniformity of results, if all forums respect choices of law. It represents, as noted above, a genuine "low-low" decision approach, since the formulation of a rule respecting contractual choices should be simple, and the enforcement of the choice reduces greatly the amount of time spent on resolving

¹⁰⁸The leading case in Anglo-Australian law is *Distillers Co. (Biochemicals) Ltd. v. Thompson*, (1971) App. Cas. 458 (P.C.) (appeal taken from N.S.W.). See also *Buttidge v. Universal Terminal & Stevedoring Corp.* 1972 V.R. 626 (Vict. Sup. Ct.); *Castree v. E.R. Squibb Ltd.*, [1980] 1 W.L.R. 1248 (C.A.); *Jackson v. Spittall*, (1870) 5 L.R.-P.C. 542.

the choice of law question in the ultimate adjudication. Moreover, unlike the other apparent “low-low” strategy — apply the *lex fori* — it should not motivate costly forum shopping. It should unquestionably facilitate market pricing because the contract locks in liability rules and permits them to be priced more easily. It should also validate more express provisions of the contract than the other methods we have seen.

The next part explores in detail the merits of express choices of law in market torts. However, express choices are not a sufficient solution because the parties may not make a choice, or the actual choice may be invalid for various reasons. Thus, there remains an unresolved issue: What form should “unchosen” choice of law rules take?

To put this in economic terms, tort rules represent allocations of property rights that supplement the express content of the parties’ contract. Our task is to explore the best means of choosing supplementary rules in default of an express choice. Can we do no better than the deficient choices explored above? In Part III we argue that the application of the economic theories of contract default rules and of discretion in adjudication do reveal better solutions.

(d) The Reception of Contractual Solutions

Before moving to the constructive analysis in the subsequent parts of the paper, we must ask a question: if contract choice of law methods are potentially a superior means of resolving choice of law problems in market torts, why have they not had more currency in the case law, or academic commentary? The answer is simple enough in American law. Vested rights theory and the RESTATEMENT (FIRST) were hostile to choice.¹⁰⁹ By the time their influence waned, forum-preferring methods were the “in-vogue” choice of law methods.¹¹⁰ These encouraged plaintiffs to select forums that would not recognize contractual choices. Hence, there has never been a scholarly constituency in U.S. conflicts scholarship that has advocated contractual choice of tort law.¹¹¹

¹⁰⁹ See, e.g., *Alabama Great Southern Railroad Co. v. Carroll*, 11 So. 803, 808-09 (Ala. 1892) (“[T]he duties and liabilities incident to the relation between the plaintiff [employee] and the defendant [employer] . . . are not imposed by, and do not rest in or spring from, the contract between the parties. . . . The whole argument is at fault. The only true doctrine is that each . . . state . . . has the exclusive power to finally determine and declare what act or omissions in the conduct of one to another . . . shall impose a liability in damages.”).

¹¹⁰ But cf. Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 329-34 (1990) (permitting choice of law in cases raising true conflicts).

¹¹¹ See, e.g., *Rosenthal v. Warren*, 475 F.2d 438, 444 (2d Cir. 1973), discussed in Ribstein & O’Hara, *supra* note 102, at 772-74. This case involved a suit brought in relation to a medical procedure in another state which limited damages for wrongful injury of death. Forum law favoring unlimited liability was applied. We agree with the criticisms of Professors Ribstein and O’Hara, which argue in favor of the importance of ex ante expectations. *Id.* We do not deal with medical torts in this article.

English law is another matter, since it has a longer history of enforcing contractual choices of law. Market torts did not assimilate contract choice of law characteristics because of the destabilizing use of doctrinal characterization.¹¹² Because judges tend to tag market tort issues as tortious, rather than contractual, they have been able to avoid giving full effect to the parties' contract. This tendency is manifest in two types of cases. In the first type, the court permits a party to a contract to assert rights in tort which would be unsustainable under the proper law of the contract. The clearest example is the English Court of Appeal case, *Coupland v. Arabian Gulf Petroleum Co.*¹¹³ That case involved an industrial accident in Libya, in which the plaintiff, a Scot, was injured. The plaintiff sought damages in tort in an English forum. The court was prepared to accept for the purposes of a strike out action that the proper law of the contract was Libyan law. It held, however, that the plaintiff was entitled to advance a claim in tort. As the alleged tort would have been actionable in Libya, that part of the rule in *Phillips v. Eyre* was satisfied and the matter could be resolved according to English law. The Court of Appeal held that the proper law of the contract had no relevance to the tort claim. The plaintiff was entitled to frame his suit as a claim in tort, if he thought it advantageous to do so. This type of

Our contractarian analysis applies here too. One must determine first whether parties should be able to contract in relation to choice of law in these cases. Obviously some medical cases, such as those involving necessity, should not be subject to contract. However, cases in which a person goes interstate seeking a renowned doctor suggests that the market for medical procedures may be working well enough to permit rational choices.

Then, if no choice of law is made or a choice is not permitted, one must determine which default rule should be used. We believe that the place of the medical procedure should be used, as it best represents patient preferences. This is so for several reasons. First, states should be able to compete for the business of health care providers, provided the costs are not imposed on those who cannot participate in the political process or on those who have not chosen to associate with the state.

Second, not to use a place of procedure rule runs the risk that, especially in the case of emergency admissions, hospitals might have to refuse to treat a patient if they cannot ascertain her domicile. Third, favoring the law of high-recovery forums will increase the cost of medical procedures, since the defendant becomes a third party insurer of a very heterogeneous risk class. *See supra* text accompanying notes 25-28.

There are good reasons why a patient might be prepared to accept a cap on damages for wrongful death. He will obviously not enjoy any of the damages himself (notwithstanding the inexplicable comments to the contrary in David Currie, *Choice of Law: How It Ought To Be*, 48 *MERCER L. REV.* 639, 703 (1997) ("People ought to get full recompense for injuries of this nature.")). Except for the case where the patient has dependants, for whom provision would certainly be most inexpensively made by first-party life insurance, no patient would be prepared to pay for insurance of this sort. *See generally* Phillip J. Cook & Daniel A. Graham, *The Demand for Insurance and Protection: The Case of Irreplaceable Commodities*, 91 *Q.J. ECON.* 143 (1977).

¹¹²For references, see *supra* text accompanying notes 25-28.

¹¹³*Coupland v. Arabian Gulf Petroleum Co.*, [1983] 3 All E. R. 226 (Eng. Ct. App.).

plaintiff therefore has a substantial ability to answer the characterization question by how she pleads her case.

Denying the relevance of the proper law of the contract to the adjudication of the tort is undesirable. As we have argued, parties to a contract need to know the form of liability rules that apply to them. An employee needs to know the risks that the law allocates to her in order to make a rational decision regarding the remuneration that compensates her for bearing them. The employee may want to effect first party insurance coverage, and the employer may want to insure against tort liability to the employee. This is much harder to do if the applicable tort rules cannot be known *ex ante*, and are only revealed at the time of trial.

Markets will also be affected adversely. Plaintiff-selected tort rules make the risks to which the employer is exposed much harder to segregate into risk pools. The employer's insurance against third party claims will become more expensive.¹¹⁴ In the extreme case of hazardous occupations, insurance may become altogether unavailable, which may in turn decrease employment. These consequences imply that the parties should be able to know and, ideally, fix the tort law that applies to claims arising under the contract.

Former Justice Peter Nygh makes a similar argument in a lecture given in the Hague.¹¹⁵ Marshalling a formidable body of support from continental law systems, Professor Nygh argues that choice of law problems should be resolved by the parties' express choice of the law. Professor Nygh also argues that even in the absence of express choice, the courts should apply the same law of the cause, whether the cause of action is contractual or tortious. This, he argues, would best give effect to the parties' reasonable expectations.¹¹⁶

In *Coupland*, Lord Goff (then Goff L.J.) made a significant comment when he said:

The plaintiff can advance his claim, as he wishes, either in contract or in tort; and no doubt he will, acting on advice, advance the claim on the basis which is most advantageous to him. . . . [T]he contract is only relevant to the claim in tort in so far as it does, on its true construction in accordance with the proper law of the contract, have the effect of excluding or restricting the tortious claim.¹¹⁷

How have English courts treated exclusion clauses in choice of law cases? Peter North has argued that these clauses can be analyzed in four

¹¹⁴ See Priest, *supra* note 23 at 1582-87.

¹¹⁵ Nygh, *supra* note 54, at 356-59, 374.

¹¹⁶ See generally Peter M. North, *Torts in the Dismal Swamp: Choice of Law Revisited*, in *ESSAYS IN PRIVATE INTERNATIONAL LAW 76* (Peter M. North ed., 1993).

¹¹⁷ 3 All Eng. Rep. at 228.

different ways.¹¹⁸ First, one could refer the validity of the exclusion to the law selected by the tort choice of law rule. Second, one could vary this method by inquiring as to the validity of the exclusion under the proper law of the contract, once one has ascertained that the *lex causae* applicable to the tort permits exclusions. So, in *Brodin v. A/R Seljan*,¹¹⁹ a court refused to enforce a contract excluding an employee's rights to compensation apart from what was available under Norwegian law. The employer was a Norwegian company and had employed the plaintiff, a resident of Scotland, to work on one of its ships. The accident occurred when the ship was docked in a Scottish port. The limitation of liability was invalid under Scottish law. The case is an example of the first approach, but the second approach would produce the same result.

The problems of *Coupland* resurface here. Referring the *lex causae* to a tort choice of law rule based on an unpredictable *lex loci delicti* or *lex fori* is inefficient. Consider that in a case like *Brodin*, injuries could occur in many places around the world. It is surely inefficient that the parties' rights should depend on where the accident actually occurs. By increasing the uncertainty associated with applicable liability rules and risk-bearing arrangements, this method adversely affects insurance and labor markets and complicates the underlying contracting process.

