Vanderbilt Journal of Transnational Law

Volume 26
Issue 5 *Issue 5 - January 1994*

Article 1

1-1994

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VANDERBILT JOURNAL
OF
TRANSNATIONAL LAW

VOLUME 26 JANUARY 1994 NUMBER 5

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ABSTRACT

The field of conflict of laws suffers from a lack of theoretical coherence, and therefore fails to provide a satisfactory basis for discourse, adjudication, legislation, and intergovernmental negotiation regarding issues of prescriptive scope. This Article advances a law and economics-based approach to conflict of laws for use in both the domestic and international context. The Article first assesses the theoretical coherence of some principal conflict of laws approaches, analyzing their resolution of four tensions: predictability and administrability versus accuracy, unilateralism versus multilateralism, private interest versus public interests, and courts versus legislatures. It refers to Professor Baxter's

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"comparative impairment" methodology as well as prior law and economic-based approaches to conflict of laws, and articulates, extends, and modifies these approaches. This Article proposes that decisionmakers faced with conflict of laws issues should allocate prescriptive jurisdiction over a subject matter to the government(s) whose constituents are affected by the subject matter, pro rata in proportion to the relative magnitude of such effects, as accurately as is merited given transaction costs in allocation of prescriptive jurisdiction. This simple proposition, however, raises many difficult theoretical and practical issues.

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It would be constructive if legal scholars were to give up the attempt to construct systems for choice of law—an attempt that cannot result in satisfactory resolution of true conflicts of interest between states, and that is very likely to result in the creation of problems that do not otherwise exist. . . .[1]

The classification of the constituents of a chaos, nothing less here is essayed.[2]

I. INTRODUCTION

Conflict of laws is a source of constant embarrassment to lawyers, judges, and scholars.[3] Few can give advice, make decisions, or analyze doctrine effectively. A survey of conflict of laws doctrine reveals no rational or even generally accepted basis for discourse, adjudication, legislation, or intergovernmental negotiation regarding issues of prescriptive scope.[4] The

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1. BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 121 (1963). *See* Herma H. Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 (III) RECUEIL DES COURTS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 150-51 (1989). Currie's views are not unique. "[S]o many . . . men, of great talents and learning, are . . . found to fail in fixing certain principles, we are forced to conclude that they have failed, not from want of ability, but because the matter was not susceptible of being settled on certain principles." Saul v. His Creditors, 5 Mart. (n.s.) 569, 589 (1827), *quoted in* FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 45 (1993).

2. HERMAN MELVILLE, MOBY DICK 134 (1851). *See* Glenn H. Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110 (1991) (showing the potential application of chaos theory to legal decisions, to indicate that, while outcomes may appear chaotic, they may comprise the outcome of a consistent theoretical framework).

3. It is widely agreed that Dean Prosser's oft-quoted and evocative 1953 description still rings true:

> 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.

William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1952-53). Each eccentric professor who studies this topic believes he or she is contributing to the effort to illuminate, ventilate, and cultivate the dismal swamp. However, these well-intentioned efforts often merely add to the muck.

4. Indeed there are a number of coexisting theories being applied, depending on the forum, the type of matter, and the particular circumstances of

indeterminacy of conflict of laws[5] has ramifications not just for private decisions, in terms of predictability of applicable rules, but also for public policy, in terms of effectiveness of substantive policy.[6]

An example may help to illustrate the problem. If a United States manufacturer produces an automobile for a market in a very poor, less-developed country, "Dystopia," with higher hurdles to, and lower standards of, recovery in tort than the United States, it may produce a less safe automobile and be able

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the case. This Article will not argue that all cases should be subject to the same conflicts rule; rather it will argue that the conflicts rule applicable should be determined in a coherent manner. *See* Reynolds, *supra* note 2.

5. For the origins of the term "conflict of laws", see ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 3 n.1 (1965). The authors noted that Professor Beale opted for 'Conflict of Laws' on a pragmatic basis.

> One can do no better, in explaining his choice of this title, than quote the wise and witty words of Vareilles-Sommieres. [Footnotes omitted.] The warlike expression 'Conflict of Laws' is used to describe the pacific work of settling by fixed bounds the line of separation between two legislative jurisdictions. The only conflict is among the legal authors who are doing this work. Yet since the expression is consecrated by good use and is simple we may well make use of it.

Id. (quoting 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 15 (1935)). *See also* JUENGER, *supra* note 1, at 4-5.

In this Article, "conflict of laws" is used to refer to what is sometimes considered merely a branch of conflict of laws: choice of law. I will not be concerned with other branches, such as choice of forum and enforcement of judgments, although they are related and could be approached using a similar methodology. *See* Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249 (1991); Spencer W. Waller, *A Unified Theory of International Procedure*, 26 CORNELL INT'L L.J. 101 (1993). I use the less accurate term "conflict of laws" instead of "choice of law" largely for aesthetic reasons: "conflict of laws" connotes the kind of conceptual battle of social policies that this Article seeks to evoke. Otherwise, I use "conflict of laws" in its very broadest sense, encompassing both "private" law and "public" law. As discussed below, this usage is not uncontroversial, and at least in some respects, determines the course of this Article's analysis. *See infra* text accompanying notes 75-77, 245-47.

6. *See, e.g.*, STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 79-83, 93-99 (1987); John Calfee & Richard Craswell, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORGAN. 279, 299 (1986) ("Without knowing more than we usually do about the actual probabilities of punishment created by a legal rule and about the way those probabilities vary with a defendant's conduct, it is very difficult to say what incentives that rule will create."); Jason S. Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form*, 76 CORNELL L. REV. 341 (1991) [hereinafter *Uncertainty and Chaos*]; Jason S. Johnston, *Bayesian Fact-Finding and Efficiency: Toward an Economic Theory of Liability Under Uncertainty*, 61 S. CAL. L. REV. 137 (1987).

to sell it more cheaply. For instance, the manufacturer might decide not to provide expensive passive restraints, such as air bags or automatic seat belts. Assume that the United States manufacturer's cars are just as safe as, if not safer than, those produced in Dystopia by local manufacturers (and perhaps imported to Dystopia by other foreign manufacturers) for the local market. Assume further that the level of quality and hurdles to successful litigation are adequate barriers against liability under Dystopia law. Consumers in Dystopia might be happy to have the United States manufacturer's cheaper and superior automobiles. Dystopia's legislature has considered and rejected the imposition of higher standards. However, if Dystopian consumers are injured by one of these automobiles, they may seek to sue in the United States, with the hope that United States procedure, regulatory requirements, strict liability, and standards of recovery might be applicable. These people are perhaps seeking the best of both worlds: low prices that fail to pass on the cost of safety combined with a high level of manufacturer responsibility for safety.[7] Nevertheless, one might agree that as a matter of substantive justice, the injured parties should win: surely a life is worth as much—and should be protected as much—regardless of whether it is that of a United States citizen or an inhabitant of a less-developed state. However, one may feel uncomfortable from the standpoint of the United States manufacturer and the export competitiveness of United States goods.

