

BOSTON UNIVERSITY LAW REVIEW**A PRAGMATIC GUIDE TO CONFLICTS†****JOSEPH WILLIAM SINGER***

Consistently with my usual experience in research in choice-of-law matters, I find the cases rather in a mess, and in no mood to have order imposed upon them.¹

Brainerd Currie

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.²

William Prosser

I. INTRODUCTION**A. *Surviving Swamps and Eccentric Professors***

Many lawyers regard modern choice-of-law analysis as a confusing morass. Judge Pierson Hall described it as a "veritable jungle" which led "not to a 'rule of action' but a reign of chaos."³ At first glance, conflicts law seems quite simple; it can be summarized in a couple of sentences. Modern choice-of-law approaches require courts to analyze the policies underlying conflicting state laws and to consider the justified expectations of the parties. Then, in light of those considerations, the courts are to apply the law of the state that has a real interest in having its law applied. If more than one state has a real interest in the case, the courts should apply the law of the state

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¹ Brainerd Currie, *Ehrenzweig and the Statute of Frauds: An Inquiry into the "Rule of Validation,"* 18 OKLA. L. REV. 243, 244 (1965).

² William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

³ *In re Paris Air Crash of Mar. 3, 1974*, 399 F. Supp. 732, 739 (C.D. Cal. 1975), quoted in *In re Air Crash Disaster at Washington, D.C. on Jan. 13, 1982*, 559 F. Supp. 333, 335 (D.D.C. 1983).

that has the most significant relationship to the parties and the transaction or occurrence, taking into account the relevant policies and expectations.

Yet when courts and scholars apply this deceptively simple prescription, their analysis seems both complex and disordered. They address a hodgepodge of factors, often with insufficient explanation of how they decided the weight given to each. Nor do the various modern approaches to conflicts law provide determinate answers to concrete cases. Some approaches provide no standard at all. Leflar's better law approach, for example, lists five relevant factors to consider, but identifies no standard for applying them—he does not tell us what to *do* with the factors, other than to *consider* them.⁴ This approach, however, is not unique.

The approaches that do offer standards do not really answer choice-of-law questions; instead, they require decisionmakers to make difficult judgments, just as Leflar does. For example, the Second Restatement requires application of the law of the state that has the most significant relationship with the case; yet, beyond listing factors to consider, it gives little guidance on how to determine significance.⁵ Moreover, both courts and scholars substantially disagree as to how to evaluate the relative significance of different factors in particular cases. Similarly, the comparative impairment approach requires application of the law of the state whose policies will be most impaired if its own laws are not applied to the case. In making this judgment, many disagreements can arise on how to judge the strength and scope of substantive

⁴ ROBERT LEFLAR, LUTHER MCDUGAL, ROBERT FELIX, *AMERICAN CONFLICTS LAW* §§ 99-109, at 281-305 (4th ed. 1986) [hereinafter R. LEFLAR].

⁵ See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* (1971). The Second Restatement does provide a detailed series of presumptions as to which state's laws should apply, but they have proven to be of little help. All the presumptions can be overcome by demonstration that some other state is the one with the most significant relationship to the parties and the transaction or occurrence. They therefore do not protect the decisionmaker from making the ultimate judgment of which state has the most significant relationship. Moreover, in practice, the courts have paid little attention to the presumptions, for precisely this reason. Whichever party points to a presumption in its favor will be met with the counter-argument by the other party that some other state has a more significant relationship with the case; the courts, therefore, inevitably face the ultimate decision of how to determine significance.

Furthermore, as descriptions of how courts handle conflicts cases, some of the presumptions in the Second Restatement are significantly out of date. For example, it can no longer be assumed that courts view the place of the injury as the presumptively most significant contact in torts cases. See *id.* § 146. Although courts still view the place of the injury as important, the place of the defendant's conduct and the domiciles of both the plaintiff and defendant have generally dominated the discussion of recent torts cases. The Reporter for the Second Restatement, Willis Reese, has recognized as much in his recent article on choice-of-law analysis in airplane crash cases. See Willis Reese, *The Law Governing Airplane Accidents*, 39 WASH. & LEE L. REV. 1303 (1982) (arguing that controlling significance should be granted to contacts other than the place of the injury).

policies.⁶ Finally, interest analysis requires application of the law of interested states, but interest analysts differ significantly in their interpretations of when states do and do not have real interests in applying their law to a case.⁷

Individual scholars do have consistent and relatively determinate approaches. It is possible to describe in detail both the methods of analysis and the proposed results that would be reached by such accomplished scholars as Louise Weinberg, Robert Sedler, Herma Hill Kay, and Russell Weintraub.⁸ No court, however, adopts the approach of a particular scholar *in toto*. Instead, the courts borrow from all the modern approaches, using whatever pieces of the analyses seem useful and compelling in a particular case.

Because the courts borrow from the vast array of modern scholarship, it often seems—quite correctly—that decisionmakers have initial intuitions about the correct result and simply manipulate the factors to justify reaching that result. At other times, the opposite problem ensues: It is not uncommon for judges to conclude that several states have significant contacts with the dispute and that they have no way to determine which contacts are more significant. In such cases judges often throw up their hands and retreat to arbitrary territorial rules like the place of the injury.⁹

The prevalent modern approaches—interest analysis, the most significant

⁶ See William Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963). Additionally both false conflict analysis (interest analysis) and the comparative impairment approach require the decisionmaker to determine the class of persons the law is meant to protect, and this judgment also cannot be made mechanically.

⁷ Compare Louise Weinberg, *Conflicts Law and the Problem of Relevant Time: A Response to the Hague Symposium*, 10 HOFSTRA L. REV. 1023, 1025 (1982) with Linda Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints after Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103, 108 (1981) (respectively construing Minnesota's interest in *Allstate Ins. Co. v. Hague*, broadly and narrowly); compare RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS §§ 6.9, 7.4 (3d ed. 1986) (defining state interests in torts and contracts narrowly and, as a result, identifying various "spurious conflicts") with Joseph William Singer, *Real Conflicts*, 69 B.U.L. REV. 1 (1989) (defining state interests in tort and contract cases broadly and thereby reducing the number of cases presenting "false conflicts").

⁸ See, e.g., R. WEINTRAUB, *supra* note 7; Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 174 (Academy of International Law, 1989), excerpted from 215 *Recueil des cours* (1989-III); Robert Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics"*, 34 MERCER L. REV. 593 (1983); Louise Weinberg, *On Departing From Forum Law*, 35 MERCER L. REV. 595 (1984).

⁹ See *In re Bendectin Litigation*, 857 F.2d 290, 304 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989) (noting that under Ohio law, if the court cannot identify the state that has the most significant relationship with the dispute, it will apply the law of the place of the injury); *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 644 F.2d 594, 613-15 (7th Cir.) (applying the law of the place of the injury because the court could not identify which of two interested states had the most significant relationship with the case), *cert. denied*, 454 U.S. 878 (1981); *Neumeier v. Kuehner*, 31 N.Y.2d 121, 129-30,

relationship test, the comparative impairment test, and the better law approach—organize conflicts analysis by listing factors to consider. Five factors generally appear—in different guises—in the various lists. Interest analysis focuses initially on (1) the *policies* underlying conflicting substantive laws and on the persons or events toward which those policies are directed.¹⁰ It then supplements this factor with consideration of (2) the *justified expectations* of the parties who may have relied on the law of a particular state in planning their conduct or who would be unfairly surprised by the application of another state's law.¹¹ In addition to these two factors, the Second Restatement's most significant relationship test and the better law approach require consideration of (3) *comity*; (4) *predictability*; and (5) the *better law*. Comity concerns include determining the relative strength of the respective state policies in the context of the case and the legitimacy of applying aberrational or minority policies to extraterritorial cases.¹² Comity concerns also include consideration of the circumstances in which it is appropriate for a state to defer to the ability of another normative and political community to govern a particular case. This may entail either deference of the forum to foreign law or deference of a foreign state to application of forum law.¹³

286 N.E.2d 454, 458, 335 N.Y.S.2d 64, 70 (1972) (identifying the law of the place of the injury as a residual conflicts rule for cases not covered by more specific rules).

¹⁰ See R. WEINTRAUB, *supra* note 7, § 6.2, at 281-84, § 6.10, at 301-08 (defining which state interests lead to a "real conflict").

¹¹ See *id.* § 6.5 (examining unfair surprise), § 6.26 (examining "the nexus problem": what contacts must defendant have with the forum to make application of forum law "fair and reasonable"). This step in the analysis is referred to as "restrained interpretation" or "taking a second look" at the relevant states' interests.

¹² The comparative impairment approach offers another version of comity by considering which state's policy would be most impaired if not applied to the case. This is equivalent, in my view, to comity considerations generally. It asks the court to determine, in cases of overlapping sovereignty, which state's interests in regulating the events and persons in question is strongest. See R. WEINTRAUB, *supra* note 7, §§ 6.24-6.25, at 336-39.

Interest analysis, in contrast, deals with comity concerns not by analyzing the strength of the different state policies, but by determining, in light of the federal system, whether one of the states has no real interest in applying its law to a case with out-of-state contacts. A determination that only one state is interested allows the decisionmaker to show respect for overlapping sovereign communities by applying the law of only the interested state. The only reason to define a state's interest narrowly—as not applying to a multistate case—is to defer to the ability of another state to govern its affairs or to prevent an unfair surprise; otherwise, the forum could happily apply its sense of justice to adjudicate all disputes before it. See also R. WEINTRAUB, *supra* note 7, § 6.6, at 287-90 (concerning the refusal to apply aberrational policies in multistate cases).

¹³ Compare Singer, *supra* note 7, at 85 ("The forum is not obligated automatically to give up its own ability to constitute itself as a normative community in deference to another state.") with Kay, *supra* note 8 ("my principle of toleration is expressed by the foreign state's willingness to acknowledge the propriety of the forum court's application of forum law").

Predictability concerns include enabling citizens to predict the legal consequences of their conduct and thus, to the extent possible, fostering uniform results in conflicts cases.

Although it remains controversial, most courts consider, either explicitly or implicitly, which set of applicable laws is better as a matter of social policy and justice. Additionally, many conflicts scholars have recently argued explicitly for consideration of the better law.¹⁴ For example, many interest analysts propose a rebuttable presumption in favor of plaintiff-favoring forum law on the grounds that (1) when two states have real interests in furthering their social policies, there is generally little reason for the forum to give up what it sees as the better forum law in deference to the worse law of another state;¹⁵ or (2) that plaintiff-favoring policies generally promote better, widely shared norms of recovery in typical torts and contracts cases.¹⁶ In the same vein, the Second Restatement requires analysis of the *basic policies* underlying the particular field of law involved in the case. I have argued that there is no way to determine the basic policy of an entire field of law, like torts or contracts, without making value judgments about which substantive policies should be favored; that is, without identifying the better law.¹⁷

This list of factors provides a useful reminder of the kinds of considerations generally thought to be relevant to choice-of-law determinations. It fails, however, to present a clear picture of how courts are to apply these factors. Nor does it give sufficient information on how to structure the analysis in either a legal brief or a judicial opinion.

Both the First and Second Restatements of Conflicts failed to provide generally acceptable approaches to analyzing and resolving cases involving choice-of-law questions. The First Restatement failed because it arbitrarily picked particular contacts as determinative. It identified the contact that was *temporally last* among the elements of a cause of action as the most significant contact. For example, in a torts case, the injury generally follows the defendant's conduct and breach of duty, and, in a contracts case, the acceptance follows the offer. But there is no good reason to presume that the

¹⁴ See Weinberg, *supra* note 8, at 600; R. WEINTRAUB, *supra* note 7, § 6.27, at 342-45; Reese, *supra* note 5, at 1305.

¹⁵ R. WEINTRAUB, *supra* note 7, § 6.27, at 345 n.68; Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 587-88 (1983).

¹⁶ Weinberg, *supra* note 8, at 599; R. WEINTRAUB, *supra* note 7, § 6.4, at 284-85, § 6.6, at 287-90, § 6.32, at 359-61.

¹⁷ Singer, *supra* note 7, at 45-47. Similarly, comparative impairment analysis, at least as adopted in California, requires the decisionmaker to determine which policies are emerging or prevalent—and therefore implicitly better—and which are regressive and archaic—and therefore worse. The goal is to confine worse laws to domestic cases with no out-of-state contacts. See, e.g., *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978) (failing to apply California law partly on the ground that it is archaic).

last event is more significant than the first. It is true that there is no tort without an injury and no contract without an acceptance, but it is also true that there is no tort without tortious conduct, and there is no contract without a valid offer.¹⁸ For this reason, the rigid application of these jurisdiction-selecting rules often resulted in arbitrary and unjust outcomes. More than one contact is significant in every contested conflicts case, and the significance of particular contacts varies depending on both the circumstances of the case and the policies underlying the conflicting laws.

The arbitrariness and injustice of the First Restatement rules forced judges to invent more and more escape devices, such as recharacterization, *renvoi*, public policy exceptions, and substance/procedure distinctions. Yet these escape devices were as arbitrary as the basic rules; they were both manipulable and unrelated to the underlying policy concerns of the states. The combination of seemingly rigid rules and arbitrary exceptions created a system that was not only unpredictable but irrational. It directed analysis away from the actual underlying concerns, such as policy goals and value choices, implicated in choice-of-law cases. The current resurgence of interest in territorial rules divorced from the policy concerns of the affected states is therefore misguided.¹⁹ Any revival of such a rule system is bound to face the same difficulties as the First Restatement.

The Second Restatement is far superior to the First Restatement because it directs the courts to consider both the substantive and multistate policies implicated in choice-of-law cases. Yet it has its own problems. First, the Second Restatement attempts to combine policy analysis with rules by essentially presenting a long list of presumptions. This goal is a good one and has been accepted by many, if not most, conflicts scholars. The particular presumptions adopted by the Second Restatement, however, are faulty. They are, for the most part, restatements of the rules in the First Restatement. The only difference is that the Second Restatement downgrades the rigid rules to rebuttable presumptions. Yet, the rules in the First Restatement were rejected, not only because they were divorced from policy concerns and overly rigid, but because they often emphasized the wrong contacts. It has thus become necessary for the courts and commentators to attempt to invent new rules more consistent with contemporary notions of the factors that are significant in analyzing conflicts in law. The Second Restatement's presumptions do not achieve their goal of increasing predictability because the courts do not view them as useful and, therefore, do not follow them.

Second, the policy analysis in the Second Restatement is also faulty. It wrongly eschews explicit consideration of the better law. Yet it allows such consideration through the back door, by requiring courts to consider the

¹⁸ See WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS*, 315-23 (1942).

¹⁹ See, e.g., John Hart Ely, *Choice of Law and the State's Interest in Protecting its Own*, 23 WM. & MARY L. REV. 173 (1981); Harold Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983).

“basic policies” underlying particular fields of law. Framing the issue in this inappropriate manner wrongly asks courts to distinguish between the basic rules and the exceptions in large areas of law without addressing the underlying wisdom and justice of those rules. This procedure is not only impossible; it makes no sense. The law of torts represents a compromise between requiring actors to compensate the victims of their conduct and encouraging socially useful, but harmful, activity by immunizing actors from liability for the harms they cause. The law of contracts represents a compromise between the policy of consistently enforcing agreements and regulating them to promote individual interests in autonomy and social interests in efficiency and justice. There is no basic policy to identify; the rules in force represent complicated accommodations among competing interests. Identifying a policy as “basic” to a field represents a judgment that it constitutes the preferred fallback position. This necessarily represents a judgment that, all other things being equal, it constitutes the better policy.

The Second Restatement’s policy analysis is also defective because it is often one-sided. For example, it argues that allegations of negligence generally concern situations in which “the parties act without giving thought to the legal consequences of their conduct or to the law that may be applied” and that in such circumstances, “the parties have no justified expectations to protect.”²⁰ Although it is true that people do not plan to have accidents, it is also true that defendants, especially businesses, often take into account the applicable tort laws in determining how much to invest in safety or how much insurance to buy. Similarly, the Restatement argues that justified expectations almost always point in the direction of enforcing contractual arrangements.²¹ Yet one reason a state may refuse to enforce an agreement is that particular expectations based on the agreement are not justified. This may be because one of the parties has acted in bad faith by unfairly slipping through an unintended loophole in the agreement. Or it may be because the contract was the result of unequal bargaining power, or because it violates important public policies such as promoting competition and alienability of property or preventing discrimination.

Interest analysis and comparative impairment analysis also have defects. Neither approach sufficiently takes account of the difficulties in determining the strength or scope of state policies. I do not mean that it is impossible to make judgments of this sort, only that some scholars fail to confront adequately the competing considerations involved in making these determinations. This problem is exacerbated as these approaches ask the decisionmaker to search for false conflicts. This procedure often induces analysts to understate or ignore the legitimate interests of one of the parties and one of the states involved in the case.²²

Nor have the Second Restatement or interest analysis always been used

²⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 comment g (1971).

²¹ *Id.* § 188(1) comment b.

²² See generally Singer, *supra* note 7 (developing my basic argument that when

wisely by the courts. Many judicial opinions that discuss conflicts issues are both oversimplified and illogical. It is commonplace to find arguments in judicial opinions that mistakenly overlook the legitimate interests of one of the parties and the regulatory concerns of one of the affected states. As a result of this one-sided analysis, judges often wrongly attribute plaintiff-protecting policies to defendant-protecting states. They also often fail to recognize the limits to plaintiff-protecting policies in all states. This failure manifests itself in oversimplified analyses of the substantive policies underlying tort and contract law.²³

The reasoning in conflicts opinions involving torts is heavily weighted toward plaintiffs. Conflicts scholars hotly dispute whether this is a virtue or an unfortunate bias. It is counted as a virtue by most, but not all, of the conflicts scholars who support the modern policy-oriented approach. In contrast, most of the scholars who tend to support territorial rules, favor giving greater protection to the interests of defendants in conflicts cases. They assume that interest analysis leads in most cases to application of forum law, which usually favors the plaintiff. This is often, but not always, true. For this reason, cases and scholarly commentary applying modern conflicts law do not easily allow lawyers for defendants to develop persuasive arguments for application of the law of defendant-protecting states. Although I believe plaintiffs in torts cases generally should get the benefit of the plaintiff-favoring law of the forum, I believe this choice cannot be adequately justified if the interests of defendants and defendant-protecting states are ignored. Moreover, defendants sometimes *are* entitled to the protection of defendant-protecting laws. The analysis presented here should serve to equip defendants' attorneys to do a better job of developing the most persuasive arguments possible in the context of the plaintiff-favoring modern conflicts system.

A somewhat different situation obtains in conflicts cases involving contracts. With some exceptions, the reasoning in conflicts opinions and scholarly commentary involving contracts heavily favors enforcing contractual arrangements. This means that attorneys representing clients seeking to escape from onerous contractual obligations, or unfair interpretations of ambiguous contractual language, may have difficulty formulating persuasive arguments. I hope to help remedy this problem by clarifying the most widely accepted arguments in favor of choosing the law that regulates the contract.

Judges oversimplify and mischaracterize conflicts cases for several reasons. The most immediate reason is that the prevailing approach to interest analysis encourages oversimplification by requiring analysts to seek out and identify purportedly false conflicts. False conflict analysis is only plausible

interests are defined appropriately—very broadly—it is hardly ever reasonable to describe contested choice-of-law cases as false conflicts).

²³ Joseph William Singer, *Facing Real Conflicts*, — CORNELL INT'L L.J. — (forthcoming, 1991).

in most cases that raise interesting conflicts questions if state interests are defined in an overly narrow way or if the states are incorrectly said to share basic underlying policies.²⁴ The more fundamental reason courts oversimplify conflicts cases is that false conflict analysis appears to relieve the decisionmaker of responsibility for choosing among incompatible values and goals. It therefore creates the illusion of neutrality while seemingly making real conflicts disappear.

My purpose in this article is twofold. First, I hope to encourage both conflicts scholars and the courts to refrain from engaging in the kind of one-sided analysis encouraged by both modern interest analysis and the Second Restatement. One-sided legal analysis is fundamentally flawed. It provides an impetus for courts and commentators to overlook important interests of both individuals and political communities. For this reason, it cannot present the most persuasive justification of the choice of law made by the court. Perhaps more important, one-sided analysis suppresses the value choices implicated in conflicts cases and obscures the judge's responsibility for both making and justifying those choices. Choices can only be made wisely if we face them. The failure to face these choices not only obscures the choices but hides facts from the decisionmaker which the decisionmaker herself would consider to be important, were she to focus on them. The analysis presented here is intended to help scholars, judges, and lawyers avoid making these mistakes.

I have in mind something on the order of a restatement. Unlike most restatements, however, my discussion focuses on arguments rather than rules or results. This is consistent with modern interest analysis, which describes an approach to thinking about conflicts questions, rather than a system of doctrines. The analysis presented here compiles and systematizes the most widely used arguments in choice-of-law cases found both in judicial opinions and scholarly commentary. At the same time, the argument is visionary; it is intended to restructure the existing analysis in a way that both clarifies it and improves it. In particular, it is intended to remedy the defective, one-sided character of modern analysis as practiced by many judges and scholars.

The second purpose of this article is to guide judges, practicing attorneys, and law students in the basic structure of modern conflicts analysis. Many judges have either misapplied the modern analysis or found it so confusing that they have retreated to arbitrary territorial rules which, in my view, are much worse because they institutionalize arbitrariness. Practicing attorneys, as well as judges, must face conflicts questions. Yet many lawyers find conflicts analysis so confusing that they avoid conflicts questions, sometimes

²⁴ See Singer, *supra* note 7, at 33-74. I do not mean to argue that all interest analysts make serious mistakes in analyzing state and individual interests. Some analysts are far more careful and perspicuous than others. I do believe, however, that false conflict analysis provides an *impetus* to understate the interests of one or another of the states involved in the case.

unknowingly disserving their clients. Lawyers have a professional obligation to investigate whether a multistate case may be governed by foreign law. This obligation extends foremost to their clients; lawyers must find out whether the client has a legal right to the benefits or defenses of the law of another jurisdiction. This obligation, however, extends as well to the court itself and to the system of justice. Judges do not raise conflicts questions themselves; it is the duty of the attorneys to note the possible applicability of the law of another state. Law students also find conflicts analysis abstruse. My purpose here is to give judges, lawyers, and law students the basic tools they need to be competent advocates in conflicts cases. With this knowledge, perhaps they will not be so reluctant to address conflicts questions. If conflicts law is a jungle, this article can be a primer on how to survive there.

In the second section of this introduction, I make explicit my own value judgments regarding the application of the five factors influencing conflicts law. Part II then presents a general framework for choice-of-law analysis. In Part III, I apply this analysis to a series of mostly recent choice-of-law cases in the areas of torts, contracts, and procedure. For each case, I present arguments and counter-arguments, focusing on the policies underlying the competing substantive laws; the justified expectations of the parties; and my version of interest analysis, which includes consideration of discrimination issues and the appropriate relations among overlapping normative and political communities. These relations among political communities evoke concern for the proper balance between promotion of what the forum sees as the better law and tolerance of the norms of a neighboring political and normative community. In making these arguments, I refuse to make clear distinctions among the various types of modern approaches. I do this, not because I think there are no differences among the modern approaches, but because I believe each of the modern approaches has something useful to contribute to choice-of-law theory. Moreover, many courts have begun to borrow from all these approaches. Following the lead of such scholars as Cavers, Leflar, Weinberg and Weintraub,²⁵ I use whatever arguments I can derive from both cases and scholarly commentary that have persuasive power. I conclude the discussion of each case by explaining the result one would expect in most courts facing the issue in question and why that result is generally thought to be correct. Where the case could easily go either way, I explain why the case generates disagreement. I do not explain what I think the preferable result is, however, because to do so would change the emphasis of this article from the techniques of argument to the advocated result. Moreover, I believe we need to develop fully the interests on both sides, rather than look for false conflicts, before we can arrive at sensible choice-of-law principles.

My analysis uses one of the basic techniques of critical legal studies: argument and counter-argument.²⁶ This approach can help highlight the real

²⁵ See DAVID CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965); R. LEFLAR, *supra* note 4; R. WEINTRAUB, *supra* note 7; Weinberg, *supra* note 8.

²⁶ See generally, e.g., James Boyle, *The Anatomy of a Torts Class*, 34 AM. U.L. REV.

value choices underlying conflicts law. Understanding these choices can enable lawyers to act as more effective advocates in choice-of-law matters. Clarifying the competing interests implicated in these cases may also enable judges to make better decisions. Those who judge, and the scholars who judge the judges, need to focus more than we have in the past, on the real conflicts presented by these difficult cases.

B. *Real Conflicts*

Although there appears to be substantial agreement on the five factors that influence conflicts law,²⁷ there are significant disagreements among proponents of modern choice-of-law analysis as to how to apply them. It is important that I make my own value judgments explicit. First, I use expansive definitions of state interests, including moral interests in seeing justice done between the parties by protecting their rights. I reject the usual practice of confining state interests to the pragmatic or expedient, like keeping people off the welfare rolls. For example, in his excellent treatise, Professor Weintraub generally defines state interests in the narrow manner that I reject; his analysis is what allows him to describe whole classes of cases as presenting false conflicts.²⁸ In contrast, when state interests are defined in a

1003, 1051-63 (1985); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Richard Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have a Corollary?* 23 HARV. C.R.-C.L. L. REV. 407 (1988); Robert Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U.L. REV. 196 (1987); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Robert Williams, *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQUALITY 103 (1987) (all describing and applying critical legal theory to diverse areas of the law).

²⁷ See *supra* notes 10-12 and accompanying text.

²⁸ R. WEINTRAUB, *supra* note 7. Professor Weintraub argues, for example, that the place of an accident has no interest in applying its interspousal immunity rule to a couple domiciled in a state that allows the lawsuit. R. WEINTRAUB, *supra* note 7, § 6.9, at 292-96. He argues that the place of injury has no interest in protecting nonresident defendants who have no immunity under the law of their domicile. He believes that interspousal immunity is intended either to prevent marital discord or to protect insurance companies from collusive lawsuits. Neither the effects of marital discord nor the fraud on the insurance company will be felt in the place of the injury, but at the couple's domicile, which is perfectly willing to live with any discord that may result and combats fraud with other procedural mechanisms. *Id.*

Although I agree that the forum in the plaintiff-protecting jurisdiction should apply its law in this case, I cannot agree that the place of the injury has no interest in applying its law to nonresidents. A court in the place of the injury would apply its law to its residents who brought a lawsuit there, and it might conclude that it would be discriminatory to deny to nonresidents the protection of forum law while they are there. It is only because Weintraub defines interests in terms of *consequences* of liability or immunity that he can

broad manner to include interests in justice, it becomes clear that relatively few cases that raise interesting choice-of-law questions can be reasonably described as false conflicts. I believe that false conflicts do exist. For an extreme example, if two people enter a contract in Massachusetts and have no contacts whatsoever with Florida, then any claim that the case is governed by Florida law would be absurd. A more realistic example concerns a construction contract between two Massachusetts residents that is to be performed in Massachusetts but is finalized and signed in a hotel room in Miami when the two are on vacation in Florida. It is hard to see why Florida should reasonably assert an interest in governing the terms of the parties' relationship on such issues as interpretation of ambiguities in the contract or the definition of what constitutes a breach. Similarly a couple married in Massachusetts who move to Florida and get into a car accident there should be governed by Florida law on the question of interspousal immunity. The law of the place of the celebration of their marriage which grants tort immunity cannot legitimately be understood as a condition of their marriage that follows them wherever they go. On the other hand, an antenuptial agreement setting the terms of separation entered into before the marriage raises special problems that do seem to remove it from consideration as a false conflict.

When I emphasize the prevalence of real conflicts, I have in mind the contested cases most discussed by conflicts scholars and the cases that are litigated to the extent that they merit judicial opinions on the conflicts question. To my mind, those cases rarely present false conflicts. In cases with significant contacts with more than one state, the parties will disagree about how to characterize the interests of the affected states. Although one of the parties may define a state's interests as limited to residents, the other party may define that state's interests as extending to nonresidents who have significant contacts with the state. These competing descriptions of the scope and nature of state policies mean that it will almost always be possible to describe each state as interested in seeing its law applied to a case with which it has significant contacts. At the same time, each party will be able to argue for a narrow or restrained interpretation of the policy underlying the law of the state they are trying to escape. For this reason, I have described contested conflicts cases as always presenting real conflicts.²⁹ Resolution of con-

ignore the interests the place of the injury might have in nondiscrimination. Compare R. WEINTRAUB, *supra* note 7, § 6.9, at 293-301 (arguing that the place of the injury has no interest in insulating the defendant from liability, unless the defendant relied on that state's insulating rule, and that such reliance is untenable in cases of unintentional torts because the defendant cannot have planned to cause the accident there) with *Id.* § 6.10, at 301 (arguing that the place of the injury is interested in compensating the victim to prevent her "from becoming a public charge" and to provide her with funds with which to pay medical creditors at her domicile).

²⁹ See generally Singer, *supra* note 7 (developing my primary argument that when courts define interests broadly there are relatively few "false conflicts").

flicts cases therefore requires decisionmakers to determine the legitimate scope and strength of state policies and to justify that determination by making explicit the value judgments needed to answer these questions.

Second, I deemphasize the First Restatement goals of uniformity and prevention of forum shopping. The goal of attaining the same result no matter where the case is heard was never achieved under the First Restatement, even though uniformity of result was perhaps Beale's preeminent goal. The availability of escape devices and the indeterminacy of characterization meant that the supposedly rigid rules of the First Restatement allowed an enormous amount of discretion to the courts to choose which law to apply. It is also clear from judicial opinions applying modern choice-of-law analysis that the courts pay much less attention to the goal of uniformity than do most conflicts scholars. Judges do have a strong tendency to apply forum law when they can. Because plaintiffs often choose the forum and are assumed to act in their own self-interest, this forum presumption tends to promote the widespread adoption of plaintiff-favoring law in conflicts cases. Thus, the uniform tendency to favor plaintiffs in conflicts cases is only partly the result of modern conflicts analysis. To a significant extent, it is the result of personal jurisdiction rules that ordinarily allow plaintiffs the freedom to shop for a forum with plaintiff-favoring law.

Instead of the traditional preoccupation with uniformity,³⁰ I focus on (1) the substantive *policies* of the affected states, (2) the *justified expectations* of the parties, and (3) the appropriate relations among overlapping normative and political communities, otherwise known as *comity* or *interest analysis*. These are the factors most often discussed in conflicts cases in the courts. It may well be possible to develop choice-of-law principles or presumptions that will promote greater uniformity. I have advocated such principles.³¹ At the same time, I want to emphasize that it will not be possible for us to identify workable and fair principles unless we start with analysis of the underlying considerations of substantive policy, justified expectations and comity as they are understood by *both* sides. Uniformity can only be partially achieved; some types of cases will always face different results depending on the jurisdiction in which the case is brought. Some amount of uniformity can be achieved for certain kinds of cases, but we will not know how to identify such cases unless we start with basic considerations of substantive and multistate policy.

Third, I refuse to accept the idea that expectations arguments are necessarily weak in the torts context. Many courts have misunderstood or uncritically adopted the comment in the Second Restatement that people have no

³⁰ Cf. Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987) (presenting a reconstituted version of the traditional perspective and arguing that a conflicts system that tolerates different laws being applied by different forums is incompatible with the rule of law).

³¹ Singer, *supra* note 7, at 91-92; see also Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990) (developing modern choice-of-law presumptions).

justified expectations to protect in cases of negligence.³² It is true that people do not plan to have accidents, but many actors in the legal system do plan their activities based on expected liabilities. This is especially true of businesses, which may be quite cognizant of the existence of damage limitations in deciding how much to invest in safety and how much insurance to buy.³³ Moreover, victims of wrongful conduct may expect that they will be protected by the law governing the place where they live or have established a relationship, even if they do not know what that law is. Similarly, defendants will sometimes feel unfairly surprised by application of another state's plaintiff-favoring law, even if they did not rely on a defendant-protecting law in deciding how to act. People may feel that application of a law of a state with which they have little connection is unfair, whether or not they planned their activity based on the law of a different state.³⁴ For these reasons, I believe consideration of justified expectations is relevant in torts cases despite the fact that the place where an accident occurs is often fortuitous and unplanned.

Fourth, I emphasize, in ways that the prevalent choice-of-law approaches do not, questions of interstate discrimination. None of the popular approaches asks the decisionmaker to consider directly whether application of the law of a particular state will unfairly discriminate against a class of residents or nonresidents. Yet, consideration of discrimination issues has been crucial to the outcome of recent conflicts cases; it is probably the main reason nonresidents are given the benefits of plaintiff-protecting forum law in mass disaster cases, rather than being relegated to the defendant-protecting policies of their domiciles.³⁵ Additionally, a growing number of conflicts

³² See RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 comment g ("There are occasions, particularly in the area of negligence, when the parties act without giving thought to the legal consequences of their conduct or to the law that may be applied. In such situations, the parties have no justified expectations to protect, and this factor can play no part in the decision of a choice-of-law question."); cf. R. WEINTRAUB, *supra* note 7, § 6.5, at 285-87 (arguing that unfair surprise arguments are weak in negligence cases, unless they are directed to foreseeability of the need for insurance).

³³ R. WEINTRAUB, *supra* note 7, § 6.5, at 286.

³⁴ *Id.* § 6.26, at 342.

Before the defendant will perceive this treatment under plaintiff's law as fair, it is necessary that there exist reasonable contacts between the plaintiff's state and the defendant, or at least that the defendant be able to foresee that in many, not just extraordinary, cases his conduct will have an effect in the plaintiff's state. This perception of fairness is important to any choice-of-law methodology. *Id.*

³⁵ For example, when Judge Weinstein decided to apply "national consensus common law" to adjudicate the Agent Orange case, see *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 690 (E.D.N.Y. 1984), his major argument for applying a single substantive tort law—other than simplicity—was the fact that it would appear unfair to "treat[] differently legally identical claims involving servicemen who fought a difficult foreign war shoulder-to-shoulder and were exposed to virtually identical risks." *Id.* at 703. Similarly, when Judge Joyce Hens Green applied plaintiff-favoring forum law in *In re Air Crash Disaster at Washington, D.C.* on Jan. 13, 1982, 559 F. Supp. 333 (D.D.C.

scholars have focused attention on discrimination.³⁶ Although there are no easy answers to these questions—any choice of law will discriminate against some class of persons—it is important to consider whether we should view certain groups of claimants as similarly situated and therefore entitled to similar treatment.

Fifth, I take as a given that both conflicts scholars and courts consider what the better law is.³⁷ It is quite clear that courts which apply the modern approaches tend to favor forum law, with several narrow but important exceptions. This fact reflects the recognition that application of either state's law will override the policy of the other, and that, if some state's policy has to give, there is little reason to require the forum to defer to what it presumably sees as the worse foreign law as long as the forum has significant contacts with the case. Moreover, requiring each state to defer to the law of the other, merely to demonstrate an abstract commitment to the virtues of a federal system, would be ludicrous. For this reason, modern conflicts scholars seem to agree that aberrational, archaic, and regressive policies should generally be confined to domestic cases.

1983), she noted that "many of the victims had some kind of settled relationship with the District of Columbia, be it residence, employment, or some other nexus, and the District of Columbia no doubt has an interest in protecting such individuals from harm." *Id.* at 350. Judge Green, however, did not limit the government interests of the District of Columbia to its domiciliaries—as many interest analysts are wont to do—but extended those interests to nonresidents who were injured there. "[T]he District of Columbia has an interest in protecting those persons who use the services of its airport." *Id.* Extending the forum policy to compensate both domiciliaries and nondomiciliaries reflects an anti-discrimination principle: nonresidents, as well as residents, are entitled to the protections of D.C. law while they are there and may recover compensation if that protection fails.

³⁶ See Lea Brilmayer, *Carolene, Conflicts, and the Fate of the Insider-Outsider*, 134 U. PA. L. REV. 1291 (1986) (examining and criticizing the *Carolene Products* footnote and the doctrine that has grown up around it as applied to "interstate cases"); Lea Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 FLA. ST. U.L. REV. 389 (1987) (arguing on a philosophical level that interest analysis is incompatible with *Carolene Products* process theory); John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981) (discussing constitutional and policy issues implicated when "outsiders" are treated differently than "insiders"); Mark Gergen, *Equality and the Conflict of Laws*, 73 IOWA L. REV. 893 (1988) (examining whether the interest-based approach to the choice-of-law violates principles of equal protection and concluding that it does not, in contrast to Brilmayer, Ely, Laycock, and Neuman); Douglas Laycock, *Equality and the Citizens of Sister States*, 15 FLA. ST. U.L. REV. 431 (1987) (arguing against interest analysis, relying primarily on "the structural needs of our federal union"); Gerald Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261 (1987) (advocating the use of equal protection analysis to territorial discrimination whether interstate or intrastate); Weinberg, *supra* note 8 (arguing that discrimination is not a problem in cases of forum preference but in cases departing from forum law).

³⁷ See R. WEINTRAUB, *supra* note 7, § 6.27, at 342-45 (reviewing cases that consider the better law).

Finally, my discussion focuses on argumentation, rather than resolution of conflicts cases. Rather than adopting the usual disinterested stance of the judge or scholar, I address these cases from the standpoint of an advocate. This means that the analysis yields conflicting interpretations of state interests and individual expectations. Essentially, I develop a brief for each side. Resolution of a case requires the decisionmaker to choose between the competing descriptions and to explain why one interpretation is adopted rather than the other. I do not attempt to make such choices here. I am concerned in this Article with exposing the most persuasive arguments on both sides, rather than closing off the analysis.³⁸ I do this partly because the modern approach does not give easy answers; it requires the decisionmaker to make policy judgments in the context of particular types of cases. More importantly, I believe those judgments will be better made if the arguments on both sides are kept in view.

That conflicts cases pose real conflicts among competing norms and between political communities does not mean that they are impossible to resolve. Nor does it mean that we cannot predict how courts will rule on choice-of-law questions. In general, the courts tend to apply forum law to benefit plaintiffs in tort and contract cases. Courts favor contracts plaintiffs in order to validate the contract or to grant the beneficiary of the contract, such as an insured or a consumer, a right to be protected from unfair obligations in the contract. The most striking exceptions to these generalizations are the following: (1) courts tend to enforce choice-of-law provisions to validate contracts between parties with relatively equal bargaining power; (2) courts often apply the law of the parties' common domicile or the place where the parties center their relationship if that law defines the fair contours of their relationship, and if the law of the place of the conduct or injury is not mainly geared to deterrence or regulation of conduct, but to loss-allocation; (3) courts apply foreign law when application of forum law would interfere with justified expectations of a party who reasonably relied on the law of a particular state at the time it acted, or if application of forum law would unfairly surprise a party who has no significant contacts with the forum related to the claim.

II. A FRAMEWORK FOR CHOICE-OF-LAW ANALYSIS

A. *Conflicts Argumentation*

Conflicts scholars have offered various frameworks for modern policy-oriented choice-of-law analysis, including interest analysis, restrained interpretation, comparative impairment, most significant relationship, better law, and the development of principles of choice-of-law.³⁹ Each of these methods has something useful to offer conflicts law, and Professors Leflar and Posnak

³⁸ For a detailed analysis of how I believe several paradigmatic conflicts cases should be resolved, see Singer, *supra* note 7.

³⁹ See generally *id.* (discussing other scholars' works).

are correct in arguing that it is possible to perceive a general approach to modern conflicts analysis common to these various methods.⁴⁰ The approach presented here attempts to integrate these approaches into a clear framework. Rather than generating a single answer to the question of which law to apply, this analysis develops the most persuasive arguments on both sides. This Article therefore presents conflicting interpretations of the nature and scope of substantive and multistate policies and the justified expectations of the parties. The decisionmaker must choose which of the conflicting interpretations is most compelling, taking into account the interests of the parties and the relations among overlapping normative and political communities.

Conflicts analysis implicates two kinds of policies: substantive policies and multistate policies. The first step in any conflicts analysis should be to determine which of the competing substantive laws is better as a matter of justice and social policy. If the foreign law is better, meaning wiser as a matter of social policy or more just, the forum should change forum law, if it can.⁴¹ If forum law is embodied in a common law rule, the forum should take the opportunity to modernize it by adopting the better, foreign rule of law. In this case, the conflict vanishes. If the court concludes, on the other hand, that the forum common law rule is better, or if forum law is embodied in a statute, the court faces a real conflict between the substantive policies of the forum and the foreign state. In that case, the forum must proceed to the second part of the analysis—consideration of multistate policy.

In analyzing the cases that follow, I will presume that the forum has examined the question of the better law and concluded that forum policy is better.⁴² I will do this, not because the better law determination is easy or unimportant, but because it is not unique to conflicts cases. Moreover, multistate policy forms the crux of most scholarly and judicial analysis in conflicts cases and it is the part of the analysis judges most often misuse and practicing attorneys most often fear. It is therefore the part of the analysis most in need of clarification.

⁴⁰ See Robert Lefflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. 10 (1977) (discussing a sampling of then recent conflicts cases and concluding that courts had almost unintentionally arrived at "the new law of conflicts," that is, in fact, a "conglomerate of approaches"); Bruce Posnak, *Choice of Law—Rules vs. Analysis: A More Workable Marriage Than the (Second) Restatement; A Very Well-Curried Lefflar Over Reese Approach*, 40 MERCER L. REV. 869, 870 (1989) (proposing a system that accommodates rules and analysis, that is "real joinder of issues by the proponents of the new methodologies" (quoting Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 755 (1963))).

⁴¹ See Singer, *supra* note 7, at 81-83; Weinberg, *supra* note 8, at 597 (changing forum law to accord with the better policy).

⁴² Special problems arise if the court concludes that the foreign law is better but cannot change the forum law—if, for example, it is embodied in a statute. For discussions of this issue, see Singer, *supra* note 7, at 88-90.

Analysis of multistate policy has five steps. It is useful to array the factors and arguments in the form of a grid.⁴³

(1) *Contacts*. First, list the relevant contacts in each of the states. These contacts include:

- (a) *Persons*: the places where the people or organizations are connected, including:
 - 1. where the parties reside, are domiciled, incorporated, or do business;
 - 2. where the relationship between the parties, both contractual and noncontractual, is centered or has significant contacts;
- (b) *Events*: the places where significant events happened, or were supposed to happen, including:
 - 1. the place of conduct;
 - 2. the place of injury;
 - 3. the place where a relationship, both contractual and noncontractual, was established;⁴⁴
 - 4. the places where the parties are supposed to perform a contractual arrangement;
- (c) *Forum*: the place where the case is being heard.⁴⁵

(2) *Laws*. For each state with significant contacts, identify the substantive rules of law that create the conflict. If the substantive rules of both states are the same, there is no choice of law to make; the case is a false conflict. In identifying the applicable substantive law of each state, it is important to distinguish particular legal rules or issues. For example, the question of whether punitive damages are available must be addressed separately from the question of whether the facts establish proximate cause or whether the plaintiff can receive compensatory damages for pain and suffering.⁴⁶

At the same time, it is important to note that seemingly separate legal rules are sometimes connected in an overall policy scheme. For example, workers' compensation systems grant employees guaranteed compensation of specified amounts for injuries on the job in return for granting the employer immunity from tort liability. It would be a mistake not to understand the compensatory and immunity policies as linked.⁴⁷

⁴³ William Richman and William Reynolds developed this grid structure in their excellent book. WILLIAM RICHMAN & WILLIAM REYNOLDS, UNDERSTANDING CONFLICT OF LAWS (1984).

⁴⁴ This includes both the place where the parties negotiate the contract and where they sign it.

⁴⁵ When a case is transferred from one federal forum to another pursuant to multi-district litigation, the law of the place where the case was filed controls. *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964).

⁴⁶ The practice of applying choice-of-law analysis to specific legal issues, rather than to entire cases, is known as *depeçage*.

⁴⁷ *Eger v. E.I. Du Pont DeNemours Co.*, 110 N.J. 133, 141, 539 A.2d 1213, 1217

(3) *Substantive policies.* The next step is to identify the substantive policies underlying the conflicting laws. There are ordinarily two kinds:

- (a) *Moral policies or rights:* which include a state's sense of justice or fairness in particular social relationships; for example, one purpose of negligence law is to promote justice by requiring people who act unreasonably to compensate the victims wrongfully harmed by their conduct; and
- (b) *Regulatory or utilitarian policies:* which appeal to the consequences of the rules in force; they are intended to regulate behavior or deter harmful conduct to promote social utility; for example, one purpose of negligence law is to impose monetary sanctions on persons to deter them from acting in ways that create unreasonable risks of harm to others and to create desirable incentives to invest in safety.

(4) *Justified expectations.* The fourth and fifth steps in the analysis concern the application of *multistate policies*. These policies are the heart of the conflicts analysis; they are the arguments for and against applying the law of each of the potentially interested states. The fourth criterion focuses on *fairness* to the parties by consideration of their *justified expectations*. This factor requires the decisionmaker to consider the legitimate interests of the parties in claiming protection under the law of a particular state. The fifth criterion, *interest analysis or comity*, requires the decisionmaker to accommodate conflicting state interests by determining the legitimate scope of state policies in the context of a multistate case. To do this, the decisionmaker must define the proper relationships among overlapping normative and political communities in the separate states.⁴⁸

(1988) ("The obligation to provide workers' compensation coverage and immunity from tort liability are linked . . .").

⁴⁸ In *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981), the Supreme Court stated that it is unconstitutional to apply the law of a state that has no interest in applying its law. Thus, if a state has no significant aggregation of contacts creating a state interest, it will not be necessary to address the parties' expectations. Application of the disinterested state's law would be unconstitutional whatever the parties' expectations are; moreover, the parties cannot legitimately expect the protection of the law of a state with such insignificant contacts with the case that it has little or no interest in applying its law. As such, in drafting a brief, comity considerations probably should be addressed before the justified expectations of the parties.

In the grid analyses of the cases that follow, however, I place the arguments about justified expectations first. I suggest consideration of the justified expectations of the parties in this preliminary analysis before consideration of the relative interests of the two states for several reasons. First, under the expansive definition of state interests that I advocate, it will rarely be possible to identify a contested case as a false conflict. If nothing else, the forum will have an interest in seeing justice done between the parties; it will therefore ordinarily have good reason to apply its substantive law to adjudicate their dispute. See *id.* at 326 (1981) (Stevens, J., concurring) (suggesting that a state has a sufficient interest in the fair and efficient administration of justice). Second, one of the

All justified expectations arguments have two parts: consideration of what the parties' *expectations* actually were and whether those expectations were *justified*. Arguments about the justified expectations of the parties play a crucial role in choice-of-law determinations. They include consideration of whether a party would be unfairly surprised by application of the law of a place with which that party has little connection and whether one of the parties reasonably relied on the law of a particular state in planning its activity. These arguments also include consideration of whether the parties claim a *right* to the protection of the law of a particular state, whether or not they knew what that state's law was and whether or not they changed their behavior based on the expectation that a particular law would apply. Even when people do not rely on the law of a particular state, they may feel unfairly surprised if the law of a state with which they have few contacts is applied, or they may feel entitled to the protection of the law of a particular state with which they have significant contacts. These perceptions of fairness are crucial to choice-of-law determinations.⁴⁹

It will almost always be possible to generate plausible arguments about justified expectations on both sides of contested conflicts cases. For example, the defendant may argue that she expected the law of a particular state to apply, and that it would unfairly surprise her to apply the law of another state. The plaintiff might respond that the defendant's expectations were not justified because the defendant has no right to rely on the immunizing law of the place where she acts if she cannot confine the consequences of her conduct to a defendant-protecting state.

The most common kinds of justified expectations arguments take the following forms:

- (a) *Unfair surprise*: the claim that application of the law of a particular state would unfairly surprise one of the parties who could not have anticipated that law applying to her conduct;
- (b) *Reasonable reliance*: the claim that one of the parties relied, and had a right to rely, on the law of a particular state in planning her conduct;
- (c) *Voluntary acquiescence*: the argument that one who enters another state or does business there accepts the vulnerabilities as well as the advantages of the law of that state;
- (d) *Entitlement or rights*: the argument that one's contacts with a particular state confer the right to be protected by its laws or to receive the benefits or immunities it extends

main reasons to limit application of a particular state's law is to protect one of the parties from unfair surprise. Development of arguments about the justified expectations of the parties may appropriately precede analysis of the relative strength of the policies as the justified expectations may inform the latter analysis by giving a reason for restrained interpretation of forum law.

⁴⁹ See R. WEINTRAUB, *supra* note 7, § 6.26, at 342.

because one is within the intended class of beneficiaries of that state's law;

- (e) *Substantive justice*: the argument that an actor has no right to rely on a substantively unjust, archaic, or aberrational law, such as a doctrine that immunizes a tortfeasor from liability for negligent conduct or a doctrine that enforces an unconscionable contract, if she cannot confine her conduct, or the consequences of her conduct, to the state that protects her. Once the conduct spills over into a state that protects the other party, the better law should prevail.

(5) *Interest analysis or comity*. Interest analysis or comity arguments concern the proper relationships among overlapping normative and political communities in the separate states. These arguments address the legitimate scope of state policies in the context of multistate cases. Courts and scholars assume that, if a case has contacts with states the laws of which conflict, each of the states might revise or limit the applicability of its otherwise applicable substantive policy. This is because application of a state's law in a conflicts case has costs that it does not have in a purely domestic case; it interferes with the ability of another state to achieve its social goals and to promote its sense of justice. Furthermore, such an application may infringe on the legitimate interests of a person who claims a right to protection under the law of the other state.

Each state has some interest in accommodating the policies of a neighboring state and protecting individuals and organizations from unfair surprise. As such, it sometimes may be appropriate to limit the scope of otherwise applicable substantive policies to particular kinds of persons or events where a state's interests are particularly strong and application of its law would be fair. In other cases, it may be appropriate for a state to engage in *restrained interpretation* of its substantive policies and defer to the ability of the other state to govern cases with which the other state has more significant contacts. Depending on the substantive policies in question and the particular array of contacts, a state's interest in applying its law may be strong or weak. Moreover, whether a state's interests are strong or weak, its lawmakers may believe that particular kinds of issues are appropriately governed by states with particular contacts or relationships with a dispute. One might argue that a state should not attempt to regulate certain kinds of out-of-state events with which it has attenuated contacts when this would unduly interfere with the ability of the political community in the other state to pursue a particular form of social life, and when application of the foreign law would not substantially interfere with the forum's interests.⁵⁰

The goal of comity arguments is not to attribute a particular intent to the legislature as to the geographic scope of particular rules of law it has

⁵⁰ See Singer, *supra* note 7, at 185-90 (discussing when a forum should not apply what it views as the better forum law).

enacted. Indeed, the reason we have a conflicts case is because we have no idea how the legislature wanted to decide cases with multistate contacts. The goal is to construct a normative argument about the circumstances under which it is appropriate for states to accommodate each other's policies.⁵¹

In modern choice-of-law analysis, interest analysis may take a wide variety of forms. The most common types of argument are discussed below.

- (a) *False conflicts*: Interest analysts argue that some cases present false conflicts because one of the states has no real interest in applying its law to the case.⁵² If so, the court should, of course, apply the law of the only state interested in governing the dispute. This kind of argument defines state interests by placing geographic limits on the scope of the substantive policies identified in the third step of the analysis.⁵³

This analysis distinguishes between loss-allocating and conduct-regulating policies. Conduct-regulating policies are intended to provide incentives to act in socially beneficial ways by imposing liability for harmful conduct. Loss-allocating policies are intended to shape the just contours of relationships, and apply even when imposition of liability may have no actual or intended effect on behavior.

Courts and scholars often argue that loss-allocating policies apply only to relationships centered in that one state. For example, these courts and scholars argue that interspousal immunity should apply only to couples who live in the immunizing state, on the grounds that it is inappropriate for a state to attempt to regulate the incidents of a marital relationship centered in another community with different values. They also argue that conduct-regulating policies, such as punitive damages awards, should only apply to defendants who have acted or have their principal place of business in that state, on the grounds that it is inappropriate for a state to attempt to regulate out-of-state conduct that does not have foreseeable consequences in the forum. These arguments may be met by the obverse claims—that loss-allocating policies apply to nonresidents as well as residents and that conduct-regulating policies apply to conduct elsewhere that has significant consequences in the forum.

⁵¹ Compare Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980) (arguing generally that interest analysis does not reflect actual or constructive legislative intent any better than the First Restatement) with Sedler, *supra* note 8.

⁵² See R. WEINTRAUB, *supra* note 7, § 6.23, at 335 (distinguishing between a “no interest” case in which neither state has an interest in having its law apply and a “false conflict” in which only one state has an interest in having its law apply); Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 251-52 (1954) (arguing that there is no real conflicts problem when, for example, applying the law of one state will not impair the interests of the other).

⁵³ See *supra* text accompanying note 48.

- (b) *Restrained interpretation*: When initial analysis of the interests of both states reveals a true conflict, meaning that both states have interests in applying their laws to the case, one way to resolve the conflict is to argue that it is appropriate for one of the states to engage in restrained interpretation of its policies in deference to the policies of the other state.⁵⁴ It might do so either because application of its policies would unfairly surprise one of the parties or because its interests are comparatively weak and it would be inappropriate to further those interests at the cost of interfering with the ability of another state to govern its affairs. Restrained interpretation may result in a purported false conflict; given the strong interests of the other state or the party who claims protection under its law, the forum⁵⁵ will refuse to assert any interest in governing the dispute. Or it may result in the conclusion that the forum, although interested, will defer to the greater interests of the other state, and thereby accommodate the other state's policies in a case that is of vital concern to the state's political community.
- (c) *Comparative impairment*: Courts may also resolve the conflict by asking which state's policies would be most impaired if they were not applied to the case at hand.⁵⁶ Here it becomes important that advocates generate competing interpretations of the importance or scope of state policies. For example, in *Bryant v. Silverman*,⁵⁷ a plaintiff

⁵⁴ Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963).

⁵⁵ As a matter of practice, restrained interpretation generally applies only to forum law. Most interest analysts assume that it is appropriate to apply forum law to govern a true conflict. Thus, the forum can always claim that both states are interested—therefore recognizing the interests of the other state—and still further its own interests by applying forum law. It would appear intolerant and unnecessary to engage in restrained interpretation of another state's law to conclude that only the forum is interested in applying its law.

⁵⁶ See William Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

⁵⁷ 146 Ariz. 41, 703 P.2d 1190 (1985). The case involved a wrongful death claim against an airline, Sun West Airlines, arising out of an airplane trip that departed from New Mexico and crashed in Colorado, killing several passengers. Sun West had its principal place of business in Arizona, but serviced cities in New Mexico and Colorado, as well. The plaintiff, Barbara Bryant, was the beneficiary of her husband, Paul, one of the passengers killed in the crash. The Bryants were both Arizona residents at the time of the crash, as was Barbara Bryant at the time of trial. Paul Bryant had purchased his ticket in Colorado. Plaintiff alleged that the crash was caused both by the pilots' negligent operation of the plane in Colorado and by the defendant airline's negligent failure to provide adequate training to the pilots at its principal place of business in Arizona. The choice-of-law issue concerned the measurement of damages. Arizona allowed compensatory damages for nonpecuniary losses and punitive damages. Colorado limited damages to pecuniary losses and did not allow punitive damages.

domiciled in Arizona sued an Arizona airline for causing the death of her husband in a crash in Colorado. Colorado, but not Arizona, limited damages to pecuniary losses. Plaintiffs could have argued that Colorado's defendant-protecting law is mainly intended to benefit companies whose principal place of business is in Colorado and that Colorado's interests would therefore have been harmed very little if not applied to an Arizona-based defendant. At the same time, Arizona's plaintiff-protecting policy would have been substantially impaired if it did not apply to protect plaintiffs domiciled in Arizona. Conversely, defendant could have argued that Arizona's plaintiff-protecting policy will not be impaired very much if it does not apply to out-of-state accidents since most accidents involving Arizona residents occur in Arizona. On the other hand, Colorado's defendant-protecting policy would have been substantially impaired if it did not apply to an accident arising out of the defendant's business operations inside Colorado.

- (d) *Relative strength of state interests*: Some courts resolve conflicts cases by considering the relative strength of each state's interests in applying its law to govern the dispute. In making this determination, the courts may assess how important the policy is, where the effects of applying or not applying each law will be felt, whether the law is archaic or isolated, and where the parties have centered relationships or other contacts.
- (e) *Illegitimate extraterritorial regulation*: Courts and scholars often argue that it is inappropriate for a state to govern certain kinds of out-of-state conduct either because that conduct is outside the scope of the state's legitimate sovereign power or because regulation of the conduct would interfere with the ability of another state to implement its policies within its territory.
- (f) *Nondiscrimination arguments*: These arguments concern the appropriateness of treating similarly situated classes of residents and non-residents differently. It is sometimes argued that nonresidents, as well as residents, have the right to the protections of a state's laws while they are there. On the other hand, it is sometimes presumed that nonresidents and residents are not similarly situated and, therefore, may legitimately be treated differently.
- (g) *Loss-allocating vs. conduct-regulating rules*: The distinction between loss-allocating and conduct-regulating rules is often believed to be crucial to analysis of the strength of state interests. It is often argued that conduct-regulating rules apply most appropriately to the place of conduct and only secondarily to the place where the effects of the conduct are immediately felt—the place of the injury—and that it is inappropriate to apply conduct-regulating policies of the victim's domicile when the conduct and injury occur elsewhere. It is also argued that loss-allocating rules apply only to domiciliaries of the state that promulgates them. These arguments, again, may be met by

the response that a state may regulate out-of-state conduct that harms its residents and that nonresidents, as well as residents, have the right to be protected by forum law while they are there.

- (h) *Where effects of regulating or not regulating will be felt*: Courts often argue that a state has strong interests in applying its law to govern a dispute because the costs of not applying its law will be felt in that state.
- (i) *Promotion of better law or progressive policies*: It has become increasingly common, in both conflicts scholarship and court opinions, to see the argument that archaic, regressive, and minority rules should be confined to domestic cases, and that, in cases touching more than one state, the better, more progressive policies should generally prevail.
- (j) *Most significant relationship*: The Second Restatement requires application of the law of the state that has the most significant relationship with the parties and the transaction or occurrence. This analysis focuses on the basic policies underlying particular fields of law, the particular interests of the states involved in the case, and the justified expectations of the parties.

B. *Resolving Conflicts Cases*

Although this article focuses on conflicts analysis and advocacy, a few words about resolving these cases are appropriate.⁵⁸ I have previously argued for a presumption in favor of forum law.⁵⁹ Given that application of either forum law or the foreign state's law interferes with the ability of the other state to further its policies and favors the interests of one party over those of the other, there is every reason for the forum to start with the presumption that conflicts cases, like domestic cases, should be decided in a way that promotes both justice and wise social policy, as the judges at the forum understand those values. Because application of forum law interferes with another state's ability to regulate its affairs, however, or may contradict reasonable expectations of one of the parties—usually the defendant—the forum should consider whether it should refrain from applying what it assumes to be the better law. Such deference recognizes that the other state comprises a distinct normative and political community to which the forum should sometimes defer.

This inquiry requires contextual case-by-case analysis. It may be possible, however, to generalize about the situations in which it is appropriate to defer

⁵⁸ For a more developed analysis, see Singer, *supra* note 7.

⁵⁹ *Id.* at 90-92 (arguing that courts should adopt a forum law presumption because it has the benefit of allowing the forum to believe it is doing justice by applying the presumptively better law, but that this presumption can be overcome where application of forum law interferes with justified expectations or interferes illegitimately with the internal norms of another political community).

to foreign law. The presumption in favor of forum law is most likely to be overcome in the following special circumstances:

The first special circumstance is where the parties are sophisticated commercial actors that engage in complex contractual relationships in which planning and predictability are particularly important. For these parties, choice-of-law clauses may aid significantly in planning. Nonetheless, even in this kind of case, the forum should override the agreement between the parties when the forum policy explicitly regulates contractual relationships of this kind to protect various social interests, and when the forum has significant interests in furthering its regulatory policies. The second special circumstance is where the parties have purposefully formed a relationship in a foreign state. If that relationship is undertaken with full knowledge of the parties, and if the place where the relationship is centered would hold its conception of that relationship to be important to its way of life, then the forum should defer to the law of that state. Again, even in this type of case, the forum should apply its own standards if the parties to the relationship have significant contacts with the forum, and if the standards of the place where the relationship is centered violate the forum's sense of justice. . . . Third, the forum should apply foreign law if it is convinced that the circumstances are such that: (1) one of the parties relied—and had a right to rely—on the law of that state or legitimately claims its protection; and (2) if the other party, by her voluntary contacts with the foreign state, placed herself within its legitimate sphere of power. This criterion would apply, for example, when application of forum law would unfairly surprise a nonresident who relied on foreign law and where application of forum law would discriminate against that person by wrongfully treating her differently from similarly situated nonresidents.⁶⁰

Paradoxically, this approach to resolving conflicts cases incorporates elements of the two most radically opposed conflicts theories—Leflar's better law approach and Cavers's principles of preference approach.⁶¹ The better law approach lists factors to be considered in making choice-of-law determinations without providing any principles to guide the decisionmaker. It represents, therefore, the most open-ended, contextual, case-specific approach to conflicts analysis. Cavers's approach, on the other hand, uses interest analysis to generate choice-of-law principles. These principles, however, are closer to presumptions than hard and fast rules. Moreover, Cavers is quite candid about the need to consider whether a new case should persuade the decisionmaker to carve an exception out of a presumptively applicable prin-

⁶⁰ *Id.* at 92.

⁶¹ R. LEFLAR, *supra* note 4; D. CAVERS, *supra* note 25. For other scholars who combine rules or principles with policy analysis, see Posnak, *supra* note 40; Kramer, *supra* note 31.

principle. Nonetheless, Cavers asks us to attempt to generalize rather than resort only to case-by-case analysis.

These two approaches maintain a useful tension in conflicts reasoning. We should be attentive to the particularities of each case; at the same time, it is useful to generalize when we can. By keeping both approaches in mind, we bring the idea of conflict into the reasoning process itself. Conflicts cases present real conflicts between case-by-case adjudication and general principles, among the conflicting substantive norms of the affected states, among the interests and expectations of the parties, and between the multistate policies of promoting what the forum sees as the better law and accommodating the ability of the foreign state to constitute itself as a normative and political community.

The presence of conflict does not make reasoning or normative argument incoherent; rather, by clarifying the conflicting values implicated in these cases, this analysis elucidates the choice. In so doing, it locates responsibility for decisionmaking where it belongs: in the hands of those responsible for making the decision. Incoherence arises only when the analyst suppresses the conflict. As Martha Nussbaum notes, "Consistency in conflict is bought at the price of self-deception."⁶²

III. PRAGMATIC CONFLICTS ANALYSIS

This Part analyzes a series of paradigmatic conflicts cases. These cases are categorized by three separate indicia. The first is the kind of *legal issue* presented. Many modern conflicts scholars argue against identifying cases as "torts" or "contracts" cases on the ground that these categories are too broad to characterize accurately the policies underlying the particular legal rules at issue.⁶³ On the other hand, it is also true that conflicts scholars attribute particular kinds of policies to cases raising "torts" issues and different kinds of policies to cases traditionally identified as "contracts" cases.⁶⁴ That a case may be identified as *either* a torts case or a contracts case does not change this fact; it merely means that more disparate policies are relevant to that kind of case. The second factor is the *array of contacts*. Courts develop standardized arguments for dealing with cases based on the way in which contacts are divided between the states. For example, one set of arguments emerges when the conduct and injury are in different states, and another set of arguments appears when the relationship between the parties is centered in one state and the conduct and injury giving rise to the legal claim arise in another state. The third factor concerns the *array of substantive laws*. The interests of the state in which the defendant's conduct occurred differ depending on whether it has a plaintiff-protecting policy or a defendant-protecting policy.

⁶² MARTHA NUSSBAUM, *THE FRAGILITY OF GOODNESS* 242 (1986).

⁶³ See R. WEINTRAUB, *supra* note 7, § 3.4, at 71-78.

⁶⁴ See *id.* §§ 6.1-6.32, at 280-361, §§ 7.1-7.9, at 362-411.

A. *Torts*

Torts cases concern allegations by the plaintiff that the defendant has acted in a way that wrongfully caused harm to the plaintiff's legally protected interests. One of the most common kinds of conflicts cases in this area arises when the defendant acts in one state and the harm is suffered in another state. I will analyze the arguments in three types of cases in which the conduct and injury are in different states: (a) false conflicts, (b) true conflicts, and (c) unprovided-for, or no-interest cases. False conflicts arise when the only contact with the defendant-protecting state is the fact that the injury was suffered there. When *all* the defendant's acts are in a plaintiff-protecting, defendant-regulating state, and all parties are domiciled there, the state of the injury may be said to have no interest in applying its defendant-protecting policy if the defendant had no reason to know its conduct might have consequences there. True conflicts typically arise when the defendant acts in a defendant-protecting state, with foreseeable consequences in the place where the injury is suffered, and the plaintiff is domiciled and injured in a plaintiff-protecting state. This is the classic true conflict: the defendant's state is interested in limiting defendants' liability, and the plaintiff-protecting state is interested in preventing the harm and compensating its injured domiciliary. Unprovided-for cases, those in which it could be argued that no state has an interest in adjudicating the case, typically arise when the defendant acts in a plaintiff-protecting state, and the plaintiff lives or is injured in a defendant-protecting state.

1. Place of Conduct vs. Place of Injury

(a) *False Conflicts*. In *Rong Yao Zhou v. Jennifer Mall Restaurant, Inc.*,⁶⁵ the Brittany Restaurant in the District of Columbia served liquor to a visibly intoxicated patron who later drove to Maryland, where he caused an accident that injured two District of Columbia residents, Rong Yao Zhou and Xiu Juan Wu, husband and wife. The victims sued the restaurant in the District of Columbia for negligently causing their injuries by serving liquor to the driver of the car that injured them. The District of Columbia, but not Maryland, imposed liability on taverns for injuries proximately caused by the sale of liquor to visibly intoxicated patrons.

This case presents a classic false conflict. The arguments for applying District of Columbia law to the case are strong while the arguments for applying Maryland law are extraordinarily weak. Nonetheless, there is something to be said for applying Maryland law. Moreover, the effort to generate arguments on behalf of the defendant is useful in its own right. It will help clarify the nature of the relationship between the political communities in the federal system. It will also lead us in directions we might otherwise not have considered, and therefore develop a richer picture of the value choices at

⁶⁵ 534 A.2d 1268 (D.C. 1987).

stake here. This, in turn, may help generate persuasive arguments in other contexts.

Plaintiffs' case. The purpose of the District of Columbia law is to protect the public from drunk drivers by deterring taverns operating in the District from serving liquor to intoxicated patrons. The District of Columbia also is interested in compensating victims domiciled there both because the District is concerned for their well-being and because the financial consequences of not compensating them will be felt there if they end up on welfare. The District of Columbia places moral blame on its resident tavern for negligently contributing to the resident plaintiffs' injury; liability promotes justice between the parties by helping to redress the wrong.

Furthermore, because of the parties' contacts with the District of Columbia, the forum has strong interests in applying its plaintiff-favoring law to this case: it seeks to regulate the conduct of a resident tavern to protect residents and others who might be injured by negligent conduct in the forum, and it seeks compensation for its residents both because it has adjudicated the defendant morally blameworthy, and because the forum will feel the consequences of not compensating them. The place of the accident is fortuitous and irrelevant; it could have as easily occurred in the District of Columbia. The fact that the accident took place in Maryland rather than the District of Columbia makes no difference in terms of the policy objectives of the forum. The defendant's negligent conduct causes the same risk of harm in the forum, no matter where the accident actually occurs. Moreover, the forum's interest in compensating its domiciliaries does not vary depending on where they are injured. To fail to apply forum law here would discriminate against plaintiffs by treating them differently than similarly situated victims injured by negligent conduct in the forum.

At the same time, Maryland has little or no interest in applying its defendant-protecting law to this case. Maryland's law is intended to protect Maryland taverns from ruinous liability; it has no interest in protecting a tavern in another state whose business is regulated by that state. This is not a case like *Bryant v. Silverman*,⁶⁶ in which the accident arose out of the defendant's business activities in the defendant-protecting state. Here, the defendant has no contacts whatsoever with the defendant-protecting state.

There is also no problem of unfairness here in applying forum law. The District of Columbia tavern will not be surprised to find out that its conduct in the District is regulated by District of Columbia law. Nor did the defendant plan for the accident to happen in Maryland; it had no predictable contacts with Maryland and therefore cannot have relied on Maryland law in deciding how to act in the District of Columbia.

Finally, this is a common domicile case; all parties are domiciled in the forum. When the defendant has no contacts with the defendant-protecting

⁶⁶ 146 Ariz. 41, 703 P.2d 1190 (1985). See *supra* note 57 for a description of this case.

state, the plaintiffs are presumptively entitled to the protection of the law of the common domicile.

Defendant's case. The defendant's side of this case is extremely weak. Can anything be said in the defendant's behalf? The answer is yes. Both the First and Second Restatements place heavy emphasis on the place of the injury in torts cases. The defendant would argue that the place of the injury is significant because Maryland has a strong general interest in determining the legal consequences of accidents there. Maryland may, for example, seek to place the entire burden of liability on drunk drivers rather than allow the burden to be shared with taverns. It may seek to do so either to give drivers an added incentive to drive carefully, or because it sees those drivers as morally responsible for the accident.

The District of Columbia's regulatory interests are weak. Dram shop liability is highly controversial. The states are divided on this issue, with a fair number of states in both camps, and it is inappropriate for a state to apply its controversial policy to cases with multistate contacts. The forum should engage in restrained interpretation of its controversial policy and refuse to extend its application to an accident that occurred in a state that refuses to recognize this form of liability. Application of the District's compensatory policy to accidents that take place inside the District of Columbia will be sufficient to give District of Columbia taverns adequate incentives to use care in serving patrons; after all, they will not be able to tell which patrons will be involved in accidents outside the District. For purposes of deterrence, therefore, there is no reason to impose liability on the tavern for accidents that occur outside the District of Columbia. Further, the forum's compensatory interest is sufficiently furthered by the availability of a tort action against the drunk driver. There is also no problem of unfair surprise to the plaintiffs if Maryland law is applied. They accepted the vulnerabilities, as well as the benefits, of Maryland law when they went there.

Expected result. The court that decided *Rong Yao Zhou* applied the law of the District of Columbia, as would almost any court or scholar applying modern conflicts law.

Several comments should be made about the defendant's arguments. The Second Restatement identifies the law of the place of the injury as presumptively applicable. The place of the injury was also the rule under the First Restatement—still in effect in a significant number of states—and is the residual rule under Judge Fuld's principles in New York.⁶⁷ It should be noted that some critics of interest analysis, such as Professor Ely, advocate the place of the injury rule on the ground that any policy-oriented approach illegitimately discriminates on the basis of residence, and therefore violates the spirit, if not the letter, of the privileges and immunities clause in article IV of the Constitution.⁶⁸ Given this argument that the place of the injury rule may be constitutionally required, and the fact that the place of the

⁶⁷ See *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1922).

⁶⁸ See Ely, *supra* note 36.

injury is the presumptively applicable rule under traditional choice-of-law theory, why, then, would the defendant's case be perceived to be so weak by the vast majority of analysts and judges using the modern approach?

The defendant's case is understood as weak for several reasons. First, conflicts scholars generally view plaintiff-favoring doctrines in torts as the better law, because such doctrines support wise and widely held values of compensating victims of wrongful conduct and deterring that conduct.⁶⁹ Further, drunk driving is perceived as a sufficiently serious social problem, and the negligent conduct of taverns as a sufficiently egregious contributing factor to that problem, as to warrant application of the better law in multi-state cases.

Second, the defendant in this case has no direct contacts at all with the defendant-protecting state. It therefore cannot have relied on application of the immunizing law and can in no way be surprised—fairly or unfairly—by application of the law of the place where it does business. The defendant might argue that it thought that *some* of the accidents caused by its service of liquor would occur in the neighboring defendant-protecting state of Maryland, and that it expected—or hoped—to take advantage of the defendant-protecting law of the place of the injury in such cases. This argument, however, is untenable: it amounts to an admission of negligence. It suggests that the tavern planned its level of investment in safety in a way that directly violates the norms of conduct of the only place where it does business, the District of Columbia.

Third, the Maryland policy is almost certainly meant either to protect taverns from ruinous liability or to reflect a position that taverns are not the morally culpable cause of such accidents. It is probably *not* the case that the Maryland policy is intended to give an added incentive to Maryland drivers not to drink and drive; immunizing taverns from liability is unlikely to have any such effect. This means that the Maryland political community really does not have any legitimate interest in providing immunity to a tavern that is liable under the law of the only place where it does business. Moreover, even if Maryland views the driver as the morally culpable actor, the decision by the political community in the District of Columbia to assign blame to the tavern as well cannot be viewed as irresponsible or fundamentally unfair and, thus, cannot justify the application of Maryland law.

Notwithstanding Ely's concerns about discrimination,⁷⁰ most analysts view this as an easy case. A District of Columbia tavern has no right to protection from liability pursuant to Maryland law for its conduct in the District of Columbia that injures a District of Columbia resident. For these purposes, a District of Columbia tavern and a Maryland tavern are differently situated in a way that matters; only the Maryland tavern has legitimate claims to the protection of Maryland's immunizing policy.

⁶⁹ See *supra* note 16 and accompanying text (discussing the presumption in favor of recovery).

⁷⁰ See *supra* note 68 and accompanying text.

Assuming the forum views its plaintiff-favoring policy as better, there is no good reason for the forum to sacrifice the better law in deference either to the defendants' justified expectations or to the political community in Maryland. Maryland's interests are weak here and would likely be so viewed even by a Maryland court. The case, however, is a real conflict, at least in the sense that application of the forum's compensatory law may violate Maryland's sense of justice: Maryland law may be premised on the view that the driver, not the tavern, is the culpable actor. Nonetheless, Maryland has no legitimate reason to object to the District of Columbia's imposition of liability on a District of Columbia tavern pursuant to District of Columbia law to vindicate the rights of District of Columbia residents injured by the resident defendant's conduct in the District of Columbia. The forum, in contrast, has multiple, powerful reasons for adjudicating the relationship between its residents by its standards of justice.

*Rong Yao Zhou v. Jennifer Mall Restaurant, Inc.*⁷¹

	Washington, D.C.	Maryland
Contacts	<ul style="list-style-type: none"> π's domicile Δ's location Δ's conduct (serving liquor to intoxicated patron) forum 	injury (accident)
Laws	π has negligence claim against Δ	Δ is immune from liability
Policies	<ul style="list-style-type: none"> • Compensate victim of tortious conduct • Deter taverns from selling liquor to intoxicated patrons • Hold taverns morally responsible for negligent conduct 	<ul style="list-style-type: none"> • Protect Δ taverns from ruinous liability • Assign moral blame to the person who drinks and drives, not the vendor of the liquor
Justified Expectations	<ul style="list-style-type: none"> • Δ will not be surprised to find out that its conduct in D.C. is regulated by D.C. law • Δ cannot have reasonably relied on Md. law applying when it planned its conduct in D.C. because the place of the accident was fortuitous; the accident could just as easily have occurred in D.C. • πs have the right to be protected by the law of the common domicile 	<ul style="list-style-type: none"> • πs accept the vulnerabilities, as well as the benefits, of Md. law, when they go there

⁷¹ I will use "π" to represent "plaintiff" and "Δ" to represent "defendant."

<p>Interest Analysis</p>	<p><i>D.C. has strong interests in applying its law</i></p> <ul style="list-style-type: none"> • D.C. seeks to deter taverns operating inside D.C. from serving liquor to intoxicated patrons to protect the public within its borders • D.C. is interested in compensating its domiciliaries who are wrongfully harmed by the negligence of resident tortfeasors • The consequences of not compensating the victims will be felt in D.C. because they live there; without compensation, they may go on welfare there, at the taxpayers' expense • As the forum, D.C. is interested in seeing justice done between the parties; as the justice-administering state, it is interested in applying what it sees as the better, plaintiff-favoring forum law <p><i>Md. has no interest in applying its law</i></p> <ul style="list-style-type: none"> • Md.'s law is intended to protect Md. taverns from ruinous liability; Md. has no legitimate interest in protecting from liability a D.C. tavern whose conduct is regulated by the law of the place where it acts • Application of forum law will not interfere with Md.'s ability to govern its affairs or to constitute itself as a normative and political community; Md. would defer to D.C. law to determine the liability of a D.C. tavern to D.C. victims arising out of Δ's conduct in D.C. when D.C. imposes an obligation not required by Md. law 	<p><i>Md. has strong interests in applying its law</i></p> <ul style="list-style-type: none"> • Md. places the entire blame on the drunken driver to give an added incentive not to drink and drive • Md. has the right to determine the legal consequences of an accident occurring within its borders <p><i>D.C. has weak interests in applying its law</i></p> <ul style="list-style-type: none"> • It is impermissible extraterritorial regulation for D.C. to attempt to determine the consequences of an accident in Maryland • Dram shop liability is controversial; the states are divided about this issue; it is therefore improper to extend application of D.C.'s controversial rule to an accident that occurs in a state that refuses to recognize liability • Application of D.C. law to accidents in D.C. will provide sufficient incentive to induce D.C. taverns to be careful since they will never know which patrons are going to drive out of state • D.C.'s compensatory interests are sufficiently addressed by a tort suit against the negligent driver
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(b) *True Conflicts*. In *Blamey v. Brown*⁷² the fifteen-year-old plaintiff, Lisa Blamey, a resident of Minnesota, attended a beer party at a friend's house in Minnesota. Around eleven p.m., after the party ran out of beer, and the liquor stores in Minnesota had closed, the plaintiff rode with a group from the party to buy beer in Wisconsin, where some liquor stores were still open. The driver of the car, a seventeen-year-old Minnesotan, bought two six-packs at the defendant Overshoe Club in Wisconsin at approximately one a.m. The defendant's premises were located on the main street of a town fifteen miles from the Minnesota border, just off an interstate highway. The Overshoe Club was a neighborhood bar with just three tables, and could accommodate about twenty people. The defendant had no direct business

⁷² 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980). For discussions of this case's outcome, see Weinberg, *supra* note 8, at 623-25 (supporting the outcome in *Blamey*); Silberman, *supra* note 7, at 121 (disagreeing with the outcome in *Blamey*).

contacts with Minnesota and did not advertise there. After purchasing the beer, the teenagers drove back to Minnesota where plaintiff was seriously injured in an accident. Plaintiff then sued in Minnesota.⁷³ Minnesota, but not Wisconsin, imposed liability on taverns for negligently selling liquor to minors.

This case presents a classic true conflict. The defendant is located and acted in a defendant-protecting state, while the plaintiff lives and was injured in a plaintiff-protecting state. Each state seems to have strong interests in protecting its resident and in determining the legal consequences of the conduct giving rise to the injury. The policies behind Minnesota and Wisconsin law are roughly the same as those discussed in *Rong Yao Zhou*. Minnesota imposes liability on defendant establishments if the plaintiff proves that the defendant's sale of liquor was negligent, and that it proximately caused the plaintiff's harm. This rule deters taverns and stores from selling liquor to minors, compensates the victims of that negligent conduct when it does occur, and allocates a significant portion of moral blame to those who engage in such socially destructive behavior. In contrast, Wisconsin seeks to protect vendors from ruinous liability based on conduct arising in the ordinary course of business. To the extent there is moral blame, Wisconsin singles out those who drink and drive. Or perhaps Wisconsin would assign no moral blame here: a teenager's decision to drink and drive may reflect more immaturity than culpability. Many teenagers believe they are immortal and immune to physical harm, and they may not have had the experience to teach them otherwise.

Plaintiff's case. Minnesota has strong interests in applying its plaintiff-protecting law in this case. The injured victim is a Minnesota resident, and the consequences of not compensating her will be felt in Minnesota. Without compensation, she may require welfare at the expense of local taxpayers. Moreover, Minnesota is interested in deterring Wisconsin taverns located near the border from selling liquor to Minnesota minors. This regulatory policy is intended to protect both minors themselves and the public from drunk driving on Minnesota roads. If Minnesota law does not apply to out-of-state taverns, resident minors can easily evade Minnesota's protective policy. Because of this likelihood of evasion, and because Wisconsin allows liquor to be sold until two a.m.—rather than until eight p.m. as in Minnesota—the Minnesota policy would be significantly impaired if the court does not apply it in this case. The conduct of the Wisconsin tavern creates a substantial risk of harm inside Minnesota, and the Minnesota legislature has the power to protect its residents from wrongful conduct that has foreseeable consequences inside the state.

⁷³ Personal jurisdiction in Minnesota was based on the fact that the defendant's conduct caused foreseeable injury in Minnesota. In allowing jurisdiction, the court considered the defendant's proximity to the border and that it was common knowledge that Wisconsin establishments stayed open for business many hours later than similar establishments in Minnesota. *Blamey*, 270 N.W.2d at 886-88.

The Minnesota policy constitutes the better law. The Wisconsin law effectively creates an exception to the general principle that businesses have a duty to act reasonably, and that, when they act negligently, they are responsible financially to the victims of their wrongful conduct. The Minnesota doctrine, in contrast, holds taverns to the same standard of conduct applicable in all other contexts: acting reasonably. The failure to take reasonable steps to avoid the sale of liquor to minors—an act presumably forbidden by criminal statutes in Wisconsin—rightfully forces the tavern to redress the damage it has caused. Wisconsin, however, wrongly assigns all the responsibility to the drunk driver, effectively insulating the tavern from the duty to act reasonably. As the Minnesota policy constitutes the better law, it should generally prevail in multistate cases such as this one. Wisconsin has the right to insulate its taverns from liability when they act unreasonably and cause harm inside Wisconsin, but if a Wisconsin tavern cannot confine the consequences of its negligent conduct to a defendant-protecting state, it properly becomes subject to the plaintiff-protecting policy of the place of the injury.

Wisconsin's interests in protecting its taverns from ruinous liability are clearly applicable here. Nonetheless, it is inappropriate for Wisconsin to assert this policy when it has the effect of causing grievous harm inside Minnesota. Wisconsin cannot externalize the costs of its business promotion policies onto Minnesota children, their families, and Minnesota taxpayers. Further, because it is presumably illegal to sell liquor to minors inside Wisconsin, application of Minnesota law here—while imposing a new financial obligation on the Wisconsin tavern—does not impose a new legal duty on the tavern. It is already obligated to take steps to determine the age of its customers; Minnesota law merely has the effect of creating a larger penalty for conduct already prohibited by Wisconsin law.

Nor is application of Minnesota law unfair to the defendant Overshoe Club. The tavern is located on the main street of a border town off an interstate highway. It is common knowledge that liquor stores close in Minnesota many hours before they are required to close in Wisconsin. It was certainly foreseeable to the tavern that some number of its customers would be Minnesota residents, some of whom would have come to Wisconsin for the sole purpose of purchasing liquor. That the tavern does not advertise or solicit customers from Minnesota does not change the fact that it is foreseeable that Minnesota residents will appear in the tavern. Further, the defendant has no right to rely on Wisconsin law when its conduct has foreseeable consequences in a state that imposes liability for the negligent sale of liquor to minors. It can rely on Wisconsin to protect it only when its conduct causes harm inside Wisconsin. Once its conduct spilled over into the plaintiff-protecting state of Minnesota, it properly became subject to the regulatory laws of Minnesota. The defendant has no right to hide behind Wisconsin law when it fires a loaded gun into Minnesota.

This is also not a case in which it is plausible to argue that the plaintiff waived the protection of Minnesota law by going to Wisconsin to buy beer.

Although it is true that nonresidents accept the vulnerabilities as well as the benefits of Wisconsin law when they go there, the plaintiff was not old enough to waive validly the protections of Minnesota law. Even if it were the case that she had waived the protection of Minnesota law, the purpose of the rule at issue is not limited to compensation; it is a regulatory statute designed to deter the tavern from selling liquor to minors in order to protect the public by making the roads safer inside Minnesota. It is also for the benefit of the families and the taxpayers of Minnesota.

Defendant's case. Wisconsin has strong interests in applying its law to protect its resident tavern from ruinous liability. The consequences of imposing liability, possibly bankrupting the defendant and putting people out of work and in need of social services, will be felt in Wisconsin. Moreover, the defendant is a local tavern that accommodates twenty people; its location in a town near a major highway does not convert the tavern into a center of interstate commerce. The Wisconsin protective policy would be significantly impaired if it did not apply to a local tavern that neither does business in Minnesota nor advertises there. The Wisconsin political community has the right to determine the legal consequences of wholly local conduct occurring within its borders.

It would be outrageous extraterritorial regulation for Minnesota to define the legal consequences of wholly local conduct in Wisconsin. The defendant has in no way engaged in any purposeful activity inside Minnesota and therefore cannot be within its legitimate regulatory power. Further, dram shop liability is controversial, and it is therefore inappropriate for Minnesota to extend the application of its controversial law to conduct that takes place in a defendant-protecting state.

It is also manifestly unfair to impose the Minnesota regulation on the Wisconsin tavern. The defendant tavern has three tables and the capacity to serve no more than twenty people. It conducts no business in Minnesota and does not advertise there. Moreover, it is clear that the defendant assumed Wisconsin law would apply to its business activities. It failed to purchase liquor liability insurance in reasonable reliance on the Wisconsin protective law. The defendant would be unfairly surprised to find out that its local conduct in Wisconsin is governed by Minnesota law. That Wisconsin prohibits the sale of liquor to minors is irrelevant. The question is not whether the defendant violated a Wisconsin criminal statute; the question is whether defendant's conduct amounts to negligence, making the tavern vulnerable to a large damage award. That defendant could have foreseen that some Minnesota residents might come to Wisconsin to buy beer is also irrelevant; it does not follow that the defendant could or should have foreseen that *Minnesota law* would apply to its local conduct and effectively escalate enormously the legal penalties for selling liquor to minors. And, although it is true that the plaintiff is a minor whom Minnesota law attempts to protect, that protection cannot survive her journey into a state that makes her responsible for her own actions. The plaintiff entered Wisconsin and is subject to the consequences of Wisconsin law arising out of her activities there.

Wisconsin places the blame for her accident on the negligent driver of the car, not on the tavern. When the plaintiff entered Wisconsin, she was on the tavern's turf; she therefore cannot look to the tavern for compensation.

Expected result. This is a hard case and is almost universally viewed as such. On the one hand, scholars like Professors Silberman and Martin argue that a defendant who has engaged in no purposeful activity in Minnesota cannot be subjected to Minnesota law.⁷⁴ Not only does Minnesota have no legitimate interest in regulating wholly local conduct in Wisconsin; it is fundamentally unfair to surprise the defendant by subjecting it to regulations of a state with which it has no purposeful connection. On the other hand, the Minnesota Supreme Court applied forum law in resolving *Blamey v. Brown* and I believe this is the result we can expect in most cases like this, at least when the plaintiff's attorney has enough sense to sue in the plaintiff-protecting state and it is able to assert personal jurisdiction over the defendant.

Professors Weinberg, Leflar, and Sedler would probably support application of plaintiff-favoring law in this case.⁷⁵ The plaintiff-favoring law here is generally viewed as the better law, since it furthers the general goals of compensation and deterrence. The main problem with this result is the possible unfairness of applying Minnesota law to the local conduct of a small Wisconsin tavern. Yet, the facts do not help the defendant tavern here: it is near the border, Wisconsin taverns are open *much* later than Minnesota taverns, and it should not surprise the tavern that some of its customers may drive from and to Minnesota. Nor is it particularly controversial to allow a state to regulate conduct just across the border that has foreseeable, devastating consequences in the forum. It is no more illegitimate for Minnesota to regulate Wisconsin conduct than it is for Wisconsin to immunize its own resident tavern when it negligently inflicts severe and foreseeable harm to a child in Minnesota.

Several other factors affect the result in cases like this. That the plaintiff is a minor strengthens her claim, because she can argue that her minority counts against the notion that she voluntarily acquiesced to Wisconsin law when she went there. When an adult voluntarily goes to another state and engages in consensual activity there which later harms her, the argument is much stronger for applying that state's law. The plaintiff would not be unfairly surprised by such a result, and the defendant arguably justifiably relied on its own law to govern its liability to its customers. At the same

⁷⁴ Silberman, *supra* note 7, at 112; James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 887 (1980).

⁷⁵ See generally, e.g., R. LEFLAR, *supra* note 4; Robert Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 219 (1977) (arguing that, in a true conflicts case, "there is nothing improper in the plaintiff's suing in the state allowing recovery and in obtaining recovery under its law"); Weinberg, *supra* note 8 (arguing that in non-false conflicts cases, few occasions arise for departure from forum law).

time, Minnesota law is intended to promote safety on *Minnesota roads*, and defendant's conduct foreseeably causes a risk of harm in Minnesota.

The status of the laws in both states is also important. The more confident the forum is that its plaintiff-protecting law is better, the less likely it is to defer to the law of the place of the conduct. Similarly, if Wisconsin law is archaic or isolated, the forum may be more confident in confining its application to purely domestic cases in Wisconsin. If the Wisconsin policy is strongly held, however, or if it was recently enacted or reaffirmed, or if the states are very divided on the question of dram shop liability—as they are—the Minnesota court will feel greater pressure to protect the defendants from unfair surprise. This is especially true as the plaintiff traveled to Wisconsin to interact with the tavern on its own turf, and the parties' relationship was centered there.

Blamey v. Brown

	Minnesota	Wisconsin
Contacts	π's domicile injury (accident) forum	Δ's location Δ's conduct (serving liquor to intoxicated patron) π visited with friends for the purpose of buying the liquor that caused her injury
Laws	π has negligence claim against Δ	Δ is immune from liability
Policies	<ul style="list-style-type: none"> • Compensate victim of tortious conduct • Deter taverns from selling liquor to minors • Hold taverns morally responsible for negligent conduct • Share blame between the negligent drunk driver and the tavern that negligently sold the liquor that contributed to the accident; tavern as a proximate cause of the accident 	<ul style="list-style-type: none"> • Protect Δ taverns from ruinous liability • Assign moral blame to the person who drinks and drives, not the vendor of the liquor; or assign moral blame to no one—teenagers tend to believe they are immortal and they may not have the experience to teach them otherwise • Because moral blame belongs to the drunk driver, if anyone, the tavern is not the proximate cause of the injury
Justified Expectations	<ul style="list-style-type: none"> • Δ will not be unfairly surprised by application of Minn. law, given its location on the border and the fact that Wis. liquor stores are open six hours later than Minn. liquor stores and it was common practice for Minn. residents to drive to Wis. after hours to buy liquor • Δ had no right to rely on Wis. law applying to a sale of liquor to Minn. minors it could have foreseen would return to Minn. • π is not of an age where she could validly consent to waive the protections of Minn. law; she is therefore entitled to the protection of the law of her domicile 	<ul style="list-style-type: none"> • Δ will be unfairly surprised to find out that its business in Wis. is regulated by Minn. law; Δ conducts no purposeful activity in Minn. • Δ reasonably relied on Wis. law in deciding not to buy liquor liability insurance and in conducting its business in Wis. • π accepted the vulnerabilities, as well as the benefits, of Wis. law when she went there; she cannot be unfairly surprised by the application of Wis. law

<p>Interest Analysis</p>	<p><i>Minn. has strong interests in applying its law</i></p> <ul style="list-style-type: none"> • Minn. seeks to deter taverns operating in Wis. from serving liquor to Minn. minors to protect the public within Minn. • If Minn. law did not apply here, Minn. minors could easily evade the Minn. policy that seeks to deter sales of liquor to minors by imposition of tort liability; Minn. policy would therefore be significantly impaired if it were not applied to this kind of case • Minn. is interested in compensating its domiciliaries who are wrongfully harmed by the negligence of nonresident tortfeasors who should foresee that their conduct may have harmful consequences inside Minn. • The consequences of not compensating the victim will be felt in Minn. because she lives there; without compensation, she may go on welfare there, at the taxpayers' expense <p><i>Wis. has weak interests in applying its law</i></p> <ul style="list-style-type: none"> • Wis. is generally interested in protecting its taverns from ruinous liability, but cannot reasonably assert this policy when it has consequences inside Minn. • Minn.'s plaintiff-protecting policy is the better law; the Δ therefore has no right to hide behind the Wis. defendant-protecting policy if it cannot confine the consequences of its conduct to the defendant-protecting state; nor can Wis. externalize the harmful effects of its business promotion policies onto a state that regulates this kind of harmful conduct 	<p><i>Wis. has strong interests in applying its law</i></p> <ul style="list-style-type: none"> • Wis. is interested in protecting Wis. taverns from ruinous liability • The consequences of imposing liability on the Wis. defendant will be felt in Wis.; if a large tort award bankrupts the tavern, it will put some people out of work and may increase the demand for public services provided by the Wis. taxpayers • The Wis. protective policy would be significantly impaired if it did not apply to the conduct of a local Wis. tavern that conducts all its business in Wis. and does not seek out-of-state customers • Wis. has the right to determine the legal consequences of local conduct occurring within its borders <p><i>Minn. has weak interests in applying its law</i></p> <ul style="list-style-type: none"> • It is impermissible extraterritorial regulation for Minn. to attempt to regulate the operation of a Wis. tavern • Dram shop liability is controversial; the states are divided about this issue; it is therefore improper to extend application of Minn.'s controversial rule to conduct in a state that refuses to impose liability • Δ has not engaged in any purposeful activity in Minn.; it is therefore outside the range of Minn.'s regulatory sphere
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(c) *Unprovided-For or No-Interest Cases.* *Johnson v. Spider Staging Corp.*⁷⁶ involves a wrongful death claim by Geneve Johnson, the Kansas widow of Jack Johnson who was the owner of an exterior building cleaning business in Topeka, Kansas. Mr. Johnson purchased a scaffold for his business from the defendant, Spider Staging Corporation, a business located in Washington state and was killed on the job in Kansas when he fell sixty feet

⁷⁶ 87 Wash. 2d 577, 555 P.2d 997 (1976). For another typical unprovided-for case, see *Erwin v. Thomas*, 264 Or. 454, 506 P.2d 494 (1973). In *Erwin* plaintiff lives and sustains an injury in a state that does not provide a remedy for loss of consortium. The defendant lives in a state that does provide such a remedy. The plaintiff-protecting forum applied its law, effectively imposing on the defendant a duty to comply with the higher standards of his home state's law for actions that occurred while he was away in another state.

from that scaffold. His wife brought a wrongful death claim against the defendant in a Washington court, alleging that the scaffold was defectively designed and had caused her husband's death. Kansas, but not Washington, has a \$50,000 limit on wrongful death damages.

This case presents the classic unprovided-for or no-interest case: a case in which it might be plausible to claim that neither state has an interest in applying its law to adjudicate the dispute. In the paradigm unprovided-for case, the defendant acts or is located in a plaintiff-protecting state and the plaintiff lives or is injured in a defendant-protecting state. In this kind of case, interest analysts sometimes conclude that neither state is interested in applying its law because the scope of each state's policy is limited to protecting residents. Thus, it might be argued that the Kansas damage limitation is designed to protect Kansas-based businesses from excessive liability, while Washington's compensatory law is designed to provide full compensation to Washington residents who are the victims of wrongful conduct. Since there is neither a Washington plaintiff nor a Kansas business, neither state has any policy that would be furthered by applying its law.

Even if one accepts the characterization of this case as a no-interest or unprovided-for case, the court still has to choose which law to apply. One way to resolve this kind of case is to question whether any applicable law provides protection to each of the parties. For example, the defendant can argue that the damage limitation should apply since neither state provides full compensation for this plaintiff; no state grants the plaintiff a legally protected interest in full compensation. Conversely, the plaintiff could argue that she has a right to receive full compensation since both states impose liability on the defendant and no state immunizes this defendant from full liability. I believe that both these arguments are formalistic and empty.

A second and more appropriate way to resolve these kinds of cases is to choose the better law. The plaintiff may argue that, since no state has any significant interest in applying its law, the forum should resolve the case by applying forum law, both because it permits a simpler resolution of these kinds of cases, and it furthers the forum's social policy and sense of justice. Washington law promotes fairness by requiring those who profit from an activity to bear its costs and promotes efficiency by requiring companies to internalize the external costs of doing business. Moreover, limits on compensation are exceptions to the general policy of full compensation and internalization of external costs; these limits are imposed not because of their inherent justice, but because they are expedient. In a case where no state has reason to sacrifice justice in the interest of expediency, justice should prevail. The defendant may counter that the better policy is limiting financial burdens on companies by taking discretion away from juries in tort cases. Excessive tort liability stifles business by drawing money and resources away from productive investment. Or, the defendant may argue that, even if forum law constitutes the better policy, it would unfairly surprise the defendant to apply Washington wrongful death law to compensate the widow of a Kansas victim who lived and died in Kansas.

A preferable way to resolve this kind of case is to refuse to describe either state as disinterested. In contrast to *Rong Yao Zhou*, which may be reasonably described as a false conflict, I believe that it is not sensible to resolve this kind of case by describing it as a no-interest or unprovided-for case. Finding no state interests here requires an unacceptably narrow definition of state interests. For example, it is not the case that Washington's only rationale for its full compensation policy is compensation; the policy arguably serves, or is supposed to serve, a deterrent function as well. This deterrence protects Washington residents as well as nonresidents by promoting investment in safety by Washington companies. Washington is also not necessarily indifferent to nonresident victims of resident tortfeasors; it is arguably discriminatory to fail to extend the protections of Washington law to nonresident plaintiffs killed by the conduct of Washington residents that occurred inside Washington.

Similarly, it is an unacceptably cramped and narrow view of Kansas interests to argue that the Kansas policy applies only to companies wholly located or with their principal place of business in Kansas. The application of Kansas law in this sort of case will promote the Kansas economy by encouraging nonresidents to do business with Kansas consumers. To the extent the Kansas damage limitation policy reduces the Washington company's costs, it may be able to provide goods at lower prices to Kansas customers, thereby benefiting the Kansas economy. This situation differs from *Rong Yao Zhou*, in that there the defendant tavern did no business in Maryland, the place of the injury, and it is hard to imagine why Maryland could assert a legitimate interest in immunizing a Washington, D.C. tavern from liability as a way to promote Maryland interests. *Spider Staging Corp.* is closer to *Blamey v. Brown*. In *Blamey* it is easy to see why Minnesota might want to regulate the conduct of a Wisconsin bar that caused foreseeable injury inside Minnesota. Here, too, it is easy to see why Kansas might want to promote interstate business dealing between nonresident companies and Kansas residents by extending the protection of Kansas law to nonresidents who sell products to Kansas residents.⁷⁷ For this reason, my analysis of this

⁷⁷ Similarly, in *Giovanetti v. Johns-Manville Corp.*, 372 Pa. Super. 431, 539 A.2d 871 (1988), the plaintiff was a New Jersey resident who worked in New Jersey as a tinsmith and welder for a total of twenty-seven years and in Pennsylvania for two years. The plaintiff alleged that he had sustained injuries as a result of his exposure on the job to asbestos manufactured and distributed by the defendants in Pennsylvania. Pennsylvania law would have allowed the plaintiff to recover damages if he could prove that he faced an increased risk of cancer in the future even if he could not prove any present injury; in contrast, New Jersey law prohibited recovery for the increased risk, but would allow recovery only if the risk materialized. The court applied New Jersey law on the ground that the plaintiff's employment had been centered there. If we translate this conclusion into interest analysis, rather than a contact-counting or "center of gravity" analysis, the court effectively extended New Jersey's defendant-protecting law to the nonresident defendants who had sold goods to customers in New Jersey. The court immunized the

case combines some aspects of the no-interest analysis with an analysis of the interests each state might in fact assert in arguing for the application of its law.

Plaintiff's case. Washington has strong interests in applying its regulatory law to this Washington defendant charged with designing, manufacturing, and selling an unreasonably dangerous product inside Washington. The sale of such products creates a risk of harm to Washington customers of the defendant. This defective scaffold could as easily have caused injury inside Washington as in Kansas; the location of the accident was fortuitous. Application of Kansas law here would significantly impair Washington's ability to regulate its resident businesses in order to protect resident consumers of its products; allowing the Washington company to factor in the damage limitations of all the places it sells its scaffolds will decrease its incentives to invest in safety by allowing it to externalize some significant portion of its costs of doing business that Washington intended to impose on it. Washington is also interested in compensating the victims of resident tortfeasors, whether or not the victims reside in Washington; it would be discriminatory for Washington to grant full compensation to residents but not to nonresidents.

Finally, Washington law constitutes the better law, because it promotes full compensation and efficiency. Given the tenuous Kansas interest in the application of its law, the proper result is to apply the better forum law. Kansas has little or no legitimate interest in applying its damage limitation to this case as the rationale for its policy applies mainly, if not exclusively, to Kansas businesses. It would also constitute illegitimate extraterritorial regulation for Kansas to limit the liability of a Washington manufacturer. Why should Kansas protect a company that is not protected by the law of the place where it does business? On the contrary, Kansas should be happy to have its resident widow receive compensation as Kansas would bear the effects of decreased compensation.

Application of Washington's plaintiff-protecting law will not unfairly surprise the Washington defendant. It cannot justifiably expect that its conduct in Washington would not be subject to Washington standards of liability. And, since the defendant had liability insurance in excess of the Kansas damage limitations, it is clear that the defendant in no way relied on the applicability of the Kansas damage limitation. At the same time, the plaintiff has a right to compensation under the law of the place where the defendant does business. The defendant should not be allowed to escape the Washington damage rules any more than it should be allowed to escape other Washington laws regulating the safety of products manufactured in the state.

Defendant's case. Kansas has strong interests in protecting a nonresident business that engages in commercial transactions with local residents. If the purpose of Kansas law is to protect businesses operating in Kansas from

Pennsylvania defendants from liability for conduct in Pennsylvania that would have been tortious under Pennsylvania law.

ruinous liability, the Kansas law also rationally applies to a nonresident that sells products to companies with their principal place of business in Kansas. Kansas will feel the consequences of not compensating the plaintiff, and, if Kansas is willing to live with an undercompensated victim in order to stimulate the local economy, why should the state of Washington override that policy? In contrast, Washington has very weak interests in applying its law. Washington's compensatory policy is mainly or even exclusively meant to compensate resident victims. Washington will not need to support the plaintiff here if her undercompensation eventually requires her to take advantage of social services. Further, application of Kansas law will have little effect on Washington's deterrence policies; resident businesses cannot know where their goods will cause accidents, so they have substantial incentives to invest in safety even if they are liable for full damages for accidents only in Washington.

The plaintiff cannot be unfairly surprised that wrongful death awards are governed by the law of her home state. Moreover, the defendant may in fact have reasonably relied on the application of the Kansas wrongful death statute to govern the use of its products in Kansas. Even if the defendant did not expect Kansas law to apply to an accident in Kansas or to a sale of its product to a Kansas customer, it has a right to be protected by the law of the state where its product allegedly harmed the plaintiff. It would constitute illegitimate extraterritorial regulation for Washington to attempt to regulate the sales of defendant's products all over the United States.

Expected result. In most cases of this type, one would expect the forum in a plaintiff-favoring state to apply forum law, both because it is likely to view that law as better, and because its application of forum law does not appear to infringe on any strong interests of the defendant-protecting state. The defendant's financial well-being is of minimal interest to the defendant-protecting state as the defendant does no business there other than shipping goods. Further, the forum has deterrent, as well as compensatory interests, and the manufacture and sale of the product in Washington creates a risk of harm in Washington, even if that risk materialized out of state in this particular case. Moreover, the failure to provide full recovery to a nonresident plaintiff appears discriminatory when the plaintiff's home state has no strong interest in applying its defendant-protecting law.

Spider v. Johnson Staging Corp.

	Kansas	Washington
Contacts	<p>π's domicile victim's domicile victim's business victim ordered the scaffold from Δ injury and death (accident)</p>	<p>Δ's principal place of business Δ's conduct (scaffold was designed & manufactured) scaffold was sold and shipped to victim forum</p>
Laws	<p>Δ is protected by \$50,000 limitation on wrongful death damages</p>	<p>π benefits from full compensatory damages; no limit on wrongful death damages</p>
Policies	<ul style="list-style-type: none"> • Protect Δ business from ruinous liability 	<ul style="list-style-type: none"> • Provide full compensation to victims of unreasonably dangerous products • Deterrence—induce sellers and manufacturers of products to invest in safety • Promote efficiency by requiring businesses to internalize the external costs of their products • Promote fairness (those who profit from an activity should bear its costs)
Justified Expectations	<ul style="list-style-type: none"> • Δ reasonably relied on the application of the Kan. wrongful death statute to govern the rights of a Kan. resident • π is not unfairly surprised that wrongful death awards are determined by the law of her home state 	<ul style="list-style-type: none"> • Δ could not justifiably expect that its conduct in Wash. would not be subject to Wash. standards of liability • Δ has liability insurance in excess of the Kan. damage limitations, so it did not rely on the Kan. limitation • π justifiably expects that a manufacturer operating in Wash. will comply with standards of conduct imposed by the place where it does business

<p>Interest Analysis</p>	<p><i>Kan. has strong interests in applying its law</i></p> <ul style="list-style-type: none"> • Kan. is interested in protecting a nonresident business that does business in Kan. from ruinous liability; Δ did business "in" Kan. by selling its product to a Kan. resident for use in Kan.; this policy promotes the local economy • Kan. should not discriminate against a nonresident business by denying it the protections of Kan. law that would be available to a resident business <p><i>Wash. has weak interests in applying its law</i></p> <ul style="list-style-type: none"> • Wash.'s compensatory policy is mainly geared to compensating Wash. ns, and there is no Wash. π here; the consequences of not fully compensating the widow will be felt solely in Kan., which is willing to live with a lower level of compensation as a way to protect industry from undue burdens incident to business • Application of Wash. law to accidents in Wash. is sufficient to promote the Wash. Δ's investment in safety, because it cannot tell where its defective products will cause injury 	<p><i>Wash. has strong interests in applying its law</i></p> <ul style="list-style-type: none"> • Wash. is interested in regulating the production of defective products in Wash.; defective products manufactured there create a risk of harm inside Wash.; this defective scaffold could just as easily have caused the death of a Wash. resident • Nonresident victims of Wash. businesses have as much right as Wash. residents to be protected from defective products sold by Wash. businesses • Application of Kan. law would interfere with the ability of Wash. to promote a high level of investment in safety by its resident business <p><i>Kan. has weak interests in applying its law</i></p> <ul style="list-style-type: none"> • Kan. law is mainly meant to protect Kan. businesses or businesses with their principal place of business in Kan.; if it could, Kan. would require full compensation for victims of defective products; it therefore can have little objection to holding this Δ to the standards of the place where it does business to achieve full compensation for its resident victim • It would constitute illegitimate extraterritorial regulation for Kan. to attempt to limit the liability of a manufacturer arising out of its Wash. business operations
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2. Place of Relationship vs. Place of Conduct or Injury

In the cases discussed in the last subsection, the defendant's conduct occurred in a state different from that in which the plaintiffs suffered the injury. In the next class of cases, the parties have created a relationship centered in one state, while the injury occurs in another state. These relationships may be of various kinds: contractual relationships, such as employer/employee relationships; noncontractual business relationships, such as relations among coworkers; family relationships, between husbands and wives or parents and children; relations among shareholders in a corporation; or other kinds of regulated relationships, such as relationships between charities and their beneficiaries or between businesses and their customers. Further, cases in which the parties have a common domicile closely resemble cases where the parties have formed a relationship clearly centered in a particular jurisdiction. Even when the parties in a common domicile case do not have a previous relationship, the injurious conduct by one and the injury to the other form a kind of relationship—one between tortfeasor

and victim. Both common domicile cases and cases involving previously established relationships are likely to raise conflicts between the regulatory interests of the state where the relationship is centered and the interests of the state in which the conduct or injury occurs. Each of these states may have a legitimate claim in defining and enforcing its conception of the just relationship between the parties.

In these kinds of cases, the courts must choose between two quite different ways of regulating the relationship between the parties. One solution emphasizes the importance of the relationship itself; that the relationship was established and is centered in a state that either imposes liability or creates immunity from liability is the determinative factor. The state of the conduct or injury may defer to the state where the relationship was established because the consequences of regulating the relationship will be felt in the latter state, and because the just contours of the relationship are important to that community's way of life. This solution prevents the parties from evading the regulatory requirements of the state where they formed their relationship. It also allows a single, predictable law to apply to disputes among parties to the relationship. In common domicile cases, the focus is not that a relationship was previously established in a particular place, but that the consequences of imposing or not imposing liability are going to be most strongly felt in the place where the parties live.

The alternative solution emphasizes the conduct of the parties and the state in which the conduct causes injury; that the parties have left the jurisdiction in which they established their relationship brings them within the legitimate regulatory power of the state they have chosen to enter. The state of the conduct or injury may have interests either in imposing liability to deter wrongful conduct or in granting immunity as a way to promote desired activity. It may also feel that the rules of the state where the parties centered their relationship promote an archaic and unjust relationship between the parties, and that the parties—or at least the disempowered member—should be free to leave the restrictive state and take advantage of the fresh air elsewhere.⁷⁸

The distinction between loss-allocating and conduct-regulating rules is crucial to the courts' analysis of which of these methods to rely upon. When a rule of law is thought to be loss-allocating, the courts are more likely, but not at all certain, to choose the law of the state where the parties established their relationship.⁷⁹ When the rule at issue is conduct-regulating, the courts

⁷⁸ See, e.g., *Hutzell v. Boyer*, 252 Md. 227, 233, 249 A.2d 449, 452 (1969) (applying forum law to allow recovery for an injury arising out of a local accident caused by a fellow employee when the law of the place of the parties' relationship would have immunized the defendant from liability; the court allowed recovery based on the forum's "genuine interest in the welfare of a person injured within its borders").

⁷⁹ Even in this circumstance, the courts will ignore the law of the place where the relationship was established if that law violates a strong forum policy favoring recovery or violates the forum's sense of justice. See *id.*

are more likely to rely on the law of the place of the conduct or injury. A difficulty may arise in that one state may view its rule of law in a particular area as a loss-allocating rule, such as family tort immunity that is designed to promote family harmony, while another state may regard its rule of law in the same area as a conduct-regulating rule, such as a family tort rule that imposes liability to deter negligent conduct. One party may also characterize a particular rule of law as merely loss-allocating and not designed to affect behavior while the other party will argue that same rule is indeed designed to affect behavior. Situations like these present real conflicts that cannot be resolved by the distinction between loss-allocating and conduct-regulating rules.

(a) *Cases in Which the Place of the Relationship Grants Immunity.* In some cases, the state where the relationship is centered immunizes the defendant from liability for harm inflicted on the plaintiff, while the law of the place of the injury imposes liability. For example, in *Schultz v. Boy Scouts of America*,⁸⁰ the issue was whether a New Jersey charity was liable to its New Jersey beneficiary for an injury inflicted in New York. The plaintiffs were a New Jersey family whose two sons had been sexually abused by a Scoutmaster on a camping trip to New York. The abuse continued back in New Jersey, and, because of the abuse, one of the sons later committed suicide. New Jersey, but not New York, granted charities immunity from liability to their beneficiaries arising out of a charity's charitable activities. The New York Court of Appeals applied the law of the state where the relationship was centered, probably because the New York policy was unlikely to have much, if any, deterrent effect,⁸¹ and probably because the court believed that it would be wrong for New York to interfere in the ability of the political community in New Jersey to determine the just contours of the relationship centered there.⁸²

A second example of a case in which the place of the relationship creates immunity is an interspousal immunity case like *Johnson v. Johnson*,⁸³ in which the place of the marital domicile seeks to promote marital harmony by prohibiting negligence suits between spouses, while the place of the conduct and injury imposes liability for negligent interspousal conduct. These cases almost universally reject the traditional place of the injury rule, instead applying the law of the state of the marital relationship. They do so on the grounds that tort liability is unlikely to regulate conduct—that is, to induce a higher standard of care, and that the issue is therefore mainly one of loss-allocation between the parties. The state in which the injury occurs may have a pragmatic interest in allowing the injured spouse to recover damages from the insurance company in order to ensure payment of unpaid medical

⁸⁰ 65 N.Y.2d 184, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985).

⁸¹ *Schultz*, 65 N.Y.2d at 200, 480 N.E.2d at 686, 491 N.Y.S.2d at 97-98.

⁸² See Singer, *supra* note 7, at 94-101 (discussing, in more detail, the conflicts analysis required by *Schultz*).

⁸³ 107 N.H. 30, 216 A.2d 781 (1966).

debts incurred in that state. In the final analysis, however, the place where the parties have centered their relationship is generally presumed to have the greatest interest in determining the just contours of that relationship.⁸⁴

A third example of this category of cases involves employment relationships in which the place where the relationship is centered immunizes the defendant from liability. In *Saharceski v. Marcure*,⁸⁵ for example, the parties were fellow employees who worked in Massachusetts but were involved in a car accident while on the job in Connecticut. Connecticut, the place of the injury, would have allowed the tort suit to proceed, while Massachusetts, the place where the relationship between the coworkers was centered, immunized employees for injuries incurred on fellow employees while on the job. The court resolved this case by application of forum law, that of the place where the relationship was centered, presumably on the ground that the Connecticut plaintiff-protecting rule was not mainly intended to regulate conduct in Connecticut but instead to allocate losses. Moreover, Massachusetts had a greater interest in determining the relationship's just contours as application of that state's law would better accord with the expectations of the parties.⁸⁶

(b) *Cases in Which the Place of the Relationship Imposes Liability.* In other cases, the place where the relationship is centered creates liability, while the place of the injury grants immunity. Numerous interspousal immunity cases of this kind, such as *Haumschild v. Continental Casualty Company*⁸⁷ and *Thompson v. Thompson*,⁸⁸ apply the liability-imposing law of the place where the relationship is centered. These cases suggest that the goal of promoting marital harmony that is reflected in the immunity statute applies most strongly to couples residing in the state that grants interspousal immunity. If the state where the parties live does not fear marital discord stemming from interspousal tort liability, but rather seeks compensation for wrongful conduct between the parties, there is little reason for the place of the injury to assert its interests. Indeed, the parties' state of residence will feel the consequences of either marital discord or the failure to compensate. Moreover, it is unlikely that anyone relies on the immunizing law of a place that they visit, and, therefore, no one would be unfairly surprised by application of the law of their home state. Furthermore, because the domicile state has significant interests in regulating the relationship, it is not discriminatory to deny to the defendant the protection of the law of the place where the conduct and injury occurred.

⁸⁴ R. WEINTRAUB, *supra* note 7, § 6.15, at 312 (arguing that this kind of case presents a real conflict between the compensatory interest of the place of the injury and the regulatory interest of the place where the parties centered their relationship).

⁸⁵ 373 Mass. 304, 366 N.E.2d 1245 (1977).

⁸⁶ *Id.* at 311, 366 N.E.2d at 1249 (arguing that the parties should have reasonably expected Massachusetts law to apply).

⁸⁷ 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

⁸⁸ 105 N.H. 86, 193 A.2d 439 (1963).

A second example of this category arises in cases in which an employment relationship is centered in a state that imposes liability on the employer for injuries incurred on the job while the place of the injury immunizes the employer from liability. The results in these cases vary. In some cases, the law of the place of the injury controls, presumably on the grounds that the employer has the right to the protections of the law of the place where it is doing business, and that the employee accepts the vulnerabilities of the law of the state that she enters in the course of her employment.⁸⁹

For example, in *Eger v. E.I. Du Pont DeNemours Co.*,⁹⁰ the plaintiff, a New Jersey resident, performed some work for his New Jersey employer at a nuclear plant in South Carolina. The employer took on the work as a subcontractor for the defendant general contractor. On one of the plaintiff's trips to South Carolina, he was exposed to radioactivity that caused him to contract leukemia. In addition to a workers' compensation award from his immediate employer, the plaintiff brought a third-party tort action in a New Jersey court against the defendant general contractor. New Jersey would have allowed the suit to go forward because the tort immunity granted to the immediate employer under the New Jersey workers' compensation statute did not extend to the general contractor. In contrast, under South Carolina law, the general contractor shared the tort immunity of the immediate employer. The court applied the immunizing law of the place where the plant was located and the injury was inflicted, rather than the place where the employment relationship and the subcontractor/general contractor relationships had been established.

In other cases, such as *Alaska Packers Association v. Industrial Accident Commission*,⁹¹ the employee is given the benefit of the plaintiff-compensating law of the place where the relationship was established and the suit was brought. This result has two possible grounds: the state where the employee lives and in which the employment relationship is centered will bear the effects of not compensating the employee, or the forum is interested in regulating the relationship between its residents to achieve its conception of justice by protecting the interests of the more vulnerable party.

A third example of this category comes from cases in which there is no prior relationship between the parties or the prior relationship is a weak one. One such case is *Bryant v. Silverman*.⁹² In this case, plaintiff and the defendant airline both were domiciled in Arizona, a plaintiff-protecting state, while the injury occurred in Colorado, a defendant-protecting state. That the defendant conducted business in both states and was alleged to have acted in both states in ways that contributed to the injury serves to further compli-

⁸⁹ See, e.g., *Alabama Great S. R.R. v. Carroll*, 97 Ala. 126, 11 So. 803 (1892) (applying the First Restatement place of the injury rule to immunize the employer from tort liability).

⁹⁰ 110 N.J. 113, 539 A.2d 1213 (1988).

⁹¹ 294 U.S. 532 (1935).

⁹² 146 Ariz. 41, 703 P.2d 1190 (1985); see *supra* notes 57 & 66 and accompanying text.

cate this case.⁹³ Moreover, the plaintiff's husband had purchased his ticket in Colorado, thus creating a contractual relationship there. Arizona, the common domicile, imposed liability for punitive damages while the place of the injury immunized the defendant from liability for such damages.

Like *Eger* and *Alaska Packers*, this case could go either way. On one hand, the place of the injury has an interest in extending its defendant-protecting law to the defendant's business activities there. Moreover, the victim accepted the vulnerabilities of Colorado law by going there and by buying a ticket there. On the other hand, the forum, Arizona, has an interest in deterring the airline from negligent conduct toward its citizens. The place where the negligence occurred and the accident happened is fortuitous and unplanned, and the forum will bear the consequences of not compensating the plaintiff. Because these cases present real conflicts, most will be resolved by application of plaintiff-favoring forum law; the forum is likely to see no sufficiently strong reason to give up what it sees as its better, compensatory and deterrent policy, in deference to the defendant-protecting law of the place of the accident.

The more recent case of *García v. Public Health Trust*⁹⁴ illustrates more fully the arguments applicable in cases involving preexisting relationships. There, the plaintiff was a resident of Spain and an employee of Iberia Airlines of Spain, an agency of the Spanish government. After being mugged and beaten during a stopover in Miami, Florida, the plaintiff was treated by a Florida doctor also employed by Iberia. Plaintiff recovered benefits under the Spanish workers' compensation system. He then sued his employer and the physician, his coemployee, in Florida for injuries resulting from medical malpractice in treating the plaintiff in Florida. Spain, but not Florida, would have allowed the tort suit. Florida immunized both the employer and the fellow employee from liability for injuries incurred on the job when, as here, the employee received benefits under the workers' compensation system of another state. The court applied the law of Florida, the place of the doctor's conduct and the plaintiff's injury.

The conflicts issues concerning liability of the Florida physician differ significantly from the issues concerning liability of the Spanish employer. The doctor has an interest in relying on the law of the place where he does business, and the place where he lives and practices will feel the consequences of imposing liability on him. The employer airline, however, has less significant ties with Florida. Given that the airline's base is in Spain, and that it established its relationship with the plaintiff there, Spain has greater reason than Florida to assert a legitimate interest in regulating the employment relationship. Because the primary conflicts issue in this case involved the employer, as there was a preexisting relationship centered in a state different

⁹³ The plaintiff alleged negligent operation of the airplane in Colorado and negligent training of the pilots in Arizona. *Bryant v. Silverman*, 146 Ariz. 41, 44, 703 P.2d 1190, 1193 (1985).

⁹⁴ 841 F.2d 1062 (11th Cir. 1988).

from the place of the injury, I will focus on the employee's claim against the employer.

Plaintiff's case. Spain has strong interests in applying its law to regulate the employment relationship established and centered there. Spain will suffer the effects of not compensating the Spanish employee, and Spain therefore has an interest in deterring the resident defendant from providing negligent care to its employees. Spain is also interested in regulating employment relationships centered there in order to protect its workers from the superior bargaining power of their employers and thereby fulfilling its vision of justice. Further, Iberia Airlines is an agency of the Spanish government; the relationship here is therefore not only an employer/employee relationship, but one between a citizen and a state. It is even more imperative that the Spanish political community be able to define the law that regulates the relationship between its citizen-employee and the government than it would be were this a private employer/employee relationship.

In contrast, the Florida forum has weak interests in applying its law. This is not a false conflict, however. Florida has legitimate interests in extending its protective, immunizing policy to this defendant: this policy will help promote business activity in the forum. Nonetheless, Florida has weaker interests in protecting companies that only engage in transient business there than those whose principal place of business is in Florida. Protecting businesses such as Iberia can only have a minimal effect on the Florida economy. Even if Florida's interests are viewed as very significant, it is wrong for Florida to assert its interests when they would interfere with a relationship established and centered elsewhere. The forum should engage in restrained interpretation of its law in deference to the ability of the political community in Spain to regulate the employment relationship centered there.

Application of Spanish law is fair. The plaintiff reasonably relied, and had a right to rely, on the law of the place where he established the employment relationship to govern his employer's obligations to him. The employee's rights should not vary depending on the location of an on-the-job injury. Furthermore, application of Spanish law would not surprise the defendant employer. No one planned for this injury to happen in Florida; it could as easily have happened in Spain. If the defendant relied on Florida law to reduce its level of care, this reliance was unjustified; the purpose of Florida law is not to encourage negligence, but to establish a balance between assuring compensation for employees and limiting employers' liability in tort suits. Nor could the defendant justifiably expect to evade the regulatory requirements of the place where it established the employment relationship, given that one of the purposes of the Spanish law is to regulate those with greater bargaining power to prevent them from coercing workers to accept unjust terms in their employment contracts.

Defendant's case. Florida has strong interests in applying its law to protect nonresident businesses operating in Florida from excessive liability to their employees arising out of their business operations there. This Florida policy serves to stimulate the local economy by protecting businesses from

the ruin that could result from unpredictable and excessive tort awards, while granting employees guaranteed compensation for work-related injuries. It also guarantees the employer more predictable insurance costs. In addition, because they accept the vulnerabilities of Florida law while they are there and must comply with local regulations, nonresident businesses are entitled to the benefits that local law provides. It would be discriminatory to deny the defendant the protection of local law on the ground that it is a nonresident. Moreover, the economic purpose of Florida's policy would be significantly impaired if it did not apply to business activity inside Florida. Florida also has an interest in limiting tort cases in order to free its courts for what it views as more pressing cases.

In contrast, Spain's interests are weak here. Although it is true that Spain will primarily feel the effects of not compensating the plaintiff, the plaintiff has already been fully compensated under the Spanish workers' compensation system. Further, Spain's interest in deterring the defendant from acting negligently is most appropriately applicable to conduct inside Spain; it is illegitimate extraterritorial regulation for Spain to attempt to impose additional liability on its resident defendant because of its conduct in Florida. There is therefore no good reason to engage in restrained interpretation of forum law.

Application of Florida law is fair to both parties. The plaintiff accepted the vulnerabilities of Florida law by working in the forum, and cannot be unfairly surprised that his activity there is governed by Florida law. Moreover, the defendant both reasonably relied on the application of Florida law and has a right to the protection of Florida law to govern its business conduct there; applying Spanish law to govern defendant's business activities in Florida would unfairly surprise the defendant.

Expected result. This case, like the others in its category, involves a real conflict and a court could justifiably apply the law of Florida or Spain. Unfortunately for the plaintiff, he brought the case against the employer in Florida, rather than in Spain, where he would have had a better chance of succeeding.⁹⁵ The Eleventh Circuit applied forum law to bar the claim. Although the court purported to apply the Second Restatement, its reasoning more closely resembled the formalistic reasoning of the First Restatement. The court formalistically defined the issue as one of tort rather than contracts because it concerned a claim of compensation for negligent conduct. The court then relied heavily on the presumption in the Second Restatement that the place of the injury should govern tort issues. Finally, the court applied the First Restatement public policy doctrine concluding that Spanish law contravened a strong public policy of the forum.

A better defense of the application of forum law would focus on the issues discussed above. Florida had significant reason to extend its protective pol-

⁹⁵ Perhaps the claim was brought in Florida because Florida allowed contingency fee arrangements or because the plaintiff hoped to get the benefits of higher damages than could be expected from a Spanish court.

icy to injuries arising out of nonresident businesses' operations in the forum, both to promote the local economy and to eschew discrimination against nonresidents. Clearly, the *García* court viewed forum law as better because it embodied what the judge saw as a reasonable compromise between the interests of employers and employees. And, although Spain might have had significant interests in applying its law to regulate the relationship, application of either state's law would have interfered with the legitimate interests of the other. In these circumstances, no good reason existed for the court to fail to apply what it saw as the better forum law in deference to the political community in Spain.

On the other hand, this case presents a paradigm of a situation widely viewed as appropriately governed by foreign law⁹⁶—the law of the place where the relationship is centered. *García* does not merely present an issue of liability for injurious conduct. It is of great importance that the parties established a prior relationship in Spain, and that Spain heavily regulated the relationship. The defendant maintains its principal place of business in Spain, and the plaintiff lives there. To relegate the Spanish employer to the law of its domicile would not be discriminatory; it would legitimately require the employer to abide by the law under which it established its relationship with the plaintiff. Moreover, it would be particularly incongruous should a public employer be able to evade the regulatory requirements of the state with which it is connected merely because its conduct caused injury to one of its employees in another state.

Florida certainly has legitimate interests in extending its law to protect the defendant's activity in Florida, but it has reason to defer to Spanish law here. The regulation of relations between public employers and their employees is a crucial part of the definition of a political community. Further, a state's requirement that its public employers not only compensate their workers who sustain injuries on the job but pay damages when they act negligently would not violate any fundamental norms of justice. For these reasons, there is a strong argument that Florida should defer to the ability of the political community in Spain to govern those rights and obligations.

⁹⁶ Compare the result in *Schultz v. Boy Scouts of America*, 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985) (applying the law of the place where the relationship was centered rather than the law of the place of the injury), discussed *supra* text accompanying notes 80-82.

García v. Public Health Trust

	Spain	Florida
Contacts	<p>π employee's domicile Δ employer's principal place of business employment relationship established flight departed</p>	<p>domicile of Δ doctor treatment by Δ doctor injury suffered Δ conducts business out of which the accident arose flight destination (stopover) forum</p>
Laws	<p>π may bring medical malpractice action against Δ employer in addition to workers' compensation award</p>	<p>Δ employer is immune from liability for medical malpractice</p>
Policies	<ul style="list-style-type: none"> • Provide full compensation for victims of medical malpractice, in addition to guaranteed workers' compensation benefits • Encourage employer to invest in safety by providing high quality medical care to its employees • Protect employees from onerous terms in employment contracts 	<ul style="list-style-type: none"> • Balance rights of employers and employees: protect employer from tort immunity for negligent conduct in return for providing guaranteed benefits to employees injured on the job • Protect employer from excessive liability to promote the local economy, while compensating employees for work-related injuries
Justified Expectations	<ul style="list-style-type: none"> • π reasonably relied on the applicability of Spanish law to govern his rights growing out of the employment relationship established and centered in Spain • π has a right to claim the protections of Spanish law governing his employment relationship; those rights should not change depending on the place where the employer sends the employee to conduct the employer's business • Δ could not justifiably expect that it could evade the regulatory requirements of Spanish law concerning its obligations to its Spanish employee 	<ul style="list-style-type: none"> • Δ reasonably relied on Fla. law to govern its liability to its employees arising out of its business activity there • Δ has a right to the protection of Fla. law when it conducts business there • π is not unfairly surprised by application of Fla. law; π accepts the vulnerabilities as well as the benefits of Fla. law when he goes there

<p>Interest Analysis</p>	<p><i>Spain has strong interests in applying its law</i></p> <ul style="list-style-type: none"> Spain seeks to regulate the employment relationship established and centered in Spain both to obtain full compensation for its injured resident and to deter the Δ from providing negligent medical care to its employees Workers' compensation awards provide a minimum of secure financial protection; the tort suit supplements this award to provide adequate incentives for the Δ to act with due care The effects of not compensating the π will be felt in Spain The π employee's rights arising out of his employment contract should not vary depending on where his job takes him or he happens to be injured; the place of the injury is fortuitous <p><i>Fla. has weak interests in applying its law</i></p> <ul style="list-style-type: none"> Fla. law is mainly geared to protect companies whose principal place of business is in Fla.; its interests are therefore weak here If the place where the employment relationship is centered seeks to regulate that relationship to impose a higher standard of care on the employer, it has the right to do so, and Fla. should engage in restrained interpretation of forum law and not interfere 	<p><i>Fla. has strong interests in applying its law</i></p> <ul style="list-style-type: none"> Fla. seeks to protect businesses operating in Fla. from tort liability to their employees in return for requiring automatic compensation of predetermined amounts for injuries incurred on the job Nonresident businesses are entitled to the protection of Fla. law; it would be discriminatory to deny them protections available to resident businesses operating in the forum Fla.'s policy would be significantly impaired if it were not applied to business activity inside Fla. <p><i>Spain has weak interests in applying its law</i></p> <ul style="list-style-type: none"> The employee has already been adequately compensated by the Spanish workers' compensation system Spanish policy of deterring its employers from acting negligently is most appropriately applied in Spain; it would constitute illegitimate extraterritorial regulation for Spain to attempt to follow its businesses to the U.S. and regulate their conduct there
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B. Contracts

We have already addressed several cases involving contracts, specifically, contracts establishing employment relationships. In the prior section, I dealt with some employment contracts to show the significance of preexisting relationships in cases involving claims of wrongful conduct in which the relationship is centered in one state and the conduct or injury occur in another state. In this section, I address cases involving conflict of law problems unique to the regulation of contracts. I first address situations in which the parties negotiate and sign a contract in a place that is different from that of performance. I then focus on situations in which the parties make a contract in a place that differs from the one where they live.

1. Place of Contracting vs. Place of Performance

(a) *Place of Performance Validates the Contract.* Contracts entered into in one state are frequently performed in another. In some cases, the place of performance will enforce the contract in accordance with its terms, while the place where the contract was made regulates the contractual relationship. In

other cases, the reverse situation ensues. In either situation, the courts must choose between the interests of the intended state of performance and the interests of the state where the agreement was made. The first state has interests in regulating business activity there and the second has interests in either protecting the parties' reliance on the agreement or in guarding one of the parties from unduly onerous contractual obligations.

*Pritchard v. Norton*⁹⁷ is an example of a case in which the state of performance would enforce the contract according to its terms, while the state in which the parties made the contract would not. In that case, the plaintiff, a Louisiana resident, insured an appeal bond posted on behalf of a railroad against whom a Louisiana trial court had rendered a judgment. To insure his obligation, the plaintiff obtained a promise in New York from the defendants that they would indemnify the plaintiff if the railroad lost the appeal. The plaintiff had to reimburse the railroad for the costs of the judgment. One of the defendants was domiciled in New York and the other in Delaware. Louisiana law would have enforced the defendants' promise, but New York law would not. New York, unlike Louisiana, would not consider the plaintiff's preexisting obligation to constitute consideration requisite to create a binding contract.

The court treated the case as presenting a conflict between the law of the place where the parties made the contract—New York—and the law of the place where the contract was to be performed—Louisiana.⁹⁸ The court enforced the promise, reasoning that the place of performance validated the contract, and that, by making the promise, the defendants must have intended to be bound. The defendants were not likely to have entered into an agreement that they knew could not be enforced. Choosing the validating law therefore accorded with the intent of the parties.

This is a one-sided analysis that wrongly overlooks the regulatory interests of the place where the promise was made. The place of performance naturally did have interests in enforcing the defendants' promise to compensate the plaintiff, its domiciliary, for debts incurred in reasonable reliance on that promise. But, to presume that enforcing the contract promotes the reasonable expectations of the parties ignores the regulatory interests of the place where the promise was made. Not all promises are enforceable, and both New York and Louisiana require consideration before a contract is enforce-

⁹⁷ 106 U.S. 124 (1882).

⁹⁸ Why the court presumed that the place of performance was Louisiana is not clear. The defendants had promised to reimburse the plaintiff if he had to pay the judgment. This promise could have meant that they would pay the judgment initially or that they would reimburse him after he paid the judgment himself. If the latter were a plausible interpretation of the promise, then performance could easily have occurred in New York. The promise in New York was a promise to pay money, and the promise did not unambiguously include a duty to make the payment in Louisiana; after all, the plaintiff had in fact come to New York to obtain the promise, and it is not clear why the plaintiff would not have to come to New York to collect on the promise.

able. One purpose of consideration is to enable the parties to establish by convincing evidence that they both intended to be legally bound by the contract. Another purpose is to serve a cautionary function by requiring formalities before a binding obligation is incurred; this ensures that the promisor knows he is taking a step that will bind him. Consideration thus helps to protect people from obligations that were not deliberately incurred. According to New York law, there was therefore not sufficient evidence that the defendants intended to be legally bound. Application of New York law here would therefore allow it to define the legal intent of the parties.

That the place where the promise was made invalidates the contract does not compel the assumption that the law of the place of performance vindicates the reasonable expectations of the parties. The plaintiff claims that he had a right to rely on the defendants' promise, and Louisiana law gives him a right to do so. The defendants, however, claim a right to be free from obligations to others in the absence of a formal, binding contract. According to New York law, the plaintiff's reliance was unjustified because he did not comply with the rules necessary to establish the defendants' obligation to him.

Plaintiff's case. The forum in Louisiana has strong interests in protecting its resident plaintiff from being taken advantage of by defendants who renege on a promise on which the plaintiff reasonably relied. Louisiana will bear the effects of not protecting the plaintiff's reliance. Moreover, the validating Louisiana law promotes widely shared interests in freedom of contract and reliance on agreements. A presumption of validity of contracts promotes and supports economic arrangements in interstate commerce. It also protects individual autonomy by allowing people to enter mutually agreeable and binding arrangements. In contrast, the New York law interferes with individual autonomy and freedom of contract by regulating the conditions under which courts will enforce agreements. Contracts should, therefore, be enforceable if considered valid by the law of any state with which the parties or the transaction have significant contacts. This presumption will confine the worse New York regulatory law to wholly domestic disputes. Although New York might appropriately refuse to enforce promises when the disappointed promisee resides in New York, it would be inappropriate to extend that regulatory policy to contracts with nonresidents to be performed at the nonresident's domicile.

Nor is application of Louisiana law unfair to the defendants. By making a promise on which they knew the plaintiff, a Louisiana resident, would rely, the defendants brought themselves within the legitimate regulatory power of Louisiana. The defendants cannot be unfairly surprised that the plaintiff relied on their promise; on the contrary, application of New York law would unfairly surprise the plaintiff who reasonably relied on the promise.

Defendants' case. New York has strong interests in protecting its residents and others doing business in New York from obligations not chosen. Failure to apply New York's policy to obligations incurred by New Yorkers in New York would substantially impair these interests. If New York law

does not apply here, residents and others doing business in New York could easily evade the protective New York policy by contracting with nonresidents for payment to be made elsewhere. Louisiana admittedly has interests in applying its law to protect its resident, but these interests cannot legitimately be asserted to impose an obligation that is invalid under the law of the place where the defendants acted.

Nor is application of New York law unfair to the plaintiff. Plaintiff's argument that the parties intended Louisiana's validating law to apply is circular; it begs the question. The argument presumes that the parties intended to be bound, but the conflict arises because New York and Louisiana differ on what evidence is sufficient to demonstrate that the parties intended the promise to be legally binding. The plaintiff could not justifiably expect that the defendants could evade the requirements of consideration imposed by the place where they acted. Moreover, the defendants had a right to protection by the law of the place where they acted from being bound by promises that they did not adopt as legally binding. Finally, by going to New York to procure the indemnity agreement, the plaintiff brought himself within the legitimate regulatory sphere of New York; he accepted the vulnerabilities of New York law and is bound by its requirements.

Expected result. The Supreme Court's resolution of *Pritchard*—application of the validating Louisiana law—is the result one would expect for this kind of case. For one thing, consideration and other formalities of contract law, such as the statute of frauds, have become less significant as promissory estoppel has gained importance.⁹⁹ Moreover, a general presumption of validity of contracts seems to prevail in multistate cases raising conflicts issues, at least where the contracts are between sophisticated business persons or entities. This presumption amounts to an adoption of contract enforcement as the better law in multistate cases, confining the effect of unusual or "technical" formalities to purely domestic cases in the states that promulgate them. Whether or not this trend is wise,¹⁰⁰ it is essential that the courts not justify the choice of law with a wrongful pretense that both states share an interest in enforcing the promises intended by the parties. These cases present real conflicts between the states' policies of what constitutes sufficient evidence that the promisor has voluntarily adopted a legal obligation.

⁹⁹ A vivid exception to this fact is evident in real property contracts, which must still comply with substantial formalities.

¹⁰⁰ I have argued against a presumption of contract enforceability in conflicts cases. See Singer, *supra* note 7.

Pritchard v. Norton

Louisiana

New York

	Louisiana	New York
Contacts	π promisee's domicile appeal bond insured (subject matter of the contract) forum	Δ promisor's domicile (the second Δ was domiciled in Del.) Δ s' promise made
Laws	π can recover; π 's preexisting obligation constitutes consideration	Δ s are not bound by their promise; π 's preexisting obligation does not constitute consideration
Policies	<ul style="list-style-type: none"> • Effectuate the intent of the parties by holding Δs to their promise • Protect the π's reasonable reliance on Δs' promise by holding Δs to their promise • Promote individual autonomy by allowing free contract and protecting reliance on voluntary agreements 	<ul style="list-style-type: none"> • Promote individual autonomy by protecting individuals from obligations not chosen • Requiring an exchange, rather than a mere unilateral promise, serves an evidentiary function by creating clear evidence that the parties had in fact reached agreement and made representations intended to be binding • The formality of consideration serves the cautionary or paternalistic function of making the promisor aware that he is undertaking a legally binding obligation before he does so • Only bargained-for promises are clearly beneficial to both parties and therefore increase social wealth
Justified Expectations	<ul style="list-style-type: none"> • π reasonably relied on the Δs' promise; this is evidenced by the fact that π did not obtain insurance from anyone else • Δs cannot be unfairly surprised that the π relied on their promise • Enforcing business promises promotes the justified expectations of both promisor and promisee 	<ul style="list-style-type: none"> • π's argument that the parties looked to the validating law is circular; it presumes that the parties intended to be bound, but the conflict arises because La. and N.Y. differ on what evidence is sufficient to show that the promise was intended to be legally binding • π could not justifiably expect that the Δs could evade the regulatory requirements of the law of the place where they acted • Δs have a right to the protection of the law of the place where they acted from obligations not clearly voluntarily adopted by them

<p>Interest Analysis</p>	<p><i>La. has strong interests in applying its law</i></p> <ul style="list-style-type: none"> • La. has strong interests in protecting its resident π from being taken advantage of by Δs who renege on a promise on which π reasonably relied • La. law promotes widely shared interests in freedom of contract and reliance on agreements; the N.Y. regulatory law should therefore be confined to purely domestic cases • The effects of not protecting the π's reliance on the promise will be felt in La. • The N.Y. Δs brought themselves within the legitimate lawmaking power of La. by voluntarily assuming an obligation enforceable in La. <p><i>N.Y. has weak interests in applying its law</i></p> <ul style="list-style-type: none"> • Application of N.Y. law would unfairly surprise the π who reasonably relied on the Δs' promise; it therefore should be confined to purely domestic disputes in N.Y. 	<p><i>N.Y. has strong interests in applying its law</i></p> <ul style="list-style-type: none"> • N.Y. seeks to protect its residents and nonresidents contracting there from obligations not chosen • N.Y. policy would be significantly impaired if it did not apply to contracts made by New Yorkers in N.Y. • N.Y. residents cannot evade the N.Y. regulatory policy by contracting with nonresidents for payment elsewhere <p><i>La. has weak interests in applying its law</i></p> <ul style="list-style-type: none"> • La. cannot legitimately impose an obligation that is invalid under the law of the only place where the Δs acted • Application of La. law would unreasonably interfere in the ability of N.Y. to govern business affairs conducted in N.Y.
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(b) *Place of Performance Regulates the Contract.* In *Wood Bros. Homes, Inc. v. Walker Adjustment Bureau*¹⁰¹ defendant Wood Brothers Homes, a Delaware corporation with its principal place of business in Colorado, hired Fred Gagnon, a California domiciliary, to perform carpentry work on the defendant's apartment complex in New Mexico. Negotiations took place in California, Colorado, and New Mexico, and the agreement was concluded and signed in Colorado. At the time of the agreement, the defendant knew that the contractor did not possess a New Mexico builder's license. Shortly after Gagnon began work, New Mexico officials ordered construction stopped because of his failure to obtain a New Mexico contractor's license. Defendant cancelled the contract and refused to pay Gagnon, although it reimbursed Gagnon's individual employees for the work they had completed. Gagnon assigned his contract rights to plaintiff, Walker Adjustment Bureau, which then sued defendant for breach of contract damages or for restitution of the value of benefits conferred on the defendant. New Mexico statutes clearly prohibited recovery either for breach of contract or restitution (quantum meruit). Colorado law imposed no impediment to recovery.¹⁰²

Plaintiff's case. Colorado has strong interests in applying its validating

¹⁰¹ 198 Colo. 444, 601 P.2d 1369 (1979).

¹⁰² Another crucial legal issue which raises separate considerations is whether the defendant was estopped from raising the defense of unenforceability under New Mexico

law. Colorado law promotes freedom of contract and protects the interests of the plaintiff in relying on an agreement negotiated and signed at the defendant's principal place of business in Colorado. The defendant is located in Colorado and has an obligation to comply with Colorado policies concerning its business operations there. In this case, the Colorado business convinced a nonresident to agree to perform work. Colorado law promotes self-reliance by requiring the defendant to guard its own interests; it assigns the defendant the duty to investigate to determine whether the person it is hiring is competent. In this case, moreover, the defendant was aware that the plaintiff contractor lacked a New Mexico builder's license and entered the contract anyway. The defendant knew and accepted the risks, and the plaintiff had a right to rely on the promises made by the defendant. Failure to award damages would allow the Colorado defendant to get away with unjust enrichment, the moral equivalent of fraud or theft. This is true despite the fact that the plaintiff should have known that the performance of the contract violated New Mexico law. As between the parties, the defendant should not be able to unjustly keep the benefits of services rendered without paying for them. Colorado has an interest in protecting the rights of nonresidents entering business associations with Colorado businesses in Colorado. Failure to award damages would discriminate against the nonresident and would harm Colorado's interests by discouraging nonresidents from dealing with Colorado businesses.

In contrast, New Mexico's interests are weak. Its main interest is protecting the public by preventing construction by unlicensed and possibly unqualified builders or contractors. The New Mexico regulatory process has already satisfied that protective policy: the state has inspected the site and discovered the failure to comply with state regulations and stopped the construction operation. The New Mexico policy depriving the plaintiff of the right to damages for breach of contract might have some deterrent effect in discouraging unlicensed contractors from operating in the state; but such effect is likely to be minimal compared with the administrative process. Indeed, a nonresident owner is unlikely to discover the contractor's lack of a New Mexico license and, therefore, fire the contractor, unless the New Mexico authorities intervene to shut down the project, as they did here. Even if the nonresident owner knows about the New Mexico policy, the parties may nonetheless make the contract, as they did here. The administrative process constitutes the main conduct-regulating mechanism.

Whether the plaintiff can recover the value of services conferred or damages for breach of contract is more a question of the allocation of the loss between the parties than a question of regulating conduct in New Mexico. New Mexico has less interest in the distribution of the loss between a California contractor and a Colorado business than does Colorado, which pro-

law because the defendant knew at the time of contracting that the plaintiff was not licensed to conduct the contracting work in New Mexico.

protects its residents from unjust enrichment of nonresidents who contract with Colorado residents in Colorado.

Application of Colorado law also would promote the justified expectations of the parties. The defendant cannot be unfairly surprised that a contract made in the state of defendant's principal place of business is enforceable under that state's law. People are not surprised when they are held to their promises. The plaintiff relied, and had a right to rely, on the law of the place where the defendant maintained its principal place of business, and where the parties negotiated and concluded the agreement. Moreover, defendant could not have justifiably relied on New Mexico law applying here; the defendant *knew* that the plaintiff lacked a New Mexico business license. If the defendant alleges that it expected that the agreement would be invalid and unenforceable, the defendant will have effectively admitted to fraud—to inducing the plaintiff to perform work for which the defendant never intended to pay. No unfairness arises, therefore, in holding the defendant to its promises under the validating law of the place where it operates and concluded the agreement; furthermore, it would be manifestly unfair to deprive the plaintiff of the protections of that law.

Defendant's case. New Mexico has strong interests in applying its regulatory policy to this case. The purpose of the New Mexico law is to discourage contractors from operating in New Mexico without proper licenses; this policy protects the public from dangerous and shoddy building construction. The administrative process is only one of the mechanisms for enforcing the regulatory policy. Building inspectors cannot find every violation of the building code, and depriving unlicensed contractors of a remedy in breach of contract suits will strongly deter operating without a valid state license. New Mexico's policies would, therefore, be significantly impaired if the defendant-protecting invalidating rule, a significant component in promulgating those policies, did not apply to construction inside New Mexico. Moreover, New Mexico will suffer the consequences of shoddy construction: a significant risk of harm to New Mexico residents.

In contrast, Colorado's interests in imposing its plaintiff-protecting rule are weak. Colorado should engage in a restrained interpretation of forum law; Colorado cannot legitimately regulate building construction in New Mexico. The Colorado rule should not apply to an agreement to perform building construction work in New Mexico. It would be wrong for Colorado to enforce or otherwise sanction an agreement to perform an illegal act in New Mexico simply because the parties entered the agreement in Colorado.

Application of New Mexico law in this case would also not significantly impair Colorado's policy of promoting the local economy by holding parties to their agreements. That policy simply does not apply to cases in which the only contact with Colorado is that a Colorado resident made the contract there. When a Colorado resident hires a nonresident to perform work in another state, Colorado has no legitimate interest in helping the parties evade the regulatory requirements of the place where the work is to occur. Applying New Mexico law here would not discriminate against the nonresi-

dent plaintiff because New Mexico law would apply even if both parties resided in Colorado.

Application of New Mexico law would not unfairly surprise the plaintiff, who could not have reasonably expected that he could perform construction work in New Mexico without complying with local licensing requirements. Moreover, the plaintiff's claim that the defendant could not have relied on New Mexico law is flawed. Although it is true that the defendant could not have expected to get the work done for nothing, the defendant could have reasonably expected that an agreement to perform work on the defendant's apartment complex would be governed by the law of the situs, and that the plaintiff's agreement to perform the work implied an obligation to comply with local law—to obtain the necessary local permits.

Expected result. The Colorado Supreme Court applied the law of New Mexico, the place of performance, on the ground that the place where services are to be performed has the greatest interest in regulating the agreement when the legal issue concerns a local rule intended to regulate the manner of that performance.¹⁰³ One would expect this result in most cases of this kind.

At the same time, the forum could plausibly apply its validating rule on the grounds that a presumption of validity of contracts should exist, that the law should not enable a resident defendant to escape its obligations to a nonresident promisee who relied on the defendant's promise, and that the regulatory interests of the place of performance are sufficiently satisfied by New Mexico's administrative process. If the forum viewed the issue as mainly a matter of fairness or loss-allocation between the parties, and if it interpreted the facts as unjust enrichment of a local defendant at the expense of a nonresident, the forum might apply the local validating law, at least to require the defendant to reimburse the plaintiff for the value of benefits conferred.

¹⁰³ The court wrongly, in my view, described the case as presenting a conflict between the expectations of the parties and the interests of the place of performance in regulating the performance. I have argued throughout this article that the parties' ostensible promises are only one component of their reasonable expectations as not all promises are enforceable. The court must also judge whether those expectations are justified, and whether the plaintiff has a right to hide behind the validating law in a way that enables him to evade the regulatory requirements of the place where he conducts business.

Wood Bros. Homes, Inc. v. Walker Adjustment Bureau

	Colorado	New Mexico
Contacts	<p>Δ's principal place of business contract negotiations contract concluded and signed forum</p>	<p>contract performance (π's assignor performed work on Δ's apartment building) contract negotiations</p>
Laws	<p>π can recover; contract is valid and enforceable; damages for breach and/or restitution for value of work already performed</p>	<p>Δ is immune from liability; contract is unenforceable because π did not have a N.M. builder's license; π has no right to damages for breach or restitution for value of benefits conferred on Δ</p>
Policies	<ul style="list-style-type: none"> • Security of transactions; protect π's reliance on the agreement by enforcing Δ's promise • Freedom of contract promotes individual autonomy • Self-reliance; Δ is bound by his agreement, so the duty is on Δ to investigate to determine if π is qualified to perform the job in N.M. 	<ul style="list-style-type: none"> • Prevent unqualified contractors from operating in N.M. • Protect the public by regulating building construction
Justified Expectations	<ul style="list-style-type: none"> • Δ is not unfairly surprised that promises made at its principal place of business are enforceable there; Δs are not surprised, in general, when they are held to their promises • Δ cannot have justifiably relied on N.M. law; Δ <i>knew</i> that π lacked a N.M. builder's license, and if Δ relied on the fact that the contract would be unenforceable, then it was attempting to defraud the π by getting work for which Δ never intended to pay • π rightfully relied on the validating law of the Δ's principal place of business where the contract was concluded and signed 	<ul style="list-style-type: none"> • π is not unfairly surprised that he is required to comply with the licensing requirements of the place where the work was to be done • Δ reasonably expected that the π's agreement to perform the work in N.M. implied an obligation to comply with local N.M. policies regarding building construction

<p>Interest Analysis</p>	<p><i>Colo. has strong interests in applying its law</i></p> <ul style="list-style-type: none"> • Colo. regulates business operations in Colo.; it is therefore interested in applying its policies promoting freedom of contract and security of transactions by holding its resident corporation to its promises made in Colo. • Failure to apply Colo. policy here would significantly impair Colo. interests by discouraging nonresidents from entering into business associations with Colo. businesses in Colo. <p><i>N.M. has weak interests in applying its law</i></p> <ul style="list-style-type: none"> • N.M.'s regulatory policies are most directly met by the N.M. administrative process, shutting down the illegal operation to protect the N.M. public; the question of whether π can recover damages is less directed to discouraging unlicensed operations in N.M. and more a question of loss-allocation; N.M. has little concern with determining the loss-allocation between a Cal. contractor and a Colo. business arising out of a business agreement made in Colo. • N.M. policy is therefore not impaired significantly if it is not applied in this case, while Colo.'s policy of holding its residents to their promises will significantly affect whether nonresidents trust Colo. businesses 	<p><i>N.M. has strong interests in applying its law</i></p> <ul style="list-style-type: none"> • N.M. is interested in regulating building construction in N.M. to protect the public • The N.M. policy is intended to deter unlicensed contractors from operating in N.M.; it is a necessary addition to the administrative process of regulation since building inspectors may not find every violation of the state building code • The N.M. policy of regulating construction to protect the public therefore would be significantly impaired if it did not apply to the operations of building contractors on N.M. buildings <p><i>Colo. has weak interests in applying its law</i></p> <ul style="list-style-type: none"> • Colo. should not attempt to regulate building construction in N.M.; this is impermissible extraterritorial regulation • Colo. has no interest or a weak interest in applying its regulatory policy to an agreement to perform acts in N.M. that are illegal under N.M. law • Colo.'s policy of encouraging business contacts and activity in Colo. will not be significantly impaired if its policy does not apply to agreements in Colo. that concern performance elsewhere
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2. Place of Contracting vs. Domicile of Protected Party

In *DeLorean v. DeLorean*,¹⁰⁴ a New Jersey court considered the enforceability of an antenuptial agreement made in California, the state where the parties were married. At the time of the marriage, the husband was a wealthy executive at General Motors with roughly twenty million dollars in assets. The wife had a career in the modeling and entertainment industries and was not wealthy. The antenuptial agreement provided that all property and earnings acquired by the parties either before or after the marriage would remain the separate property of each. This agreement applied both during the marriage and in the event of divorce, thereby preventing equitable distribution of the property or treatment of the property as community property. The agreement also expressly provided that California law would govern it.

The husband presented the antenuptial agreement to the wife just a few

¹⁰⁴ 211 N.J. Super. 432, 511 A.2d 1257 (1986).

hours before the wedding ceremony and threatened to call off the ceremony if she did not sign. At first, she refused to sign. She then met with her soon-to-be husband and an attorney whom her husband had hired to counsel her. The attorney advised her not to sign the agreement. Not wanting to call off the marriage, however, she signed. She had a general knowledge that her husband was wealthy, but she had no idea of the extent of his wealth.

The parties apparently moved to New Jersey some years later¹⁰⁵ and resided there for some time. The wife instituted and was granted a divorce in California. The husband simultaneously filed for divorce in New Jersey and asked the New Jersey court to assume jurisdiction on the ground that the wife was domiciled in New Jersey. The New Jersey court agreed that the wife was domiciled in New Jersey at the time of the California divorce and found the California judgment invalid since the California court did not have jurisdiction. The New Jersey court consequently had to determine the enforceability of the California antenuptial agreement.¹⁰⁶

Under California law, the agreement was enforceable in accordance with its terms: the husband could keep all his separate property owned or acquired before or during the marriage and would not be compelled to share that property with his wife. The husband testified at trial that he had voluntarily arranged for his wife to receive the income for life from a trust. Although the court noted that the husband was "vague, if not evasive" about the value of this trust, it concluded that the trust was valued at two to five million dollars. In contrast, under New Jersey law, the antenuptial agreement was unenforceable because the husband failed to disclose fully his financial assets when his wife signed the agreement.

The court enforced the choice-of-law provision and applied California law. It presumably did so for two reasons. First, application of California law would not be unconscionable since the wife would not be left destitute or a public charge. The court obviously believed, despite its failure to make a precise factual determination as to its worth, that the trust that the husband set up would leave the wife relatively wealthy, although far less wealthy than he. If, on the other hand, the husband had completely abandoned any monetary obligations to the wife, the court might very well have reached a different conclusion and found the contract unconscionable. Second, the court understood the conflict between California and New Jersey law about the voluntariness of the agreement as relatively narrow. As the court concluded that there was no duress involved in the case, despite the circumstances of the offer and acceptance a few hours before the wedding; the issue of voluntariness involved solely the question of whether the parties had a duty to disclose fully the extent of their financial assets. Such a narrow difference in

¹⁰⁵ The opinion does not specify when the parties moved to New Jersey or what the husband's domicile was at the time of the divorce.

¹⁰⁶ Another important issue in the case was the enforceability of an arbitrator's judgment that California law applied to the contract and that the agreement was enforceable under California law.

policies apparently was not sufficient to overrule the choice-of-law provision in an agreement that the court did not view as fundamentally unfair.

For the purposes of my analysis, I will substitute for the *DeLorean* court's interpretation of New Jersey law one more favorable to the wife. Analyzing a somewhat more acute conflict between the policies of the two states better highlights the issues that are likely to emerge in cases of this kind. I therefore assume the following New Jersey law. Unlike California's validating policy, New Jersey would find that the circumstances under which the antenuptial agreement was signed were not only less than ideal, but vitiate the voluntariness of the agreement such that it cannot form the basis of legitimate expectations on the part of the husband. The timing of the presentation of the agreement and the refusal to give the wife adequate time to consider and discuss the agreement negate any claim that the contract represents the free choice of both parties. The husband's provision of an attorney to advise his wife not to sign does not render her decision to sign more legitimate; it was merely a clever machination by the husband to make her decision to sign appear well-informed and deliberate. In reality, the husband carefully chose the circumstances under which to discuss the matter, leaving the wife no real choice, given her desire to proceed with the marriage. Here the husband unilaterally exercised power; the parties did not join in a voluntary collaborative venture.

I assume that, in addition to finding the agreement resulted from coercion and undue pressure, New Jersey courts would find the terms of the agreement unconscionable. Antenuptial agreements are enforceable only if they are both freely agreed to and fair. An agreement that provides for *absolutely no* division of property at the conclusion of the marriage is fundamentally unfair, especially in the context of a marriage lasting more than ten years. Antenuptial agreements need not provide for absolute equality or match precisely the results that would obtain by applying equitable distribution or community property law, but they must contain terms that are not grossly disproportionate. A wealthy husband of ten years does not merely have a duty to see that his wife does not become destitute or go on welfare, but has a duty to recognize his wife's contribution to the joint enterprise of the marriage, as well as a duty to protect her opportunity costs and her interest in relying on the continuation of the marriage. An agreement with absolutely no distribution of property clearly fails this test. The New Jersey court therefore would have an obligation to divide the property acquired during the marriage equitably.

Cases of this category may arise in a variety of situations. In the first paradigm, the parties form a relationship—both familial and contractual—in their home state, and later they both move to another state. In this kind of case, a real conflict exists between the regulatory policies of the place where they initially established their relationship and the interests of their new domicile. A conflict arises because one state strives to protect the more vulnerable party by invalidating the contract while the other strives to preserve the autonomy of the parties by enforcing their agreement. This case presents

a real conflict partly because it is plausible to assert that both parties, by changing their residence, brought themselves within the legitimate regulatory power of their new domicile; at the same time, the state where the parties made their agreement has a clear interest in regulating agreements made there. In the second paradigm only one of the parties moves to another state. The new domicile may still have interests in protecting its new resident, but application of the law of the new domicile appears more problematic because the unilateral act of one of the parties would then alter the nature of the relationship. The third paradigm exists when one of the parties moves to another state, and only then do the parties sign a separation agreement.

All of these paradigmatic cases require attention to the place where the parties centered their relationship at the time of marriage, the place where they made the agreement, and the domicile of the parties at the times they married, signed the agreement, and divorced each other. As in other conflicts cases, they also require close attention to the particular state policies involved.

Husband's case. California has strong interests in applying its validating law. Its law gives the parties to the marriage freedom to determine the nature of their relationship. They can adopt the general community property system of equal control of property acquired during the marriage or some other system, such as the one adopted here—a separate property system in which each spouse retains control of the property acquired by his or her individual efforts. It also allows wealthy individuals to protect themselves from individuals who might marry them simply for their money. This policy of individual autonomy in the family obviously applies to couples domiciled and married in California, and it would be substantially impaired if it did not apply to all agreements made in California between California residents married there. Moreover, the rights of the parties should not change simply because many years later they chose to move to another state. Applying the law of their common domicile at the time they were married and by which they chose to govern their agreement creates predictability and security for each of the parties.

The court here should engage in a restrained interpretation of New Jersey law. New Jersey will bear some effects of enforcing the agreement because the victim of the coerced contract lives there. Nonetheless, it would be illegitimate extraterritorial regulation for New Jersey to determine the consequences of a familial contract made in California between California residents who married there. The definition of the mutual obligations of spouses is central to any political community's form of social life.

Furthermore, New Jersey has absolutely no legitimate interest in regulating either the contract or the relationship between the parties at the time they entered the relationship. The subsequent move to New Jersey does not create an interest when none existed previously. The effects of not applying New Jersey law here are not significant. The New Jersey political community will still be able to define the relationships of couples married in New

Jersey. Moreover, the husband has made ample provision for the wife, so that enforcing the agreement will not cause hardship either to her or to the New Jersey taxpayers. New Jersey is not discriminating by denying the protection of its law to the wife because the agreement is legitimately governed by the law of the place where the parties established their relationship.

Application of New Jersey law would also unfairly surprise the husband who relied on the enforceability of the agreement when he married. Furthermore, the wife cannot be unfairly surprised to find that the contract is enforceable; she agreed to be governed by California law, both by signing the contract choosing California law, and by maintaining substantial contacts with California at that time. She has no right to avoid her promises simply because she moved to another state. Application of California law would therefore promote the justified expectations of both parties.

Wife's case. New Jersey has strong interests in applying its law to this case, and California has little or no interest. New Jersey law regulates divorce to guard the interests of both parties that have arisen out of their joint contributions to the relationship and their mutual reliance on that relationship. New Jersey has chosen to protect the more vulnerable party when the relationship ends. This policy applies to recent immigrants as well as to long-time residents; it would be discriminatory to refuse to protect the wife simply because she arrived in New Jersey too recently. Although it is true that the wife is unlikely to go on welfare, New Jersey's interests are not limited to keeping people off welfare. The New Jersey policy applicable to New Jersey couples divorcing in New Jersey requires equitable distribution of the property acquired by the joint efforts of the partners to the marriage, and the state will enforce antenuptial agreements only to the extent they are not inconsistent with this policy.

California may have had exclusive interests in regulating the agreement at the time of the marriage. But at the time of the divorce, its interests are minimal to nonexistent.¹⁰⁷ The parties appear to have been domiciled in New Jersey at the time of the divorce, and the consequences of enforcing or not enforcing the agreement will be felt almost entirely in New Jersey. Moreover, even if the husband had moved back to California and the wife were still domiciled in New Jersey, California could not legitimately impose its regulatory policy at the expense of New Jersey's policy. California may indeed have an interest in protecting its resident's reliance on the enforceability of the agreement concluded in California, but this interest cannot compel a New Jersey court to ignore the interests of New Jersey in protecting its resident from the effects of an involuntary promise made in haste many years ago.

The New Jersey policy represents the better law because it more effectively protects people from coerced obligations and recognizes the marriage relationship as a joint enterprise in which each party contributes to the mar-

¹⁰⁷ Weinberg, *supra* note 8.

riage partnership and relies on its continuation. The California policy may be appropriate for domestic cases wholly situated in California, but when the parties voluntarily move to a state that invalidates the contract, they come within the legitimate scope of regulation of their new home, which should apply its better law to prevent unfairness.

Nor is application of New Jersey law unfair to the husband. By moving to New Jersey, he placed himself within the legitimate regulatory sphere of the New Jersey political community and accepted the vulnerabilities, as well as the benefits, of New Jersey law. That his marriage relationship centered in New Jersey is subject to New Jersey rules about divorce, therefore, cannot unfairly surprise him. Further, the wife has the right to be protected by the law of the place where she lives and in which the relationship is now centered.

Expected result. The results in these kinds of cases probably depend, to a very large extent, on the terms of the antenuptial agreement. The more unfair the agreement, the more likely is the forum court to apply its invalidating rule to protect its resident from overreaching by the more powerful party. Conversely, if the agreement appears fair, or at least not fundamentally unfair, the court is more likely to protect the husband's expectations by holding the wife to the agreement.

These cases pose real conflicts between the laissez-faire norms of the place where the parties made the agreement and the regulatory norms of the place where the relationship is centered at the time it breaks up. Moreover, both states' policies purport to recognize and protect individual autonomy; one defers to the parties' agreement, and the other protects the more vulnerable party from abuse by the more powerful party.

The *DeLorean* court treated California's interest in enforcing the contract as sacrosanct, giving inadequate attention to New Jersey's regulatory policies. Even if the court concluded by applying California law, it should have approached the case as hard, rather than easy. New Jersey's regulatory policy has consciously chosen to *limit* freedom of contract, both to protect the wife's reliance on the relationship and to encourage equitable distribution of the parties' property. Interference with the husband's expectations based on the contract terms is fair if the contract terms are unfair or if the contract was signed under duress.

DeLorean v. DeLorean

	California	New Jersey
Contacts	husband's (H) and wife's (W) domicile at time of marriage and at the time they signed the antenuptial agreement place of celebration of marriage	W's domicile at time of divorce H's domicile for some time before the divorce forum
Laws	H keeps his separate property under the antenuptial agreement, which is enforceable in accordance with its terms, and W has no right to any of his separate property unless he chooses to share it or give it to her	W has the right to an equitable share of H's property acquired during the marriage; the antenuptial agreement is unenforceable for two reasons: (1) it was not sufficiently voluntary (because H failed to disclose pertinent information and because the circumstances of the contract put undue pressure on W to agree); and (2) the terms of the agreement are unconscionable
Policies	<ul style="list-style-type: none"> • Protect individual autonomy by giving married couples the freedom to enter mutually beneficial arrangements • Enable wealthy individuals to protect themselves from people who might marry them just for their money • Treat husbands and wives as equals by giving them the freedom to determine what their relationship will be like, and give each person the right to control the fruits of their own labor • Give the parties the freedom to choose between the community property system of equal control and the separate property system 	<ul style="list-style-type: none"> • Protect individual autonomy by refusing to enforce agreements that are not expressions of voluntary, considered choice • Implement a view of marriage as a relationship of mutual dependence and a common enterprise to which each person contributes; each person's reliance on this relationship must be protected; this conception is inconsistent with an agreement that refuses to recognize each party's contribution to the marriage at the time the relationship ends by equitably distributing the property acquired by their joint efforts • Treat husbands and wives as equals by recognizing their joint contributions to the marriage and thus the property acquired during it
Justified Expectations	<ul style="list-style-type: none"> • Application of N.J. law would unfairly surprise H who reasonably relied on the applicability of Cal. law at the time he married and signed the agreement • W cannot be unfairly surprised that she is held to her agreement or that the law of the place where she was married and lived governs the agreement entered there 	<ul style="list-style-type: none"> • H cannot be unfairly surprised by application of the law of his new domicile at the time of divorce; H accepted the vulnerabilities, as well as the benefits of N.J. law by moving there • W has the right to be protected by the law of the place where she lives, where her relationship is centered and where she is divorcing H

<p>Interest Analysis</p>	<p><i>Cal. has strong interests in applying its law</i></p> <ul style="list-style-type: none"> • Give Cal. couples the freedom to fashion their relationship as they see fit • Protect wealthy Cal. residents from being taken advantage of by people who are only interested in getting their money • Protect the legitimate expectations of H in relying on the enforceability of the agreement made in Cal. between Cal. residents married there • Create predictability by determining the mutual obligations of the couple, regardless of where they may later move • Cal. policy would be significantly impaired if it did not apply to protect the expectations of Cal. residents married in Cal. who contracted there <p><i>N.J. has weak interests in applying its law</i></p> <ul style="list-style-type: none"> • N.J. should engage in restrained interpretation of forum law because N.J. cannot legitimately regulate a contract made between Cal. residents in Cal. at the time they married • At the time of the marriage and the agreement, N.J. had no contact and no interest in applying its law; the subsequent move to N.J. does not create an interest in regulating a contract already made; the move cannot change the obligations arising out of the marriage and the agreement • N.J. interests are weak because the H has made ample provision to take care of the W 	<p><i>N.J. has strong interests in applying its law</i></p> <ul style="list-style-type: none"> • N.J. is interested in protecting its residents from unconscionable promises that were extracted by illegitimate means • N.J. is interested in regulating the relationship between spouses who are domiciled and divorced in N.J. • N.J. should not discriminate against recent immigrants, who, like long-term residents, have the right to be protected by the law of the place where their relationship is centered at the time of the divorce <p><i>Cal. has weak interests in applying its law</i></p> <ul style="list-style-type: none"> • At the time of the divorce, both parties appear to be domiciled in N.J.; thus, the effects of enforcing or not enforcing the agreement will be felt entirely in N.J. • Even if H is domiciled in Cal. at the time of the divorce, Cal. cannot legitimately impose its unjust policy in a case that has contacts with a state that protects its resident
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C. Procedure

1. Statute of Limitations

To explore procedural issues in conflicts cases, I will address the problem created by statutes of limitation. This subject has inspired long and sustained debate both during the reign of the First Restatement and in recent years, as well. The following generally describes the modern view. For the sake of simplicity, the forum courts generally follow their own procedural rules. They do, however, consider applying foreign rules of procedure, if those rules are likely to affect the outcome of the case, and if they are not too difficult to find and apply. The forum will treat the seemingly "procedural" rules in the same way it treats all other conflicts: it considers the policies underlying the competing rules of law, their applicability to the multistate

contacts at hand, and whether either of the parties reasonably relied on the applicability of one of the competing rules or otherwise would be treated unfairly if the rule did not apply.¹⁰⁸

The choice-of-law treatment of statutes of limitation is particularly complicated because statutes of limitation are thought of as a combination of procedure and substance.¹⁰⁹ Their procedural purposes include (1) protecting the administration of justice by barring stale evidence which may be distorted and nonprobative and (2) unlogging the court system by eliminating claims that have not been diligently pursued. Their substantive purposes include (1) granting defendants repose from the fear of being sued for actions that took place long ago and (2) giving plaintiffs a strong incentive to assert their rights within a reasonable period of time to effectuate the policies that inform the right of action, such as deterring negligence, spreading losses, and promoting reliance on promises.

The procedural purposes underlying a statute of limitations concern the fairness of the court system itself and the legitimacy of the state's system of administering justice. These purposes apply most directly, and sometimes exclusively, to the courts in the forum. The forum, for example, has little interest in unlogging the court system of another state if that state is uninterested in doing so. Some procedural purposes, however, may present concerns which foreign courts want to address. For example, different states may reach different judgments about what constitutes competent evidence and the circumstances under which a factfinder should proceed to make a judgment about a dispute. To the extent the statute represents a judgment about the fairness of subjecting someone to liability in the absence of recent, probative evidence, it may be reasonably found to apply to protect parties whose cases are being heard in other states. Although adopting the entire evidence code of another state would be confusing and extremely costly, it would not be overly complicated or costly for a court to discover and apply the statute of limitations of another state.

The substantive purposes underlying a state's statute of limitations obviously apply regardless of where the case is being heard. The goal of regulating behavior by authorizing private damage suits will be furthered no matter which state's courts hear the case. Similarly, the interest in providing the defendant repose will be relevant if the defendant has significant contacts with the state under whose statute of limitations she seeks protection.

(a) *Procedural vs. Substantive Characterizations of Statutes of Limitation.* The mixed procedural/substantive nature of statutes of limitation accounts for the complicated history of the choice-of-law treatment of these statutes. A variety of approaches has been or could be adopted. First, courts could automatically treat statutes of limitation as procedural for choice-of-law pur-

¹⁰⁸ R. WEINTRAUB, *supra* note 7, § 3.2C1, at 53.

¹⁰⁹ See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988) (holding that the Constitution does not bar application of the forum state's statute of limitations to claims governed by the substantive law of a different state).

poses. The forum would apply the forum statute of limitations in all instances, regardless of its purpose and length relative to the foreign statute. This was the traditional approach adopted by the First Restatement,¹¹⁰ and the original Second Restatement retained this general presumption.¹¹¹

Second, many courts have adopted an exception to this principle by applying a foreign statute of limitations when it is so intimately connected with the foreign substantive right as to become almost a part of that right. Such statutes of limitation that "extinguish the right rather than the remedy"¹¹² are generally related to newly created statutory rights that contain specific statutes of limitation in the legislation that created the right.¹¹³ Indeed, this second method treats the foreign statute as substantive if it qualifies a specific right and as procedural if the statute is a general one applicable to large classes of cases of a general type. Both Beale's treatise and the Second Restatement explicitly note this exception.¹¹⁴

Third, courts could treat the statute of limitations as always substantive. In every case then, the court would have an obligation to determine which state had the greatest interest in applying its statute of limitations. Professor Weintraub has advocated this third possibility, and it has been explicitly adopted by a recent revision to the Second Restatement.¹¹⁵

(b) *Presumptions*. When courts treat statutes of limitation as substantive for choice-of-law purposes, it is not only necessary to weigh the involved states' substantive interests. Courts must also determine the circumstances under which the forum's procedural interests will outweigh the interests of the foreign jurisdiction in having its statute applied in order to promote its substantive goals of creating repose or regulating conduct. Four different presumptions might be considered. First, we could assert that the regulatory interests of the state whose substantive law the court is otherwise applying always outweigh the forum's interests in controlling access to its courts. This would guarantee the application of the foreign state's statute. This presumption works if the foreign statute is not difficult to find or apply. This result is particularly appropriate as the choice-of-law issue only arises in cases in which the choice of statutes is outcome-determinative. Moreover,

¹¹⁰ See 3 JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS § 603.1 (1935) ("[t]hat the statute of limitations of the forum is the applicable law of limitations is so well settled . . . as to be beyond dispute"). Professor Beale was the Reporter for the First Restatement.

¹¹¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1971).

¹¹² 3 J. BEALE, *supra* note 110, § 604.3, at 1622-25.

¹¹³ See, e.g., *Bournias v. Atlantic Maritime Co.*, 220 F.2d 152, 156-57 (2d Cir. 1955) (discussing whether a limitation was "directed to the newly created liability so specifically as to warrant saying that it qualified the right" (quoting *Davis v. Mills*, 194 U.S. 451, 454 (1904) (emphasis in original))).

¹¹⁴ 3 J. BEALE, *supra* note 110, § 604.3, at 1622-25; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 143 (1971).

¹¹⁵ R. WEINTRAUB, *supra* note 7, § 3.2C2, at 59-60; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1971) (rev. 1988).

once the forum has determined that another state's substantive law should apply, it has implicitly or explicitly concluded that the foreign state has the greatest interest in adjudicating the rights of the parties or in regulating the conduct in question. Under these circumstances, it would seem contradictory to ignore the regulatory interests of that state merely because the forum disagrees with the foreign state as to the proper timing of the suit.

Second, we could adopt the view that the forum should choose whichever statute is longer. Such an approach is compelling in that both states share interests in compensating victims of tortious conduct and in protecting reliance on agreements. A presumption that plaintiffs can bring claims if the claim is good under the law of any interested state would further these shared interests. Thus, this policy might further the presumptively better law, the one that provides a greater likelihood that the wronged party will recover. This approach also may be justified because, as defendants are unlikely to rely on a statute of limitations in choosing how to act, application of a longer statute of limitations will not surprise them. Additionally the regulatory interests of the state with the shorter statute of limitations will not be compromised. Finally, as long as jurisdiction over the defendant exists in either state, the choice-of-law should not penalize the plaintiff for mistakenly suing in a state that bars the claim when another interested state's law would entitle the plaintiff to relief.

The difference among statutes of limitation is not that great; even a difference of a few years is not likely to represent a principled choice by the political community that adopted it. Arguably, as long as a state grants repose after a reasonable period of time, the states are more or less following the same policy. This presumption in favor of the validity of legal claims would promote the underlying substantive purposes of the law providing the claim without sacrificing adequate repose or protection against stale evidence.

Third, we could apply the shorter statute of limitations. Such a presumption might be justified in the following way. When the forum statute is shorter than the foreign statute, the forum may have significant interests in unclogging its court system by eliminating stale claims. Moreover, the forum wants to ensure a fair trial; the forum statute is partly a judgment about what evidence is probative. If the forum believes that the evidence is sufficiently stale as to be of questionable probity, but nevertheless allows the trial to go on, the forum participates in what it sees as a miscarriage of justice, adjudicating the rights of the defendant on the basis of flawed evidence. Thus, when the forum statute is shorter than the foreign statute, its interests in protecting the integrity and efficiency of its system of justice are substantial and are not outweighed by any regulatory interests of the other jurisdiction.

When the forum statute of limitations is longer than the foreign statute, the forum should apply the shorter foreign statute on the ground that the foreign interest in creating repose for the defendant outweighs any interest the forum would have in hearing the case. Since the court will only consider applying the foreign state's statute of limitations when that state has the

most significant relationship to the case, the court should adjudicate the rights of the parties under the outcome-determinative rule of the foreign state, furthering the foreign state's policy of granting repose to the defendant. That the forum is *willing* to hear the case does not give it an *interest* in hearing the case. Furthermore, although, the defendant's actions were probably not affected by the statute of limitations, she now has a legally presented interest in repose, an interest in knowing that a given past action can no longer give rise to a suit against her. The forum should therefore defer to the shorter statute of limitations of the state whose substantive law governs.

Fourth, we could apply the intermediate position that the American Law Institute's 1988 revision to section 142 of the Second Restatement adopted. This revision clearly states that general choice-of-law factors should determine whether a claim is time-barred in the forum. Such an analysis requires choosing the statute of the state with the most significant relationship, with respect to the issue of the statute of limitations, to the parties and the transaction or occurrence. The revision presumes that the forum should ordinarily apply its statute of limitations when it's statute is shorter, and bar a claim viable elsewhere, unless such a result is unreasonable. This presumption rests on the justification explained above: the forum's interests in unclogging its court system and in determining what constitutes fair litigation procedures outweigh any interests of the other jurisdiction in having the case heard. The revision further provides that when the forum statute is longer than the foreign statute, the forum should ordinarily hear the claim; this result may be justified by the irrelevancy of the foreign state's interests in unclogging its court system when the claim is heard in another state. The revision, however, states that the forum should refuse to apply its longer statute of limitation if the foreign state has the most significant relationship to the parties and the transaction or occurrence and if maintenance of the lawsuit would serve no significant interest of the forum. In other words, the forum must make a judgment as to whether adjudication will frustrate the policies of the foreign state that seeks to establish repose for persons like the defendant and will, at the same time, not further any significant forum interests.

To illustrate the arguments as they arise in advocacy, I address two cases: one in which the forum statute is shorter than the statute of the foreign state whose substantive law otherwise applies, and one in which the forum statute is longer than the statute of the foreign state whose substantive law otherwise applies.

2. Forum Statute of Limitations Bars the Claim

In *Ledesma v. Jack Stewart Produce, Inc.*,¹¹⁶ several California residents were injured in Arizona in a car accident with a second car. The driver of

¹¹⁶ 816 F.2d 482 (9th Cir. 1987).

the other car was employed by a corporation whose principal place of business was in Oklahoma, and the accident occurred while he was working. Plaintiffs sued the employer in federal court in California claiming it was vicariously liable for the negligence of its employee.¹¹⁷ The suit was timely under the two-year Arizona statute of limitations, but barred under the forum's one-year statute. The court applied the two-year statute of limitations of the place of the accident. This result is consistent either with the presumption that the forum should choose whichever statute is longer or that the statute of the place whose substantive law is otherwise applied should be chosen.¹¹⁸

Plaintiff's case. Arizona has strong interests in seeing its longer statute applied thereby allowing the claim to be heard. Arizona tort law unquestionably applies to the accident. Arizona has an interest in promoting safety on Arizona roads, and tort liability is partly intended to induce people to drive safely. It is often argued that people drive safely in order to protect themselves and, therefore, that tort liability cannot be reasonably intended to regulate conduct. This argument is flawed. People may well irrationally discount the possibility that they will be hurt in a car accident; the prospect of being hurt is so painful that people may systematically misapprehend the danger in which they place themselves by reckless driving. The frequency of serious traffic violations, like speeding, running red lights, and abrupt lane changing, attests to this theory. The possibility of facing high monetary damages may be easier for people to internalize than the possibility of being killed or seriously injured. Thus, monetary liability may deter people from driving negligently even though fear for their own safety may not do so.

Moreover, in this case, the target of the deterrence is the employer; liability may induce the employer to exercise greater care in hiring and training its employees. Liability may also induce the employer to emphasize safety, rather than speed, in instructing its traveling employees in how to carry out

¹¹⁷ The *Ledesma* court does not explain the legal theory under which the plaintiffs sued the employer. Specifically, it does not state whether the plaintiffs alleged that the employer was itself negligent in its hiring or supervision of the employee who caused the accident or that the employer is vicariously liable for the negligence of the employee. Since this issue is important to the policy analysis required by modern conflicts law, see *infra* text accompanying note 121, I assume that the allegation is based on vicarious liability.

¹¹⁸ In applying the two-year Arizona statute of limitations, the *Ledesma* court interpreted the forum statute as not being intended to grant repose to nonresidents. *Ledesma*, 816 F.2d at 485. Thus, the only forum interests were in unclogging its court system and in its general policy of compensating its domiciliaries for negligently inflicted harm. The court concluded that the interest in compensating its domiciliaries outweighed the interest in unclogging the court system, especially in light of Arizona's consistent interest in deterring negligent conduct. *Id.* at 485-86. Under California's comparative impairment analysis, the court concluded that Arizona's regulatory interests would be more impaired than California's if the Arizona two-year statute of limitations was not applied. *Id.*

their job duties properly. Therefore, Arizona's tort law may have significant deterrent purposes. Arizona's desire for deterrence is particularly strong in this case; Arizona seeks to regulate conduct inside Arizona to protect Arizona citizens and others driving on its roads. Arizona also wants compensation for these plaintiffs, partly to provide a fund from which to pay local medical creditors, and partly to extend to nonresident visitors the same protections as it provides to residents.

In contrast, California's interests in applying its statute are weak. First, no conflict exists between the substantive tort law of Arizona and California; applying Arizona's statute of limitations will not compromise California's substantive interests. Each state would impose vicarious liability on the employer for negligent on-the-job conduct of its employee, and there is no issue of the appropriate amount of damages. Thus, California shares Arizona's interests in spreading the loss to compensate victims of negligent conduct and in deterring that conduct. California, then, cannot logically object when Arizona imposes liability in a way that is substantively consistent with how California would.

Second, the difference between the California and Arizona statutes of limitation is slight—one year compared to two years. Arizona shares California's basic interests in granting defendants repose and preventing courts from hearing stale claims based on nonprobative evidence. Given this slight difference in the laws, allowing this claim to be heard would not impair California's interests to any significant degree; hearing this kind of case is not likely to overburden the court system or pervert its procedures for administering justice. Applying Arizona's slightly longer statute is analogous to upholding loan contracts despite the invalidating usury statute of an interested state.¹¹⁹ Courts presume that such contracts are valid, reasoning that differences in allowable interest rates, if they are small, are a matter of detail, rather than principle. As long as both states have some reasonable limits on the allowable interest rate, either law adequately protects borrowers from getting in over their heads.

Third, California's statute of limitations mainly intends to protect local defendants from temporally remote claims. But no California defendant is present to protect here. The forum thus has no reason to extend its protective statute to benefit a nonresident who has no relevant contacts with California and is unprotected by the law of the state in which it committed its tortious conduct.

Fourth, since Arizona tort law unquestionably applies to the basic issue of liability, it would be self-defeating and contradictory to apply the forum statute of limitations to bar the claim. Although the forum generally has interests in applying its own rules of procedure, the statute of limitations of the place of the injury is ascertainable, easily applied, and outcome-determina-

¹¹⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1971) (establishing such a rule); see also R. WEINTRAUB, *supra* note 7, § 7.4C, at 391 (noting the rule and the difference between discrepancies in details and in basic policies).

tive. As Arizona has the most significant relationship to the case regarding substantive liability, its law should apply to determine the timeliness of the suit as well. The court should consider the local statute of limitations as intimately tied to the local tort law designed to deter the negligent conduct. In sum, the forum should engage in restrained interpretation of its policy of unclogging its court system and protecting defendants from stale claims.

Application of the place of the injury's statute of limitations is not unfair to the defendant. It in no way relied on the forum's one-year statute in deciding how to act. Nor can the defendant be unfairly surprised that the law of the place where it caused tortious injury provides a remedy. On the contrary, the defendant would be surprised in discovering the defense of the California statute of limitations. Indeed, such a discovery would constitute a windfall.¹²⁰ Moreover, the plaintiffs are entitled to a remedy under the law of the place they were injured. They justifiably expected that the regulatory law of the place where they were injured would grant them a remedy for their injury; they did not waive those protections simply because they chose to sue at home.

Defendant's case. California has strong interests in applying its statute of limitations to its own court system. The statute of limitations has several important purposes related to the forum's litigation process. First, it unclogs the overburdened court system by eliminating older claims. Allowing victims of tortious conduct to sue at their leisure would drastically multiply the number of lawsuits burdening the court system, placing pressure on courts to dispose of cases quickly—perhaps cutting corners to do so—or causing justice to be delayed and therefore denied. Second, the forum statute prevents introduction of stale, and therefore unreliable, evidence. This protects the integrity and fairness of the litigation process; it promotes the administration of justice in the forum. The forum has an interest in excluding unreliable evidence regardless of which state's substantive law is being applied; it would compromise the forum's sense of justice to subject parties to unfair procedures even if they would be so subject in another state. Finally, to achieve the interests of judicial efficiency and integrity discussed above, the forum seeks to apply its statute to provide an incentive for its citizens to bring claims quickly. If residents can escape the forum's statute of limitations by introducing the statute of another state, they will have less incentive to bring cases quickly. Denying compensation to this set of plaintiffs may increase their need for public services, but this cost may be necessary to induce other plaintiffs to bring claims quickly.

Arizona has little interest in seeing its statute of limitations applied in this case. First, Arizona's interests in opening up its courts to cases like this simply do not apply when a California court is hearing the case; Arizona

¹²⁰ See Weinberg, *supra* note 8, at 617. The defendant is on notice in a way that the plaintiff is not. The contract debtor expects to be made to pay. The tortfeasor expects to have to make the damage good. Defendants are not surprised by claims. They are surprised, rather, when counsel discovers that they have some sort of defense.

would not regulate the conditions under which California courts hear cases. Second, Arizona's interest in compensating these plaintiffs is weak. They are not residents of Arizona. California will feel almost the entire consequences of not compensating them, and California's political community has chosen to live with undercompensation in this case to promote other goals. Arizona law may partly intend to provide a fund for compensation of local medical creditors, but it would be purely fanciful to contend that this is the main purpose of tort liability. The main purpose of tort liability is to provide compensation for the victim, a purpose California has chosen to subordinate to its interest in administration of justice. Under these circumstances, the forum may legitimately follow its own rules and close its courts.

Third, the Arizona policy has no significant deterrent function. People underestimate the chances of being in an accident; imposition of liability will not change this. The fear of liability will not persuade people to drive carefully if they do not fear being killed; they simply believe they will not *be* in an accident. Moreover, this case involves vicarious liability of the employer. Imposing such liability will not likely encourage safe driving on Arizona roads. Why would imposition of liability on the *employer* induce the *employee* to drive more safely? Vicarious liability is a form of strict liability; it promotes loss-spreading by imposing the burden on the employer. It does not punish negligent conduct by the employer. If the plaintiffs could prove negligence by the employer in hiring or supervising the employee, then application of Arizona law might affect the employer's behavior.¹²¹ Imposition of vicarious liability, however, arguably will not affect the employer's behavior; employers will invest in safety up to the point where the cost of investing in safety equals the expected liability. If the cost of investing in safety goes beyond this point, the employer would be better off simply paying the judgment. Employers already have incentives to undertake reasonable, cost-justified measures to ensure that their employees drive safely; they are subject to negligence liability if they do not. Any investment in safety beyond that point may be unjustified, because, by hypothesis, if the employer has invested sufficiently in safety, it has already taken all possible reasonable steps to prevent accidents by its employees.

Application of forum law will not unfairly surprise the plaintiffs, who should have a responsibility to comply with the procedural rules of the place they file suit. Plaintiffs cannot reasonably expect to be exempt from the timing requirements of the forum. Moreover, defendant is entitled to the same protections available to resident defendants sued in the forum; the forum should not subject nonresident defendants to liability that is unavailable against resident defendants. Indeed nonresident defendants, as well as resi-

¹²¹ Although the difference between vicarious liability and negligence liability is important for choice-of-law purposes, the Ninth Circuit failed to explain the basis of the plaintiffs' claim. Rather, it assumed that imposition of liability on the employer would somehow affect the employee's conduct, without explaining how this would happen. *Ledesma*, 816 F.2d at 486.

dents, have the right to be protected against stale and nonprobative evidence and the right not to be subjected to an unfair litigation process.

Expected result. The law in this area is in a state of flux. The Ninth Circuit allowed the suit, applying Arizona's longer statute. This result might be justified on the following grounds: (1) both California and Arizona share interests in compensating these plaintiffs and in encouraging the defendant to invest in safety by encouraging its employees to drive safely, and the forum interest in closing its courts does not outweigh this interest; (2) lawsuits should include a presumption of timeliness, just as there is a presumption of validity of contracts, to promote widely shared interests in compensation and deterrence, while sufficiently protecting defendants from stale suits; (3) application of the shorter forum statute would be "unreasonable" under the 1988 revision to section 142 of the Second Restatement because the difference between the statutes is so slight and because the shared interests of Arizona and California in compensating these plaintiffs outweigh the forum interest in unclogging its courts; and (4) adopting a rule that would require California plaintiffs to sue in Arizona, when California has jurisdiction over the defendant, may increase plaintiffs' costs of litigation, depriving them of a remedy to which they are otherwise entitled under the law of the situs or, at the least, encouraging an inefficient use of their money.

On the other hand, many courts still adhere to the traditional practice of treating statutes of limitation as procedural for choice-of-law purposes and, thus, automatically apply the forum law. Even states that adopt the modern approach may feel that the important goal of unburdening the overburdened court system is compelling, and that it is therefore important to create incentives to bring suits in a timely fashion. Moreover, although suing in Arizona would have been more expensive for plaintiffs, they could have chosen to sue there. California, then, might vindicate its interests both in compensating victims of tortious conduct and unclogging its court system, by encouraging suits to be brought at the site of the accident.

Ledesma v. Jack Stewart Produce, Inc.

California

Arizona

Contacts	π 's domicile forum	accident with Δ 's employee (Δ conduct/ π injury)
Laws	Δ immune from liability; claim barred under one-year statute of limitations	π 's claim is timely under two-year statute of limitations
Policies	<ul style="list-style-type: none"> • Unclog court system by excluding stale claims • Protect fairness in administration of justice by requiring evidence to be fresh and therefore reliable • Grant repose to defendants from fear of being sued for remote conduct • Share goals of compensation and deterrence, but sees those goals as outweighed by the Δ-protecting policies stated above 	<ul style="list-style-type: none"> • Compensation: grant π a remedy for a relatively recent wrong; compensate victim of negligent conduct • Deterrence: impose liability to give employers an incentive to induce their employees to drive safely • Share goals of granting repose to defendants and ensuring a fair administration of justice, but considers Δ as not yet entitled to repose and the fairness of the court procedures not yet threatened
Justified Expectations	<ul style="list-style-type: none"> • π cannot be unfairly surprised that the courts in his home state where he chose to sue impose a one-year limitation on actions; π could have protected himself by bringing the lawsuit within the time allotted in the forum he chose; π has a duty to follow the rules of procedure for suit in the forum • Δ is entitled to the same protections against remote lawsuits as a resident Δ; Δ justifiably expects the forum to follow its own rules of procedure on what constitutes relevant evidence, so that Δ is not subjected to an unfair litigation process 	<ul style="list-style-type: none"> • Δ will not be unfairly surprised by being made to defend the lawsuit; Δ could not have in any way relied on the one-year statute of limitations in Cal. in arranging his conduct, because Δ could have been sued in Ariz. where it sent its employee and caused injury, and the claim would be good there • π has a right to compensation under the law of the state whose substantive law governs the legal rights of the parties

<p>Interest Analysis</p>	<p><i>Cal. has strong interests in applying its law .</i></p> <ul style="list-style-type: none"> • Cal. seeks to unburden its own court system from stale claims • Cal., as the forum, has strong interests in determining what evidence is sufficiently probative to be introduced in its courts; it has strong interests in protecting the fair administration of justice in its courts • Cal. seeks to encourage its residents who sue there to bring their claims quickly <p><i>Ariz. has weak interests in applying its law</i></p> <ul style="list-style-type: none"> • No deterrent interest is served by application of its statute of limitations; since it does not regulate conduct or promote safety in Ariz., the failure to apply the Ariz. statute to allow the claim will not affect behavior in Ariz. or subject Ariz. residents to danger • Ariz.'s interest in compensation is weak when the π is a resident of Cal., since the consequences of not compensating the π will be felt in Cal., and Cal. is willing to live with an uncompensated resident as a way to promote its policy of unburdening Cal. courts from having to hear stale claims 	<p><i>Ariz. has strong interests in applying its law</i></p> <ul style="list-style-type: none"> • Ariz. is interested in compensating anyone injured in Ariz. as a result of negligent conduct; this interest extends to nonresidents visiting Ariz. as well as residents; no discrimination against a nonresident • Compensation may be needed to pay debts to local medical creditors and others who provided services to the injured victim • There may be some significant deterrent effect to imposing liability on an employer for the negligence of its employee, inducing employers to supervise employees more carefully <p><i>Cal. has weak interests in applying its law</i></p> <ul style="list-style-type: none"> • The difference between the one-year Cal. statute and the two-year Ariz. statute is slight; thus, forum interests in unburdening the court system from old claims and protecting Δs from nonprobative evidence are weak here • The Cal. statute is mainly intended to protect Cal. Δs from older claims; Cal. should not extend its policy to protect a nonresident Δ who is not protected by the law of the place where it committed its tortious conduct • Cal. should engage in restrained interpretation of the forum policy, since Ariz. interests in regulating conduct in Ariz. and providing a remedy for tortious conduct there are strong • The foreign statute of limitations is not difficult or costly to discover and it is clearly outcome-determinative; it therefore should be considered to be part of Ariz. tort law, and if Ariz. has the most significant relationship to the issue of tort liability, its law should apply to the timeliness of suit, as well
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3. Forum Statute of Limitations Allows the Claim

*Sun Oil Co. v. Wortman*¹²² involved the lease of lands in Texas and several other states by plaintiff landowners to defendant oil and gas company for exploration and extraction of natural gas. Defendant withheld some royalty payments due on gas extracted from plaintiffs' lands for a period of time. Plaintiffs brought a class action in state court in Kansas to recover interest on the withheld royalties. One issue in the case involved claims that were

¹²² 241 Kan. 226, 734 P.2d 1190 (1987), *aff'd*, 486 U.S. 717 (1988).

time-barred under the law of the situs of the property, that of Texas, but were timely under the forum's longer statute of limitations. Although Texas substantive law applied, the Kansas Supreme Court determined that its longer forum statute applied.¹²³

Plaintiffs' case. Plaintiffs contend, not that Kansas has strong interests in applying its law, but that Texas is fundamentally interested in providing a remedy for these plaintiffs and therefore should not object to having the claim heard in the Kansas court. The policy underlying the Texas law that governs the substantive rights of the parties prohibits unjust enrichment; the short statute of limitations subordinates this fundamental goal to the need to unclog the Texas court system and protect the defendant from both perpetual liability and nonprobative evidence. Kansas, in fact, shares these goals. Texas and Kansas law differ only in detail, rather than principle. Although the differences in the statutes of limitation are outcome-determinative, they do not amount to fundamentally different judgments about the underlying substantive rights of the parties. Thus, Texas should not object if Kansas altruistically opens its court system to claims barred in Texas.

The only possible interests Texas might assert are interests in providing repose for the defendant and protecting against stale and nonprobative evidence. But, despite these interests, the difference between Texas's and Kansas's statutes of limitation is not sufficient to raise a serious conflicts issue. As long as some reasonable time limit is set on filing the lawsuit, Texas's general goals of protecting defendants will be met. Alone any interest in protecting the defendant does not outweigh the more important Texas goals of preventing unjust enrichment by one of its citizens against another. Texas has determined that only the goals of protecting defendants and unclogging its courts together justify the short statute of limitations that prevents plaintiffs from filing this suit in Texas. In other words, in this case, Texas can have its cake and eat it too. The Kansas statute of limitations adequately protects defendants from remote claims, and refusing to hear the case in Texas courts protects the goal of unclogging the Texas court system. Texas therefore cannot reasonably object if Kansas opens its courts to vindicate substantive claims under Texas law. Kansas is in fact furthering Texas substantive policies and basically maintaining its procedural policies without hurting the Texas court system.

Kansas has interests in providing nondiscriminatory access to its court system to residents and nonresidents, as long as jurisdiction exists. Moreover, a presumption of timeliness of lawsuits vindicates the laws' substantive

¹²³ The United States Supreme Court upheld this ruling against the challenge that it violated the mandate in *Allstate Ins. Co. v. Hague*, 449 U.S. 717 (1988), and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), that prohibited application of a disinterested state's law as a violation of due process and the full faith and credit clauses. *Sun Oil Co.*, 486 U.S. 717 (1988). In my discussion of *Sun Oil Co.*, however, I will ignore the constitutional question that the Supreme Court addressed in order to focus on the common law choice of law that faced the Kansas Supreme Court.

policies. Like a presumption of validity of contracts or a presumption of recovery of tort plaintiffs, a presumption of timeliness vindicates widely shared policies of preventing unjust enrichment. Courts should apply whichever of the interested states' statute of limitations validates the claim, as long as the statutes are not wildly different, thus assuring that no state's determination of how best to protect defendant's interest in repose and in not facing stale evidence is grossly violated. Such a presumption would not necessarily require the forum with the shorter statute of limitations to hear a claim; in that case, the forum would have significant interests in unclogging its court system.

Additionally, being required to comply with Texas law requiring it to disgorge its unjust enrichment will not unfairly surprise the defendant. Defendants do not rely on statutes of limitation in planning their conduct because they cannot predict when and where plaintiffs sue, and the defendant should reasonably expect to be required to comply with the substantive law of the place where it does business. At the same time, plaintiffs are entitled to bring suit against the defendant in any state in which the defendant has sufficient contacts to create jurisdiction to hear the claim, and plaintiffs have a right to rely on the procedural rules of the forum to govern the time limits involved in the litigation process. Just as forum law governs how many days defendant has to answer the complaint, it should govern how many days plaintiffs have to bring the complaint.

Defendant's case. This case presents a false conflict. Plaintiff's argument that Texas is interested in providing a remedy for plaintiffs is disingenuous. It misstates Texas law. Texas has balanced competing interests; it protects plaintiffs from unjust enrichment only to the extent remedies that vindicate this right do not unfairly subject defendants to liability for remote claims. Texas law grants this defendant repose from liability for any claims arising out of its business contacts in Texas that occurred some years ago. The Texas political community has determined that the defendant's interests in repose outweigh the plaintiffs' interests in recovery. Moreover, Texas will bear the effects of imposing liability on the defendant contrary to Texas law; such liability will harm the local economy by imposing an obligation on defendant's business.

In contrast, Kansas has absolutely no interest in applying its law to this case. The protestations of the Supreme Court in *Sun Oil Co.* to the contrary,¹²⁴ application of the Kansas statute would violate due process by providing a remedy barred by the only state with any interest in protecting the plaintiffs' property rights. Kansas has no contacts with the case. Although statutes of limitation have obvious procedural qualities, and, thus, arguably the forum law should apply, the statute in Texas is not difficult to find or apply and is clearly outcome-determinative. It is contradictory to conclude, on the one hand, that Kansas's direct regulation of these events that

¹²⁴ See *Sun Oil Co.*, 486 U.S. 717; *supra* note 123 (discussing the Supreme Court's holding).

occurred in Texas is unconstitutional and then, on the other hand, to conclude that Kansas can apply its law to create legal rights that were extinguished in Texas. Allowing Kansas to apply its statute of limitations would amount to illegitimate extraterritorial regulation by the Kansas legislature of wholly local Texas transactions.

Application of the law of a state with which it has no contacts related to the claim would unfairly surprise defendant. Additionally, plaintiffs are not unfairly surprised by being held to the standards of the place where the relationship is centered. They were not justified in relying on the longer statute of limitations of a disinterested state when planning their lawsuit.

Expected result. As before, the law is in a state of flux. The Kansas Supreme Court applied the longer forum statute of limitations to hear the claim. The United States Supreme Court found this result constitutional, at least where the situs would characterize the statute of limitations as an issue of procedure or litigation conduct. Under these circumstances, a court might plausibly conclude that the major purpose of the statute of limitations of the situs is to unclog the local court system, and that the situs would be happy to have its substantive policies vindicated—and its resident victim compensated—as long as some other court system handled the matter. This result also might be justified by a presumption of timeliness akin to the widespread presumption of validity of contracts or the tendency to favor plaintiffs in conflicts cases involving tort claims. Such a presumption vindicates the underlying substantive purposes of the law, while allowing courts that want to clear their dockets of older cases to bar claims by applying their shorter statutes.

Conversely, the argument for applying the shorter statute of the situs to bar the claim is quite powerful. Insisting that Kansas cannot apply its oil and gas law to regulate activities in Texas and then turning around and allowing Kansas to apply its own statute of limitations to create a liability on a Texas gas company that is barred under Texas law seems senseless. Why should a Kansas court protect Texas landowners who have no rights under the law of the only place where they and the defendant have conducted business? If Kansas cannot regulate these activities directly by applying its property and contract law to events and persons in Texas, why should it be able to regulate them indirectly by applying its rules to revive claims the law of the situs has extinguished?

Sun Oil Co. v. Wortman

Kansas

Texas

	Kansas	Texas
Contacts	forum	situs of π 's property Δ 's business conduct (leasing π 's property to extract gas) agreement between π and Δ made
Laws	π 's claim is timely under forum statute of limitations	Δ is immune from liability; claim is time-barred by statute of limitations of the situs
Policies	<ul style="list-style-type: none"> • Govern procedures at the forum for conducting fair litigation • Allow introduction of probative evidence • Provide remedy for unjust enrichment 	<ul style="list-style-type: none"> • Grant repose to defendants from fear of being sued for remote conduct • Protect defendants from claims based on stale and possibly nonprobative evidence • Underlying goals of preventing unjust enrichment and promoting security of transactions, but subordinates these policies to the interest in repose for Δs
Justified Expectations	<ul style="list-style-type: none"> • Δ is not unfairly surprised at being required to comply with the substantive law of the place where it does business • Δ did not rely on the situs statute in planning its conduct; it had no control over when π brought suit • π is entitled to bring suit against Δ in a state in which Δ has sufficient contacts to create jurisdiction to hear the claim and has the right to rely on the procedural rules of the forum as to time limits for the litigation process 	<ul style="list-style-type: none"> • Δ is entitled to repose based on the law of the place where it did business • Δ would be unfairly surprised by application of the law of a state with which it has no contact related to the claim • π is not unfairly surprised by being held to the standards of the place where the relationship at question is centered • π cannot have justifiably relied on the longer statute of limitations in a disinterested state in planning when to bring suit

Interest Analysis	<p><i>Kan. has strong interests in applying its law</i></p> <ul style="list-style-type: none"> • Kan. is interested in providing remedies • Kan. provides access to its court system in a nondiscriminatory fashion to residents and nonresidents • A presumption of timeliness furthers the substantive policies underlying the law <p><i>Tex. has weak interests in applying its law</i></p> <ul style="list-style-type: none"> • The main purpose of the statute of limitations is to unclog the Tex. court system; it is not to protect Δs from liability for unjust enrichment • Tex. is interested in preventing unjust enrichment of its citizens by Δs doing business in Tex. • Thus, Tex. cannot object if Kan. is altruistically willing to open its courts to vindicate substantive Tex. policies even though Tex. courts are unwilling to do so 	<p><i>Tex. has strong interests in applying its law</i></p> <ul style="list-style-type: none"> • Tex. is interested in repose for Δs who do business in Tex. with resident landowners to protect them from liability for remote lawsuits • Imposition of liability on Δ will be felt in Tex., harming the local economy <p><i>Kan. has no interests in applying its law</i></p> <ul style="list-style-type: none"> • Kan. has no contacts with the lawsuit giving it any interest in applying its statute of limitations to hear a claim barred by the law of the only state with any interest in applying its law • It would be illegitimate extraterritorial regulation for Kan. to regulate wholly local transactions in Tex. or to create remedies barred by local law
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IV. CONCLUSION

This article develops a method of choice-of-law analysis that integrates the important elements of the various modern policy-oriented approaches to conflicts law. The extended examples of paradigm cases illustrate the arguments that most frequently arise in choice-of-law analysis both in the courts and in scholarly commentary. What is unique about the method advocated here is the insistence on generating arguments on both sides before reaching any conclusions about the proper outcome. The genuine attempt to construct arguments on both sides almost always leads the analyst to focus on issues she considers important that would otherwise have been dismissed.

Many mistakes can be avoided in conflicts analysis by carefully generating arguments for and against application of each state's law. This exercise should generate competing versions of the regulatory and moral interests of the states connected with the case and competing versions of the interests of each of the parties in relying on the protection of the law of the state that favors their interests. This procedure will not only prevent the wrongful attribution of plaintiff-protecting policies to defendant-protecting states, and vice versa, but will engender a rich picture of the competing interpretations of the legal relations between the parties and between overlapping normative and political communities in the separate states. By trying to see the case from the perspective of each of the parties, the decisionmaker can better understand the competing claims of protection of the different political and normative communities to which the parties are connected. This interpretive method can help elucidate the value conflicts implicated in a multistate system.

Deciding these cases requires the decisionmaker to confront the conflict between the forum's interest in promoting what it is likely to see as the better, forum law and the forum's interest in accommodating the ability of another state to constitute itself as a political and normative community. The elaboration of competing versions of the substantive and multistate policies implicated in conflicts cases assists the decisionmaker in making this judgment. It does so by requiring her to face the real conflicts present in the case and to consider, in Robert Cover's words, how "[e]ach group must accommodate in its own normative world the objective reality of the other."¹²⁵

¹²⁵ Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 28-29 (1983).