Professor North describes two other methods which may, in part, overcome these problems. One uses the proper law of the contract to adjudicate the validity of the exclusion. The other uses a unique choice of law rule, which would consider both the circumstances of the contract and the tort.

Both approaches are used in the Court of Appeal decision in *Sayers v. International Drilling Co. N.V.*¹²⁰ That case, also an industrial accident, this time involved injury to an English plaintiff employed by the Dutch defendant to work outside of the England. The injury was sustained on board a Nigerian oil rig. The plaintiff's contract provided for a compensation scheme should the plaintiff be injured, but it excluded his rights under English tort or workplace insurance law. The plaintiff sued in England seeking damages for negligence. The limitation was held valid under Dutch law but not valid in England. Stamp and Salmon L.J.J. held that the proper law of the contract was Dutch and that the limitation should take effect. This is consistent with Professor North's contractual approach. Lord Denning M.R.'s approach in the case is consistent with imposing a unique choice of law rule based on the proper law of the contract (which he thought was English) and of the tort (which he thought was Dutch). However, he thought that the contract helped him to break the deadlock, since it could only have been valid under Dutch law.

¹¹⁸Peter M. North, *Contract as a Tort Defence in the Conflict of Laws*, in *ESSAYS IN PRIVATE INTERNATIONAL LAW* 89 (Peter M. North ed., 1993).

¹¹⁹*Brodin v. A/R Seljan*, 1973 Sess. Cas. 213 (Scot.).

¹²⁰*Sayers v. Int'l Drilling Co., N.V.*, [1971] 1 W.L.R. 1176 (Eng. Ct. App.).

An approach designed to isolate a unique choice of law which upholds the express provisions of the contract is a desirable feature of a market tort choice of law rule.¹²¹ Thus, English (and Scottish) law takes an erratic approach to contractual solutions in choice of law cases. Much of the blame lies in the formalistic way in which courts have approached characterization issues.

D. Conclusion

Part II has covered a great deal of ground, which is worth briefly re-capping. First, legal rules affect the distribution of property rights and obligations between contracting parties. These legal rules are significant in a world of positive transaction costs and economic analysis can reveal the efficiency effects of different allocations. Choice of law issues are relevant to cases that involve contracting, including cases involving market torts, because they influence the range of bargains that parties can strike and they regulate the selection of the corpus of law from which contract-supplementing legal rules are drawn. We have pointed out that choice of law rules have efficiency effects in non-contractual tort cases but that efficiency supports different tort choice of law rules in each case. We described the principal contract and tort rules in Anglo-American law, and we introduced a framework, to which we will return subsequently, which permits simple comparison of choice of law methods. We also showed that though both systems have generally suitable contract methods, tort rules have often been characterized by inefficient forum preferences, indeterminate analysis, and muddled policy aspirations.

At the end of this part, we confront two principal issues. First, should parties be able to choose the tort law that applies to injuries arising out of a contract? Second, what is the optimal choice of law method for market torts and what will the content be of the chosen method's rules? We must also ask whether there is an interaction between the responses to the two questions. For example, we may want one rule to apply where a choice was permitted but not made and another rule to apply where a choice is not permitted. In the following parts, we will emphasize that the efficiency of markets and the nature of transactions affect one's confidence in contractual solutions, and the suitability of the underlying choice of law rule. We will not analyze every possible market tort, but we will address two of the most important: products liability and securities litigation brought by investors. An examination of these market torts shows how choice of law depends on market context.

¹²¹ See *supra* text accompanying note 54.

III. A CONTRACTARIAN CHOICE OF LAW METHOD FOR MARKET TORTS

A. Contractual Choices of Tort Law

In this part, we examine the cases for and against the grant of autonomy to parties to make a choice of law in their contract that applies to all legal issues arising from it. Its effect would, in this analysis, not be subject to diminution or escape by the sophistry of characterization. The parties would typically make their agreement in a choice of law clause. A little later we consider the formality with which parties should be able to make a choice of law.¹²²

1. Advantages

The preceding part foreshadowed many of the advantages of contractual choices. Before examining criticisms, it is worth recounting these advantages.

First, contractual choices increase the number of contracts the parties can write. A wider scope for choice of contracts makes it more likely that parties will be able to avoid the effect of local tort rules that make inefficient allocations of property rights and obligations.¹²³ This is a particular problem because tort rules often take mandatory, uncontractible forms. Where party preferences for contract terms are heterogeneous, as they mostly will be, contractual choices of law will dominate alternative choice of law methods, unless the court is a competent exponent of strong form tailoring. For example, when people would prefer to insure to different levels, the case for contract is very strong. As mentioned above, insurance markets unravel where insurers (producers under tort rules) cannot segregate risks into classes. Locking parties into the generally inflexible tort rules of either a single tort regime or a regime selected by a plaintiff *ex post* creates the difficulties for product and insurance markets that we have described above.¹²⁴

There may be reasons to believe that even if tort rules were doctrinally in the nature of defaults, few parties would contract out of them. Recent law and economics research has suggested two reasons why parties may not contract out of defaults, even though the allocation produced by an alternative term appears to be Pareto superior¹²⁵ to the default arrangement. One reason is that contract terms associated with tort rules may be affected by learning and network externalities.¹²⁶ Parties may prefer to adopt terms that

¹²² See *infra* text accompanying notes 152-156.

¹²³ See generally Priest, *supra* note 14.

¹²⁴ See *supra* text accompanying notes 25-28.

¹²⁵ That is, both parties would be better off.

¹²⁶ See generally Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997);

have been commonly used in the past because of the institutional "learning" available in respect of their terms. Such terms are, for example, easier to draft, more certain in their operation, simpler to explain to others, and so on. Similarly, parties may prefer to adopt terms that are contemporaneously used, or expected to be used in the future, in other contracts. The pioneering legal scholarship in this area demonstrates that the presence of such effects may lead to sub-optimal contracting, because there is either too much standardization or too little. It is very likely that substantive market tort rules are affected by these externalities. The long history of uncontractibility of tort rules and of judicial skepticism about exclusion clauses in contracts, as well as the difficulty of specifying terms in relation to care, all combine to create lock-in effects. By contrast, contractual choice of tort law permits contracting parties to bargain for different rules by selecting a different law.¹²⁷

A second, competing reason is that parties have a psychological predisposition against changes to the status quo.¹²⁸ Russell Korobkin has argued for, and found experimental evidence in favor of, a hypothesis that parties will substantially undervalue changes to the status quo position, embodied in the (domestic) default. Again, there may be some value in the virtual menu effect of choices of law in overcoming a status quo bias.

Second, contractual choices of law, if enforced, stifle the incentive of the plaintiff to select a forum on the basis of the substantive favorability of tort rules. Since tort choice of law rules continue to have either forum biases or devices to escape to forum law, this is a real concern.¹²⁹ A wide recognition of the right to select law contractually would be a major control on forum shopping, because it decreases the variance of awards between forums. In principle, the plaintiff should select a forum based on its ability to minimize her costs of litigation. This will not necessarily minimize the

Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995). For references to the literature on learning and network, see, e.g., Joseph Farrell & Garth Saloner, *Standardization, Compatibility, and Innovation*, 16 RAND J. ECON. 70 (1985); Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93 (1994); S.J. Liebowitz & Stephen E. Margolis, *Network Externality: An Uncommon Tragedy*, 8 J. ECON. PERSP. 133 (1994).

¹²⁷ See Whincop & Keyes, *Proper Law of the Contract*, *supra* note 33, at 527. As we argued there, the choice of law mechanism resembles a virtual menu of terms from which parties may choose. See also Klausner, *supra* note 126, at 837-42. Professor Klausner has suggested that menu options may be better than single default rules in combating the effect of network externalities. See generally HENRY N. BUTLER & LARRY E. RIBSTEIN, *THE CORPORATION AND THE CONSTITUTION* 115-16 (1995). See also *Siegelman v. Cunard White Star*, 221 F.2d 189, 195 (2d Cir., 1955).

¹²⁸ Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998).

¹²⁹ See *supra* text accompanying notes 68-95.

parties' joint costs, but it is a good start, which may be complemented by appropriate jurisdiction rules on transfer of proceedings.¹³⁰

Third, contractual choices of law provide a crucial circuit-breaker for the current of indeterminacy that runs through multi-state market torts as a result of the prevalent use of the *lex loci delicti*, the *lex fori*, or interest analyses.¹³¹ Contractual choices provide certainty at the time of contracting, which increases the future enforceability of any express terms of their contracts, thereby facilitating both product and insurance markets. This state of affairs may also be consistent with giving effect to the parties' reasonable expectations.¹³² Reasonable expectations resonate more with justice considerations than with efficiency considerations, but they share with economic analysis a focus on party interests.

Fourth, contractual choice of law provides a low-cost means by which contracting parties can "exit" a state imposing inefficient, interest group-serving rules.¹³³ Many current tort choice of law methods provide a means by which interest group legislation can extend the coverage of their laws to persons and firms who have no voice in that state's political process.¹³⁴ This increases the abilities of states to externalize costs. Consistently with Hirschman's famous analysis, the only option remaining to these firms is to exit.¹³⁵ Contractual choices are the surest means of exit. Professors Ribstein and Kobayashi go further and argue that the ability to exit by contractual choice of law plays a vital role in the evolution of state contracts statutes towards efficiency.¹³⁶ Even scholars criticizing consequentialism have emphasized the importance of being able to exit state regulation.¹³⁷

Fifth, as we have noted above, enforcing an agreed choice of law is a low-low decision strategy in terms of the Sunstein-Ullman-Margalit framework.¹³⁸ In other words, no great complexity is required to commit to a legal rule (a second order strategy) that enforces contractual choices of law. At the stage of adjudication, that rule minimizes the costs of decision, since the court only needs to decide whether an enforceable choice of law

¹³⁰ Whincop & Keyes, *Torts*, *supra* note 35, at 383-85.

¹³¹ See *supra* text accompanying notes 92-96, 106-108.

¹³² See *supra* text accompanying notes 115-116.

¹³³ Kobayashi & Ribstein, *supra* note 43. See *supra* text accompanying notes 89-90, 96-104.

¹³⁴ Hay, *supra* note 100; McConnell, *supra* note 100.

¹³⁵ See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

¹³⁶ Kobayashi & Ribstein, *supra* note 43. *Accord*, Whincop & Keyes, *Statutes*, *supra* note 41. See generally Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & ECON. 23 (1983); Susan Rose-Ackerman, *Does Federalism Matter? Political Choice in a Federal Republic*, 89 J. POL. ECON. 152 (1981); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

¹³⁷ Brilmayer, *Rights*, *supra* note 6, at 1306-08; Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1 (1989).

¹³⁸ See *supra* text accompanying notes 57-61.

exists. The only other low-low strategies are the plainly inefficient *lex fori*, and the use of generic untailed rules (e.g. the *lex loci contractus*). If costs are low under both party choices and generic untailed rules, the former remains preferable because it is more likely to select a rule that maximizes the parties' wealth.

There are, as we can see, strong reasons why courts should enforce parties' choices of law. The next sub-section explores the limitations of contractual choices of law.

2. Disadvantages

The reasons why a choice of law should not be enforced include grounds which are economic in nature, but also include other issues that are more political in nature. We examine the latter first.

(a) Political Reasons

Where substantive legal rules are found in "reform" statutes, or where common law rules have powerful mandatory overtones, the enforcement of a choice of foreign law seems to violate the policy of the law. We encountered these arguments above, when we discussed the effect of a contractual choice of foreign law on a mandatory rule.¹³⁹ These sorts of arguments are reinforced by the tendency to enforce legislative rules that apparently protect consumers in a wide, purposive manner.¹⁴⁰ On this view, contractual choices of law not only deprive consumers of protection but are subversive of the function of law-makers.

In another article, we have dismissed this argument, and argued for what is an essentially literal enforcement of the statute's provisions regarding contractibility and choice of law and forum.¹⁴¹ We accept that the value of purposive interpretations in substantive situations may often be high, because it will be rare for the text to apply clearly to all possible situations. In these cases, purposive interpretation functions in a gap-filling function, given the limits on legislative foresight.¹⁴² However, the value of purposive interpretations in respect of the relation between the statute and private ordering is, on the same argument, much lower. Unlike a potentially vast number of statutory situations, there are only four ways by which parties can avoid the scope of, or "exit" legislation. First, they can change the pa-

¹³⁹ See *supra* text accompanying notes 39-50.

¹⁴⁰ See generally Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 426-34 (1989).

¹⁴¹ Whincop & Keyes, *Statutes*, *supra* note 41.

¹⁴² Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817-20 (1983). *But cf.* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540 (1983); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

rameters of their contract and their relation to particular states in order to avoid the application of the legislation by the choice of law rules applied by the courts of the state enacting it. Second, the parties can attempt to contract around the rule itself. Third, the parties can avoid the provision by a choice of law clause. Fourth, the parties can agree to an exclusive jurisdiction clause, and so submit to the process of a forum which will apply another, presumably preferred law.¹⁴³

Although not true of every Act, much legislation makes specific provision for the effect of these purported exits, most obviously in respect of substantive opting out, but also in respect of choices of law and forum.¹⁴⁴ For example, in relation to exit by re-ordered contracting, the contract may specify an express criterion of operation.¹⁴⁵ In relation to choice of forum, the statute may provide that the jurisdiction of courts may not be ousted by a provision submitting to the jurisdiction of a foreign court.¹⁴⁶ Moreover, although their phrasing may vary, these provisions are both similar and simple in conception. Our argument is this: since there are generally good reasons why party autonomy might be preserved, it is appropriate to regard as destroyed *only* those parts of autonomy that the statute indicates, either specifically or by necessary implication.¹⁴⁷

There is also no particular reason why the elimination of, say, the right to contract out of specific rules should be regarded as fatal to the right to the private ordering of forum or choice of law. Domestic mandatory rules may coexist with choice of law autonomy. For example, there may be less chance of systematic unfairness to contracting parties if they must take foreign law in wholesale form (including procedural and mandatory rules),

¹⁴³ Like contractual choices of law, there is some difference in the extent to which English and American law enforce choices of jurisdiction. English and Australian law has generally taken a permissive approach, although mandatory rules may provide a reason not to enforce. See *The Eleftheria*, 1970 P. 94 (Prob. Div.); *Huddart Parker Ltd. v. The Ship Mill Hill*, (1960) 81 C.L.R. 502. American law initially refused to enforce forum selection agreements. See, e.g., *Benson v. Eastern Building & Loan Ass'n*, 174 N.Y. 83, 86 (1903); *Carbon Black Export, Inc. v. The S.S. Monrosa*, 254 F.2d 297 (5th Cir.), cert. dismissed, 359 U.S. 180 (1959); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971). For the last half a century that rule has been undergoing substantial change. See also GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 374-81 (1996); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991). The change has not been without substantial criticism. See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331. In this article, we do not want to give the impression that our arguments apply equally to choice of forum. While there is much value in contractual forum selection, there may be potential problems of conflicting incompleteness if the most efficient forum depends on the nature of the case.

¹⁴⁴ See, e.g., *Carriage of Goods by Sea Act* 1991 (C'th Aust.), §§11, 16.

¹⁴⁵ See generally Stuart Dutson, *The Territorial Application of Statutes*, 22 MON. U. L. REV. 69 (1996).

¹⁴⁶ See, e.g., Mont. Code Ann. §28-2-708 (1997).

¹⁴⁷ Whincop & Keyes, *Statutes*, supra note 41, at 443-45.

rather than giving parties an unlimited right to customise their agreements. Likewise, the parties' willingness to submit to the courts of the same foreign jurisdiction as the law they have chosen is a credible signal that parties are not simply attempting an opportunistic subversion of a local statute. On balance, the political argument against contractual choices of tort law does not support limitations that are not clearly stated in the statute.¹⁴⁸

(b) Economic Reasons

Are there economic reasons not to enforce contractual choices of tort law? The advocacy of contractual freedom by economists and libertarians assumes that the contract does not have any external effects on third parties to the contract.¹⁴⁹ There may be a few cases where this assumption does not hold. For example, a contract concerning the safety of products may have external effects on bystanders. However, that sort of externality does not require that the parties be deprived of their ability to contract, as the injured person can be, and usually is, given rights under a tort liability rule.¹⁵⁰

If we dismiss the significance of third party effects, the only economic reason for denying parties the right to make contractual choices of tort law is that they will systematically agree to inefficient, wealth-decreasing contractual terms. One must subscribe to some sort of market failure hypothesis. Such hypotheses come in two forms. One is a generic argument in which parties will agree to sub-optimal choices of law, just as they will to other contract terms. The other is a more specific argument which focuses on unique contracting problems associated with choice of law.

At this stage, we neither acknowledge or dismiss the generic argument. It is simply too generalised to be helpful, just as the tag "contract of adhesion" is more pejorative than it is descriptive.¹⁵¹ There may be a paternalistic justification *in certain cases* for depriving parties of the right to make choices of law, because of information costs, cognitive limitations on ra-

¹⁴⁸This approach to the statute involves the use of presumptive canons as tools of interpretation. This is consistent with recent theory: *see* Kramer, *supra* note 110; Sunstein, *supra* note 140.

¹⁴⁹Technically, it is assumed that there is no technological externality, where there is a divergence between prices and marginal cost. The existence of a pecuniary externality, such as a change in prices, is not a basis for legal intervention: *see* David D. Haddock *et al.*, *Property Rights in Assets and Resistance to Tender Offers*, 73 VA. L. REV. 701, 723-26 (1987).

¹⁵⁰*See generally* Calabresi & Melamed, *supra* note 21 (contrasting liability rules and inalienable rights as means of protecting entitlements).

¹⁵¹*See, e.g.*, Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1424 (1985) (criticizing economic analyses of the corporation as a contract). *But see*, Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 13 (1990). In private international law, a similar literature exists. *See generally* Ehrenzweig, *supra* note 14; Carington & Haagen, *supra* note 143; Priest, *supra* note 14.

tional choice, or moral hazard problems. But whether such justification exists cannot be assessed from the armchair. It depends at the very least on the dynamics of particular types of contracts, the abilities of particular types of contracting parties, and the efficiency of relevant markets. Hence, we examine this argument in Part IV in specific contexts.

Is there something special about contractual choices of law that makes them more likely to be subject to market failure than other terms? The most important consideration is the information costs associated with choices of law. A party cannot make a rational decision regarding choices of law without some knowledge of the substantive rules of the systems between which he or she must choose. Assume S_J offers to sell goods to B on terms of a contract selecting the law of jurisdiction J. B must decide whether to buy the goods from S_J or S_K , who offers a contract selecting the law of K, which happens to be B's domicile. Using K as a benchmark, B will bear a risk under J law that has an expected monetary value of \$50. B will act contrary to her best interests if she buys from S_J without demanding at least a \$50 discount compared to the price at which she can buy from S_J . B is incapable of doing this unless she knows (i) the risks she bears under the competing laws; and (ii) the expected value of those risks (that is, their probabilities and the value of harm). Likewise, if B does not know what risks she bears, she will be incapable of deciding rationally whether or not to buy insurance for the risk.

The acquisition of information regarding these risks is costly.¹⁵² It is probably beyond the capacity of many household contractors to acquire that information with respect to most transactions.¹⁵³ However, experienced contractors and other "repeat players" may not be disadvantaged by having to make these choices. The logical solution to this problem is to impose a disclosure duty on the party offering a contract that would opt into foreign law.¹⁵⁴ Such a duty is justifiable because, in determining that the term was optimal for its needs, the proffesor will presumably have sunk the costs required to understand its effect. Also, the proffesor is typically the one with the lower information costs, as between the two parties.

It therefore makes sense to impose a duty on the proffesor to disclose, at the time of contracting (i) the fact of the choice of law clause and (ii) information that will help the other party to appreciate the salient differences between the selected law and the law that will otherwise apply to the con-

¹⁵² See generally Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 667-70 (1986); Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 501-12 (1981).

¹⁵³ If there were to be a substantial amount of contracting in favor of foreign law, mechanisms would presumably develop to remedy any market failure. For example, consumer organizations might begin publishing reports on the effects of choosing foreign law.

¹⁵⁴ Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 257-58 (1993). See generally Beales et al., *supra* note 152.

tract. If that duty is not discharged, the choice of law clause would be ineffective if its effect would be prejudicial to the other party. The parties would fall back to the choice of law selected by the choice of law "default."

An exception to the duty might be made where the person being offered a contract containing a foreign choice of law clause is domiciled in the country or state whose law is chosen, or where the person otherwise could be assumed to be familiar with that country's law.

There might also be some subtle issues with regard to the way in which the duty should be discharged.¹⁵⁵ It might not be sufficient if the proffesor simply hands over a document that the law expects or obliges the other party simply to read. A more active duty to warn may be appropriate, at least where the document is not expected to be negotiated, as economic analysis shows that consumers may rationally choose not to read such a document.¹⁵⁶ It may be that legislatures should take active responsibility for regulating the form and content of these disclosures. Comprehension may be facilitated, and therefore information costs decreased, by standardization.¹⁵⁷

In addition to discharging this duty to disclose, the proffesor would have to comply with the procedural requirements of the general body of contract law applicable to the contract, such as obligations of form and capacity. But which body of law would that be? It cannot be the selected law, because that would beg the question of its validity. Typically, form should be governed by the law applying in default of choice, sometimes called the "putative" proper law.¹⁵⁸ Obviously, this law needs to be selected in a way that supports the object of decreasing the information costs of those contracting in these situations.

¹⁵⁵See Avery W. Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 272-93 (1990) [hereinafter Katz, *Strategic Structure*]. See generally Avery W. Katz, *Your Terms or Mine: The Duty to Read the Fine Print in Contracts*, 21 RAND J. ECON. 518 (1990) [hereinafter Katz, *Your Terms*].

¹⁵⁶Katz, *Your Terms*, *supra* note 155.

¹⁵⁷Klausner, *supra* note 126, at 829-41.

¹⁵⁸In English law, this is the law with the closest connection to the contract. See generally *White Cliffs Opal Mines Ltd. v. Miller*, (1904) 4 S.R. (N.S.W.) 150; *The Parouth*, [1982] 2 Lloyd's Rep. 351; SYKES & PRYLES, *supra* note 51, at 611-13. See also PETER E. NYGH, *CONFLICT OF LAWS IN AUSTRALIA* 304 (6th ed. 1995). There is, however, some authority for the use of the *lex fori*. See *Oceanic Sun Line Special Shipping Co. Inc. v. Fay* (1987) 165 C.L.R. 197, 222, 261; *Mackender v. Feldia A.G.*, 1967 Q.B. 590, 602-03. U.S. law also uses the putative proper law. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. d (1971). See generally *Green v. Australian Industrial Investment Ltd.* (1989) 90 A.L.R. 500; Australian Law Reform Commission, REPORT NO. 58: CHOICE OF LAW §§ 8.12, 8.59 (1992); Andrew Bell, *Jurisdiction and Arbitration Agreements in Transnational Contracts, Part II*, 10 J. CONT. L. 97, 98-101 (1996). Forum law is problematic because of the risk of forum shopping.

3. Conclusion

Subject to disclosure of the choice, there is no overarching reason why contractual choices of tort law should not be permitted. However, there may be reasons in specific market contexts. We pursue these issues in Part IV. The next issue we analyze is how law should be determined in default of a choice of law, or how it should be determined in those cases where choices should not be permitted because of market failure. The law so selected is important to choices of law agreed to by the parties for the two reasons we have just seen: it provides the benchmark for disclosure of substantive law differences, and it should provide clarity in selecting the putative law in order to determine the applicable procedural requirements for contracting.

B. Default and Mandatory Choices of Tort Law

How should the *lex causae* be selected where parties have not chosen, or are not permitted to choose, a proper law? In analyzing this question, we can return to the Sunstein–Ullman–Margalit framework, which trades off the costs of decision at the time of choosing a second-order choice of law strategy, and the costs of decision at the time of the first-order adjudication.¹⁵⁹ We must also analyze the broader efficiency effects of the choice of law method, which we do by reference to the economic literature on rules and standards.¹⁶⁰ Our analysis considers four different choice of law methods. These are:

- (1) Generic untailed rules (low-low);
- (2) Transaction-type untailed rules (high-low);
- (3) “Most significant relationship” analysis (low-high);
- (4) Strong form tailoring (low-high).

We can also expand this range by substituting, in the first and second methods, the use of a presumption for the inflexible rule.¹⁶¹ The presumption takes the same form as the rule but the court would be able to select

¹⁵⁹ It is conventional in the literature to argue that rules are preferable to standards where the subject matter recurs frequently, and in forms that are not materially different. See e.g., Kaplow, *supra* note 15. The rule economizes on the sum of the costs of rule-making and adjudication. Note, however, that there may be cases, particularly choice of law cases, where this is not so. A low-low method could choose a high-adjudication-cost standard, whereas a high-low or low-high method could choose a low-adjudication-cost rule. While this is a fair point, we assume for the purposes of analysis that there is no correlation between a choice of law method and the type of substantive rule it is likely to choose.

¹⁶⁰ See *supra* note 15.

¹⁶¹ The use of presumptions in choice of law is increasing. The Rome Convention applies a rebuttable presumption that the place of residence or business of the party effecting the contract’s “characteristic” performance is the proper law of the contract: The Rome Convention, Art. 4(2). In the case of a sale of goods, the characteristic performance of the contract is that of the seller; therefore the law of the seller’s place of business is the proper law of the contract.

another law under certain circumstances. Obviously, a presumption involves somewhat higher costs at the time of the first-order adjudication than the rule because the court may have to consider whether there is a case for its rebuttal. In the analysis that follows, we shall refer to the first and second methods collectively as "pre-emptive" when they do not admit rebuttal, and "presumptive" in other cases.

1. Choice of Law Defaults

The case for pre-emptive rules is a strong one if either of two conditions hold: first, if pre-emptive rules represent the preferences of a substantial majority of contracting parties, or second, if the costs of transacting in respect of choice of law approach zero. The less representative the rule, the more savings on adjudicative costs will be offset by the sum of (a) the transaction costs of parties who will contract around it for their preferred rule, plus (b) the social costs of an inefficient rule selection in cases where parties do not contract around it.¹⁶²

As is implicit in the previous paragraph, and of course in the Coase theorem,¹⁶³ a rule that is not widely preferred will be irrelevant to efficiency if the parties can costlessly transact around it by a choice of law clause. However, transaction costs are so rarely zero that this proviso need not trouble us much. Recall from Part II that there may be substantial social costs if the contract is governed by an inefficient choice of law. There may be an excessive amount of litigation and threats to breach the contract, litigation may be more costly,¹⁶⁴ and risks may be assigned to those who will bear them inefficiently.

The representativeness of untailed rules depends not only on the distribution of preferences but also on the form of pre-emptive rules. It is likely that the approach taken by the RESTATEMENT (FIRST) in referring issues associated with formation to the *lex loci contractus* and those associated with performance to the *lex loci solutionis*, may be as good an approximation as one is likely to get, should one require a rule that applies to all contracts.

On the other hand, untailed rules also have disadvantages. They may implicate two bodies of law rather than just one, which can create uncertainty, conflict, and unpredictability. Also, the sheer breadth of contracts to which a generic rule must apply greatly increases the likelihood that it will be unrepresentative.

¹⁶² See Ayres, *supra* note 15.

¹⁶³ Coase, *supra* note 19.

¹⁶⁴ For example, in international cases, the parties have to prove foreign law as a fact in a local court. See generally Richard Fentiman, *Foreign Law in English Courts*, 108 L.Q. REV. 142 (1992).

Although more costly in terms of rule formulation (that is, costly at the time of the second order decision), transaction-type untailed pre-emptive rules are more likely to reflect majority preferences. Thus, there would be, where appropriate, different rules for products liability cases,¹⁶⁵ medical negligence cases, industrial accidents, and so on. Professor Louis Kaplow makes this point when arguing that complex rules can replicate the sophistication of some standards, even if simple rules cannot.¹⁶⁶ Transaction-type rules continue to achieve lower first-order adjudication costs. However, they have a disadvantage of their own. Because the rules will never be collectively exhaustive or mutually exclusive, that is, there will always be some hiatuses and overlap, they may be subject to evasion by characterization of the nature of the case.¹⁶⁷

If transaction-type untailed rules fail to reflect substantial preferences, lawmakers can respond either by making them of presumptive status only or by moving towards more tailored forms of rule selection. So far as presumptions go, our analysis suggests that a court should admit another law than the one presumed to apply where the parties would have contracted in favor of it had they turned their mind to choice of law problems. This might be indicated where express provisions of the contract will be invalid under one, but not another, law.¹⁶⁸ However, if the presumption is only applied to the cases where there is a marked superiority between legal systems, it may be that there will in fact be few cases for it to actually apply. If one system has a marked superiority, one would expect the parties to make a choice of law in its favor. After all, choice of law clauses are quite frequently observed in agreements with multi-state features. If this is so, passivity in adjudication may be the best response in many cases.¹⁶⁹ The greater uncertainty arising from downgrading the rule to mere presumptive status may not be worth the benefits.

This comment applies equally to the tailored methods. Let us first consider the most significant relationship test, which we called semi-strong tailoring above.¹⁷⁰ It is important to note that while closest connection tests involve a degree of tailoring, they assume a strong correlation between jurisdiction and preference, i.e., that where parties' contracts are most closely connected with jurisdiction J, they prefer J's law.¹⁷¹ This is surprising for a tailored method. If preferences vary, or if jurisdictions supply substantially

¹⁶⁵Not every products liability case need be the same either. For instance, if air disasters are included in products liability cases, a place of the sale rule would be clumsy to use and heavily reliant on formalisms. It may be best to use the law of the place of departure.

¹⁶⁶See Kaplow, *supra* note 15, at 586-87.

¹⁶⁷See *supra* text accompanying notes 112-121.

¹⁶⁸See *supra* text accompanying note 54.

¹⁶⁹See generally Schwartz, *supra* note 13.

¹⁷⁰See *supra* text accompanying note 53-54.

¹⁷¹See *supra* text accompanying note 55-56.

inefficient rules, this assumption will be hard to maintain. Additionally, an approach that is reliant on examining and balancing different types of connections must confront the fact that there is no systematic, unbiased means of doing so. In other words, connections are incommensurable.¹⁷² Judges will implicitly resort to tie-breakers, such as preferences for forum law, to resolve deadlocks.¹⁷³ As compared with untailed pre-emptive rules, we believe "most significant relationship" tests are probably inferior. In simple cases, they will mostly reach the same result. In complex cases where factors point in more than one direction, the commensurability problem implies that semi-strong tailoring does no better than a tie-breaker which is known *ex ante*.

What of strong-form tailoring? Here, the court is not asking which jurisdiction is most closely connected. Rather, it is asking which legal system would the parties be most likely to have contracted for. Ordinarily, in longer contracts, parties will bargain for a cooperative outcome. There is no need for courts to ask what the parties would have agreed to, because the parties will probably end up agreeing to it by themselves. However, litigation may intervene to preclude a cooperative solution. Choice of law tailoring may be one way of remedying this, since it can simulate what the parties would have agreed to had negotiations not broken down. Tailoring may indeed be the *only* way this can be achieved, because the English courts have been hostile to contingent, or "floating", choice of law arrangements.¹⁷⁴ In these circumstances, there would be an asymmetry between a rule and a tailored standard. The tailored standard could be excluded by an express choice of law, but a pre-emptive rule could not easily be excluded in favor of a contingent arrangement.¹⁷⁵ Thus, tailoring rectifies the problem that contracts can be complete in the sense of specifying all their obligations, but they are insensitive to future states of the world. That is, because circumstances change over time, rule preferences

¹⁷² See generally Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

¹⁷³ See, e.g., *Coast Lines Ltd. v. Hudig & Veder Chartering N.V.*, [1972] 2 Q.B. 34, 44 ("[T]here are sometimes cases where . . . [t]he circumstances . . . point equally to two countries, or even to three What is an arbitrator or judge to do? Is he to toss up a coin and see which way it comes down? Surely not."). See also *Atlantic Underwriting Agencies Ltd. v. Compagnia Assicurazione di Milano S.P.A.*, [1979] 2 Lloyd's Rep. 240, 245.

¹⁷⁴ Floating choices of law do not lock in a choice of law at the time of the agreement but provide a procedure for setting it at some later time. See, e.g., *Rossano v. Manufacturers' Life Ins. Co.*, [1963] 2 Q.B. 352, 362; *Armar Shipping Co. v. Caisse Algerienne d'Assurance et de Reassurance*, [1980] 2 Lloyd's Rep. 450, 455; *Astro Venturoso Compania Naviera v. Hellenic Shipyards S.A.*, [1983] 1 Lloyd's Rep. 12, 15; *Dubai Electricity Co. v. Islamic Republic of Iran Shipping Lines*, [1984] 2 Lloyd's Rep. 380, 385; *Star Shipping A.S. v. China National Foreign Trade Transportation Corporation*, [1993] 2 Lloyd's Rep. 445. See also Whincop & Keyes, *Proper Law of the Contract*, *supra* note 43, at 539-42.

¹⁷⁵ See Ian Ayres, *Making a Difference: The Contractual Contributions of Easterbrook and Fischel*, 59 U. CHI. L. REV. 1391, 1403-06 (1992).

change, too. Untailored choices of law may induce costly renegotiation or breaches.¹⁷⁶

This is an impressive argument on paper, but it may be unconvincing in practice. For it to be significant in the context of market torts, it would imply that the parties' demand for reasonable precautions, or for insurance, would change over time. With the exception of industrial accidents, most market torts do not contemplate long term relations between the parties. Therefore, the need for tailoring to track longer term agreements will frequently be low. Even where contingent incompleteness is a substantial problem, courts must be competent in analyzing the rules to which the parties would have agreed. Courts may not be so if the information required for efficient gap-filling is unverifiable.¹⁷⁷ Finally, the discretion conferred by tailoring may not be used to simulate party agreement but used instead to further spurious, inefficient, or partisan objectives.¹⁷⁸

Thus, we would argue that transaction-type, pre-emptive rules respond best to the problems of tort choice of law rules.¹⁷⁹ First, they should set clear benchmarks at the time of contracting, which would permit parties to decide whether they want to remain with the default, or contract out of it. Obviously, this requires that the basis of the rule is something both parties will be able to recognize at the time of the contract. For instance, a consumer domicile rule in a products liability case would fail by this standard. Second, in conjunction with procedural rules such as those we considered above, they can economize on information costs.¹⁸⁰ Using one simple rule, which is based on one or two factors known to both parties, reduces the amount of information the parties need to acquire to ascertain the applicable law, compared to the much broader inquiry needed under tailoring. If the rule operates in a conventionally territorial manner, it will often reduce information costs with respect to legal rules, since conflicts issues can be substantially ignored in a majority of apparently domestic transactions. Parties are not precluded from choosing foreign law where there are advantages, but if this is to occur then the party proffering a choice of foreign law will be obliged to bear the other party's information costs.

¹⁷⁶ See Ayres & Gertner, *Strategic Contractual Inefficiency*, *supra* note 13, at 730. Tailored choices of law may also be a means of overcoming possible status quo biases. See *supra* text accompanying note 128.

¹⁷⁷ See Schwartz, *supra* note 13. See also Hadfield, *supra* note 15; Johnston, *supra* note 15.

¹⁷⁸ See generally Brilmayer, *Interest Analysis*, *supra* note 6, 395-96.

¹⁷⁹ See Georges R. Delaume, *The European Convention on the Law Applicable to Contractual Obligations: Why a Convention?*, 22 VA. J. INT'L. L. 105, 120 (1981); H. Matthew Horlacher, *The Rome Convention and the German Paradigm: Forecasting the Demise of the European Convention on the Law Applicable to Contractual Obligations*, 27 CORNELL INT'L. L.J. 173, 200 (1991).

¹⁸⁰ See *supra* text accompanying note 154.

Third, clearer rules will facilitate pricing in product markets and, depending on the selected tort rules, insurance markets. Fourth, they reduce forum shopping incentives and should take less time to litigate. Fifth, simpler rules facilitate class actions. The court can reduce the extent to which it must make individual findings on the *lex causae* applying to a class member's transaction.¹⁸¹ Thus, transaction-type, pre-emptive rules may be optimal for market torts, where they are simple, where they are based on criteria that are common knowledge, and where they correspond to the spatial locus of the market in which the transaction occurred. In Part IV, we will demonstrate an example of the transaction-type, untailed pre-emptive rule we would favor in products liability cases.

2. *Mandatory Choice of Law Methods*

Most of the advantages of transaction-type, pre-emptive rules continue to hold even when the choice of law rule becomes mandatory. Parties and markets still need the ex ante certainty that pre-emptive rules provide. The only change is the effect of preference heterogeneity on the preferred form of the choice of law method. Under a choice of law default, parties could contract around the rule by a choice of law clause. By hypothesis, they cannot do so here, irrespective of transaction costs. In theory, the parties could attempt to take the transaction outside the criterion of operation of the statute applying the tort rules.¹⁸² However, this form of exit is costly. We believe that the optimal approach is to retain pre-emptive rules but to dilute them to presumptions that are rebuttable where another jurisdiction is closely connected with the transaction¹⁸³ and where there are sound reasons to believe the parties would have contracted in favor of that system.

Presumptions are not an ideal solution because they may serve to protract litigation if one of the parties perceives the opportunity for private gain should the presumption be rebutted. However, some flexibility in choice of law is needed where preferences are heterogeneous and where contracting is not permitted. Ex post tailoring takes the place of ex ante contracting. To deal with opportunistic attempts to rebut the presumption, we would argue that parties should be given the freedom to contract to confirm the application of the legal system selected by the choice of law presumption.

¹⁸¹ These last two points are recognized in the American Law Institute's Complex Litigation Project: AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 6.01 (1994). See P. John Kozyris, *The Conflicts Provisions of the ALI's Complex Litigation Project: A Glass Half Full?*, 54 LA. L. REV. 953, 962 (1994).

¹⁸² See *supra* text accompanying note 143-145.

¹⁸³ This provides a limit on the number of options a court can be asked to consider, and so reduces adjudication costs.

3. Conclusion

Thus, an economic analysis of choice of law in market torts advocates an approach to choice of law that will, in the first instance, defer to the parties' choice of law, subject to a suitable disclosure requirement. In other cases, the law should set rules for each major transaction-type. Such rules should be based on commonly known criteria and should reflect the preferences of a majority of contracting parties. These rules should apply preemptively in cases where contractual choice of law is permitted and where it is not permitted they should apply presumptively. Presumptions should be rebuttable if another jurisdiction is more closely connected with the transaction and if there are sound reasons to believe the parties would have contracted in favor of that system. The rule that is the subject of the presumption should in every case be capable of contractual confirmation by the parties.

IV. APPLYING THE CONTRACTARIAN CHOICE OF LAW METHOD

One of the themes of Parts II and III is that information about the efficiency of markets and the nature of transactions that comprise them is essential to the analysis of choice of law rules. First, it is impossible to determine whether there is a market failure that warrants restrictions on the right to choose law contractually unless one defines and understands the market. For example, it is likely that the possibility of market failure is higher in cases of contracts between patients and heart surgeons than in the market for consumer products.¹⁸⁴ It is almost certain that market failure is more likely in either of those markets than in securities markets.

Second, we have advocated transaction-type untailored rules as the optimal default choice of law method. An understanding of the nature of transactions and party preferences is crucial to establishing choice of law rules that reflect party preferences. The following sections of this part are not intended to be the final word in the rules that should apply to the market torts we examine. Rather, they are intended to be a preliminary analysis of rule-setting in each area and a review of the issues raised by relevant theory and scholarship.

We first examine products liability cases. Here, we find that there may be a case against direct contractual choices of law, though this is far from certain. We then examine the resolution of choice of law issues in securities litigation. We argue, consistently with other commentators, that these cases should be assimilated with the choice of law rules applicable to the internal affairs and governance of the issuing corporation. In effect, we regard incorporation as a matter of direct choice between the parties to corpo-

¹⁸⁴ See generally Ellen S. Pryor, *The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation*, 79 VA. L. REV. 91 (1993).

rate contracts, and therefore this choice should be enforced in all matters arising from those contracts.

A. Products Liability

1. *Contractual Choices of Law*

Should the law permit a manufacturer and a buyer to subject their tort rights to an agreed choice of law? This question is very similar to another vexing dilemma: whether liability rules applicable to products cases should be subject to contract.¹⁸⁵ Professor Landes and Judge Posner argue that contracting may often not be an efficient solution to liability because the information costs associated with generally low accident risks may swamp the benefits from contracting.¹⁸⁶ They echo the finding of Professors Alan Schwartz and Louis Wilde that a market can function well, even if some consumers are poorly informed, if the market clears at prices that reflect the presence of other, well informed consumers.¹⁸⁷ However, there may only be a small fraction of consumers with any feel for product risks.¹⁸⁸ Even if consumers' perception of average product risks are accurate, manufacturers will have no incentive to provide quality that is greater than consumers' average valuation. Unless this problem can be controlled in some other way, such as by reputation, it will cause high quality manufacturers gradually to drop out, with the ultimate result being the unravelling of the market.¹⁸⁹

Professor Schwartz takes a different view.¹⁹⁰ He points out that the case for enforcing contracts depends on three things. First, consumers must know the content of their contracts.¹⁹¹ Not enforcing contracts is not the best means to achieve this. Procedural means such as disclosure and plain English requirements may be a better solution.¹⁹² This is consistent with our analysis of the law's procedure-settling functions.

Second, consumers must know the alternative terms offered in the market and must opt for the terms they prefer.¹⁹³ While Professor Schwartz

¹⁸⁵ See *supra* text accompanying note 28.

¹⁸⁶ LANDES & POSNER, *supra* note 18, at 280-82.

¹⁸⁷ Alan Schwartz & Louis Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979).

¹⁸⁸ See Shavell, *supra* note 18, at 54-55, 61-62. See also Beales et al., *supra* note 152, at 502.

¹⁸⁹ See Mark Geistfeld, *Manufacturer Moral Hazard and the Tort-Contract Issue in Products Liability*, 15 INT'L. REV. L. & ECON. 241 (1995).

¹⁹⁰ Schwartz, *supra* note 34.

¹⁹¹ *Id.* at 372-73.

¹⁹² This was our argument regarding choices of law: it is better to require their effect to be disclosed than to deprive parties of the right to agree to them. See *supra* text accompanying notes 154-156.

¹⁹³ Schwartz, *supra* note 34, at 373.

recognizes that comparison shopping is probably limited, firms will profit if they satisfy significant preferences for contract terms.

Scholars critical of law and economics are naturally skeptical of these two claims.¹⁹⁴ That there may be an economic basis for this intuition has been demonstrated by Professor Avery Katz.¹⁹⁵ Professor Katz analyzes contracts in which the buyer places value on aspects of the exchange which she cannot costlessly evaluate. These include the quality or the risk of the goods as well as warranty and contractual provisions. The problem for the buyer is that after she incurs the cost of investigating these aspects of the contract, that cost will cease to be relevant to her decision to enter that contract. Thus, reading the contract terms will not change the reservation price that bounds the contracts she will accept had she *not* investigated them. Thus, the seller will want to offer terms that put the buyer in the position of wanting to accept the contract, but only just.¹⁹⁶ The buyer who reads will be in the same position as the buyer who does not read, but the former will wish she had not incurred the cost of doing so. Therefore, in equilibrium, buyers will not read, and sellers will offer low quality terms. It follows that we should not be too ready to credit an argument that says consumers will opt for the contract terms they like if they cannot be expected to know what the terms are.

Professor Katz acknowledges that sellers may profit by offering higher quality terms where consumers are willing to pay more for higher quality, but this will depend on sellers being able to make information regarding this attribute of the contract available to buyers at very low cost.¹⁹⁷ This might be done with a specific requirement to bring the matter to the consumer's attention, as we have argued in the choice of law context.¹⁹⁸

Third, Professor Schwartz notes consumers must perceive risks correctly and appreciate the effect on risk of product alterations.¹⁹⁹ He argues that there is no theoretical or empirical reason to believe that consumer estimates err systematically in one direction or the other.²⁰⁰ Much behavioral research over the last two decades shows that human decision-making is often substantially flawed, because of the tendency to use informal heuristics to analyze risks.²⁰¹ These heuristics may lead to overestimation or un-

¹⁹⁴ See the discussion of contracts of adhesion, *supra* text accompanying note 151.

¹⁹⁵ See Katz, *Strategic Structure*, *supra* note 155, at 272-93, and Katz, *Your Terms*, *supra* note 155, the former article being a non-technical analysis of these issues.

¹⁹⁶ Katz, *Strategic Structure*, *supra* note 155, at 286-87.

¹⁹⁷ *Id.* at 288.

¹⁹⁸ See *supra* text accompanying notes 155-156.

¹⁹⁹ Schwartz, *supra* note 34, at 374-78.

²⁰⁰ *Id.* at 378-82. See also Shavell, *supra* note 18, at 54.

²⁰¹ The pathbreaking work in this area is by Amos Tversky and Daniel Kahnemann. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY* 3 (Daniel Kahneman *et al.* eds., 1982). For reviews of this literature and assessments of its relevance to legal policy, see Ward Edwards & Detlof von

derestimation based on, for example, the vivid or bland nature of the risk. Failures of rationality need not be uniform across all transactors. Repeat transactors may be more accurate than one-time transactors.²⁰²

So while the case for contractual choices of law is not compelling, neither is the case against it, since the predictions of behavioral economic theory are not sufficiently tractable to use for policy-setting in this area.²⁰³ This dilemma is compounded by the fact that the problem arises in a private international law context in which accepted doctrinal approaches admit either *all* or *no* contractual choices of law. Intermediate positions are possible, but by and large these require statutory sanction, because courts are in a poor position to regulate which contractual choices they will enforce and which they will not.²⁰⁴ Courts lack the necessary information to undertake that task. Unless there were some form of coordination among courts as to the standards applied in order to judge whether the choice of law should be enforced, forum approaches would become fractured and divergent. Variation in these "substantive" choice of law rules would increase the amount of forum shopping, which was one of the very problems to which contractual choices of law were thought to offer a solution. Choice of law problems would begin anew.

All of this implies that courts should adopt a passive approach to the enforcement of contracts not prohibited by legislation, or at least adopt the same approach to choices of law as they do in "pure" contract cases. Given that much U.S. legislation now leaves substantial issues of tort liability and third party insurance to contract,²⁰⁵ a similar approach in tort law would at least have the (minor) virtue of consistency. So far as statutory solutions go, perhaps the simplest response would be to prohibit contractual choices of tort law in consumer contracts, while leaving business purchasers with the ability to make their own choices.²⁰⁶

Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225 (1986); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Korobkin, *supra* note 128. *But cf.* Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998) (criticizing behavioral economics for lacking predictive power and inaccurately caricaturing the concept of rational choice in modern economics).

²⁰²Thus, the Rome Convention provides that different rules regarding choices of law should apply to consumer contracts. ROME CONVENTION, arts. 6, 7.

²⁰³It might be added that even if there are relevant market failures, their costs must be offset against the seriously dysfunctional choice of law method that currently applies to market torts.

²⁰⁴See Schwartz, *supra* note 34, at 378.

²⁰⁵See *supra* text accompanying note 28.

²⁰⁶See *supra* text accompanying note 202. *But cf.* William J. Woodward, Jr., "Sale" of Law and Forum and the Widening Gulf Between "Consumer" and "Nonconsumer" Con-

2. Choice of Law Defaults in Products Liability

Our analysis of choice of law for products liability cases substantially follows our general analysis of choice of law defaults in part III.B. The optimal products liability default is a pre-emptive rule, while the optimal mandatory rule is a presumption, each selecting the law of the place of sale to the consumer. This recommendation, it may be recalled, was anticipated by Professor McConnell.²⁰⁷

A place of sale rule reduces information costs, for it minimizes the amount of information about legal rules that buyers need to have. Unless a buyer goes to the trouble of buying products abroad, such as by the Internet or by mail-order, a private international law issue should simply not arise. The buyer will not need to acquire further information about foreign legal rules and can assume that, in the absence of a choice of law being disclosed and explained, local law will apply. The rule enables the seller to decide whether to distribute its product within a given jurisdiction, based on its markets and potential legal exposure. Although some manufacturers may not have direct control over their product distribution, it seems most practical to make manufacturers bear the risk, given that they have lower transaction costs than buyers in making arrangements regarding final markets with the distributor.

A place of sale rule in practice is not perfect. It will not produce uniformity in rights in mass products liability litigation that involves buyers from multiple states.²⁰⁸ It is thus perhaps less of a high-low strategy when there are multiple plaintiffs. However, there are no perfect rules in that situation. If one adopts rules that compel mass torts to be resolved by a single law, one will either destroy ex ante predictability or, at least, increase the information costs to consumers of acquiring information about the liability rules governing their contract. One simply cannot have it both ways. Given the other advantages of a place of sale rule, and the fact that mass

tracts in the UCC, 75 WASH. U. L. Q. 243 (1997). In fairness, though, it must be added that legislatures have often failed specifically to address the question of the impact of private international law issues on products liability legislation. See Stuart Dutton, *International Products Liability Litigation: The Territorial Application of Part VA of the Trade Practices Act 1974 (Cth) and Part I of the Consumer Protection Act 1987 (UK)*, 22 MON. U. L. REV. 244 (1996); P. John Kozyris, *Choice of Law for Products Liability: Whither Ohio?*, 48 OHIO ST. L.J. 377, 377 (1987).

²⁰⁷ McConnell, *supra* note 100, at 98. See also O'Hara & Ribstein, *supra* note 102, at 769-70; Harvey Perlman, *Products Liability Reform in Congress: An Issue of Federalism*, 48 OHIO ST. L.J. 503, 508 (1987); Brilmayer, *Rights*, *supra* note 6, at 1307-08. But cf. P. John Kozyris, *Interest Analysis Facing its Critics – And, Incidentally, What Should Be Done About Choice of Law for Products Liability?*, 46 OHIO ST. L.J. 569, 583-85 (1985) (advocating place of intended use where mutually known, otherwise place of delivery).

²⁰⁸ For instance, the A.L.I.'s Complex Litigation project is intended to ascertain a choice of law rule which will permit mass torts by the law of a single state. See Complex Litigation Proposal, *supra* note 181, § 6.01(a).

torts are a rare event for any single consumer, the place of sale rule seems a reasonable compromise.

Another practical difficulty with a place of sale rule is that the place of sale may not always be apparent. For example, take a case in which a buyer litigates with respect to a product such as a drug, from which she suffered adverse effects as a result of long-term administration. What happens if she has moved between jurisdictions during the period in question?²⁰⁹ Of course, such issues are no easier to resolve using the *locus delicti*, which engrafts an added layer of complexity regarding duties to warn. Few rules giving certainty at the time of the contract will be completely certain *ex post*.²¹⁰

B. Securities Litigation

Choice of law problems are also presented by litigation brought by investors in corporate securities against the officers of a corporation, professionals (such as auditors and underwriters) retained by the corporation, and the corporation itself.²¹¹ Such lawsuits fall into two categories. In one category are suits that allege a common law cause of action, such as negligence by the auditor in the audit of financial statements included in a disclosure document used in capital raising. Australia and England have seen much litigation of this sort.²¹² In the second category are suits based on a cause of action deriving from a statute regulating securities. The twentieth century has seen extensive legislative regulation of securities market conduct including disclosure and fundraising.²¹³ In federations such as Australia and the United States, where this statutory law has been promulgated by the federal government, conflicts can occur only on an international basis, not on an intra-national basis.²¹⁴ However, with increasing internationali-

²⁰⁹ See Gottesman, *supra* note 63, at 43.

²¹⁰ See generally RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 37-42 (1995).

²¹¹ Why consider securities litigation in an article on torts? First, some securities litigation alleges common law negligence. See *infra* text accompanying note 212. Second, like other tort rules, the provisions in securities regulation statutes tend to be mandatory. Third, the A.L.I. Complex Litigation choice of law proposal may apply to them, according to the Introductory Note to Chapter 6 and the comments in § 6.01. See Complex Litigation Proposal, *supra* note 181.

²¹² See, e.g., *Caparo Industries PLC v. Dickman* [1990] 2 App. Cas. 605; *Columbia Coffee & Tea Pty Ltd. v. Churchill* (1992) 29 N.S.W.L.R. 141; *Esanda Finance Corporation Pty Ltd. v. Peat Marwick Hungerfords* (1997) 188 C.L.R. 241.

²¹³ See, e.g., *Securities Act of 1933*, 15 U.S.C. §§ 77a-77bbbb (1994 & Supp.); *Securities Exchange Act of 1934*, 15 U.S.C. §§ 78a-78m (1994 & Supp.); *Corporations Law* (Cth) Parts 7.11 and 7.12; *Financial Services Act 1986* (U.K.).

²¹⁴ However, that is not completely true of the United States, as all states have securities legislation, and state legislation may be emerging from a long desuetude. See Mark A. Sargent, *A Future for Blue Sky Law*, 62 U. CIN. L. REV. 471, 504-05 (1993).

sation of securities markets, these issues are important to the efficiency and integrity of global finance.

A preliminary issue is whether these issues are amenable at all to the contractarian theory of choice of law that we have described. When the defendant is a professional retained by the corporation, there is no direct contractual chain between the parties as there is between consumer and manufacturer. However, economic analysis can explain the provision of audits or other forms of disclosure by a company offering its securities.²¹⁵ In Coasean terms, investors value the verification of company information and would be prepared to pay for it because it is relevant to security returns. There are barriers to their doing so, in that a producer of information can rarely capture all of its benefits. However, the company, which can provide the verification information most cheaply, will profit if it does so since investors will pay more for these securities. Thus, the audit commissioned by the company reduces the third party costs of information and transacting.

In the case of other types of rights asserted against officers and the corporation itself, contractual analyses are appropriate *a fortiori*. The economic analysis of corporate law has demonstrated that the corporation is a nexus of contracts. That is, officers, shareholders, creditors, employees and others have contractual relationships with each other. The corporation is simply a nexus of these related contracts.²¹⁶ Thus, a contractarian approach is a very appropriate to the analysis of choice of law issues raised by securities litigation

We have said above that the optimal choice of law rule for a given type of transaction must flow from a study of the transaction's market context. An important aspect of securities markets is that the transaction cost of trading is typically very low. For most transactions, securities can be reduced to their risk-return properties, giving them a uniquely high degree of substitutability.²¹⁷ These features give securities markets a high degree of efficiency in the response of securities prices to new information. One of the consequences of efficient, low cost markets is that territoriality concepts wither. It matters not at all that the investor bought her Black, Inc. securities in Tokyo, or in Sydney, or in New York. Low transaction costs mean

²¹⁵ See EASTERBROOK & FISCHER, *supra* note 13, at 280-83; Ross L. Watts & Jerold L. Zimmerman, *Agency Problems, Auditing and the Theory of the Firm*, 26 J.L. & ECON. 613 (1983).

²¹⁶ The concept of the company as a nexus of contracts was first described in Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310-11 (1976). The definitive synthesis of that proposition with corporate law scholarship is EASTERBROOK & FISCHER, *supra* note 13.

²¹⁷ Nicholas L. Georgakopoulos, *Frauds, Markets, and Fraud-on-the-Market: The Tortured Transition of Justifiable Reliance from Deceit to Securities Fraud*, 49 U. MIAMI L. REV. 671, 679-81 (1995).

that price differentials persist only very briefly before they are eliminated by the effects of arbitrage.²¹⁸

These features affect the optimal choice of law rule. Rights must be constant across all those who invest in a corporation's securities.²¹⁹ Place of sale, the basis of the choice of law rule in the United States,²²⁰ is a meaningless datum in the context of a securities market. The place of the wrong would be a highly impractical rule because of ascertainment difficulties, especially when a corporation has multinational or indeed cyberspatial operations.²²¹

The best choice of law rule is one that selects the law of the place of incorporation.²²² The place of incorporation is used in common law countries to resolve conflicts regarding the corporation's "internal affairs", such as shareholders' rights and governance issues.²²³ It has formed the basis of jurisdictional competition for incorporations in the United States. Despite

²¹⁸ On the efficient capital markets hypothesis, see generally Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383 (1970); Eugene F. Fama, *Efficient Capital Markets II*, 46 J. FIN. 1575 (1991). For application of the theory to legal scholarship, see generally Ronald A. Gilson & Reinier Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984); Jeffrey N. Gordon & Lewis Kornhauser, *Efficient Markets, Costly Information and Securities Research*, 60 N.Y.U.L. REV. 761 (1985); Donald C. Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 U. PA. L. REV. 851 (1992); Lynn Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 MICH. L. REV. 613 (1988). See also Jolls *et al.*, *supra* note 201, at 1485-86 (referring to the importance of arbitrage to rational behavior in a market).

²¹⁹ See P. John Kozyris, *Some Observations on State Regulation of Multistate Takeovers – Controlling Choice of Law Through the Commerce Clause*, 14 DEL. J. CORP. L. 499, 509-11 (1989) (stressing the need for uniformity across investors); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2403-04 (1998) (same).

²²⁰ UNIFORM SECURITIES ACT, § 414, 7B U.L.A. 672 (1985).

²²¹ Stephen J. Choi, *Gatekeepers and the Internet: Rethinking the Regulation of Small Business Capital Formation*, 2 J. SMALL & EMERGING BUS. L. 27, 41 (1998).

²²² Where incorporation occurs under state legislation but securities regulation has a substantially federal basis, this rule would select the securities law of the federation of which the state was part. If federal regulation ceases to pre-empt the state's right to regulate, the rule would exclude state securities regulation. Competitive models of securities regulation are proposed in Romano, *supra* note 219, and in Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the Reach of International Securities Regulation*, 71 S. CAL. L. REV. 903 (1998).

²²³ LAWRENCE A. COLLINS, DICEY AND MORRIS ON THE CONFLICT OF LAWS 1109-13 (12th ed. 1993); SYKES & PRYLES, *supra* note 51, at 398-99; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302(2) (1971). For critical analysis of the difference between the U.K. and U.S. choice of law approach and the approach in European Union states other than the United Kingdom, see generally David Charny, *Competition among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the 'Race to the Bottom' in the European Communities*, 31 HARV. INT'L. L.J. 423 (1991); R.R. Drury, *The Regulation and Recognition of Foreign Corporations: Responses to the 'Delaware Syndrome'*, 57 CUMB. L.J. 165 (1998).

much criticism,²²⁴ empirical evidence indicates that such competition has value to shareholders.²²⁵ However, the rule does not apply to all corporate affairs. The characterization process would refer rights asserted in tort to tort choice of law rules. Rights arising from securities regulation are most commonly referred to the law of the place of the transaction.²²⁶ As we have seen, these rules are inappropriate.

The advantages of applying the internal affairs rule to shareholders' rights in tort are that, first, it provides a simple rule which minimizes information costs. Shareholders only need to know the company's place of incorporation. In making judgments that depend on applicable liability rules, corporations need only consult a single body of law, and they need not concern themselves with the exchanges on which shareholders buy shares. Second, it provides a single body of law for all of the rights a shareholder asserts. This makes for consistency between the rights forming the corporate contract between shareholders and managers and the tort rights shareholders assert against other defendants.²²⁷ Third, the rule has the effect of a contract between shareholders and managers regarding the future provision of information and disclosure. Shareholders know that they will be able to enforce the laws of the place of incorporation. Promoters and managers can give a credible commitment about the quality of future information. Fourth, this predictability facilitates the pricing of shares. Because incorporation in a jurisdiction is a credible way to lock in the application of laws, the quality of these laws should be reflected in the price of securities offered by the corporation.²²⁸ The value of the corporation will be maximized by choosing the jurisdiction with the best corporate and securities laws.

Professor Romano has used this argument to advocate the devolution of securities regulation authority from the federal level to state level.²²⁹ Professor Romano's argument further advocates a right for a corporation to select a securities domicile which could be separate from the place of incorporation.²³⁰ This approach uncouples securities law from other corporate

²²⁴The most influential critique is William Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974). *But cf.* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977).

²²⁵See Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985) [hereinafter Romano, *Law as a Product*]; Roberta Romano, *Corporate Law and Corporate Governance*, 5 IND. & CORP. CHANGE 277, 313-30 (1996); Romano, *supra* note 219, at 2383-88. *See also* Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987).

²²⁶See *supra* text accompanying note 220; UNIFORM SECURITIES ACT § 414, 7B U.L.A. 672 (1985).

²²⁷These include rights conventionally thought of as relating to internal affairs, and those relating to securities regulation.

²²⁸See Romano, *Law as a Product*, *supra* note 225.

²²⁹See Romano, *supra* note 219.

²³⁰*Id.* at 2407-08.

law, potentially permitting greater choice. It would also be the logical requirement if the federal government is to become a competitor with the states as a place of securities domicile, unless the federal government is also to become a competitor for incorporations.

It will be noted that so far we have only advocated a *single* solution: apply the law of the place of incorporation. Since every corporation must be incorporated somewhere, this contractual solution cannot conceivably involve gaps in the choice of law. Hence, unless there is some reason to believe it to be inappropriate to govern securities litigation choice of law issues by the state of incorporation, there is no need for a choice of law default. Is there a relevant market failure that would make these choice of law rules inappropriate? The usual reaction to market failure has been advocacy of federal law.²³¹ Even if securities legislation purports to apply extraterritorially, a foreign forum, if not a domestic one, must still make a judgment on which law to apply.²³² Yet federal law cannot change the fact that international cases still raise choice of law issues.²³³

There is no reason to believe that an internal affairs rule would discriminate against out-of-state investors. Nothing would compel them to invest in out-of-state securities. They could instruct brokers not to invest in foreign corporations. Since securities are so readily substitutable, investors would still have a substantial amount of choice among investments.²³⁴ Brokers and exchanges, among others, would be likely to serve as intermediaries or "gatekeepers", which would allow investors to reduce the costs of obtaining information about different regimes.²³⁵ In terms of its uniformity and predictability, the place of incorporation rule is far superior to other conceivable rules.

This section has shown how a contractarian approach to choice of law in market torts might be applied to analytically complex torts and tort-like causes of action. As is clear from our conclusions, a single choice of law rule cannot be recommended because the appropriate method depends on relevant aspects of the market and the nature of contracts formed therein. Thus, in products liability cases we embraced territoriality, but we rejected it in securities litigation cases. Likewise, in products liability cases, we expressed doubt about enforcing the chosen law, but we affirmed the place of

²³¹ See, e.g., Cary, *supra* note 224. See also Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992).

²³² See generally Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT'L L. & BUS. 207 (1997); Arthur R. Pinto, *The Internationalization of the Hostile Takeover Market: Its Implications for Choice of Law in Corporate and Securities Law*, 16 BROOK. J. INT'L L. 55 (1990).

²³³ Of course, corporate law can always be harmonized internationally, difficult though that may be.

²³⁴ See Butler & Ribstein, *supra* note 151, at 13.

²³⁵ See Choi, *supra* note 221, at 42-48.

incorporation, as the product of corporate contracts, in securities litigation cases. This approach is one which looks for answers not in theories of private international law or state sovereignty, as do vested rights or interest analysis, but in theories of transacting and property rights. Thus, it is a theory which extends theories of the substantive law areas of tort and contract to multistate contexts, not a theory which grafts a freestanding theory about conflicts onto substantive law areas. It therefore offers a more principled and more reliable means of pursuing legitimate policy goals.

V. CONCLUSION

In this article, we have examined the relationship between tort and contract at the theoretical level to give a normative analysis of the relationship they should have at the conflictual level. We also demonstrate how conflictual issues can be analyzed in terms of the legal and economic theory examining the form of legal rules, and the first- and second-order strategies that are adopted to resolve legal problems. Private international law must draw on these literatures if its scholarship is to drag itself out of the "dismal swamp" its doctrine is often described as inhabiting.²³⁶

Real world contracts are incomplete, and choice of law has a role in selecting the jurisdiction which supplies rules to fill those gaps. However, both English and United States tort law choice of law rules are inherently unsuitable as gap-filling methods in securities market tort cases. We have also argued that the rule selecting the law which has the most significant relationship to the contract or the tort may not be appropriate, either. These problems are exacerbated by the characterization process. We have argued that the primary norm of contract choice of law methods — selection of the *lex causae* by express choice of law — should be embraced as a presumption in contract cases, but that this presumption should be rebuttable on grounds of market failure. Market failure will very rarely be a generic phenomenon, and remedying it is thus better suited to legislative intervention than to judicial activism. It requires study of particular market contexts. It may exist in product markets, but is much less likely to exist in investment markets. Likewise, contract theory is very helpful in constructing choice of law methods that should apply in the absence of choice.

An important part of our analysis has been to show how different rules affect the time at which adjudication costs are incurred. The natural advantage of a choice-enforcement rule is that it transfers the costs to the parties whose information on their preferences should be superior. In cases where choice-enforcement is not appropriate, we have generally argued in favor of high-low methods, which select choice of law rules appropriate to transaction-types. These should attempt to satisfy party preferences, they should be based on criteria that are common knowledge, and they should

²³⁶William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

minimize the length of adjudication and the variation among awards across forums.

Our argument, however, will not go uncriticized. Most conflicts scholars will see this as a return to vested rights, in effect if not in theory. We have subscribed to the same multilateralist goals — uniformity across forums, certainty, and predictability. We do not feel ashamed that we do so. Unlike most proponents of interest analysis, we see private international law in general, and choice of law rules in particular, as an uninspiring font of justice. Scholars have been told many, many times that the tort system is prohibitively expensive in delivering compensation compared to first-party insurance and social security.

Some scholars, such as Professor Juenger, will criticize us for reverting to an approach likely to expose plaintiffs to the tort reform statutes he regards as the product of special interest groups.²³⁷ He maintains that the conflicts revolution has not been about interest analysis but about the recognition of the need for flexibility to avoid bad substantive laws. Even if one were to ignore crises in products and insurance markets, such a method presupposes that we want more, not less, judicial activism, and that we can find judges who can combine those activist tendencies with sufficient sagacity to be able to recognize better laws. Professor Juenger, in preferring to resolve problems such as mass torts by substantive (i.e., federal law) solutions rather than conflictual solutions does not recognize that interest groups will *prefer* a federal substantive solution because it is much harder to avoid.²³⁸ Our solution, by contrast, takes interest groups seriously, embraces exit strategies, and asks judges to leave their activist tendencies to law review articles.

A more serious criticism is that by adopting a transaction-type approach to the law, we open up some scope for a new sort of characterization problem. The choice between transactions becomes an escape device. That this may happen on occasions is likely, but so what? If there are radical differences between the potentially applicable laws, parties are likely to make a choice of law if they are permitted to do so. If the differences are relatively minor with regard to the underlying risk, the efficiency effects will be minor, too. It takes no special skill to think of a case that creates a problem for a rule. In terms of the behavioral theory discussed in this paper, academic rationality is severely bounded, because our perceptions are biased by an availability heuristic — we read too many exceptional cases and not enough routine ones.²³⁹

²³⁷ See, e.g., Friedrich K. Juenger, *The Complex Litigation Project's Tort Choice-Of-Law Rules*, 54 LA. L. REV. 907, 916-19 (1994).

²³⁸ And of course this option is not available in international cases.

²³⁹ Jolls *et al.*, *supra* note 201, at 1477-78.

To close this essay with a view towards future research, we emphasize how important empirical research should be to the future of policy-based conflictual research.²⁴⁰ Much remains to be done in examining how parties in the real world deal with choice of law issues. Is there a status quo bias, and if so how strong is it? Is commercial arbitration a solution that parties prefer as a superior means of dispute resolution or simply as a better alternative than forum biases and judicial incompetence? What differences are there in the resolution of contractual problems in long term relations compared to faceless mass-market transacting? Do more cases settle under rule-like choices of law than standard-like ones? These questions will provide a platform on which to model theoretically the impact of legal rules, and provide either endorsement or criticism of assumptions about choice of law. We hope to have assisted in the formulation of those research questions. One day we hope to see them answered.

²⁴⁰ See, e.g., David W. Robertson, *Forum non Conveniens in America and England: A Rather Fantastic Fiction*, 103 L.Q. REV. 398 (1987); Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989).