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7. *See In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd and modified*, 809 F.2d 195 (2d Cir. 1987); R.R. Jesperson, *The Bhopal Decision: A Forum Non Conveniens Perspective*, 18 LINCOLN L. REV. 73 (1988); Ved P. Nanda, *For Whom the Bell Tolls in the Aftermath of the Bhopal Tragedy: Reflections on Forum Non Conveniens and Alternative Methods of Resolving the Bhopal Dispute*, 15 DENV. J. INT'L L. & POL'Y 235 (1987); Mark A. Chinen, Note, *Jurisdiction: Foreign Plaintiffs, Forum Non Conveniens, and Litigation Against Multinational Corporations*, 28 HARV. INT'L L.J. 202 (1987); Stephen J. Darmody, Note, *An Economic Approach to Forum Non Conveniens Dismissals Requested by U.S. Multinational Corporations—The Bhopal Case*, 22 GEO. WASH. J. INT'L L. & ECON. 215 (1988); Richard Schwadron, Note, *The Bhopal Incident: How Courts Have Faced Complex International Litigation*, 5 B.U. INT'L L.J. 445 (1987).

These types of cases are often litigated and there is no clear answer regarding whose law should govern: that of Dystopia or that of the United States.[8] The public policy perspective of Dystopia and the United States on these issues may differ, or may be the same. Unpredictable conflict of laws rules result in inaccurate allocation of social resources: over-investment by the United States manufacturer in safety for products intended for Dystopia's markets; or perhaps lack of choice for consumers in Dystopia otherwise willing to accept a less-safe product, in the event that the United States manufacturer declines to enter the market.

This example illustrates the real problems of predictability, accurate allocation of social resources, the concerns of consumers arrayed against the concerns of government, and the concerns of one government arrayed against the concerns of one or more other governments. These are problems of trade, of efficiency, and of equity. They result from inadequate conflict of laws rules.

At a time when conflict of laws issues like these arise more frequently in tort cases,[9] in securities law cases,[10] in antitrust

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8. *See, e.g.*, Piper Aircraft v. Reyno, 454 U.S. 235 (1981) (leaving intact the decision of the Court of Appeals to apply United States law to injuries incurred in Scotland); Challoner v. Day & Zimmermann, Inc., 512 F.2d 77, 80 (5th Cir. 1975), *vacated and remanded per curiam*, 423 U.S. 3 (1975) (requiring application of Texas choice of law in federal court, thus choosing Cambodian law to determine a tort suit between a United States plaintiff and a United States manufacturer); Harrison v. Wyeth Laboratories, 510 F. Supp. 1 (E.D. Pa. 1980), *aff'd without opinion*, 676 F.2d 685 (3rd Cir. 1982). Often these types of cases are addressed under a *forum non conveniens* analysis, and the court may not need to reach the choice of law issue. *See, e.g.*, Dow Chemical v. Castro Alfaro, 786 S.W. 2d 674 (Tex. 1990) (holding in case brought by Costa Ricans injured in Costa Rica by United States product that Texas statute prohibits dismissal of a personal injury or wrongful death claim on grounds of *forum non conveniens*), *cert. denied*, 111 S. Ct. 671 (1991). In response to the *Alfaro* case, the Texas legislature has amended its statutory framework to allow the application of *forum non conveniens* to exclude suits by foreign plaintiffs. *See* 61 U.S.L.W., Mar. 30, 1993, § 2.

9. For examples, see the *Alfaro* case cited in note 8 and the *Bhopal* case cited in note 7.

10. *See, e.g.*, MCG, Inc. v. Great Western Energy Corp., 896 F.2d 170 (5th Cir. 1990) (United States company, using a Hong Kong company to purchase company shares of a United States company offered exclusively on London Stock Exchange, denied recovery); Zoelsch v. Arthur Andersen & Co., 824 F.2d 27 (D.C. Cir. 1987) (German plaintiffs purchasing securities of German partnership denied recovery under United States law).

cases,[11] in tax,[12] and in labor law,[13] as well as in other areas, and rational allocation of government authority over multistate or transnational business has taken on greater importance,[14] conflict of laws theory could hardly be in greater disarray. That disarray leaves many interstate and international problems unresolved or unsatisfactorily resolved.[15]

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11. *See, e.g.*, Hartford Fire Insurance Co. v. California, 113 S.Ct. 2891 (1993) (finding that the application of the United States antitrust laws is not subject to a "comity" analysis in cases where there is not "in fact a true conflict between domestic and foreign law"); Pfizer Inc. v. Government of India, 434 U.S. 308 (1978) (recognizing foreign countries as "persons" entitled to recover treble damages under § 4 of the Clayton Act). *Pfizer* was legislatively reversed in 1982 under the Foreign Sovereign Antitrust Recoveries Act, 15 U.S.C. § 15(b) (1988) (foreign government acting in governmental, as opposed to commercial, capacity may only recover actual damages). Professor Stephan has argued that *Pfizer* should have incorporated a rule of reciprocity, and that allowing foreign governments to recover "without extracting any return benefit, impaired the ability of the political branches to develop common international norms of free competition." Paul B. Stephan III, *International Law in the Supreme Court*, 1990 S. CT. REV. 133, 157 (1991). *See infra* text accompanying notes 249-59.

12. Recently, the California Supreme Court ruled that California may use a three-factor formula to apportion the income of a foreign multinational corporation for state tax purposes, without violating the Commerce Clause of the United States Constitution. U.S. CONST. art. I, § 8, cl. 3. Barclays Bank Int'l, Ltd. v. Franchise Tax Board, 829 P. 2d 279 (Cal. 1992), *cert. denied*, 113 S.Ct. 202 (1992).

13. *See* E.E.O.C. v. Arabian American Oil Co., 111 S. Ct. 1227 (1991).

14. I join a long line of commentators in making this statement. *See, e.g.*, William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

15. Again, many scholars have made this point, and few are satisfied with the current state of affairs. *See, e.g., id.* at 1 ("After attempting for several years to teach the rules devised for the resolution of choice-of-law problems, I have concluded that those rules do not yield satisfactory results"), and materials cited in notes 1 and 3, *supra*. The reader will note that I make little effort to distinguish here between conflicts in the United States interstate system, and conflicts in the international system. *See* Albert Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 MINN. L. REV. 717 (1957); Eugene F. Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CAL. L. REV. 1599, 1599-1600 (1966) ("To apply mechanically a rule developed in interstate cases to an international situation without a consideration of its policy relevance is both wrong and dangerous"). These arguments may be consistent with this Article's proposal, insofar as the proposal also calls for appropriate responses to different institutional, constitutional, and social settings. This is because I believe the differences are not relevant to my analysis. Of course, in practice, these systems possess different constitutions and different levels of consensus on various policies, as well as different levels of desire for integration. However, the theoretical proposal advanced here is applicable equally to interstate and international conflicts, although it may call for different methodologies and outcomes in the two types of cases. We do not always think of the international legal order as having a "constitution." *See* Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20 (1948). With respect to

Brainerd Currie, the central United States conflict of laws scholar of this century, ceased his endeavor to find a resolution, concluding that sometimes courts should leave conflicts of law unresolved.[16] Of course, not to decide is to decide, and by virtue of its presumably unprincipled outcome, this approach is likely to be suboptimal. The first purpose of this Article is to begin to sketch an optimal conflict of laws solution, based on law and economics principles, that would provide a means of resolving every conflicts issue. Although the optimal solution is not feasible, it is possible to approximate more closely this optimal solution. Thus, a second purpose of this Article is to analyze the circumstances under which a retreat from the optimal solution is necessary, arguing for as accurate and limited a retreat as possible.[17]

Even more important than the problem of adjudicating conflicts issues, and often disregarded by conflict of laws scholarship, is the problem of increased statutory and regulatory law and increased bilateral, regional, plurilateral,[18] and multilateral agreements in particular regulatory areas. These statutes, regulations, and international agreements provide the political branches of government the opportunity to address conflicts problems.[19] Yet the formulation of these prescriptions is often

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the internal United States perspective on the different constitutions and their impact on conflicts approaches, see Daniel C. K. Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165 (1988).

16. *See* CURRIE, *supra* note 1, at 602-03. It should be noted that while Currie despaired of the possibilities that courts might develop conflicts systems for addressing "real" conflicts, and was skeptical of Congress' willingness to act, he nevertheless stated that "it is not unreasonable to call upon Congress, rather than the courts, to resolve interstate conflicts in any critical situation." *Id.* at 603.

17. *See Uncertainty and Chaos*, *supra* note 6.

18. This term is used to denote agreements among multiple states that are not located in the same region, when the number of states involved is smaller than the number of states subscribing to GATT or the United Nations Charter, which larger number is denoted by the term "multilateral."

19. With increasing frequency, it is becoming necessary to determine the jurisdictional reach of statutes. Congress has spoken to jurisdictional reach only in limited instances. Even when Congress has addressed this issue, it has often failed to do so with great clarity. For example, § 7 of the Sherman Act, added by the Foreign Trade Antitrust Improvements Act, 15 U.S.C. §§ 6a, 45(a)(3) (1988), provides an exemption from the Sherman Act for export commerce that does not have a direct, substantial, and reasonably foreseeable effect on United States markets (domestic trade, import trade, or export trade). *See* Hartford Fire Insurance Co. v. California, 113 S.Ct. 2891, 2908 (1993) (finding that the scope of this exemption was unclear in its application to the relevant conduct). For a discussion of the scope of this exemption, see Spencer W. Waller, *The Ambivalence*

negotiated or formulated without sufficient concern for, or analysis of, conflicts problems.[20]

A. *The Proposal*

This Article thus proposes a principle for discourse, adjudication, legislation, and intergovernmental negotiation regarding conflict of laws.[21] Prior to the development of the dis-

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of United States Antitrust Policy Towards Single-Country Export Cartels, 10 NW. J. INT'L L. & BUS. 98 (1989-90). In addition, in 1979, Congress amended the Export Administration Act to widen the potential scope of prescriptive jurisdiction. Export Administration Act of 1979, 50 U.S.C. app. § 2404(a) (1988) (extending jurisdiction to goods or technology or any person "subject to the jurisdiction of the United States"). These amendments left open the question of what goods, technology, or persons were in fact subject to the jurisdiction of the United States, and the Commerce Department's 1981 regulations in connection with the imposition of martial law in Poland interpreted the coverage very widely. *See* 47 Fed. Reg. 27,250 (1982), *revoked*, 47 Fed. Reg. 51,858 (1982). In response to the Supreme Court's decision in the *Boureslan* case, E.E.O.C. v. Arabian American Oil Co., 111 S. Ct. 1227 (1991), Congress has amended Title VII of the Civil Rights Act of 1964 to specify its extraterritorial application. Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071 (1991). In the field of securities regulation, the Securities and Exchange Commission has taken action to divide the world for regulatory purposes in connection with its principal areas of regulation, including public offerings, broker-dealer regulation, and tender offers. *See, e.g.*, Regulation S—Rules Governing Offers and Sales Made Outside the United States Without Registration Under the Securities Act of 1933, 17 C.F.R. §§ 230.901-904 (1991). *See* Joel P. Trachtman, *Recent Initiatives in International Financial Regulation and Goals of Competitiveness, Effectiveness, Consistency and Cooperation*, 12 NW. J. INT'L L. & BUS. 241 (1991) [hereinafter *Recent Initiatives*].

20. For examples of inconsistencies and difficulties of unilateral, bilateral, and regional approaches to allocation of prescriptive authority in international finance regulation, see *Recent Initiatives*, *supra* note 19. On the other hand, the European Community, in its use of the technique of "essential harmonization," has often legislated well-considered conflict of laws rules for public law. *See, e.g.*, *Second Council Directive of December 15, 1989 on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Taking Up and Pursuit of the Business of Credit Institutions and Amending Directive ,77/780* art. 32, 1989 O.J. (L 386) 1. This new legislative technique, the so-called "new approach" to harmonization, involves legislation of minimal (or "essential") harmony in a particular area of regulation, combined with mutual recognition by each Member State of each other Member State's regulation. *See, e.g.*, Jacques Pelkmans, *The New Approach to Technical Harmonization and Standardization*, 25 J. COMMON MKT. STUD. 251 (1987); Council Resolution on a New Approach to Technical Harmonization, 1985 O.J. (C 136) 1. Mutual recognition of home state regulation is a conflict of laws rule that allocates prescriptive jurisdiction (at least with respect to specified matters) to the home state, as defined.

21. It has been thirty years since Professor Baxter observed that "the deficiencies of present choice-of-law rules are attributable in large part to a lack of foundation on intelligible normative criteria." Baxter, *supra* note 14, at 1. Since then, matters have not improved and may have become worse.

cipline of law and economics, courts and scholars lacked the complete vocabulary and theoretical resources necessary to address coherently true conflicts problems, with the result being that conflict of laws theory has remained incoherent.[22] This Article posits that law and economics can provide the tools of measurement necessary to guide (but in most cases not to predetermine the outcome of) discourse, adjudication, legislation, and negotiation in conflict of laws, and thereby to lend it coherence.[23]

Another factor that has hampered the development of conflict of laws is the failure to conceive of conflict of laws as relating to public law. Conflict of laws has its origins in private law[24] and thus is unprepared to recognize that "private law" is an oxymoron. The proposal of this Article is premised on the principle that all conflict of laws rules allocate power to government.[25] The next basis for this proposal is the proposition that it is beneficial to allocate power consistently with responsibility: to

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22. Professor Baxter approached these issues using law and economics concepts in 1963. *Id.*

23. However, this Article suggests modifications in the approach taken so far by some law and economics scholars to conflict of laws. As noted by Judge Posner, law and economics methodology has not been applied vigorously to the conflict of laws problem. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 307 (1985) [hereinafter THE FEDERAL COURTS]. *See also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 587-88 (4th ed. 1992) [hereinafter ECONOMIC ANALYSIS]; Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4 (1987); Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987); Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989).

24. *See infra* note 75. *See also* Friedrich K. Juenger, *A Page of History*, 35 MERCER L. REV. 419 (1984); Rodolfo De Nova, *Historical and Comparative Introduction to Conflict of Laws*, 118 (II) R.C.A.D.I. 435 (1966).

25. This proposition is not new, although it is not universally accepted. Baxter said of Currie: "[a]s his own analysis effectively shows, the process of resolving choice cases is necessarily one of allocating spheres of legal control among states." Baxter, *supra* note 14, at 22. It is a corollary of the proposition, expressed by Lenin, that all law is public law. JOHN N. HAZARD, COMMUNISTS AND THEIR LAW 77 (1975). *See* John H. Merryman, *The Public Law-Private Law Distinction in European and American Law*, 17 J. PUB. L. 3, 13 (1968). If all law is public law, then all law is an expression of state power. Conflict of laws is thus the science of circumscription of state power. For a criticism of Currie's failure to distinguish private from public law, see Gerhard Kegel, *Fundamental Approaches*, §§ 3-11, *in* III ENCYCLOPEDIA OF COMPARATIVE LAW 3-19 (Kurt Lipstein ed., 1987) (arguing that the assimilation of "private matters" to matters of state "might be suitable for a totalitarian state."). *See also* Friedrich K. Juenger, *Governmental Interests—Real and Spurious—in Multistate Disputes*, 21 U.C. DAVIS L. REV. 515 (1988). Perhaps with Currie, I see the protection of private interests as subordinate to the allocation of governmental power. *See infra* text accompanying notes 74-77, 245-47.

ensure that all costs of action are internalized by the individuals or societies allocated the power to decide and act.[26] Responsibility is derived from effects on constituents: a government absorbs responsibility, or must take responsibility, to the extent that its constituents are affected.[27] Therefore, power should be allocated in accordance with effects.[28] The effects test asserted by the United States (and others) in extraterritoriality discourse[29] should be refined and adapted as a foundation for all conflict of laws rules.[30]

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26. *See* Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT'L L.J. 47 (1993), for a discussion of the effect of possibilities for externalization on the utility of regulatory competition. *See also* Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, *in* NEW DIRECTIONS IN LIABILITY LAW 90 (W. Olson ed., 1988); Bruce L. Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 GEO. L.J. 617 (1992). Coase argues that in a zero transaction cost world, internalization is unnecessary and externalities unworrisome. RONALD H. COASE, THE FIRM, THE MARKET, AND THE LAW 10-16 (1987). However, Coase posited this model in order to help understand a world with transaction costs. I will argue below that in a world with transaction costs, it is more efficient as an initial state to internalize externalities. *See infra* text accompanying notes 288-304.

27. The author makes some unwarranted assumptions regarding the responsiveness of government. The public choice literature shows that government does not accurately reflect the preferences of citizens. *See, e.g.*, KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 59-60 (1951); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987).

28. *See* Gregory S. Alexander, *The Concept of Function and the Basis of Regulatory Interests Under Functional Choice-of-Law Theory: The Significance of Benefit and the Insignificance of Intention*, 65 VA. L. REV. 1063 (1979). Professor Alexander examines effects as a basis for allocation of power. "Rational allocation requires an assessment of the effect upon a state of denying the authority to regulate a dispute. If such denial would affect a state adversely, that state may be considered legitimately interested." *Id.* at 1064. Professor Alexander argues accordingly that effects, rather than interests, should be the basis for interest analysis. *Id.* at 1090. *See also* Baxter, *supra* note 14.

29. There is a vast literature on extraterritoriality. A fine recent summary and analysis is provided by Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1 (1992).

30. To those who follow the problem of extraterritoriality, this is a radical assertion and endorsement of a basis for jurisdiction promoted by the United States, but viewed with distaste (albeit sometimes adopted) in other states. United States assertion of prescriptive jurisdiction on the basis of territorial effects is often criticized by other governments or by commentators as "extraterritorial" or as excessive. *See, e.g.*, HOMER E. MOYER, JR. & LINDA MABRY, EXPORT CONTROLS AS INSTRUMENTS OF FOREIGN POLICY 169 app. 8, 9, 10, 11 (1985) (diplomatic objections to United States extraterritorial export controls). *See* Cuban Democracy Act of 1992, 22 U.S.C.A. §§ 6001, 6005 (West Supp. 1993) (prohibiting "certain transactions between certain United States firms and Cuba" and sanctioning vessels that have entered Cuban ports to engage in trade). But see Russell L. Weintraub, *The Extraterritorial Application of Antitrust & Securities Laws: An Inquiry Into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799 (1992), for an argument that the effects test is inappropriate for conflict of laws generally.

This Article proposes that decisionmakers faced with conflict of laws issues should allocate prescriptive jurisdiction over a subject matter to the government(s) whose constituents are affected by the subject matter, pro rata in proportion to the relative magnitude of such effects, as accurately as is merited given transaction costs in allocation of prescriptive jurisdiction.[31] This simple proposition raises many difficult theoretical and practical issues. The most difficult theoretical problem is whether the determination of effects is relative, that is, whether effects may only be determined once the state's policy is determined.[32] The most difficult practical problem is measuring effects. Another practical problem is establishing a tradeoff between accuracy in allocation of jurisdiction on the one hand, and predictability and administrability on the other. Given that the smallest phenomenon has enormously wide potential effects,[33] how can prescriptive jurisdiction be broken down into administrable and meaningful pieces?

One no longer can blindly accept the inaccuracy of trying to allocate prescriptive jurisdiction over a particular matter to a single government,[34] despite significant direct effects on another society, or even widely dispersed and indirect effects on many other societies.[35] It is necessary to reaffirm and embrace the

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31. *See infra* text accompanying notes 280-328. This statement is similar to, but distinct from, Baxter's comparative impairment approach (*see supra* text accompanying note 14), and the approach suggested by Professor Alexander. Alexander, *supra* note 28, at 1080 ("Choice-of-law theory therefore must recognize a basis for allocating regulatory authority to a state whenever that allocation would further the state's goals or achieve some beneficial social effect that is consistent with the state's conception of public welfare.").

32. In this respect, this proposal is related to Professor Baxter's: "The extent to which the purpose underlying a rule will be furthered by application or impaired by nonapplication to cases of a particular category may be regarded as the measure of the rule's pertinence and of the state's interest in the rule's application to cases within the category." Baxter, *supra* note 14, at 9. *See infra* text accompanying notes 169-94.

33. *See, e.g.*, JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE 8, 11-31 (1988) (describing the "Butterfly Effect": the "notion that a butterfly stirring the air today in Peking can transform storm systems next month in New York."). *See also* Reynolds, *supra* note 2.

34. Thus, this Article argues for a precise, rather than a gross, approach to jurisdiction, at least as an initial analytical position. The gross approach may be appropriate as a fallback position to reduce complexity and administrative costs. It is interesting that conflicts scholars, especially interest analysts, have often thought in continuous adjustment terms but have formulated recommendations in discrete adjustment terms. *See, e.g.*, Baxter, *supra* note 14.

35. See the recent discussion of the effects test in Hartford Fire Insurance Co. v. California, 113 S.Ct. 2891 (1993). In his majority opinion, Justice Souter noted that "it is well established by now that the Sherman Act applies to foreign

complex and essentially political nature of conflict of laws problems.[36]

From a political standpoint, the proposal of this Article may be restated as follows: Prescriptive jurisdiction may only be legitimated by, and to the extent of, concern regarding effects on the community purporting to prescribe. This is consistent with social contract theory[37] and with subsidiarity.[38] Subsidiarity is the vertical form of the proposal. The proposal allocates control horizontally to those affected, thereby placing the government in a horizontal order to which to allocate power.[39] Subsidiarity allocates control vertically to those affected, thereby placing the government in a vertical order to which power should be allocated.[40] To the extent that subsidiarity indicates a move upward in the vertical level at which a particular matter is

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conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Id.* at 2909. Justice Souter also applies § 7 of the Sherman Act, 15 U.S.C. §§ 6a, 45(a)(3) (1988). *Id.*

36. It is important to recognize that scholars cannot turn their backs on this complexity: They must recognize that when they simplify in the name of administrability, they act inconsistently with optimal allocation of responsibility to governments. They may be willing, however, to accept a sub-optimal allocation in exchange for a reduction of administration costs. Politics is the free market in ideas and negotiation that are used to integrate varying individual views into a more-or-less coherent social policy. It is thus the best tool for handling this type of complexity.

37. Social contract theory holds that the power of the state is determined dynamically by the purposes for which the state is formed. JEAN-JACQUES ROUSSEAU, CONTRAT SOCIAL [SOCIAL CONTRACT] (1762). *See, e.g.*, JAMES BUCHANAN, FREEDOM IN CONSTITUTIONAL CONTRACT (1977). Of course, conflict of laws presents a special problem for social contract theory: who are the parties to the contract, and for what purposes? The answer to this question lies in the determination of who are the social actors that are being discussed. It may not seem fair to subject a French individual to a law produced by the United States social contract, as the French individual has no social contract with United States citizens. However, in the "society of nations," one might posit that France has a social contract with the United States, which may allow the United States to subject French citizens to United States laws in appropriate circumstances, and on a reciprocal basis.

38. See Deborah Z. Cass, *The Word That Saves Maastricht? The Principle of Subsidiarity and the Division of Powers Within the European Community*, 29 COMMON MKT. L. REV. 1107 (1992); A. G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 COMMON MKT. L. REV. 1079 (1992); Joel P. Trachtman, *L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity*, 33 HARV. INT'L L.J. 459 (1992).

39. In this sense, conflict of laws amounts to nothing less than the horizontal component of a constitution: defining among horizontally-related societies the scope of the power of each. The horizontal component of a federal constitution must be related to the vertical component. *See* Trachtman, *supra* note 26.

40. *Id.* Subsidiarity argues that authority should be allocated along the vertical axis to the level at which a given social policy may be effected most efficiently.

regulated, through either harmonization of law or centralization of law, the horizontal problem of conflict of laws is eliminated. Conflict of laws is thus a means of organizing valid horizontal diversity.

Currie despaired of finding any solution; he argued in his earlier work for the simple application of forum law as the best approach to "true conflicts"—conflicts of two societies' applicable policies—placing administrability above accuracy.[41] In his later work, Currie moderated this approach by allowing that the forum state might moderate its policy or interest and thereby defer to another state's law.[42] Thus, he linked unilateralism, expression of the forum state's interests, with multilateralism, regard for the concerns of other jurisdictions. Subsequent scholars have described or recommended eclectic approaches,[43] in some cases combining unilateral approaches with multilateral approaches.[44] In addition to seeking to combine unilateral and multilateral approaches (which may merge in certain circumstances), scholars have sought to marry conflicts justice[45] with substantive

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41. This was Currie's self-styled "give-it-up" philosophy. *See* CURRIE, *supra* note 1, at 120-21. Currie argued that "[a] give-it-up attitude is constructive when it appears that the task is impossible of accomplishment with the resources that are available." *Id.* at 121. For a comprehensive and nuanced analysis and defense of Currie's scholarship, see Kay, *supra* note 1, at 152. It is worth noting that Professor Singer reports that courts appear to have uniformly avoided explicit adoption of this principle of applying forum law to real conflicts. Joseph W. Singer, *Facing Real Conflicts*, 24 CORNELL INT'L L.J. 197, 200 n.12 (1991). Singer proposes adoption of this principle in the form of a presumption. However, Singer posits exceptions to this principle for "justified expectations" and for circumstances where application of forum law would regulate relationships "centered" in another state, and would thereby interfere with its nature as a community. *Id.* at 203. These exceptions loom enormous.

42. Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 763 (1963). *See also* Kay, *supra* note 1, at 68-77.

43. *See* James E. Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case for Eclecticism*, 40 MO. L. REV. 407 (1975). *But see* William A. Reppy, *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645 (1983) (criticizing eclecticism as lacking in certainty and administrability).

44. *See, e.g.*, VON MEHREN & TRAUTMAN, *supra* note 5, at 76-79.

45. Conflicts justice may simply be defined as the application of the correct law as indicated by nonsubstantive conflict of laws analysis, regardless of the quality of the law. *See* JUENGER, *supra* note 1, at 69-70 (referring to Kegel for this "peculiar brand of justice that is readily satisfied by the application of the law most closely connected with a particular transaction"). I argue below that "conflicts justice" may be analogized to allocational efficiency at the state level, whereas substantive justice may be analogized to allocational efficiency at the firm or private level. Conflicts justice and substantive justice may coincide, but may diverge. *See infra* text accompanying notes 239-62.

justice.[46] This Article seeks to explain the inconsistencies of these approaches as, in many respects, appropriate and consistent in a larger context, just as a toolbox containing a variety of tools, each appropriate to a particular circumstance, is consistent. Different approaches to conflicts problems, by different decisionmaking bodies, will be appropriate to different circumstances, depending on a variety of factors.

The best solution to conflict of laws problems is negotiation and agreement of conflicts rules among governments. This negotiation should be informed by the methodology described here.[47] Unfortunately, this solution will often be politically unacceptable, and more importantly, is often impracticable. A second-best solution might involve implementation of the

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46. Kegel has argued that this marriage is impossible: "Both are entirely different things: it is one thing to try and find rules which correctly balance opposing interests in material and spiritual values; it is another to look at the globe, to see many states with different laws and to ask oneself which state's rule to apply." Gerhard Kegel, *Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers*, 27 AM. J. COMP. L. 615, 621 (1979).

47. Currie put it this way:

> I can only repeat that no satisfactory solution can possibly be evolved by means of the resources of conflict-of-laws law. This does not mean that the problem cannot be solved. It cannot be solved by any effort, judicial or legislative, however brilliant in its conception, on the part of a single state acting alone; and conflict of laws law, strictly speaking, is found only in the laws of individual states . . . . It is possible, however, that the conflict may be resolved by agreement between the states concerned, and it is clear that it can be resolved by higher governmental authority.

CURRIE, *supra* note 1, at 117. *See also* LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 143-189 (1991) [hereinafter FOUNDATIONS]; Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 21 (1991) (arguing that the correct forum for this negotiation is Congress). My statement that intergovernmental negotiations should be informed by the proposal made here is more than a conceit. It is hoped that by establishing a normative basis for negotiations, and providing a guide to establishing valuations of the issues being negotiated, negotiations can be facilitated, reducing transaction costs and thereby allowing efficient allocation of prescriptive jurisdiction. Principles can add much to a negotiation, especially if they are agreed. *See, e.g.*, ROGER FISHER & WILLIAM URY, GETTING TO YES 84-98 (1981).

methodology described here unilaterally[48] by state legislatures.[49] Even this may often prove impracticable, however, and it raises serious issues of impartiality. In the end, when intergovernmental agreement fails and legislatures fail to act unilaterally, these problems fall to the courts, which must act unilaterally, although they may have regard to reciprocity or comity as quasi-unilateral strategies. When faced with these problems, courts may refuse to embrace the complexity of the problem and simply apply forum law or defer to foreign law.[50] Alternatively, courts may embrace complexity and seek to "negotiate with themselves" a resolution in accordance with the methodology described here.[51]

B. *The Argument*

The remainder of the Article is organized as follows. Part II analyzes three significant and representative approaches to conflict of laws:[52] (1) Beale's vested rights theory; (2) Currie's

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48. By "unilaterally", I mean simply that the decision is made without negotiating with other jurisdictions, and is not necessarily referring to the unilateralist tradition in conflict of laws, which would require courts to consider conflicts questions solely from the standpoint of forum policy, determining the scope of application of forum law. This tradition is often distinguished from the multilateral tradition, which approaches conflicts as a choice among competing jurisdictions. *See* JUENGER, *supra* note 1, at 13-14.

49. There are significant criticisms of the ability of legislatures to resolve conflict of laws problems. *See, e.g.*, Donald Trautman, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1612, 1620 (1981) ("I believe legislative direction is inherently incapable of capturing the nuance and sophistication necessary for just and satisfactory choice-of-law solutions.").

50. Sometimes courts manage to throw the case out of court altogether, for example under the principle of *forum non conveniens*. Indeed, Currie encouraged such action: "the best way for the courts to handle the case of the disinterested third state is, first, to dismiss on *forum non conveniens* grounds where that is an appropriate disposition." CURRIE, *supra* note 1, at 607. Often an underlying concern of *forum non conveniens* doctrine is uncertainty of the governing law, or discomfort with the task of applying foreign law. *See In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd and modified*, 809 F.2d 195 (2d Cir. 1987). *See also* materials cited in notes 7 and 8, *supra*; Maier & McCoy, *supra* note 5; Allen R. Stein, *Forum Non Conveniens and the Redundancy of Court Access Doctrine*, 133 U. PA. L. REV. 781 (1985).

51. One option courts do not generally have, and one source of the comparative disadvantage of courts in this area, is the ability of the political branches of government to negotiate with foreign governments regarding which society's rules should govern a particular matter.

52. I have by necessity left out several significant approaches, including von Mehren and Trautman's functionalism, VON MEHREN & TRAUTMAN, *supra* note 5;

interest analysis; and (3) Leflar's choice influencing considerations and better law factor.[53] This analysis indicates that each of the conflict of laws theories examined may be viewed as an attempt, in an imperfect world, to approximate, albeit inaccurately, the solution provided by this Article's proposal. In this sense, these theories, although flawed themselves, provide a sort of inductive support for the proposal.[54] The proposal, however, rests more strongly on a deductive analysis.

Part III analyzes the two major antecedents of the proposal: (1) Baxter's comparative impairment approach and (2) early law and economics work on conflict of laws.

Part IV builds on Parts II and III to provide a more detailed deductive articulation of this Article's proposal, to explain some complexities, and to seek to address some potential criticisms implicated by the proposal. In this discussion, the private and public distinction in conflict of laws is addressed and then related to the unilateral and multilateral distinction.[55] Part IV addresses the problem of accuracy in conflict of laws, relating it to the definition of "effects," which in turn is related to the definition of

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Savigny's seat test, FRIEDRICH C.V. SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS, AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME 42-46 (1869), and the *Restatement Second*'s most significant connection test, RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter RESTATEMENT SECOND]. However, the approaches described are sufficient to make my points.

53. Rather than try to repeat what others have done well, I have tried to provide an account that is harnessed to my purpose. For this reason, I have left out important aspects of these theories. However, I do not believe the omitted aspects are material to my purpose.

54. This support could be based, in part, on the presumed efficiency of the common law: (i) the common law is efficient; (ii) the common law has increasingly approximated the outcomes of the proposal; therefore, (iii) the proposal is efficient. There is a voluminous literature arguing the issue of the relative efficiency of the common law, and its implications. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980). Similar inductive support might also be based on the fact that legislative and treaty law, as well as adjudication, frequently arrive at similar conclusions to those indicated by the proposal.

55. This is the unilateralist/multilateralist distinction described *supra* at note 48. *See also, e.g.*, FOUNDATIONS, *supra* note 47, at 1:

> Is the choice between two states' laws an *external* and objective one, based on methods or rules that are in some measure independent of the preferences of the particular alternative states whose laws might be chosen? . . . Or is the perspective the *internal* perspective of one of the alternative states, namely the one that is now charged with deciding the case?

(emphasis in original), quoted in Harold G. Maier, *Baseball and Chicken Salad: A Realistic Look at Choice of Law*, 44 VAND. L. REV. 827, 830 (1991).

state policy. Of course, the very definition of policy itself is troublesome, as one must be careful to encompass the full scope of public policy, including the varying local policies that may be expressed in a single prescription, the "multistate policies"[56] that are of increasing importance, as well as the policies of predictability and administrability.[57] In order to provide a point of departure for the approach to effects, which amounts to an arguably normative basis for conflicts analysis, Professor Brilmayer's rights-based method of arriving at normative foundations of conflict of laws is examined.[58]

Finally, Part V, discusses some policy implications of the proposal, and includes some concluding observations. The Article seeks to describe how its proposal may be applied in discourse, adjudication, legislation, and intergovernmental negotiation.

II. THE PROBLEM WITH CONFLICT OF LAWS

Ever since Currie, Cook, and Cavers discredited Beale's "vested rights" theory,[59] no successor theory has met with widespread acceptance.[60] This part of the Article, provides brief

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56. *See* VON MEHREN & TRAUTMAN, *supra* note 5, at 215-326 (1965).

57. Administrability has been the focus of some law and economics literature on conflict of laws. *See, e.g.*, ECONOMIC ANALYSIS, *supra* note 23, at 587; THE FEDERAL COURTS, *supra* note 23, at 305-06. *See also*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (describing von Ihering's concept of formal realizability, similar to administrability, as one of the central touchstones of argument in private law adjudication).

58. FOUNDATIONS, *supra* note 47; *see also* Lea Brilmayer, *Rights, Fairness and Choice of Law*, 98 YALE L.J. 1277 (1989); Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293 (1987).

59. *See infra* note 105. The vested rights theory was articulated in the *Restatement First of Conflict of Laws*. RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934) [hereinafter RESTATEMENT (FIRST)]. "In their heyday, the vested rights theories ultimately embodied in the first Restatement of Conflicts were consonant with formal approaches to justice that sought predictability and uniformity at any price. The price—failure to respond to policy—has proved too high a price to pay." Donald T. Trautman, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1612, 1613 (1981) (citations omitted). *But see*, Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987).

60. In 1989, Professor Solimine counted that, within the United States, about 23 states follow the *Restatement Second*, 14 follow *lex loci delicti* (this count may be congruent with vested rights), four follow Professor Leflar's approach and one (California) follows Professor Baxter's approach. Of the remaining eight, two follow a presumption of the applicability of forum law and six follow some form of unclassified interest analysis. Solimine, *supra* note 23, at 54-55 nn.32-33. Professor Solimine has updated and explicated certain components of this count.

sketches[61] of three leading approaches to conflict of laws: (1) Beale's vested rights approach;[62] (2) Currie's interest analysis;[63] and (3) Leflar's choice influencing considerations and better law factor.[64] Part III of this Article then examines the major antecedents of the proposal: (1) Baxter's comparative impairment approach;[65] and (2) the emergent law and economics approach. The purpose of this discussion is to describe, from several perspectives, the problem with conflict of laws, and to provide a reference to be used to show how these formulations are (and are not) encompassed by this Article's proposal. It is hoped that this exposition will also further delineate the proposal.

A. *Fundamental Issues in Conflict of Laws*

The following are the four diads that together comprise the fundamental issues in conflict of laws.

Michael E. Solimine, *Choice of Law in the American Courts in 1991*, 40 AM. J. COMP. L. 951 (1992).

61. For more complete overviews of the development of choice of law theory, see LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 215-47 (1986), ROGER C. CRAMTON ET AL., CONFLICT OF LAWS 1-135 (4th ed. 1987), and EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 4-47 (1982).

62. JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935). Beale's approach was incorporated in the *Restatement (First)*. RESTATEMENT (FIRST), *supra* note 59. This approach is sometimes described as the territorial, *situs* or *lex loci delicti* approach. Solimine, *supra* note 23, at 57. Juenger notes that the *lex loci delicti* rule is not only subject to numerous exceptions, but there is no agreement on what "place of the wrong" means. According to some authorities, the law of the place of wrongful conduct controls; according to others, the law of the place of injury, and in several states, such as France, the question of which of the two applies is unsettled. JUENGER, *supra* note 1, at 50 (citations omitted).

63. *See* CURRIE, *supra* note 1. Currie's approach had a significant influence on the *Restatement Second*.

64. Professor Leflar expanded on Currie's approach, positing a balancing test to resolve "true conflicts" which, among its other considerations, considers what law provides the "better rule". Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966) [hereinafter *Choice-Influencing Considerations*]; Robert A. Leflar, *Conflicts · Law: More Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1586-1588 (1966) [hereinafter *More Choice-Influencing Considerations*]. *See also* ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW (4th ed. 1986).

65. Baxter, *supra* note 14.

1. Predictability and Administrability Versus Accuracy[66]

This first diad accepts the notion that there is a tradeoff between simplicity and accuracy: the more we simplify, the less accurate we can be in conflicts determinations. This diad is derived, but distinct, from another diad familiar in the literature: conflicts justice versus substantive justice. Predictability, certainty, and uniformity of result are normally viewed as comprising the term "conflicts justice." Predictability and certainty are the central conflicts justice factors that are considered under the first diad. Predictability is equated with what Professor Baxter refers to as "primary predictability"—the ability of people to plan their affairs based on the knowledge of the law that will govern their conduct in the event of litigation.[67] Certainty is related to what Baxter terms "secondary predictability": the ability of lawyers to predict what law will be applied once a matter is brought to litigation.[68] However, certainty may be important less for this reason than for another reason: administrability—the ability of courts to apply conflicts rules with certainty at minimum cost. Uniformity of result, which is often included in this diad under the heading of "conflicts justice," is considered below as a part of the diad between unilateralism and multilateralism. However, without uniformity of result among all possible fora, predictability and certainty are jeopardized.

Most importantly, "accuracy" is referred to under this first diad, rather than substantive justice. As set forth more fully below, the idea of substantive justice as a concern of conflict of laws should be approached with extreme caution.[69] "Accuracy" connotes the idea that there is something normative involved in determining which legal rules apply to particular matters.[70] The normative issue is not, however, substantive justice in the outcome of the case, but accuracy in determining which legal rules

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66. There is little new in this diad. *See, e.g.*, Paul H. Neuhaus, *Legal Certainty Versus Equity in the Conflict of Laws*, 28 LAW & CONTEMP. PROBS. 795 (1963).

67. Baxter, *supra* note 14, at 3.

68. *Id.*

69. *See infra* text accompanying notes 143-65.

70. One might argue that accuracy has something to do with the proscription of arbitrariness found in Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-313 (1981) (plurality opinion). By requiring that choices of law be based on "[s]ignificant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair," this opinion established a requirement for some degree of accuracy. *Id.* at 313. Unfortunately, in the *Allstate* decision, the Court accepted a relatively low degree of accuracy. *Id.*

best match the particular matter.[71] "Conflicts justice," like any other "procedural" value, is worthy of protection and must sometimes trump a particular judge's views of "substantial justice."[72] Indeed, this type of accuracy may be the type of systemic value that speaks to the fundamental structure of our society, like a constitution, and may therefore be worthy of extraordinary protection.[73]

It is worth noting that there is an additional relationship between predictability and accuracy. Predictability may be viewed as the realization, in private conduct, of accuracy: it allows private actors to conform their conduct to the appropriate or accurate rule and thus to act efficiently.[74]

2. Unilateralism Versus Multilateralism

This second diad addresses the question of whether the forum, in making conflicts decisions, should think in terms only of forum policy or interests, or of the policies or interests of other jurisdictions as well. While many conflicts specialists apparently agree that this is a critical and central issue, it has been disputed whether this dichotomy is actually as sharp as sometimes drawn. It is clear that forum self-interest must include regard for other fora. Thus, a forum with a long-sighted perspective on a conflict of laws problem will wish to integrate nonforum policies into its analysis. It will do so in anticipation of reciprocity, in order to avoid overextensions of its power and legitimacy and because, under the proposal, it would in any event be accorded power sufficient to address local effects (subject to concerns of administrability). Perhaps the better question is how much unilateralism and how much multilateralism should figure into the forum's considerations?

As noted above, however, this issue is important for another reason: it affects predictability and accuracy. If each forum approaches conflicts issues from its own narrowly unilateral, parochial perspective, each forum will determine in a different way which law to apply. This difference further diminishes predictability and accuracy by raising the potential for effective forum shopping.

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71. One might call this procedural justice or a different kind of conflicts justice.

72. *See* FOUNDATIONS, *supra* note 47, at 153-55.

73. *See infra* text accompanying notes 155-62.

74. *See* FOUNDATIONS, *supra* note 47, at 176-77.

3. Private Versus Public Interests

This third diad considers whose interests are addressed by conflict of laws; the state or the private person. In truth, this is an only partially valid distinction. The critical factor in this diad is public interests, which, in a market economy, include private interests. Sometimes the public interest is the protection of private interests. When it is not, conflict of laws (and law generally) should not be concerned with private interests. Traditional conflict of laws or private international law contained a "public law taboo"[75] that prevented courts from giving effect to foreign fiscal, regulatory, or penal law.[76] However, "the classical

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75. Andreas Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 R.C.A.D.I. 311, 323-24 (1979); ANDREAS LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 1 (1993) ("Traditionally, in all countries, conflict of laws has been confined to controversies under private law."). The English case of Holman v. Johnson, 98 Eng. Rep. 1120 (K.B. 1775), is often cited for this principle. *See* Baxter, *supra* note 14, at 12 n.26 ("The dictum of Mr. Chief Justice Marshall in The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825), that 'the courts of no country execute the penal laws of another' has been applied in the choice-of-law context, sometimes narrowly, Loucks v. Standard Oil Co., 120 N.E. 198 (1918), and sometimes broadly, Doggrell v. Southern Box Co., 208 F.2d 310 (6th Cir. 1953), but has never been adequately justified."). *See also* Jeffery C. Atik, Note: *The Problem of Reciprocity in Transnational Enforcement of Tax Judgments*, 8 YALE J. WORLD PUB. ORD. 156 (1981).

76. This public law taboo is breaking down in piecemeal ways. First, it is recognized that a conflict of laws for public law is necessary. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 401-403 (1987) [hereinafter RESTATEMENT (THIRD)] (establishing a system for determining the propriety of assertions of prescriptive jurisdiction). Second, governments make positive law in this area by entering into agreements that allocate jurisdiction. So far, this has occurred mostly in the area of taxation by virtue of double taxation treaties, and within the European Community. With respect to enforcement of tax laws in the United States interstate system, see FOUNDATIONS, *supra* note 47, at 160 n.30. In the international arena, much of the progress has been at the administrative cooperation level. International tax treaties typically include enforcement cooperation provisions. *See, e.g.*, RICHARD L. KAPLAN, FEDERAL TAXATION OF INTERNATIONAL TRANSACTIONS 370-82 (1988); SOL PICCIOTTO, INTERNATIONAL BUSINESS TAXATION 58-63 (1992); Karen B. Brown, *Allowing Tax Laws to Cross Borders to Defeat International Avoidance: The Convention on Mutual Administrative Assistance in Tax Matters*, 15 BROOK. J. INT'L L. 1 (1989); MICHEL W.E. GLAUTIER & FREDERICK W. BASSINGER, A REFERENCE GUIDE TO INTERNATIONAL TAXATION 385 (1987). The United States Securities and Exchange Commission has negotiated a series of memoranda of understanding on enforcement cooperation. *See, e.g.*, Elizabeth E. Barlow, Note, *Enforcing Securities Regulations Through Bilateral Agreements with the United Kingdom and Japan: An Interim Measure or a Solution?*, 23 TEX. INT'L L.J. 251 (1988); United States Securities and Exchange Commission, *Report of the Staff of the U.S. Securities and Exchange Commission to the Senate Committee on Banking, Housing and Urban Affairs and the House Committee on Energy and*

distinction between public and private law, in so far as it affects transnational activity, has long been overtaken—one could well say overwhelmed—by events."[77] Because private law no longer can be said to be a mere matter of taste having no impact on public policy, a conflict of laws for public law is needed.[78] This third diad is related to the first diad, as predictability is the type of private value that also should be considered a public value in a market economy.

4. Institutional Competence: Courts Versus Legislatures

This fourth diad raises the question of which issues are appropriate for determination by courts, and which issues should be left to legislatures. This is a question of relative institutional competence, of administrability (relating to the first diad), and of political legitimacy (or "horizontal" federalism). Conflict of laws goes to the core of political power. Many are skeptical of the ability and the legitimacy of courts determining the bounds of states' political power. This issue relates to the scope of forum power, as well as to the scope of foreign power. Therefore, in the international conflicts setting, it is a foreign policy issue, which normally is committed to the executive branch.[79]

B. *Form Over Substance: Beale's Vested Rights Approach*

Vested rights is the doctrinal approach to conflict of laws most firmly associated with traditional legal scholarship, and the view of law as an autonomous discipline able to decide cases in

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Commerce on the Internationalization of the Securities Markets VII-27-77 (1987); Ronald E. Bornstein & N. Elaine Dugger, *International Regulation of Insider Trading*, 1987 COLUM. BUS. L. REV. 375 (1987). Finally, the United States Department of Justice has signed some enforcement cooperation agreements in the area of antitrust. *See, e.g.*, Agreement on the Application of Their Competition Laws, September 23, 1991, *reprinted in* 30 I.L.M. 1487 (1991); Memorandum of Understanding as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws, March 9, 1984, U.S.-Can., *reprinted in* 23 I.L.M. 275 (1984).

77. Lowenfeld, *supra* note 75, at 326.

78. *See* Weintraub, *supra* note 30, at 1818 (arguing that neither a choice-of-law approach nor the effects test is appropriate in the area of public law, such as securities regulation or antitrust).

79. Courts may avoid this foreign policy issue under the rubric of *forum non conveniens*, the act of state doctrine, or perhaps sovereign immunity, but otherwise may be placed in the uncomfortable position of making foreign policy when they determine the scope of forum or foreign law.

isolation from political, economic, or social factors.[80] It envisions that rights will "vest," or attach, in a particular jurisdiction, based on the occurrence of certain events in that jurisdiction. For example, rights to sue in tort would vest upon the occurrence of legal injury, duty, and causation.[81] Once rights have vested in one jurisdiction, they are to be respected in other jurisdictions. Thus, the law of the jurisdiction in which the last event occurs to cause the rights to vest governs in connection with the vested rights.[82] This approach was articulated by Professor Beale, the reporter for the *Restatement (First) of Conflicts of Laws (Restatement (First))*.

1. Predictability and Administrability Versus Accuracy

One purported advantage of the vested rights approach is that "[i]t . . . makes a selection by reference to objective criteria without regard to the content of the substantive rules that compete for application."[83] Thus, vested rights provides a theoretical predictability, certainty and uniformity of result, not to mention administrability. These results appear far more difficult, if not impossible, to achieve under the interest analysis, better law, or

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80. "Choice of law was among the last hold-outs for the formalistic, metaphysical, overly conceptualistic approaches to law; Currie brought it down to earth." Bruce A. Posnak, *Choice of Law: Interest Analysis and Its "New Critics,"* 36 AM. J. COMP. L. 681, 701 (1988). *See* