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A Multilateralist Method of Choice of Law

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INTRODUCTION

> The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.[1]

William Prosser wrote these words in 1953. What would Prosser think of the state of conflict of laws today?

This Article will explore the dismal swamp of conflict of laws. It will present a theory on how conflict of laws got to be the way it is today It will then propose a solution to the problems found in modern choice of law

This author believes that many of the problems in modern conflicts are due to a switch from a multilateralist approach to a unilateralist approach, beginning in the 1920s and 1930s. There are three major classes of choice of law systems: (1) the unilateralist, (2) the multilateralist, and (3) the substantive or better rule.[2] Unilateralist systems focus on the application of one jurisdiction's laws; they begin with forum law, and they tend to favor forum law[3]

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[1] William L. Prosser, *Interstate Publication*, 51 MICH. L. REV 959, 971 (1952-53).

[2] FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 45-46 (1993). For a discussion of the better rule approach, see *infra* Part II.B (notes 63-66 and accompanying text).

[3] Dirk H. Bliesener, *Fairness and Choice of Law: A Critique of the*

"Multilateralist approaches attempt to connect a factual situation with the 'closest' appropriate legal system."[4] A multilateralist method has two main features: 1) "that choice of law may not reflect any unjustified preferences," and 2) that "the result of a choice-of-law decision be foreseeable by the parties to the controversy."[5]

This author believes that a multilateralist approach is the best option for a group of states united under a federal government and constitution, such as the United States.[6] This author thinks that a choice of law system should: (1) be grounded in positive law, (2) be substantively neutral, (3) be forum neutral, (4) be predictable, (5) reflect the relevant states' interests, and (6) be fair to the litigants. A multilaterist method of choice of law can fulfill these requirements,[7] while a unilateralist one cannot. In particular, a unilateralist approach is, by definition not forum neutral. It is usually neither substantially fair nor predictable, and it generally emphasizes the forum's interests, at the expense of the interests of the litigants.[8]

This Article proposes a multilateralist method of choice of law, which draws on existing approaches and that this author believes satisfies the above criteria. The method is comprised of two steps: (1) identify the legal relations created by the states whose laws might apply to the facts, and (2) when two or more states create legal relations that apply to the facts, choose the state's law that has the closest connection to the controversy.[9]

Political Rights-Based Approach to the Conflict of Laws, 42 AM. J. COMP. L. 687, 704 (1994); *see also* LEA BRILMAYER, CONFLICT OF LAWS 17-19 (2d ed. 1995).

[4] Bliesener, *supra* note 3, at 705; *see also* BRILMAYER, *supra* note 3, at 18.

[5] Bliesener, *supra* note 3, at 707

[6] This author believes that a choice of law method that works well in an international setting may not be the best method for a group of states united under a federal government and constitution. As David Cavers has noted:

> Though our nation is divided into fifty-one separate legal systems, our people act most the time as if they lived in a single one. In contrast, when people or their legal transactions cross national border lines, I suspect the legal significance of the action is much more likely to be observed.

DAVID F CAVERS, THE CHOICE-OF-LAW PROCESS 119 (1965).

[7] *See infra* Part IV.C (notes 152-55 and accompanying text).

[8] These matters are treated in detail in Part III (*infra* notes 107-41 and accompanying text).

[9] *See infra* Part IV (notes 142-55 and accompanying text).

Part I of this Article examines the move from a multilateralist approach to choice of law to a unilateralist one, beginning in the 1920s and 1930s.[10] Part II discusses the major choice of law methods that courts use today, as well as additional approaches that have been advocated by conflicts scholars.[11] Part III presents this author's criteria for choice of law [12] Part IV sets out this author's multilateralist method of choice of law,[13] and Part V analyzes famous choice of law cases using this author's system.[14] Finally, Part VI examines the need for a uniform method of choice of law [15]

I. THE MOVE FROM A MULTILATERALIST TO A UNILATERALIST APPROACH TO CHOICE OF LAW

A. Classical Legal Thought and Joseph Beale's Vested Rights Approach

Joseph Beale's multilateralist, vested rights approach dominated choice of law during the first third of the twentieth century, and it served as the basis of the *Restatement of Law of Conflict of Laws*, promulgated in 1934.[16] Beale's vested rights approach arose during a period of legal scholarship often called Classical Legal Thought.[17] Classical Legal Thought emerged after the Civil War in an attempt to formulate an autonomous legal culture that could deal with the enormous economic and social changes that were occurring at that time. Classical Legal Thought was a major jurisprudential school from approximately 1870 until the 1930s, and major proponents of this school included Christopher Columbus Langdell, Samuel Williston, and Beale.[18]

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[10] *See infra* notes 16-57 and accompanying text.

[11] *See infra* notes 58-106 and accompanying text.

[12] *See infra* notes 107-41 and accompanying text.

[13] *See infra* notes 142-55 and accompanying text.

[14] *See infra* notes 156-236 and accompanying text.

[15] *See infra* notes 237-43 and accompanying text.

[16] ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW 1 (3d ed. 1977).

[17] According to Morton Horwitz, Duncan Kennedy coined the term Classical Legal Thought. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 273 n.1 (1992); *see* Duncan Kennedy, *Towards an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. LAW & SOC. 3 (1980).

[18] HORWITZ, *supra* note 17, at 5, 9-10; G. EDWARD WHITE, TORT LAW IN AMERICA. AN INTELLECTUAL HISTORY 6 (1985) [hereinafter WHITE, TORT

Classical Legal Thought scholars considered law a science.[19] Modern scholars have labeled their mode of thinking "conceptualistic" or "formalistic."[20]

> Obsession with ineluctable rules, principles, and axioms became characteristic of the academic disciplines of the time. By applying a curious combination of spiritualism and Darwinism, economists, natural scientists, and sociologists discovered universal absolutes that governed their fields. One had only to discover these truths: political, economic, sociological, and biological theories flowed from the discovery
>
> Jurisprudence was likewise attracted to the universal principle. Judges began their decisions by making verbal distinctions, defining concepts in useful ways. They then pronounced their definitions as axiomatic. From then on it was a rush downward to the result: the axiom was applied to the facts of a case, and certain things "invariably" followed.[21]

Related to this syllogistic thinking is the nineteenth-century preoccupation with categories.[22] "For late nineteenth-century scientists, the primary end of legal scholarship was the extraction and classification of governing principles in an area of law "[23] These thinkers used bright-line distinctions, rather than "differences of degree."[24] The key was to place a dispute in the correct category; once the dispute was in the correct category, the result became clear.[25]

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[19] Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV 1, 5 (1983).

[20] GRANT GILMORE, THE AGES OF AMERICAN LAW 62 (1977); HORWITZ, *supra* note 17, at 16-17; WHITE, TORT LAW, *supra* note 18, at 6. *See generally* Grey, *supra* note 19. For a defense of the period's legal thought that tries to view it in its original context, see Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV 1 (1980).

[21] G. EDWARD WHITE, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America, in* PATTERNS OF AMERICAN LEGAL THOUGHT 99, 101-02 (1978) [hereinafter WHITE, *Sociological Jurisprudence*].

[22] HORWITZ, *supra* note 17, at 17-19.

[23] WHITE, TORT LAW, *supra* note 18, at 33.

[24] HORWITZ, *supra* note 17, at 17-18.

[25] *Id.* at 18.

Also part of Classical Legal Thought was an objective approach to law.[26] Thinkers adopted objective theories to create uniformity Thus, courts determined negligence objectively, rather than by looking at the tortfeasor's subjective intent. Similarly, courts examined questions of contract formation not based on the parties' subjective intent, but on objective factors.[27]

Thomas C. Grey has described Christopher Columbus Langdell's approach to law· "Langdell believed that through scientific methods lawyers could derive correct legal judgments from a few fundamental principles and concepts, which it was the task of the scholar-scientist like himself to discover."[28]

Elizabeth Mensch has demonstrated how this process worked in contracts:

> Williston's monumental treatise on contracts assumed that from the general principle of free contract one could derive the few central doctrines around which the treatise was organized — offer and acceptance, consideration, excuse, etc. — and from the logic of those central doctrines one could derive all of the specific rules that made up the law of contracts. Those rules could then be applied, rigidly and formally, to *any* particular social context; in fact, failure to do so would be evidence of judicial irrationality and/or irresponsibility.[29]

Beale's vested rights approach to choice of law followed the tenets of Classical Legal Thought; in particular, once one places a set of facts in the correct substantive category, choice of law is clear. Beale based his system on territory; a state has exclusive jurisdiction within its borders and no authority outside its borders.[30] Under Beale's system, the location of a significant territorial factor in the occurrence or transaction, usually the last act, determines which state's law should govern.[31] For example, the law of the place of the injury controls in torts cases, and the

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[26] Grey, *supra* note 19, at 11.

[27] HORWITZ, *supra* note 17, at 35.

[28] Grey, *supra* note 19, at 5.

[29] Elizabeth Mensch, *The History of Mainstream Legal Thought, in* THE POLITICS OF LAW 16, 24-25 (David Kairys ed., 1982) (footnote omitted).

[30] JOSEPH H. BEALE, SELECTIONS FROM A TREATISE ON THE CONFLICT OF LAWS 6 (1935).

[31] RESTATEMENT OF THE LAW OF CONFLICT OF LAWS § 377 (1934) [hereinafter FIRST RESTATEMENT].

law of the place of the making of a contract applies in contract cases.[32] In addition, under the vested rights approach, rights and obligations "vest" at the applicable time and place in accordance with the state's law, and other jurisdictions must recognize the rights or obligations.[33] In other words, a court does not enforce another state's law, it enforces vested rights arising under the other state's law

In theory, vested rights provides a simple and uniform approach to choice of law A court merely determines the character of the issue, and applies the appropriate rule to the facts. The result should be the same regardless of the forum in which the case is filed.

The vested rights approach, however, contains mechanisms that allow judges to avoid "awkward" results. One of these mechanisms is characterization. For example, a court can characterize a problem as a contracts case instead of a torts case, allowing a different state's rule to apply [34] Also, a court does not have to enforce a vested right when enforcement of that right violates the forum's public policy [35]

B. The Realist Attack on Beale's Approach

Realist scholars in the 1920s and 1930s attacked the tenets of Classical Legal Thought and Beale's vested rights approach to choice of law, which exemplified Classical Legal Thought. "The point of the Realist critique was to emphasize that the architecture of Classical Legal Thought was neither neutral, natural, nor necessary, but was instead a historically contingent and socially created system of thought."[36]

Realist scholars viewed syllogistic reasoning as mechanical, formalistic, and conceptualistic.[37] They believed that judges should not derive

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[32] *Id.* §§ 311, 323, 325, 332, 377, 386.

[33] BEALE, *supra* note 30, at 1, *see also* A.V DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS at xliii (1896); Slater v Mexican Nat'l R.R., 194 U.S. 120, 126 (1904) (describing the vested rights approach as the "obligatio" theory).

[34] *See* Levy v. Daniels U-Drive Auto Renting Co., 143 A. 163, 164-65 (Conn. 1928). For a discussion of this case, see *infra* Part V.I (notes 232-36 and accompanying text).

[35] RESTATEMENT OF THE LAW OF CONFLICT OF LAWS § 612 (1934). For additional examples of choice of law manipulation, see *infra* Part III.B (notes 121-29 and accompanying text).

[36] HORWITZ, *supra* note 17, at 6.

[37] *Id.* at 198-206. This attack began in the first decade of the Twentieth Century. *See, e.g.*, Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV

legal rules from general principles; they adopted Holmes' aphorism that "[g]eneral propositions do not decide concrete cases."[38] Rather, these thinkers drew on experience, reality, and social policy-making.[39]

These scholars also rejected bright-line categories, in favor of balancing tests and distinctions of degree.[40] For example, a rule of reason test replaced an absolute view of restraints of trade in antitrust law.[41] Similarly, courts often used balancing tests when evaluating negligence in torts.[42]

An article by Walter Wheeler Cook, one of the major proponents of a new approach to choice of law, exemplifies Realist legal reasoning. Cook declared that "[i]t may seem incredible, but it is still possible for eminent members of the bar to assert that all a court does in deciding doubtful cases is to deduce conclusions from fixed premises ..."[43] Cook thought that, rather than applying pure logic to a case, judges legislate; they make law.[44] Because a judge makes law, Cook thought that a judge should base his analysis on social or economic policy. Consequently, "the judge will need to know two things: (1) what social consequences or results are to be aimed at, and (2) how a decision one way or another will affect the attainment of those results."[45]

Realist scholars, such as Cook, Ernest Lorenzen, and David Cavers, attacked Beale's choice of law approach for not reflecting the law in practice.[46] They rejected both territorial sovereignty and vested rights.[47] First, Lorenzen contended that courts choose law based on policy, not

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605 (1908).

[38] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

[39] HORWITZ, *supra* note 17, at 202, 208-10; WHITE, *Sociological Jurisprudence*, *supra* note 21, at 122, 124-25; *see also* Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 645-46, 954-56 (1923).

[40] HORWITZ, *supra* note 17, at 199.

[41] Standard Oil Co. v. United States, 221 U.S. 1, 60-62 (1911).

[42] United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

[43] Walter W. Cook, *Scientific Method of the Law*, 13 A.B.A. J. 303, 307 (1927).

[44] *Id.* at 308.

[45] *Id.*

[46] *E.g.*, David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 173-75 (1933); Walter W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 458-60, 464 (1924); Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 743-46 (1924).

[47] BRILMAYER, *supra* note 3, at 35.

territory[48] Second, because Realist scholars believed that "'law' is a prophecy of what courts will do," they rejected the concept of vested rights as nonsensical.[49] Cook declared that "[w]e must constantly resist the tendency to which we are all subject to reify, 'thingify' or hypostatize 'rights' and other 'legal relations.'"[50] In addition, Lorenzen attacked the consistency of a theory that creates a right that must be recognized by other states, then allows a state to refuse to enforce that right based on policy[51]

From the above criticisms of Beale's system, Cook made the move from Beale's multilateralist approach to conflicts to a unilateralist one. In one of the key passages in conflicts' history, Cook wrote:

> [T]he forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected, the rule so selected being in normal cases, and subject to the exceptions to be noted later, the rule of decision which the given foreign state or country would apply, not to this very group of facts now before the court of the forum, but to a *similar but purely domestic group of facts involving for the foreign court no foreign element.*[52]

In other words, "a court never enforces foreign rights but only rights created by its own law"[53] The focus is now on the forum's relation to choice of law (unilateralist), not the relationship of the facts to the appropriate legal system (multilateralist).

Cavers similarly attacked Beale's multilateralist approach. He rejected any "jurisdiction-selecting" rule — a rule that chooses law without

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[48] Lorenzen, *supra* note 46, at 743, 745, 748-50.

[49] Cavers, *supra* note 46, at 175-76; *see also* BRILMAYER, *supra* note 3, at 37-41.

[50] Cook, *supra* note 46, at 476. Cavers wrote similarly, "one may now wonder how any juristic construct such as 'right' could have been accepted as fundamental in the explanation of any important aspect of judicial activity." Cavers, *supra* note 46, at 175-76.

[51] Lorenzen, *supra* note 46, at 746-47

[52] Cook, *supra* note 46, at 469.

[53] *Id.* at 475.

considering the law's content.[54] "Without taking the content of the conflicting laws into account, how could one know what would satisfy the demands of justice or the requirements of policy?"[55]

The Realists made valid criticisms of Beale's approach to choice of law. First, Beale's insistence that only one state's law can apply to a controversy was mechanical and arbitrary A state's laws can extend outside its territory Consequently, a case can have connections to several jurisdictions, and as will be shown below, more than one jurisdiction can create a legal relation that might apply to a situation. Second, Beale's idea of vested rights reflected an out-moded jurisprudence — that judges merely found the law, rather than making it.[56]

While these criticisms of Beale may be valid, they did not require the rejection of a multilateralist approach to conflicts in favor of a unilateralist one.[57] This author believes that this rejection of a multilateralist approach to choice of law created the dismal swamp of which Dean Prosser complained.

II. MODERN APPROACHES TO CHOICE OF LAW

Courts today use four main methods of choice of law: (1) Beale's *First Restatement* approach, (2) Currie's governmental interest analysis approach, (3) Leflar's best rule approach, and (4) the *Second Restatement* approach.[58] In addition, several scholars have advocated other solutions

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[54] CAVERS, *supra* note 6, at 9; *see also* Cavers, *supra* note 46, at 194.

[55] CAVERS, *supra* note 6, at 9.

[56] In addition, Beale's mechanical approach can also cause rights to vest when the state has *not* created a right that governs a case. *See infra* note 177

[57] As Brilmayer points out, vested rights are not the only type of rights. "We should not reject a rights-based approach to choice of law without first trying to discover what the best possible rights-based theory might have to offer." BRILMAYER, *supra* note 3, at 223; *see also* John Bernard Corr, *Interest Analysis and Choice of Law: The Dubious Dominance of Domicile*, 1983 UTAH L. REV 651, 673-76.

[58] A list of conflicts methods that states use is contained in Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV 521, 591-92 (1983). As of 1983, approximately one-third of the states employed the *First Restatement* approach. *Id.* at 582; *see also* Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1172-74 (1987). Modern courts, however, use Beale's method without its conceptual framework, concentrating instead on its territorial rules.

to conflicts of law This Part will examine modern systems of choice of law that have not been discussed above.

A. Currie's Governmental Interest Analysis Approach

The work of the Realist scholars was mainly critical rather than constructive. It was not until Brainerd Currie's governmental interest analysis method of choice of law in the late 1950s and early 1960s that a scholar developed a system that seriously challenged Beale's approach.[59] Following Cook and other Realist scholars, Currie developed a unilateralist system that looked at choice of law from the forum's viewpoint and examined the policies behind the laws that the forum might apply

One may summarize Currie's method as follows:

1. Even in cases involving multistate elements, a court should generally adopt forum law

2. In cases where a party argues that another state's law should apply, the court should first examine the governmental policy behind forum law Next, the court should determine whether the forum has a relation to the case that furnishes a legitimate basis for it to assert an interest in the application of its policy

3. Next, the court should determine the policy behind the foreign law and whether the other state has an interest in applying its policy

4. When the forum has no interest in applying its policy, but the other state does, the court should adopt the other state's law

5. When the forum has an interest in employing its law, the court should adopt forum law, even though the other state has an interest in applying its law [60]

As can be seen from this summary, although Currie examines the policy behind the various states' laws, he advocates that a forum should generally apply its law. A forum should adopt foreign law only when it has no interest in employing its law Currie expressly rejects the weighing of each state's interests in conflicts.[61]

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[59] *See* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

[60] *Id.* at 183-84. Later in his career, Currie suggested that sometimes a court should give forum law "a more moderate and restrained interpretation" in deference to the foreign state's interest. *Id.* at 757-58. Courts generally have not followed this modification.

[61] *Id.* at 181-83, 601-02.

Currie's approach gave choice of law two key terms — false conflicts and true conflicts. Under Currie's method, a false conflict (or false problem) exists when only one state has an interest in applying its law [62] In such a case, a court should adopt the state's law that has an interest in using its law When two or more states have an interest in applying their law, a true conflict exists.

B. Leflar's Better Rule Approach

Professor Robert Leflar believed that judges used choice of law mechanisms, such as characterization, to hide the fact that they were seeking the just result.[63] Leflar felt that judges should not hide this preference, but rather should emphasize it.

Leflar's approach consists of five choice of law influencing considerations:

(A) Predictability of results;
(B) Maintenance of interstate and international order;
(C) Simplification of the judicial task;
(D) Advancement of the forum's governmental interests;
(E) Application of the better rule of law.[64]

While Leflar emphasizes that courts should consider all five factors, his analyses and those of courts following his system seem to rely on the better rule of law factor more than the others.[65] Not surprisingly, those states employing Leflar's system usually find their law to be the better rule.[66]

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[62] *E.g.*, *id.* at 107, 163, 180, 189, 726. Professor Robert Leflar points out that "false conflict" has two meanings in choice of law. In addition to Currie's usage, a false conflict describes the situation where the laws of the possible states are the same or would produce the same result. LEFLAR, *supra* note 16, at 187-89.

[63] LEFLAR, *supra* note 16, at 180-81.

[64] *Id.* at 195. Professor Juenger also advocates a substantive approach. JUENGER, *supra* note 2.

[65] *E.g.*, Clark v. Clark, 222 A.2d 205 (N.H. 1966); Heath v. Zellmer, 151 N.W.2d 664 (Wis. 1967); Brown v. Church of the Holy Name of Jesus, 252 A.2d 176 (R.I. 1969).

[66] William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV 645, 691 n.216 (1983); BRILMAYER, *supra* note

C. *The* Second Restatement *Approach*

The *Second Restatement*[67] reflects the influence of several choice of law approaches, and it is both multilateralist and unilateralist.[68] Section 6 sets out choice of law principles:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relevant interests of those states in determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of results, and
>
> (g) ease in the determination and application of the law to be applied.[69]

Professor Reese, reporter of the *Second Restatement*, has written that "the values stated in section 6 underlie the entire field of choice of law and that all of the black letter rules stem from these values."[70]

3, at 71.

[67] RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter SECOND RESTATEMENT].

[68] The *Second Restatement* originally "was to contain rules, not policies, in its black letter formulations " Kay, *supra* note 58, at 553. However, while it was being drafted, the *Second Restatement* received considerable criticism, particularly concerning its failure to consider Currie's scholarship. *Id.* at 553-55. "The Restatement Second was thus promulgated with two vastly different conceptions about how a choice of law problem should be addressed." *Id.* at 555.

[69] SECOND RESTATEMENT, *supra* note 67, § 6.

[70] Willis L.M. Reese, *The Second Restatement of Conflict of Law Revisited*, 34 MERCER L. REV 501, 516 (1983) (footnote omitted).

Section 145 sets out the "most significant relationship test" for torts[71] which resembles step two of this author's choice of law method:[72]

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.[73]

The *Second Restatement* adopts similar tests for contracts,[74] property,[75] agency,[76] etc.

The *Second Restatement* also has specific rules for particular situations. For example:

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[71] Scholars also sometimes call this test "the center of gravity" test. This test will be discussed in detail *infra* Part V (notes 156-236 and accompanying text), in connection with a discussion of *Auten v. Auten*. Savigny developed a related theory in the Nineteenth Century, which he called the "seat of the relationship." FRIEDRICH KARL VON SAVIGNY, PRIVATE INTERNATIONAL LAW 27, 94-95 (1869).

[72] However, this author believes that reading section 145 in conjunction with section 6 is difficult because the sections involve different choice of law concepts. As Professor Kay has declared, "[i]n the drafters' attempt to mollify their critics, they have created an umbrella for traditionalist and modern theorist alike: a fragile shelter that may prove itself unable to survive any but the most gentle of showers." Kay, *supra* note 58, at 562. Or as Professor Brilmayer has stated, "[t]he overall picture reminds one of the famous humorous definition of a camel: namely, a horse drafted by committee." BRILMAYER, *supra* note 3, at 75.

[73] SECOND RESTATEMENT, *supra* note 67, § 145.

[74] *Id.* § 188.

[75] *Id.* § 222.

[76] *Id.* § 291.

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.[77]

As others have noted, this section sounds suspiciously like a reversion to a *lex loci delicti* approach that Beale adopted in the *First Restatement.*[78]

D. Lea Brilmayer's Negative Rights Approach

In recent years, several scholars have harshly criticized Currie's method of choice of law[79] Instead of Currie's policy-based system, several of these scholars choose law based on rights. This Article will examine three of these approaches in the next three subparts.

Lea Brilmayer advocates an approach based on negative rights against the government.[80] Her proposal is not a definitive method for choosing law; rather, it is an approach to determining what law a court can choose, much like due process limitations on choice of law Accordingly, Brilmayer's proposal may allow the law of several jurisdictions to be

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[77] *Id.* § 146.

[78] *See* David E. Seidelson, *Interest Analysis or the Restatement Second of Conflicts: Which is the Preferable Approach to Resolving Choice-of-Law Problems?*, 27 DUQUESNE L. REV 73, 84-85, 117 (1988); Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV 731, 736 (1990). However, note that one is supposed to read section 146 in conjunction with section 6.

[79] *E.g.*, Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV 392 (1980); Lea Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV 555 (1984); Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP L. 1 (1984); Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV 772 (1983). See also the articles cited *infra* Parts II.D-F (notes 79-106 and accompanying text). For a reply to some of these critics, see Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics,'* 34 MERCER L. REV 593 (1983). *See also* Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 9 (1989); Bruce Posnak, *Choice of Law — Interest Analysis: They Still Don't Get It*, 40 WAYNE L. REV 1121 (1994).

[80] BRILMAYER, *supra* note 3, at 219-63.

applied to a situation. "A negative rights-based argument might rule out the application of State *A* law without dictating a choice between *B* and *C*'s."[81]

Brilmayer rejects choice of law systems predicated on furthering social policy because "one cannot simply take for granted the fairness of using a multistate litigant as a means to an end."[82] Instead, Brilmayer sets out "[a] political rights model of choice of law [that] requires a state to justify its exercise of coercive authority over an individual aggrieved by the application of the state's law."[83] In other words, "a state must be able to justify the burdens that it imposes, as well as explain the benefits it seeks to achieve, when it applies its law."[84]

The first step in Brilmayer's approach "is to identify the circumstances under which the state has, or lacks, an adequate justification for coercion."[85] First, the court must determine the connection between the state and the party burdened by the application of that state's law An adequate connection between the state and the burdened party might comprise: (1) the party is a local domiciliary, (2) the party has consented to the application of the state's law, or (3) the party has voluntarily affiliated herself with the state by engaging in local conduct or activities with foreseeable legal consequences in the state.[86] Second, the court must analyze the connection between the state and the party who is to be benefitted by choice of law "Is there the sort of connection that would allow application of local law if the tables were turned and he or she thus stood to lose?"[87] Ideally, a court will adopt the law of a state with connections to both parties.

Brilmayer's negative rights approach is comparable to the early writings of the Realists that criticized vested rights. The Realists attacked the intellectual foundations of vested rights without putting forth a system under which choice of law could be finally determined. Similarly, Brilmayer makes legitimate criticisms of Currie's method without developing a definite basis for determining choice of law, although her approach, like the Realists' writings, may contain the foundation of such a system. However, the most important aspect of Brilmayer's proposal is

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[81] *Id.* at 223.
[82] *Id.* at 235-36.
[83] *Id.* at 240.
[84] *Id.* at 262.
[85] *Id.* at 240.
[86] *Id.* at 241-53, 262.
[87] *Id.* at 262; *see also id.* at 253-59.

her argument that a litigant has a right not to have the law of a state applied to a lawsuit unless the litigant has a connection to the state sufficient to justify the imposition.

Brilmayer's approach is unilateralist in that it focuses on the application of one state's law Dirk H. Bliesener points out that Brilmayer's approach merely reverses Currie's method.[88] Currie looks at the relationship between the state and the individual; Brilmayer examines the relationship between the individual and the state. Bliesener criticizes both approaches because they favor one side over the other.[89] Interest analysis favors insiders; Brilmayer's proposal favors outsiders.

E. Dane's Vestedness Approach

Like Brilmayer's approach, Perry Dane's approach to choice of law is not a full-fledged system, but a constraint on choice of law.[90] In his article, Dane attacks choice of law systems based on *lex fori*, those that favor forum law Instead, Dane advocates a multilateralist approach, which he calls "vestedness," that requires that "the court of any forum should, in selecting the criteria governing the substantive elements in an adjudication, apply choice of law criteria that could be expected to generate the same set of substantive criteria if they were applied by any other forum in an actual adjudication."[91]

Dane points out that vestedness does not guarantee identical results.[92] First, it does not require that all jurisdictions adopt the same choice of law rule. Rather, it mandates that the conflicts rule a jurisdiction employs produce the same substantive criteria if used by a different forum. Second, vestedness might not produce the same substantive result even if jurisdictions adopt the same choice of law rule. Nonsubstantive elements may generate different outcomes. Moreover, two judges in different forums might view an identical controversy differently, which, of course, is also true of two judges sitting in the same jurisdiction.

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[88] Bliesener, *supra* note 3, at 705.

[89] *Id.* at 706.

[90] Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1209 (1987).

[91] *Id.* at 1205.

[92] *Id.* at 1207-09.

F Kramer's Interpretive Method

Larry Kramer advocates an interpretive method of choice of law [93] He points out that choice of law problems are not limited to multistate situations, but occur in domestic lawsuits. He suggests that one can apply techniques for solving domestic choice of law problems to multistate situations.

Kramer proposes a two-step method of choice of law: (1) one must determine whether there is a conflict of laws, and (2) if there is a conflict, one must employ a "second-order rule of interpretation to choose between these laws."[94] Obviously, a court does not have to choose between laws unless two laws can govern a case. Kramer calls establishing whether more than one law might be applicable "determining a law's prima facie applicability "[95]

Kramer adopts a rights-based approach in determining a law's prima facie applicability He looks to see whether a law creates a right that might apply to the case. In other words, has the legislature, expressly or implicitly, intended that the law govern the situation? Such analysis "has two components: (1) ascertaining the purpose that led to the adoption of a law in wholly domestic cases, and (2) presuming that the law applies only when that purpose is advanced in the state."[96]

The above analysis may generate three results: (1) no law creates a right, (2) one law creates a right, and (3) both laws create a right. In many situations, this analysis will end the inquiry; if there is no right or only one law furnishes a right, there is no choice of law problem. If two laws provide a right, then courts must go to the next step — resolving true conflicts.

Kramer resolves true conflicts by using second-order principles — canons of construction.[97] These canons include: (1) "[i]f there is a conflict between two states' laws, and failure to apply one of the laws would render it practically ineffective, that law should be applied[,]"[98]

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[93] Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV 277 (1990).

[94] *Id.* at 291.

[95] *Id.*

[96] *Id.* at 299.

[97] *Id.* at 323-38. Kramer's canons resemble David Cavers "principles of preference." *See* CAVERS, *supra* note 6.

[98] Kramer, *supra* note 93, at 323. This canon resembles Professor Baxter's comparative impairment approach. Comparative impairment means "to subordinate in the particular case, the external objective of the state whose

(2) "[i]n a conflict between a substantive policy and a procedural policy, the law reflecting the substantive policy should prevail unless the forum's procedural interest is so strong that the forum should dismiss on grounds of *forum non conveniens*[,]"[99] (3) "[i]n contract cases, true conflicts should be resolved by applying the law chosen by the parties, or, if no express choice is made, by applying whichever law validates the contract[,]"[100] (4) "[w]here one of two conflicting laws is obsolete the other law should be applied[,]"[101] and (5) "[w]here two laws conflict, but the parties actually and reasonably relied on one of them, that law should be applied."[102]

Finally, Kramer discusses the role of reciprocity in the choice of law.[103] Kramer compares conflicts to the classic prisoner's dilemma in game theory. Both states would be better off if they cooperated in the choice of law. By cooperating, a state's law governs when it is especially important to that state's interest, but the state would step aside when it is important to the other state's interest that its laws apply. That way both states' policies would be furthered. Obviously, a state would be better off if the other state cooperated, but it did not. In other words, there is an incentive to cheat. However, this incentive to cheat is lessened by the fact that the game is reiterated. If state *A* cheats on the first play, state *B* will feel free to cheat on the second play. Kramer does not believe that cooperation will always result, but that both parties will be better off if they do so.[104]

This author believes that Kramer's approach is a significant advance in choosing law. Courts should first determine whether a state has created a right that applies to the controversy. This author's method modifies Kramer's first step by combining it with Hohfeldian analysis.[105]

On the other hand, this author disagrees with Kramer's use of canons of construction to resolve true conflicts. Choice of law is not interpretive on this level. Rather, once a court has identified the states' legal relations, it should choose the law of the state with the closest connection to the

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internal objective will be least impaired in general scope and impact in cases like the one at hand." *Id.* at 318; William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 18 (1963).

[99] Kramer, *supra* note 93, at 324.

[100] *Id.* at 329.

[101] *Id.* at 334.

[102] *Id.* at 336.

[103] *Id.* at 339-44.

[104] *Id.* at 341 n.224.

[105] *See infra* Part IV.A (notes 142-45 and accompanying text).

controversy In addition, Kramer's approach will not solve all choice of law problems,[106] and his second step will be difficult for courts to use.

III. CRITERIA FOR A CHOICE OF LAW

This author believes that choice of law should satisfy the following criteria:

(A) choice of law should be grounded in positive law;
(B) choice of law should be substantively neutral;
(C) choice of law should be forum neutral;
(D) choice of law should be predictable;
(E) choice of law should reflect the relevant states' interests; and
(F) choice of law should be fair to the individual litigants.

A. Choice of Law Should Be Grounded in Positive Law

Many legal thinkers in the late nineteenth and early twentieth centuries conceived of law as a priori — law existed before government, and the judge's role was to "find" this preexisting law.[107] Many early twentieth century legal scholars and judges rejected this natural law view, arguing instead that the only law that existed was positive law — law created by the state. Justice Holmes stated that "[t]he life of the law has not been logic: it has been experience,"[108] and he fought against the "brooding omnipresence in the sky"[109] Justice Brandeis rejected the notion that there was a federal common law because there was no pre-existing law for a judge to find.[110]

Wesley Hohfeld agreed that all law was positive law, and he revolutionized legal thinking by categorizing property into four pairs of correlative relations: right/duty, privilege/no right, power/liability, and immunity/disability.[111] Legal scholars have used these correlative

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[106] Kramer states that his canons are not intended to be exhaustive. Kramer, *supra* note 93, at 322.

[107] G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 107, 148-49 (1988).

[108] OLIVER W HOLMES, THE COMMON LAW 1 (1881).

[109] Southern Pac. Co. v Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[110] Erie R.R. v Tompkins, 304 U.S. 64, 78-79 (1938).

[111] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917-1918); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial*

relations in a variety of contexts, and they are useful in thinking about choice of law [112]

While a few legal thinkers still view law as being based on natural law,[113] most modern scholars adopt a positive law approach. This author believes that choice of law must be grounded in positive law — choice of law analysis must begin by looking at the legal relations created by the relevant states.[114]

Most modern choice of law approaches allow a state to apply its law to a set of facts, even if that state has not created a legal relation that concerns the case. This is because the due process requirement for choice of law is minimal: *A* state can apply its law to a case, if that state has a significant enough connection or aggregation of connections to the case.[115] Consider the facts of *Allstate v. Hague*, a leading case on this rule. *P*'s husband was a Wisconsin resident who had several automobile insurance policies that he purchased in Wisconsin. He was killed in a traffic accident in Wisconsin. His wife brought suit in Minnesota against the insurance carrier, claiming that the insurance policies should be stacked (each of the policies paid off to the policy limit rather than recovery being limited to the maximum under one policy). Minnesota allowed stacking, Wisconsin did not. The Minnesota court, using Leflar's better rule approach, adopted Minnesota law and allowed the policies to be stacked.[116]

The United States Supreme Court upheld the application of Minnesota law on due process grounds because there was a significant set of connections to Minnesota. The widow had moved to Minnesota after her husband's death and married a Minnesota resident, and her first husband had worked in Minnesota.[117]

This author questions how the Court found a positive law basis for applying Minnesota law [118] First, the fact that a person worked in the

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Reasoning, 23 YALE L.J. 16 (1913-1914).

[112] *See infra* Part IV (notes 142-55 and accompanying text).

[113] *E.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

[114] *See infra* Part IV.A (notes 142-45 and accompanying text).

[115] Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1980).

[116] *Id.* at 305-07

[117] *Id.* at 320.

[118] Several other scholars have criticized this case. Bliesener, *supra* note 3, at 687-90; Terry S. Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity*, 62 N.Y.U. L. REV 651 (1987); Linda Siberman, *Can the State of Minnesota Bind the Nation? Federal Choice of Law Constraints After* Allstate Insurance Co. v Hague, 10 HOFSTRA L. REV 103, 104

forum does not create a right for a non-resident to stack insurance policies relating to an accident that occurs outside the forum. Similarly, how does the fact that a widow moved to the forum after her husband's death create a right? As Professor Twerski has written, "[t]he mere fact that some other state can find some interest — real or imagined — in the case cannot be enough to alter its local nature and prevent the application of the law of the sovereign in which the transaction took place."[119]

Some existing choice of law systems are grounded in positive law while others are not. Although partly based on natural law, Beale's system is grounded in positive law. An important aspect of Beale's system is that state law creates rights that vest. Similarly, Kramer's approach is grounded in positive law His first step is to determine which states have created rights that might govern a case. The *Second Restatement*, while not stating that choice of law should be grounded in positive law, will usually produce such a result with its most significant relationship test because the state with the most significant relationship to the controversy probably provides a legal relation that governs the case. On the other hand, Leflar's better rule approach could produce a choice of law that is not grounded in positive law As was seen in *Allstate*, the state with the better rule might not create a legal relation that applies to the controversy Finally, while not rejecting a positive law basis of law, Currie's governmental interest analysis concentrates on the states' policies and interests.[120]

(1981); Willis L. M. Reese, *The* Hague *Case: An Opportunity Lost*, 10 HOFSTRA L. REV 195, 200 (1981); Arthur T. von Mehren & Donald T. Trautman, *Constitutional Control of Choice of Law: Some Reflections on* Hague, 10 HOFSTRA L. REV 35, 43 (1981).

[119] Aaron D. Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV 149, 169-70 (1981).

[120] Currie's approach also allows a court to adopt a right created by a state's law (e.g., a right to recover for wrongful death) because a state has an interest in having that right govern, while rejecting the application of the limitations that go with that right (e.g., damages limitations) because the state has no interest in applying the limitations to the facts. As will be shown below in detail, *see infra* Part IV.A (notes 142-45 and accompanying text), this author believes that this analysis ignores the positive law basis of choice of law — a court should not ignore the fact that states create legal relations in conjunction with each other. A right often comes with limitations (e.g., an immunity or damages limitation), and a court should not allow a remedy that would not exist under any state's law absent a multistate setting.

B. *Choice of Law Should Be Substantively Neutral*

This author, along with other writers who advocate a multilateralist approach,[121] believes that choice of law should be substantively neutral: choice of law should not differ based on how the judge feels the case should come out. Choice of law is a method for determining what law applies; it should not be a mechanism for corrective justice. The states have varying views on what the law should be, and courts should not ignore another state's opinion by abusing choice of law As P John Kozyris has written, "[d]oes it really make sense to mix substantive justice with conflicts justice? Under what authority, from what source and in what practical way may a judge decide that one of two potentially applicable systems of justice is more just?"[122]

Most choice of law approaches are not substantively neutral, and it is difficult for a unilateralist system to be substantively neutral. On the surface, Beale's multilateralist method seems to be substantively neutral. For example, judges must apply the substantive law of the place of the injury in torts cases. However, as stated above, a judge can avoid a result she disfavors by characterization. She can characterize a rule she dislikes as procedural, rather than substantive, allowing her to apply forum law, or she can characterize a situation as being governed by contract, rather than tort, permitting a different rule to govern.

For example, a traffic accident occurs in Washington, where there is a one-year torts statute of limitations.[123] The plaintiff files suit in Montana, which has a two-year statute of limitations, thirteen months after the accident. Under Beale's approach, Washington law governs because it is the place of the injury Washington law creates a right to recover for the injury, but the action is barred if the statute of limitations is considered substantive. A judge who believes that the plaintiff should be compensated can overcome the bar of the Washington statute of limitations by characterizing it as procedural, allowing her to adopt the longer Montana statute.

Similarly, characterization of the category of a substantive right can be outcome determinative. *P* rents a car in Arizona and is injured in a traffic accident in New Mexico due to improper preparation of the car.

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[121] *E.g.*, Bliesener, *supra* note 3, at 707-09.

[122] P Jon Kozyris, *Reflections on* Allstate — *The Lessening of Due Process on Choice of Law*, 14 U.C. DAVIS L. REV 889, 906 (1981).

[123] Unless citing a specific case or statute, the examples in this Article are hypotheticals and do not necessarily reflect actual state law.

The rental contract contains a limitations of damages clause that precludes recovery for pain and suffering. New Mexico enforces such clauses; Arizona does not. If the court characterizes the action as tort, the limitation of damages clause will limit the damages that *P* can recover because the law of the place of the injury governs in tort actions. However, if the court characterizes the action as contract, it can apply Arizona law to invalidate the limitations clause and give *P* full recovery

Governmental interest analysis is not substantively neutral.[124] Rather, it is consequentialist and instrumentalist — judges under Currie's system use choice of law as an instrument of social change. Thus, judges evaluate alternative rules of law "according to the desirability of their consequences."[125] One can make numerous criticisms of the consequentialist element of governmental interest analysis.[126] However, the most fundamental criticism is a Kantian one: governmental interest analysis "is indifferent to what the parties deserve the individual is treated merely as a means to an end."[127]

Leflar's better rule approach is not substantively neutral. It intentionally allows a court to adopt whatever rule it feels is better, as long as the state's law which is to govern meets due process requirements — the state has a sufficient enough connection to the controversy that its law can be used. As was shown in Part III.A,[128] this "sufficient connection" may be tenuous. As was stated above, this author rejects the use of choice of law to make substantive determinations. State legislators,[129] not judges, should make the decision on what is the better rule. In addition, one judge's notion of what the better rule is will often differ from that of another judge. Finally, how does a judge make this decision? Obviously, the judge must base her decision on a general notion of justice — in other

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[124] Several commentators have pointed out that modern choice of law systems, in particular governmental interest analysis, are pro-plaintiff. *E.g.*, Singer, *supra* note 78, at 738; Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV 49, 56, 81-89 (1989). If a jurisdiction wants to be pro-plaintiff, it should do so at the substantive level, not through choice of law. Why should a plaintiff have an increased right of recovery solely because multistate elements are involved?

[125] BRILMAYER, *supra* note 3, at 225.

[126] *Id.* at 224-32.

[127] *Id.* at 232.

[128] *See supra* notes 107-20 and accompanying text.

[129] Or the state's highest court in establishing common law rules. If the state's highest court thinks a different rule should apply, then it should change the substantive rule, not manipulate choice of law.

words, natural law Should natural law be the basis of choice of law when it is generally rejected in other areas of the law?

C. *Choice of Law Should Be Forum Neutral*

A major criticism by modern choice of law scholars of governmental interest analysis is that it is not forum neutral.[130] In Currie's governmental interest analysis, a forum should apply its law to true conflicts because a forum has the right to prefer its interest to that of other states. This author is not convinced that a state should further its policies by choice of law at the expense of justice to individual litigants in a private dispute. In particular, a jurisdiction should not be able to further its interests in a way that is unfair to non-residents.

This author believes that choice of law should be forum neutral because it prevents forum shopping for favorable law and that this ability to forum shop is unfair, especially in light of the fact that the plaintiff chooses the forum. Choice of law should be the same regardless of where a case is filed;[131] a case's outcome should not depend on choice of forum.

Rosenthal v. Warren[132] vividly illustrates the unfairness in "conflicts localism" — "cases favoring local substantive law when the forum state's relation to the controversy is clearly less than that of the place providing conflicting law "[133] In *Rosenthal*, a wrongful death case, the plaintiff's husband, a New York domiciliary, had gone to a Massachusetts hospital for an operation. The husband died while under the doctor's care, and the plaintiff sued the doctor and hospital for malpractice. The question was whether to apply Massachusetts law that limited wrongful death damages or New York law that permitted unlimited recovery All connections to the case, except for the husband's and wife's domiciles, were with

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[130] *E.g.*, Dane, *supra* note 90, at 1205-06; Luther L. McDougal III, *Comprehensive Interest Analysis Versus Reformulated Governmental Interest Analysis: An Appraisal in the Context of Choice-of-Law Problems Concerning Contributory and Comparative Negligence*, 26 UCLA L. REV 439, 449-51 (1979); *see also* John Hart Ely, *Choice of Law and the State's Interest in Protecting its Own*, 23 WM. & MARY L. REV 173 (1981).

[131] As Gene Shreve notes, "[m]ultilateralism strives for uniform results in choice of law." Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271, 282 (1996).

[132] Rosenthal v Warren, 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973).

[133] Shreve, *supra* note 131, at 271.

Massachusetts.[134] In particular, as the dissent pointed out, "the decedent made a deliberate choice to undergo the operation in Massachusetts at defendant hospital."[135] Nevertheless, the New York federal court applied New York law, allowing unlimited recovery [136]

Most choice of law systems are not forum neutral, and a unilateralist approach, by definition, cannot be forum neutral.[137] As was true of content neutrality, Beale's system seems forum neutral, but characterization can make the place the suit is filed outcome determinative. As was stated above, governmental interest analysis consciously favors the forum. Similarly, the *Second Restatement* and Leflar's approach list the forum's interest as a factor courts should consider when choosing law On the other hand, Dane's approach explicitly advocates forum neutrality

D. Choice of Law Should Be Predictable

A major goal of any legal system should be predictability Individuals need to know how the law governs their behavior so that they can conform their behavior accordingly Similarly, businesses need to be able to predict what the law will be so that they can conduct their affairs with certainty Consequently, any choice of law system should be predictable.

If choice of law is not content neutral, it is difficult to predict what rule controls a situation. Consider a hypothetical under Leflar's better rule approach. *D* is a railroad company that operates solely in Texas. Texas has a rule that passengers on railways can contractually waive their right to recover from railroad companies for negligence. Tickets issued by *D* have such a waiver that is valid under Texas law *P*, an Oklahoma resident, is injured through *D*'s negligence while a passenger on *D*'s railroad. Oklahoma allows recovery for damages when its residents are

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[134] *Rosenthal*, 475 F.2d at 439-40.

[135] *Id.* at 447 (Lumbard, J., dissenting).

[136] Several scholars have strongly criticized this decision. *E.g.*, James A. Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV 185, 225-27 (1976); Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV 1587, 1605-06 (1978).

[137] Professor Shreve points out that uniformity is not central to unilateralists, including Currie. Shreve, *supra* note 131, at 284-85. Rather, these scholars believe that unilateralist approaches, such as interest analysis, can produce a better result. However, this author believes that a multilateralist approach can produce both uniformity and a good result. As noted above, the problem with Beale's method was that he mechanically choose law based on a single factor in a controversy. A multilateralist system does not have to be mechanical.

injured by another's negligence, regardless of where the accident occurs. In addition, Oklahoma would not enforce the waiver of liability clause.

Under Leflar's better rule approach, the Texas court might believe that the Oklahoma rule is the better rule and apply it because the Texas rule is antiquated and Texas law generally favors compensating negligence victims. Thus, the railroad cannot plan its affairs with certainty While many people will believe that compensation of negligence victims is a major goal of law, the law should achieve this goal by changing the substantive law, not by manipulating choice of law If the Texas legislature believes that waiver of liability clauses should not be enforced, it can pass such a law

Lack of forum neutrality destroys predictability If a forum can apply its law to a situation regardless of the fact that another state's law might be more appropriate, forum selection is outcome determinative. In such a situation, it can be difficult for individuals and businesses to conduct their affairs with certainty

Beale's method is the most predictable of the major choice of law systems. It will usually be easy to establish the place of the wrong. However, characterization and public policy inject unpredictability into Beale's approach. Because governmental interest analysis is forum favoring, a case's outcome often depends on where the case is filed, and, thus, it is unpredictable. Similarly, the better rule method is unpredictable because the outcome depends on what the judge believes is the better rule. Finally, Brilmayer's approach limits the number of states' laws that a court can apply to a case, but it often leaves the ultimate choice of law open.

E. Choice of Law Should Reflect the Relevant States' Interests

If a legal system is based on positive law, then choice of law should reflect the interests of the states that created those laws. Courts should not choose law in a vacuum. Rather, any application of law, particularly choice of law, should reflect the policies and interests a state had when it passed the law

Of the major choice of law systems, governmental interest analysis pays the most attention to the states' interests in applying their laws. In fact, governmental interest analysis is predicated largely on a state's policy behind a law and a state's interest in applying its law Yet, governmental interest analysis often rejects the law of the state that has the most interest in employing its law (the state that has the closest connection to the controversy) in favor of adopting forum law Under the classic formulation of governmental interest analysis, the forum can

employ its law with true conflicts as long as it has an interest in doing so, regardless of the strength of another state's interest in having its law govern. There is no weighing under Currie's system.

This author believes that not only should a choice of law system reflect the states' interests, it should select the law of the state that has the most interest in having its law applied. This author thinks that this can be accomplished by choosing the law of the state that has the closest connection to the controversy [138]

F Choice of Law Should Be Fair to the Litigants

This author believes that the primary goal of choice of law should be fairness to the litigants. As Lon Fuller has stated:

> Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute.[139]

While a lawsuit may affect society in general, and courts cannot ignore the impact its decision will have on future cases, a lawsuit's main purpose is individual justice. Yet most choice of law systems place little emphasis on fairness to the litigants.

A choice of law system that is not substantively neutral is not fair to the litigants. A rule might control a case that would not be applied absent a multistate setting. Similarly, a system that is not forum neutral is unfair because the place of filing suit can affect a case's outcome. Likewise, a system that is not predictable is not fair because individuals will not be able to conform their behavior and affairs to the law.

Although Beale's approach is the most content neutral, forum neutral, and predictable of the major choice of law systems, it is not always fair to the litigants because it sometimes allows a court to use a state's law that has only a secondary connection to a case. Consider another waiver of liability clause case. *D* is a railroad incorporated and operating mainly in Missouri, with one train a week taking passengers to Kansas City, Kansas. *P*, a Missouri resident, buys a ticket on *D*'s train to travel from

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[138] *See infra* Part IV.B (notes 146-51 and accompanying text).

[139] LON L. FULLER, THE MORALITY OF LAW 39 (1964).

St. Louis, Missouri to Kansas City, Kansas. Tickets issued by *D* contain a waiver of liability clause in favor of the railroad. Missouri refuses to enforce such clauses, but Kansas does enforce them. *D*'s mechanic negligently repairs the train's brakes in St. Louis. Other of *D*'s employees fail to properly inspect the train's brakes in Kansas City, Missouri. The brakes fail while the train is in Missouri, causing it to go out of control. Shortly after the train has passed into Kansas, it jumps the tracks, and *P* is injured.

Because *P* is injured in Kansas, the law of the place of the injury controls, and *P* will not be able to recover for his injuries. Is this fair? *P* and *D* are both Missouri residents, the negligence occurred in Missouri, and most of the train trip was in Missouri.

Governmental interest analysis ignores fairness to the litigants, in favor of the states' interests.[140] In particular, it is not forum neutral. Similarly, Leflar's better rule method is not fair because it allows a judge to adopt the rule that she thinks is preferable, regardless of whether another state's law has a closer connection to the case. Finally, Brilmayer's rights-based approach considers fairness to the litigants, but her approach does not insure a fair result because it only provides a loose constraint on choice of law.

One can restate the above using a Rawlsian approach to fairness. Professor Rawls wrote:

> A practice is just if it is in accordance with the principles which all who participate in it might reasonably be expected to propose or acknowledge before one another when they are similarly circumstanced and required to make a firm commitment in advance without knowledge of what will be their peculiar conditions.[141]

Looking at choice of law *ex ante*, which system is fairer: (1) an approach, such as Beale's, that uses a single, perhaps fortuitous factor; (2) a method, such as Currie's, that depends on the forum in which a case is filed; (3) a system, such as Leflar's, that allows a judge to choose the law that he or she thinks is the "better rule"; or (4) a method, such as this

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[140] Brilmayer points out that state interests and fairness are not incompatible. "States have policies about fair treatment; if nothing else they would want to have their own people treated fairly in their own courts and in other courts." BRILMAYER, *supra* note 3, at 22 n.4.

[141] John Rawls, *Justice as Fairness*, *in* JUSTICE AND SOCIAL POLICY 80, 98 (Frederick A. Olatson ed., 1961).

author's, that selects the law of the state with the closest connection to the controversy?

IV A MULTILATERALIST METHOD OF CHOICE OF LAW

As mentioned above, state law creates rights, duties, privileges, areas with no rights, powers, liabilities, immunities, and disabilities. More than one of these relations may apply to a situation. For example, an automobile accident takes place in Virginia. Virginia provides a right to recover damages in persons who are injured by another's negligence. *P* is injured by *D*'s negligence. Thus, *P* has a right or a potential right to recover damages against *D*.

However, *P*'s right to recover damages against *D* is not the only legal relation Virginia establishes in connection with the accident. Virginia furnishes an immunity for automobile drivers from lawsuits by passengers in their cars, commonly known as guest statutes. *P* was a passenger in *D*'s car. In this instance, the immunity trumps the right or potential right, and *P* has no remedy against *D*.

A similar situation can arise in a multistate context. *P* and *D* are in an accident in Virginia. *P* is a North Carolina citizen, and *D* is a Virginia citizen. Virginia creates a right to recover damages in persons who are injured by another's negligence in Virginia. *P* was injured by *D*'s negligence in Virginia. Thus, *P* has a potential right to receive compensation from *D* for his injuries. However, Virginia also provides an immunity that passengers may not recover damages from drivers. The statute's purpose is to prevent collusion between drivers and passengers that raise Virginia insurance rates. Clearly, *P* has no remedy under Virginia law.

Multistate interests are involved in this case because *P* is a North Carolina citizen. North Carolina furnishes a potential right to its citizens to recover when they are injured by another's negligence regardless of where they are injured. North Carolina does not place any limitations on this right, so *P* would have a remedy against *D* — if North Carolina law applies. However, a court must consider the Virginia immunity because *D* is a Virginia citizen. Considering the North Carolina right and the Virginia immunity, can *P* recover damages against *D*?

A. Step One: The Identification of Legal Relations

The first step in choosing law is to identify the legal relations created by the relevant states that might control a case. When step one reveals

that more than one state's law might apply to the facts, then a court must go on to step two — deciding which state's law should govern.

In the first step, the analyst identifies every legal relation that might control the facts, as this author did in the above examples. However, one should not use just any state law that might be relevant; one must determine the law's scope — whether the lawmaker intended the law to govern the situation.

For example, Virginia creates a right in a person who is injured by another's negligence to recover damages from the negligent party What is the scope of this right? It is reasonable to conclude that the lawmaker intended the law to encompass accidents that occur in Virginia. Virginia has an interest in regulating accidents that take place in that state. Similarly, one can assume that Virginia intended its negligence rule to apply to accidents occurring in other states in which its citizens are injured because Virginia has an interest in ensuring that its citizens are compensated for negligent injuries. However, it is not reasonable to conclude that Virginia lawmakers intended that its negligence rule govern accidents that take place in California between California citizens. Virginia does not have an interest in regulating California highways, nor does it have in interest in compensating California tort victims.

The above analysis resembles governmental interest analysis's identification of state policies and interests. However, this author's method examines states' interests to determine which states have created legal relations that govern a controversy It does not use states' interests to choose law when there is a true conflict.

Step one shows that many potential choice of law problems are not problems at all because only one state's law applies to a situation.[142] There can be no conflict of laws if only one state creates a legal relation.[143]

Assume that Virginia provides a right to recover in persons who are injured by another's negligence on Virginia highways or who are Virginia citizens, and that North Carolina furnishes a similar right for North Carolina. Also assume that Virginia has a guest statute that immunizes Virginia defendants from lawsuits from passengers in their cars to protect Virginia insurers from collusion between drivers and passengers. North Carolina, however, places no limit on recovery for negligence. An accident occurs in North Carolina in which *P*, a passenger in *D*'s car and a Virginia citizen, is injured by *D*, a North Carolina citizen.

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[142] Of course, this is also true of governmental interest analysis.

[143] There is also no conflict if the states' laws are the same.

There is no conflict of laws in this example, despite the fact that parties from more than one state were involved. The Virginia guest statute is irrelevant because Virginia lawmakers did not intend that it govern accidents in other states involving non-Virginia defendants — where Virginia insurers are not subject to collusion.

In some instances, no state will furnish a legal relation. For example, North Dakota provides a right of recovery for alienation of affections when the tort occurs in North Dakota or when a North Dakota spouse is involved. South Dakota has abolished the tort of alienation of affections. A North Dakota resident alienates a South Dakota spouse's affections in South Dakota. No legal relation is created. South Dakota does not have an action for alienation of affections, and North Dakota's right does not apply to the alienation of a South Dakota spouse's affections that occurs in South Dakota.

Some cases involve true conflicts in which two states' laws govern a situation. For instance, California creates a right to recover for breach of contract for contracts entered into in California or with a California resident, while Oregon has enacted an immunity for its residents who have been adjudged spendthrifts.[144] Sam, an Oregon spendthrift, enters into a contract in California with a California resident, and Sam breaches the contract. California has an interest in upholding contracts, while Oregon has an interest in protecting spendthrifts. Consequently, this case presents a true conflict because both the California right to recover for breach of contract and the Oregon immunity for spendthrifts applies to the facts. Resolution of this conflict requires a second step, as set forth below.

For another true conflict, consider a variation on the guest statute hypothetical from above. Virginia furnishes a right to recover for negligence for accidents that happen in Virginia or involve its residents. Virginia, however, has a guest statute. North Carolina has a right for its residents to recover for damages incurred from another's negligence. An accident occurs near Charlottesville, Virginia involving a Virginia driver,

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[144] A spendthrift is defined as:

> One who spends money profusely and improvidently; a prodigal; one who lavishes or wastes his estate. By statute, a person who by excessive drinking, gaming, idleness, or debauchery of any kind shall so spend, waste, or lessen his estate as to expose himself or his family to want or suffering, or expose the government to charge or expense for the support of himself or family, or is liable to be put under guardianship on account of such excesses.

BLACK'S LAW DICTIONARY 1400 (6th ed. 1990).

who was negligent, and a North Carolina passenger. Virginia does not provide a remedy because of the guest statute. North Carolina creates a right to recover in the passenger, but the Virginia immunity also applies because the Virginia guest statute encompasses Virginia defendants. Consequently, a true conflict exists.

This author believes that when a state's law creates a legal relation that a court must employ all other legal relations that go with it. In other words, when a state's law establishes a right, a court applying that law must also adopt the immunities or other legal relations that limit the right. A court should not be able to choose only what legal relations it wants to allow a remedy that would not exist in the state that created the legal relations. For example, a court should not adopt a right such as a state's negligence rule, but ignore the limiting immunity, its guest statute. This would permit a remedy when that state's legislature intended that both the right and immunity apply to the facts. Similarly, a state should not employ another state's wrongful death statute to provide a cause of action, but disregard damages limitations in that statute.

This approach helps avoid forum shopping, and helps ensure that the same law will govern regardless of forum. It also avoids creating a cause of action that does not exist under any relevant state's law Moreover, this requirement is not unfair; a plaintiff would not have had a remedy under any applicable state law outside of the multistate context, so it is not unfair that she does not have a remedy in a multistate context.

The above refusal to separate legal relations that belong together is most relevant for statutes of limitations. Under this author's approach to choice of law, a court must adopt the statute of limitations of the state that created the right.[145] Otherwise, it has provided a remedy that does not exist under any state's law

On the other hand, governmental interest analysis might furnish a remedy where none existed. For example, *P* is injured in Illinois by a product manufactured in Indiana. Illinois has a cause of action for products liability under both strict liability and negligence and has a one-year tort statute of limitations. Indiana has a cause of action for products liability only under negligence, with a two-year tort statute of limitations.

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[145] A state can change this by statute, applying either the statute of limitations of the state that created the right or the forum's statute of limitations, whichever is longer. However, in doing so, the forum is creating a new right under its law; it is not enforcing a right created by the other state's law because that right does not exist separately from the statute of limitations.

P files suit in Indiana thirteen months after he is injured. *P* can satisfy the requirements for strict liability, but not negligence.

Under governmental interest analysis, *P* would recover. There would be no cause of action under Indiana law because *P* cannot prove negligence. However, *P* can prove strict liability, and Illinois has interest in having its law adopted because it wants to regulate sales in Illinois. On the other hand, Illinois has no interest in applying its statute of limitations to cases that are brought in Indiana, and Indiana has an interest in using its statute of limitations. Consequently, *P* can recover under the Illinois right and the Indiana statute of limitations; a cause of action exists in a multistate setting that does not exist under any state's law

Under this author's analysis, *P* would not recover. Illinois creates no cause of action because the action is barred by Illinois' statute of limitations. Likewise, Indiana does not have strict liability

Some might view the above result as being unfair; *P* was injured by the product. However, if there is unfairness, the unfairness is not in choice of law; it is in the states' choices of tort rules. *P* would not have recovered under either states' laws, absent the multistate setting. A court should not use choice of law for substantive justice; substantive justice must exist in the legal relations furnished by state law

B. Step Two: Choosing Law When a True Conflicts Exists

Step one will eliminate many choice of law problems; conflicts problems do not occur when only one state's law (or no state's law) provides legal relationships that govern the facts. However, many situations arise where two states create legal relations that apply to the case — where a true conflict exists.[146]

Part II of this Article discussed and evaluated other approaches to true conflicts.[147] Currie would employ forum law with true conflicts as long as the forum had an interest in applying its law This author criticized this solution because it promoted forum shopping and was unfair to the litigants. Leflar would adopt the better rule. This author criticized this approach because: (1) it is often difficult to tell what the

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[146] This author's use of the term "true conflict" is different than Currie's. This author employs true conflict to indicate those cases in which the law of two or more states create *legal* interests that govern the controversy. Currie uses true conflict to mean that two or more states have *policy* interests in applying their states' laws to the facts.

[147] *See supra* Part II (notes 58-106 and accompanying text).

better rule is, (2) it is not substantively neutral, and (3) it is not fair to the litigants. Kramer advocated using interpretive canons when true conflicts exist. This author criticized Kramer's method because: (1) choice of law is not interpretive on this level, (2) Kramer's approach does not solve all conflicts problems, and (3) there should be a simpler solution.

This author believes there is a simple multilateralist solution, at least in theory· adopt the law of the state that has the closest connection to the controversy In doing so, one should look at connections that relate to the laws that might be applicable ("relevant connections"), not to connections to a state that are unrelated to the controversy For instance, the fact that a person is doing business in Montana is not a relevant connection to an automobile accident occurring in Montana, unless doing business in Montana is related to the accident.

A typical breach of contract case involving multistate parties illustrates this author's closest connection step. *P*, a Georgia resident, enters into an oral contract with *D*, a Florida resident. The contract was negotiated and executed in Florida, and is to be performed entirely in Florida. *D* breaches the contract. The contract is not enforceable under Florida's statute of frauds, but it would be enforceable under Georgia's. Florida has an interest in employing its statute of frauds to invalidate contracts that do not conform to its statute to protect its residents and those who enter into contracts in Florida from fraud. Georgia has an interest in validating contracts entered into by its residents. Thus, both states create legal relations that apply to the controversy, and a true conflict exists.

Under this author's approach, Florida law would govern these facts because the legal relations created by Florida law have the closest connection to the situation. The contract was executed, negotiated, and to be performed in Florida, all significant connections. The only connection Georgia has with the controversy is that one of the contracting parties is domiciled there; a relevant connection, but not strong enough to overcome the stronger connections with Florida. In addition, the parties would probably expect that a contract negotiated, executed, and to be performed in Florida would be governed by Florida law

Consider a true conflict in a guest statute setting. An accident occurs in Virginia involving *D*, a Virginia resident, and her passenger, *P*, a North Carolina resident. Virginia creates a right to recover for injuries caused by negligence, but has a guest statute. North Carolina provides a cause of action when its residents are injured by negligence, and it has abolished its guest statute. Thus, North Carolina furnishes a cause of action for *P*, while Virginia establishes an immunity for *D* Which state's law governs? In this case, the accident occurred in Virginia and the

defendant is a Virginia resident. The only contact with North Carolina is that *P* is a North Carolina resident, and *D* lacks any relevant connection with North Carolina.[148] Consequently, the closest connections are with Virginia.

In the above examples, the states' laws that this author thought should govern the facts had more relevant connections with the situations than did the states' laws that were not applied. However, this does not mean that choice of law is simply counting connections. The step two inquiry is both quantitative and qualitative; some connections are more important than others. For example, in a breach of contract case, the place of the contract's performance is usually more significant than one of the parties' domicile.[149]

One connection that has no relevance in this author's approach is forum — that a case is brought in a jurisdiction should not count in the choice of law analysis. Thus, in the first example above, Florida law should govern regardless of the place of the trial, and, in the second example, any court that hears the case should apply Virginia law

While this author's second step is theoretically simpler than many choice of law approaches, it leaves open the possibility that courts will differ on which state's law has the closest connection to the facts.[150] Of course, the possibility that courts will reach different conclusions on the same facts is an intrinsic part of our legal system.

The following example illustrates a close case. *P*, a Mississippi resident, is badly injured in a traffic accident in Mississippi, by *D1*, an Alabama resident, who was legally drunk under both states' laws at the time of the accident. *D1* is insolvent and cannot compensate *P* for his injuries, despite the fact the *D1* was negligent per se. Consequently, *P* sues *D2*, an Alabama tavern owner, who served *D1* the alcohol and was aware that *D1* was inebriated. Mississippi has a law that holds tavern

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[148] Lack of relevant connections to a jurisdiction is also important in step two of this author's method. When a party has no relevant connection to a jurisdiction, he would not expect that that state's law would apply to him.

[149] For more illustrations on how this works, see the examples set forth *infra* Part V (notes 156-236 and accompanying text).

[150] One might criticize this author's system for leaving too much discretion to the judge in deciding which state has the closest connection with a controversy. However, this author does not want to repeat Beale's mistake of developing rigid, mechanical rules. The most important aspect of this author's closest connection step is that the judge determine the controversy without reference to the substantive outcome. This system leaves open the possibility that judges will differ in evaluating connections.

owners liable for injuries drunk drivers cause if the tavern owner knew or should have known that the customer was inebriated. The law's purpose is to compensate injured parties and to regulate the service of alcohol to reduce the number and severity of accidents. Alabama has an immunity from liability for tavern owners from persons who are injured by drunk drivers. The Alabama law's purpose is to engender responsibility in all drivers and to avoid placing the burden of drunk driving injuries on tavern owners who often cannot tell when a customer is legally drunk. Thus, a true conflict exists with Mississippi creating a cause of action for *P* against *D2*, and Alabama law providing an immunity for the tavern owner.

It is difficult to predict what state's law a court will apply to the above facts — both states have close connections to the controversy The accident occurred in Mississippi, and *P* is a resident of that state. On the other hand, the tavern owner is an Alabama resident, and he served the drinks in Alabama.[151] In the present case, this author would adopt Mississippi law to give *P* a cause of action because the fact that the accident occurred in Mississippi seems more significant than the fact that the drinks were sold in Alabama. In addition, *P* has no connection to Alabama and would not expect that Alabama law would apply, but the tavern owner should have known that *D1* might drive into Mississippi.

In the above example, it might be tempting for courts to fall back on traditional choice of law devices. For example, an Alabama court would be tempted to apply Alabama law, while a Mississippi judge would be inclined to adopt her state's rule. Similarly, a judge's choice of law might be influenced by how he felt about a tavern owner's responsibility and personal responsibility This author rejects such temptations because they are not forum and substantively neutral. The only inquiry in the second step is which state's law has the closest connection to the controversy That this decision might be difficult is not a reason to ignore the requirements of the choice of law system.

C. *Evaluation of Choice of Law Method*

While the reader may normatively disagree with this author's multilateralist choice of law method,[152] it satisfies the requirements set

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[151] *D1* was also an Alabama resident, but this is probably irrelevant unless *D2* knew that *D1* was an Alabama resident, which would have meant that it was less likely that *D1* would be driving in Mississippi.

[152] As Professor Brilmayer points out, "[t]he fundamental and unavoidable

forth in Part III.[153] First, the approach is grounded in positive law It first determines what legal relations are provided by the states that might have a connection with the facts. It does not adopt a state's law unless that state has created a legal relation that applies to the facts.

The choice of law approach is substantively neutral. It examines the legal relations created by the states, and it examines the scope of those relations without judging the wisdom of the rule. Then, with true conflicts, it chooses law, not based on substantive criteria, but on which state has the closest connection to the facts.

The system is also forum neutral. In the system, choice of law does not depend on where the suit is filed. With true conflicts, a judge must adopt the law of the state that has the closest connection to the controversy, even if his state's interest is ignored.

The system is predictable. Parties will know that when two states create legal relations that a court will use the law of the state with the closest connection to the controversy The outcome will not depend on in which forum the case is filed or which state's law the judge believes is the better rule.[154]

The system reflects the relevant states' interests. It looks to the interests and policies of the relevant states when determining what the legal relations are and the scope of those relations. Although it does not directly consider the states' interest in the second step, choosing law in cases of true conflicts, the approach's outcome furthers the states' interests. The second step chooses the law of the state with the closest connection to the controversy Thus, under the approach, a state's interest will be furthered when a state has the closest connection to a controversy, and the state's interest will yield when another state has the closest connection. This author believes that adopting a state's law when it has the closest connection to a case but requiring that state to yield its interest when another state has a closer connection is the best solution to choice of law in a multijurisdictional setting.

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problem of choice of law is one of perspective This is a question of the proper normative grounding, of what is the appropriate foundation for choice of law." BRILMAYER, *supra* note 3, at 1.

[153] *See supra* notes 107-41 and accompanying text.

[154] As noted above, this author does not claim that the system will always produce the same result in all similar cases. For example, judges will differ on the scope of a statute or rule and which state's law has the closest connection to the facts. Still, this author believes that this method is more predictable than existing systems.

Finally, this author's method is fair to the litigants. First, a state cannot apply its law to a situation unless that state has established a legal relation that governs that situation. A significant connection to the controversy will not be enough when the legal relation the court wants to employ was not intended to encompass the facts. Second, a judge cannot use choice of law to produce a judge's notion of substantive fairness in contravention to the body that created the law that should govern. Substantive justice depends on substantive decisions, not choice of law Third, choice of law is forum neutral — a case's outcome does not hinge on the place where the lawsuit is filed. Fourth, choice of law is more predictable for the reasons set forth above. This allows parties to conduct their behavior and structure their business transactions to conform to the law

This author believes that the major element of fairness in this system is that it conforms to the parties' expectations. Parties will usually expect that a court will apply the law of the state with the closest connection to the controversy [155] They will not be surprised when a state's rule that they thought had no relevance to the lawsuit governs the case's outcome.

V EXTENDED EXAMPLES

A. Emery v Emery

Among the issues in *Emery v. Emery*[156] was whether family tort immunity nullified the plaintiffs' causes of action for reckless disregard negligence. Two minor daughters, who were California domiciliaries, were injured in an automobile accident in Idaho caused by the alleged recklessness of their brother, the driver of the car in which the daughters were passengers.[157] Justice Traynor looked to Idaho law to determine whether there was a cause of action, as is required under the vested rights approach. Notably, he applied the Idaho guest statute, which allowed suits by passengers against drivers only when the driver's conduct is intentional or is caused by his intoxication or his reckless disregard of other's rights.[158]

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[155] This is true even in torts cases. One of the purposes of torts is to cause people to conform their behavior to the law. Obviously, people try to conform their behavior to the law they think applies.

[156] Emery v Emery, 289 P.2d 218 (Cal. 1955).

[157] *Id.* at 220.

[158] *Id.* at 221.

The next question was whether family tort immunity negated the sister's remedy Idaho apparently would have employed the family tort immunity doctrine, but there was no California law on whether minors can sue family members for malicious or willful torts. If California law applied, Justice Traynor could follow the modern trend and refuse to apply family tort immunity [159]

Justice Traynor used characterization combined with language that sounds like governmental interest analysis to find that California law applied. Traynor stated that three jurisdictions' laws might govern this case: (1) the law of the place where the injury occurred, (2) forum law, or (3) the law of the family's domicile.[160] Although one case had applied the law of the place where the injury occurred, which is the normal rule under Beale's approach, Traynor thought that the question was not one of tort, but of the "capacity to sue and be sued."[161] Traynor pointed out that in such a case "the place of injury is both fortuitous and irrelevant."[162] One case on the issue had held that forum law applies, and analogous cases concerning husband-wife immunity had also applied forum law [163] Justice Traynor then declared that:

> We think that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile. That state has the primary responsibility for establishing and regulating the incidents of the family relationship and it is the only state in which the parties can, by participation in the legislative process, effect a change in those incidents. Moreover, it is undesirable that the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home.[164]

Thus, Traynor used characterization from Beale's approach, along with principles from governmental interest analysis that the domicile has the

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[159] *Id.* at 222. This does not violate this author's requirement that choice of law should be substantively neutral. Justice Traynor changed the California substantive rule; he did not manipulate choice of law to obtain the result he felt was just.

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.* at 223.

interest in regulating family relationships, to find that California law governed and the daughters could recover.

This author's method would produce a similar result. California provides a right for its citizens to recover when they are injured by another's negligence, regardless of the place of the negligence. California does not have family tort immunity, at least when reckless disregard is involved. Idaho creates a right for persons to recover for negligence that occurs in Idaho (in order to regulate conduct), but it has family tort immunity However, the Idaho family tort immunity only encompasses Idaho families, not California families that are only temporarily in Idaho. Consequently, there is no conflict because California establishes a right, while the Idaho immunity does not apply

The analysis of the above example was based on the assumption that Idaho intended to apply family tort immunity only to Idaho families. This is probably correct because Idaho has no interest in regulating California families. But assume that the Idaho legislature specifically stated that its family tort immunity rule applied to all accidents happening in Idaho, which it could do under the Due Process Clause[165] because there is a significant connection to Idaho, the accident occurred there. In this case there is a true conflict — both the California right to recover and the Idaho immunity govern the facts. Idaho's connection to the controversy is that the accident took place there. California's connection is that the family is domiciled there. Although the relevant connections are equivalent quantitatively, the California connection is more significant qualitatively Where a family lives is more important in relation to family tort immunity than where an accident occurs, especially considering the fact that the family was only temporarily in Idaho.

B. Alabama Great Southern Railroad v Carroll

Alabama Great Southern Railroad v. Carroll[166] involved the issue of whether the plaintiff's claim for negligence was barred by Mississippi's fellow servant rule. Plaintiff, an Alabama resident and a railroad brakeman, was injured in Mississippi when a link between two railroad cars broke while a train was going from Alabama to Mississippi. The accident was caused by the failure of the Alabama railroad's employees

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[165] U.S. CONST. amends. V & XIV, § 1.

[166] Alabama Great S. R.R. v Carroll, 11 So. 803 (Ala. 1892).

to inspect the link between the cars properly before the train left Alabama.[167]

The plaintiff's lawsuit would have been barred if Mississippi law governed because Mississippi had adopted the fellow servant rule (an employee cannot recover from his employer based on another employee's negligence).[168] On the other hand, the brakeman would have had a cause of action under Alabama law because Alabama had abrogated the fellow servant rule by statute.[169] Using the vested rights rule that the place of injury governs, the court found that the fellow servant rule barred plaintiff's claim.[170]

Under this author's approach, no conflict exists. Alabama establishes a right to recover for injuries caused by negligence when the injury occurs in Alabama, the negligence occurs in Alabama, or when Alabama citizens are involved. In this case, the negligence occurred in Alabama, and the plaintiff was an Alabama resident. Because there was no limitation on the plaintiff's right to recover under Alabama law, the brakeman had a claim under Alabama law.

The brakeman had no cause of action under Mississippi law because of the fellow servant rule. However, this author thinks that the fellow servant rule does not create an immunity for the railroad that produces a true conflict. This author believes that the Mississippi rule is intended only to protect Mississippi employers.[171]

C. Grant v McAuliffe

Grant v. McAuliffe[172] restates the "place of the wrong" rule for torts, although one can see Justice Traynor grasping for another approach.

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[167] *Id.* at 804.

[168] *Id.*

[169] *Id.* at 808.

[170] *Id.* at 809.

[171] On the other hand, Mississippi might have also intended that its fellow servant rule apply to accidents occurring in Mississippi, in which case there would be a true conflict. As stated above, this author's system, while more predictable than existing approaches, cannot be totally predictable because judges will differ as to a law's scope. If a true conflict exists in this case, the brakeman should still be able to recover because Alabama has the closest connection to the lawsuit based on a qualitative and quantitative analysis of the facts, the only relevant connection to Mississippi being that the accident took place there.

[172] Grant v McAuliffe, 264 P.2d 944 (Cal. 1953).

In *Grant*, three plaintiffs were injured in an automobile accident in Arizona. The other car's driver died nineteen days after the accident. When the plaintiffs made claims against the driver's estate, the administrator rejected them because Arizona law did not provide for survival of causes of action. The plaintiffs, the decedent, and the administrator were California residents.[173]

The plaintiffs sued the administrator in California state court. The administrator filed a general demurrer and a motion to abate the complaints, arguing that under Arizona law a cause of action does not survive the tortfeasor's death. The trial court granted the motions, and the plaintiffs appealed.[174]

The California Supreme Court reversed. Justice Traynor restated the vested rights rule that the law of the place where the tortious act occurs governs substantive matters. However, he continued by declaring that the forum does not adopt the procedural rules of the place where the tortious act took place.[175] Characterizing survival of causes of action as procedural, Traynor employed California law, which allowed victims to bring negligence suits against estates.[176]

This author's analysis of *Grant* is similar to the analysis of *Carroll*. Arizona creates a right of recovery for persons injured in Arizona by another's negligence. This right, however, is predicated on the tortfeasor's survival. If the tortfeasor dies, the injured party does not have a claim against the tortfeasor's estate under Arizona law The reason behind the rule is to protect Arizona estates, so the survival statute has no force outside Arizona — the survival statute does not apply to California estates.[177]

The plaintiff has a cause of action under California law California provides a right in its citizens to recover damages when the citizen is injured by another's negligence, regardless of the place of injury, and it

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[173] *Id.* at 946.

[174] *Id.*

[175] *Id.*

[176] *Id.* at 949

[177] This case illustrates a problem in Beale's mechanical approach. Under Beale's approach, which was apparently used by the lower court, the Arizona survival statute bars the cause of action because the accident occurred in Arizona. However, Arizona has not created a legal relation that governs the controversy because Arizona did not intend its survival rule to apply to California estates. One can make similar criticisms of the outcome under Beale's method in *Emery* and *Alabama Southern*.

has no survival statute. Therefore, there is no conflict in this case, and the plaintiff has a remedy

D. Hurtado v Superior Court

An analysis of *Hurtado v. Superior Court*[178] illustrates the differences between governmental interest analysis and this author's method in the context of a wrongful death suit. In this case, the plaintiff's decedent was killed in an automobile accident in California in which the defendant was at fault. The decedent and his family were Mexican domiciliaries, and the decedent was in California temporarily The defendant, his cousin, was a California resident, and the three vehicles involved in the accident were registered in California.[179]

Both Mexico and California had wrongful death actions, but Mexico limited recovery to approximately $1946.72, to protect resident defendants from excessive financial burdens.[180] California had no limitation because it wanted to compensate decedents' beneficiaries fully and because it wanted to deter conduct within its borders that wrongfully takes a life.[181]

In deciding whether the Mexican wrongful death limitation governed, the court applied governmental interest analysis. The court stated that "California as the forum should apply its own measure of damages for wrongful death, unless Mexico has an interest in having its measure of damages applied."[182] The court recognized three aspects of wrongful death actions: "(1) compensation for survivors, (2) deterrence of conduct and (3) limitation, or lack thereof, upon the damages recoverable."[183] The third aspect, the one involved in this case, "insofar as *defendants* are concerned, reflects the state's interest in protecting resident defendants from excessive financial burdens."[184] Consequently, on the limitation of damages issue, California has an interest in applying its wrongful death statute without limitation to deter conduct within California, while Mexico has no interest in employing its wrongful death limitation because Mexican defendants are not involved. Thus, there is no conflict.

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[178] Hurtado v. Superior Ct., 522 P.2d 666 (Cal. 1974).
[179] *Id.* at 668.
[180] *Id.* at 674.
[181] *Id.* at 672.
[182] *Id.* at 670.
[183] *Id.* at 672.
[184] *Id.*

This author's method reaches the same result by looking at whether the relevant states have created a legal relation that applies to the facts. California provides a wrongful death action without a damages limitation because its wrongful death statute encompasses injuries that occur in California. Mexico's wrongful death statute could also allow recovery for the plaintiff because it is intended to encompass wrongful deaths of Mexican nationals. However, the wrongful death limitation does not apply because it only protects Mexican defendants, and the defendant is from California.[185] Thus, there is no conflict because Mexico has not created a legal relation that governs the controversy

In sum, the difference between this author's method and governmental interest analysis is that this author's method looks to see whether a state has created a legal relation that governs the facts, while governmental interest analysis tries to determine whether a state has an interest in applying its law This author does analyze a state's interest in applying its law to determine the law's scope.

E. Ryan v Clark Equipment Co.

In *Hurtado*, the court discusses a similar case, *Ryan v. Clark Equipment Co.*,[186] decided by the California Court of Appeals. In *Ryan*, the plaintiff's husband, an Oregon resident, was killed in that state while operating a front-end loader for his Oregon employers. The plaintiff brought an action in California on behalf of the decedent's heirs, all Oregon residents, against the Michigan manufacturer of the front-end loader. Jurisdiction was proper in California because the Michigan manufacturer did business in California. Oregon limited wrongful death recovery to $20,000 and provided that other amounts recovered because of the wrongful death must be offset against damages recovered in the wrongful death action. Since the plaintiff had already received $35,000, she would not be able to recover any damages in a wrongful death action if Oregon law controlled.[187]

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[185] In the alternative, one could analyze the limitation of liability as being inseparable from the Mexican wrongful death act. In other words, it does not apply to wrongful death acts of other jurisdictions.

[186] Ryan v. Clark Equip. Co., 74 Cal. Rptr. 329 (Cal. Ct. App. 1969). Because there are analytical errors in *Ryan*, this analysis will employ the correct presentation of *Ryan*'s facts from *Hurtado*. *See supra* Part V.D (notes 178-85 and accompanying text).

[187] *Ryan*, 74 Cal. Rptr. at 330-31.

The court declared that both Oregon and Michigan had an interest in applying their wrongful death statutes. Oregon is interested in protecting defendant's financial security by limiting damages because defendant did business in Oregon, while Michigan had an interest in allowing unlimited liability in order to deter the manufacturer's conduct.[188] The California Court of Appeals resolved this true conflict by deciding that Oregon's interest "overrides any possible concern of Michigan in the regulation of activities of manufacturers," and by employing Oregon law.[189]

This author's analysis produces a similar result.[190] Oregon creates a limited wrongful death action to protect Oregon defendants. Michigan has a wrongful death action that permits unlimited liability, which applies to injuries caused by products manufactured in Michigan, regardless of where the injury occurs, because Michigan wants to deter Michigan manufacturers' negligence. Thus, the limitation of damages issue presents a true conflict.

Oregon has the closest connection to the controversy because the accident occurred there, the employers were Oregon residents, and the decedent and his family were Oregon citizens, while the only relevant connection with Michigan was that the front-end loader was manufactured there. Consequently, this author's analysis reaches the same conclusion as *Ryan*, but by determining which state has the closest connection to the controversy, not by weighing.

F Milliken v. Pratt

In *Milliken v. Pratt*,[191] a much-discussed choice of law case,[192] Mrs. Pratt executed a guaranty of her husband's credit in favor of a Maine

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[188] *Id.* at 331.

[189] *Id.*

[190] Two choice of law approaches might have allowed unlimited damages. Under the better rule approach, the court could have determined that the Michigan rule was the better rule and applied Michigan law.

The court could have also employed governmental interest analysis. In *Ryan*, the court used some interest analysis, but made the final determination by weighing, a method Currie explicitly rejected. *Id.* at 331-32. Under classic governmental interest analysis with true conflicts, the forum, California, had no interest in applying its law, or, for that matter, the law of the other two states. In such an instance, California could apply the rule that was the same as its own. In this case, California had an unlimited wrongful death action, so it could have allowed full recovery for the plaintiff. However, this author disagrees with such a result because choice of forum is outcome determinative.

[191] Milliken v Pratt, 125 Mass. 374 (1878).

[192] *E.g.*, CURRIE, *supra* note 59, at 77-127; Cook, *supra* note 46, at 471.

partnership. She executed the guaranty at her home in Massachusetts, and her husband mailed it to Maine. Mr. Pratt defaulted on his debts, and the partnership sued Mrs. Pratt on her guaranty in Massachusetts.[193] Under a Maine statute, a married woman could be held liable as a surety,[194] but, under Massachusetts law, a married woman could not bind herself as a surety [195]

The court reversed a trial court judgment for the defendant on the ground that Maine law governed. The court analyzed Mrs. Pratt's guaranty as an offer for a unilateral contract that was accepted by goods delivered to the buyer or to the buyer's carrier.[196] Since the goods were delivered in Maine, Maine law governed. Consequently, the Maine statute applied, and the guaranty was valid.[197]

Governmental interest analysis yields an opposite result.[198] Both Massachusetts and Maine have an interest in applying their laws. Massachusetts wants to protect married woman, whom at that time it believed needed special protection. Maine, on the other hand, has an interest in freedom of contract. Since the suit was filed in Massachusetts, the court should apply Massachusetts law, voiding the contract. Concerning this situation, Currie declared, "if one state's policy must yield, should not the court prefer the policy of its own state?"[199]

If the creditor had filed the lawsuit in Maine, a court employing governmental interest analysis would have upheld the contract. Both states have an interest in applying their laws, and, in such a case, the forum should further its interest and adopt its law Thus, *Milliken's* outcome under governmental interest analysis hinges *solely* on the forum where the action is filed.

A court applying the better rule approach would uphold the guaranty because the Maine rule is the better rule. While it is obvious that the Maine rule is the better rule in hindsight, which rule was the better rule

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[193] *Milliken*, 125 Mass. at 241-42.

[194] *Id.* at 243.

[195] *Id.* at 249

[196] *Id.* at 243. The court could have just as easily found the place of the making of the contract to be Massachusetts. The Maine creditor offered to sell Mrs. Pratt's husband goods in exchange for Mrs. Pratt's signing the guaranty. *Id.* at 241-42. Thus, one can conclude that the place of the making of the contract is Massachusetts where Mrs. Pratt accepted the offer. This case again illustrates how courts can manipulate their analysis to obtain the desired result.

[197] *Id.* at 249..

[198] CURRIE, *supra* note 59, at 90.

[199] *Id.*

was not as clear in the Nineteenth Century Similarly, states have the right to differ on what is the better rule. If protecting married women is not the better rule, Massachusetts should change its substantive law, not use choice of law to obtain a desired result on an ad hoc basis.

Under this author's approach, a true conflict exists. Maine creates a cause of action to recover on the guaranty, while Massachusetts furnishes an immunity that negates any right to recover on a Massachusetts married woman's contracts.

This author would adopt Massachusetts law because it has the closest connection to the controversy Mrs. Pratt was a Massachusetts domiciliary, and she entered into the contract there. The contract was to be performed in Massachusetts; Mrs. Pratt would have paid the guaranty there. On the other hand, the only primary connection to Maine was that the partnership was a Maine domiciliary, a connection that is not as significant as the connections to Massachusetts.[200]

G. Lilienthal v Kaufman

Lilienthal v. Kaufman,[201] involved the issue of whether an Oregon spendthrift statute voided promissory notes executed and delivered in California in a case brought in Oregon. *D* had been adjudged a spendthrift,[202] and, under Oregon law, a spendthrift's guardian could void a spendthrift's contracts, except for necessaries. *D* had entered into a promissory note with a California resident to finance a joint venture to sell binoculars. *P* was unaware that *D* had been declared a spendthrift and placed under a guardianship. The guardian declared the notes void.[203]

There is no doubt that the court would have declared the notes void if only Oregon law was involved. The court had declared the same spendthrift's obligation to repay the unpaid balance of a check void based on almost identical facts.[204] Consequently, the only issue in this case involved choice of law

The court began by determining that there was a true conflict — the obligation was enforceable under California law, but not under Oregon law[205] The court also decided that it could not decide the matter by

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[200] It is true that the contract that Mrs. Pratt guaranteed was to be performed in Maine, but this author considers this fact secondary.

[201] Lilienthal v. Kaufman, 395 P.2d 543 (Or. 1964).

[202] For a definition of spendthrift, see *supra* note 144.

[203] *Lilienthal*, 395 P.2d at 543.

[204] Olshen v. Kaufman, 385 P.2d 161 (Or. 1963).

[205] *Lilienthal*, 395 P.2d at 545-46.

characterization. The defendant had urged that the Oregon court should not apply California law because the validity of a contract is a matter of procedure, not substance. However, the court found that the issue was one of substance under standard definitions of substance and procedure.[206]

The plaintiff contended that the issue of a contract's validity is governed by the place of the contract's making — in this case California.[207] This is the rule under Beale's approach, and Oregon had restated this rule for many years.[208] However, the rule had also been under attack for many years, mainly on the ground that the place of the contract's making is often fortuitous, and in such a case the state of the contract's making has no interest in the parties or the contract's performance. Still, the court refused to overrule the *lex loci contractus* principle because the contract had other connections to California — (1) the defendant had gone to California to obtain the loan, (2) the plaintiff was a California resident, (3) the money was loaned in California, and (4) the money was to be repaid in San Francisco.[209] Based on the above, the court stated that "apart from *lex loci contractus*, other accepted principles of conflict of laws leads to the conclusion that the law of California should be applied."[210]

The court also felt that California law should govern based on the "rule of validation" — if a contract is valid under the law of any jurisdiction having a significant connection to the contract, the court will adopt the law of the jurisdiction that validates the contract.[211] This is because "[i]n the general law of contracts we constantly strive to hold the contract valid and enforceable."[212]

Despite the above, the Oregon court refused to enforce the contract because Oregon had a strong public policy against enforcing spendthrifts' contracts.[213] The court conceded that both the California and Oregon interests were of substance, and that neither was more important than the other. Nevertheless, the court declared that "[w]e are of the opinion that in such a case that the public policy of Oregon should prevail and the law

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[206] *Id.* at 546.
[207] *Id.*
[208] *See, e.g.*, Erwin v. Thomas, 506 P.2d 494 (Or. 1973).
[209] *Lilienthal*, 395 P.2d at 545-46.
[210] *Id.* at 546.
[211] *Id.*
[212] *Id.*
[213] *Id.* at 546-49.

of Oregon should be applied; we should apply that choice-of-law rule which will 'advance the policies or interests of' Oregon."[214]

Of course, this choice of law analysis, as well as the Oregon court's actual decision, places the validity of some California contracts in doubt.[215] The plaintiff did not know, and apparently had no way of knowing, that the defendant was a spendthrift.[216]

These facts also demonstrate the problem with using the better rule approach, as well as any method that is not substantively neutral. Which rule is the better rule — that the validity of contracts should be upheld to provide predictability in the commercial world or that a spendthrift should be protected?

This author's method would produce a different result from the one the Oregon court reached — mainly, because it is jurisdiction neutral. Oregon upholds the validity of contracts, but provides an immunity from obligations made by Oregon spendthrifts to protect spendthrifts and their families, so there is no remedy under Oregon law California upholds the validity of contracts and has no spendthrift immunity However, the Oregon legislature intended that its spendthrift statute encompass contracts made by Oregon residents outside of Oregon, so a true conflict exists.

Under this author's second step, one looks to the state that has the closest connection to the controversy Oregon has only one relevant connection to the facts — the defendant is an Oregon resident, but this is a significant connection as it relates to the spendthrift statute.[217] The majority of the relevant connections, however, are with California, and they are also significant — the defendant executed the notes in California, the plaintiff gave the money to the defendant in California, the plaintiff is a California resident, and the money was to be repaid in California. Based on this quantitative and qualitative analysis of these facts, a court should apply California law and uphold the contract.

The above result advances California's interest in upholding the validity of contracts connected with California, at the expense of Oregon's interest in protecting spendthrifts. However, Oregon's interest

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[214] *Id.* at 549 (quoting Hill, *Governmental Interests and the Conflict of Laws — A Reply to Professor Currie*, 27 U. CHI. L. REV 463 (1960)).

[215] As is true of many cases decided under governmental interest analysis, the result would be exactly the opposite if the case had been filed in California.

[216] *Lilienthal*, 395 P.2d at 544.

[217] As stated above, the fact that the lawsuit was filed in Oregon is irrelevant.

is not as impaired as one might think because the facts have a closer connection to California than Oregon.[218]

H. Auten v Auten

Auten v. Auten,[219] which involved the issue of whether a wife had repudiated a separation agreement, illustrates the difference between my method and the "center of gravity" approach. The plaintiff wife and defendant husband were married in England and had two children. The husband deserted the wife, obtained a Mexican divorce, and, apparently, moved to New York. The wife traveled to New York to discuss their differences, and the parties entered into a separation agreement. Under the agreement, a trustee was to pay the wife £50 a month for the support of the wife and children, who would continue to live in England.[220] The agreement stated that the parties were to live separately and provided that "neither should sue 'in any action relating to their separation' and that the wife should not 'cause any complaint to be lodged against [the husband], in any jurisdiction, by reason of the said alleged divorce or marriage.' "[221]

The husband soon breached the agreement, leaving his family destitute. The wife brought an action against the husband in England for separation and asked for an order for the husband to pay alimony *pendente lite*. The wife allegedly filed this action to enable her to enforce the separation agreement, not with any thought of repudiating it. Apparently, the case never came to trial.[222]

Several years later, the wife sued the husband in New York to recover $26,564 that the husband allegedly owed her under the separation agreement. The husband defended on the ground that the English action repudiated the separation agreement. The trial court granted summary judgment based on New York law, agreeing that the English action's

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[218] Professor Kramer would apparently disagree with this conclusion. Kramer, *supra* note 93, at 303. Using his comparative impairment canon, he thinks that the Oregon policy behind the spendthrift statute is more impaired than the California policy of establishing a secure commercial environment. *Id.* On the other hand, this author believes that determining which state's policy is more impaired is as difficult and as subjective as establishing which jurisdiction has the better rule.

[219] Auten v. Auten, 124 N.E.2d 99 (N.Y 1954).

[220] *Id.* at 100.

[221] *Id.* (alteration in original).

[222] *Id.*

commencement had repudiated the separation agreement. An intermediate appellate court affirmed.[223]

The Court of Appeals overturned the lower courts' decisions because English, not New York, law applied. In doing so, the court adopted the "center of gravity" test, which resembles the "most significant relationship" test later used by the *Second Restatement*.[224] "Under this theory, the courts, instead of regarding as conclusive the parties' intention or the place of making or performance, lay emphasis rather upon the law of the place 'which has the most significant contacts with the matter in dispute.'"[225] The court advocated this approach because "it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction 'most intimately concerned with the outcome of [the] particular litigation.'"[226] It also gives "effect to the probable intention of the parties and consideration to 'whether one rule or the other produces the best practical result.'"[227]

Using the center of gravity test, the court concluded that English law "must be applied to determine the impact and effect to be given the wife's institution of the separation suit."[228] The court thought that England had all the significant contacts with the case, while New York's sole contacts with the dispute was that it was the place of the contract's making and the place where the trustee had his office. The court pointed out that the wife's sole purpose in making the trip to New York was to get her husband to support his family; she returned to England shortly after the agreement was signed.[229] The separation agreement:

> [F]ixed the marital responsibilities of an English husband and father and provided for the support and maintenance of the allegedly abandoned wife and children who were to remain in England. There is no question that England has the greatest concern in prescribing and

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[223] *Id.* at 101.

[224] *Id.*

[225] *Id.* at 101-02 (quoting Rubin v. Irving Trust Co., 113 N.E.2d 424, 431 (N.Y 1953)).

[226] *Id.* at 102 (quoting Note, *Choice of Law Problems in Direct Actions Against Indemnification Insurers*, 3 UTAH L. REV 498, 498-99 (1953)) (alteration in original).

[227] *Id.* (quoting Swift & Co. v. Bankers Trust Co., 19 N.E.2d 992, 995 (N.Y 1939)).

[228] *Id.*

[229] *Id.*

> governing those obligations, and in securing to the wife and children essential support and maintenance.[230]

This author disagrees with several of the factual determinations and conclusions in *Auten*. First, the court was wrong that the only contacts with New York were that the contract was made in New York and that the trustee was resident there. The court omitted the significant fact that the husband lived in New York at the time the agreement was executed. Second, the court focused on the wrong subject matter — the marriage, rather the subject matter actually involved in the case — the separation agreement. The wife was not suing for support because the husband had a duty to support her because they had been married, but because the husband owed her money under the separation agreement. Moreover, this author thinks that the husband could have reasonably believed that New York law governed the separation agreement's performance, considering that he lived in New York at the time of its execution, it was executed in New York, and the money was to be paid to the trustee in New York (who would then send it to England).

There are really two issues concerning whether the wife's initiation of the lawsuit repudiated the separation agreement. First, what was the legal meaning of the lawsuit's institution in England? Because the lawsuit was an English lawsuit, only English law is relevant to this issue. Second, did the initiation of the lawsuit, considering its legal meaning under English law, repudiate the separation agreement? A court might answer this question using either English or New York law

Under this author's method, a true conflict exists for the second issue. New York law could apply to the facts because the separation agreement was executed there, it was to be partly performed there, and one of the parties to the agreement lived there when it was entered into and at least part of the time when it was being performed. England also had a connection to the facts that would allow the use of English law because the wife and children lived in England and the separation agreement was to be partially performed there.

Concerning the second step of this author's method, New York connections included: (1) the separation agreement was entered into in New York, (2) the husband lived in New York at the time of execution and for at least part of the time of performance, and (3) the husband's performance was to be made in New York. England's connections included: (1) the wife and children lived there and (2) the contract was

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[230] *Id.* at 103.

to be partially performed in England. Since the connections with New York and England concerning domicile and contract performance seem equal, the fact that the parties executed the contract in New York tips the balance toward New York. Consequently, looking only at the separation agreement and the facts pertaining to it, and ignoring the husband's duty to support his family outside the separation agreement (which was not at issue in *Auten*), this author believes that New York has the closest connection to the controversy If the Court of Appeals agreed with the lower courts that under New York law the wife's action repudiated the separation agreement, then the wife had no cause of action.

The above result seems substantively unfair. The wife and children are left destitute by a selfish father, and the only reason the separation agreement was entered into in New York was because that was the only place that the wife could find her husband. But is the unfair result caused by choice of law? Consider the same facts except that the wife lived in Albany, New York, rather than England. Since there is only one jurisdiction involved, a New York court would have had to adopt New York law and tell the wife to go home penniless. The Court of Appeals implied that the lower courts' rulings may have been wrong concerning what is required under New York law for a repudiation,[231] and analysis of the substantive law would have been a preferable method for exacting substantive justice, instead of setting a choice of law precedent that may produce a substantively unfair result in another case.

I. Levy v Daniels U-Drive Auto Renting Co.

Levy v. Daniels U-Drive Auto Renting Co.[232] presents a situation where persons using this author's system may differ concerning which state's law to apply In *Levy*, a person rented a car in Connecticut from the defendant, an automobile rental company The renter drove it to Massachusetts, where he injured the plaintiff by the negligent operation of the car. Under Massachusetts law, the plaintiff had no right to recover from the car rental company based on a lessee's negligence.[233] On the other hand, Connecticut had a statute that stated "[a]ny person renting or leasing to another any motor vehicle owned by him shall be liable to any

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[231] *Id.* at 101.

[232] Levy v. Daniels U-Drive Auto Renting Co., 143 A. 163 (Conn. 1928).

[233] *Id.* at 163-64.

person or property caused by such motor vehicle while so rented or leased."[234]

The plaintiff filed suit in Connecticut, which used Beale's approach. Under a strict application of Beale's method, the place of the injury was Massachusetts, and the rule for torts is that the law of the place of injury governs. Consequently, since Massachusetts law governed and there was no right to recover against an automobile lessor in Massachusetts, the court should have found for the defendant.

The court avoided this result by characterizing the issue as one of contract rather than tort. Because the issue was a contract issue, Connecticut law — the place of the making of the contract — governed. The leasing contract was made in Connecticut, and according to the court, the Connecticut statute became part of the contract.[235] Under this interpretation, the plaintiff could recover from the lessor.

Professor Leflar in his discussion of this case is undoubtedly right that the court used characterization to avoid what it believed was an unfair result.[236] The court thought that it would be unfair to allow the plaintiff to go uncompensated, so it recharacterized the issue as contract in order for the Connecticut statute to control. However, as has been mentioned several times above, this author believes that courts should not use choice of law to provide substantive fairness. If Massachusetts law is unfair, the Massachusetts legislature or courts should change it. A Connecticut court should not be able to change it by manipulating choice of law

While this author's approach is substantively neutral, it does not always provide an unassailable result in all instances. In this case, persons using this author's method might differ on what law should apply Connecticut creates a statutory right that a party who is injured by an automobile lessee's negligence can recover from a Connecticut lessor, even if the lessor is not at fault. On the other hand, there is no right against an automobile lessor for a lessee's negligence under Massachusetts law This is not a false conflicts case. The fact that there is no right to recover against a lessor under Massachusetts law is a legally protected interest.

Since there is a true conflict, the analyst must determine which state has the closest connection to the facts. The car's driver and the defen-

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[234] *Id.* at 163 (quoting 1925 Conn. Pub. Acts 195 § 21).

[235] *Id.* at 164. Of course, the contract was between the defendant lessor and the lessee, not between the plaintiff and defendant. *Id.*

[236] LEFLAR, *supra* note 16, at 176-80.

dant/lessor were from Connecticut. The contract was entered into there and partially performed there. However, the accident occurred in Massachusetts, and the plaintiff apparently was from Massachusetts.

Looking at the parties' expectations produces contrary results. The plaintiff (assuming he knew Massachusetts law) would not have expected that he could recover from an automobile lessor for the lessee's negligence. On the other hand, a Connecticut automobile rental agency would have expected to be liable for its lessee's negligence because of the Connecticut statute.

This author is tempted to apply Connecticut law on policy grounds. The rental company could have bought insurance to cover the cost of its lessee's negligence, or it could have charged higher rates to compensate for the possibility of a renter's accident. On the other hand, it is difficult for a tortfeasor to be able to predict when she will be injured by an uninsured party Still, this author rejects this reasoning because such analysis is for substantive law, not choice of law In addition, for every policy there is usually an opposite policy One might argue that allowing the plaintiff to recover would discourage persons from buying uninsured motorists insurance.

While this author believes that the choice of law in *Levy* could go either way under this author's method, this author would adopt Massachusetts law The place of the accident and the plaintiff's residence were there, and these seem to be the most significant connections to the facts. In addition, the plaintiff has no relevant connection to Connecticut. However, this author would not argue with someone who reached the opposite conclusion. No choice of law method can fairly give a single answer in all cases.

VI. THE NEED FOR A UNIFIED METHOD OF CHOICE OF LAW

A final problem with choice of law in the United States is that each state has its own choice of law rules. Some states employ Beale's method, others the *Second Restatement* approach, others governmental interest analysis, others different approaches, with each system producing a different result in many cases. This individuality of approaches to choice of law produces indeterminacy and invites forum shopping.

One of the reasons for this multitude of choice of law systems is that there is no "superlaw" that prevents states from favoring their laws or approaches, except for the very loose requirements in *Allstate*.[237]

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[237] *See supra* Part III.A (notes 107-20 and accompanying text).

Several scholars have stated that the constitution could provide greater restraints on choice of law.[238] For example, Professor Shreve points out that: "The Due Process Clause could protect litigants' reasonable expectations in choice of law. The Full Faith and Credit Clause could prevent unwarranted refusals to apply sister-state law [T]he Privileges and Immunities, Equal Protection, and Commerce Clause could secure nonresident litigants from discriminatory applications of forum state law."[239] While this author agrees that the Supreme Court could use these clauses to create greater uniformity in choice of law, the Court is unlikely to do so in the immediate future.[240]

Several scholars have suggested that Congress could enact a uniform choice of law under the Full Faith and Credit Clause of the United States Constitution.[241] The second sentence of this clause reads, "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and *the Effect thereof*."[242] In other words, under the Full Faith and Credit Clause Congress can legislate the effect of one state's laws in another state; it can draft national choice of law rules.

Some might view the above as infringing on the states' domain, despite the fact that Congress has the power to do so under the Constitution. Nevertheless, this author believes that a uniform approach to choice of law is necessary, and that the best way to achieve such uniformity is through an act of Congress. Of course, the states might adopt a uniform law as they have done in other instances, such as with the Uniform Commercial Code.[243] However, this author believes that it is unlikely that the states will be able to agree on a single method.[244]

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[238] *E.g.*, Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundation of Choice of Law*, 92 COLUM. L. REV 249 (1992); Shreve, *supra* note 131.

[239] Shreve, *supra* note 131, at 274-75.

[240] *See also id.* at 294-95.

[241] CURRIE, *supra* note 59, 125-26; Walter W Cook, *The Powers of Congress under the Full Faith and Credit Clause*, 28 YALE L.J. 421 (1919).

[242] U.S. CONST. art. IV, § 1 (emphasis added).

[243] *See* Larry Kramer, *On the Need for a Choice of Law Code*, 89 MICH. L. REV 2134 (1991).

[244] As stated *supra* Part II.F (notes 93-106 and accompanying text), Professor Kramer believes that the states would be better off if they cooperated in choice of law. *See also* BRILMAYER, *supra* note 3, at 169-218. This author fully agrees with Professor Kramer. However, this author also sees the difficulty in fifty-one jurisdictions deciding on a single choice of law system.

CONCLUSION

In this Article, this author theorizes that many of the problems in modern conflicts were caused by a switch from a multilateralist approach to choice of law to a unilateralist one. This author also proposes a multilateralist method of choice of law to remedy these problems. This author's system consists of two steps. First, a court should determine the legal relations created by the laws of the states that might apply to the situation. If only one state provides legal relations that govern the controversy, then there is no conflict of laws. Second, when a true conflict exists, a court should employ the legal relation of the state that has the closest connection to the facts.

The above method meets this author's criteria for a choice of law system. First, the method is grounded in positive law Second, it is substantively and forum neutral. Third, it is more predictable than other approaches. Finally, it considers the interests of the relevant states and the individual litigants.

This author also advocates that all states use a uniform method for choosing law, because the myriad of systems the fifty states presently use contributes to the indeterminacy of law. Such a uniform method could be created by an act of Congress under the Full Faith and Credit Clause of the United States Constitution or by a uniform law among the states.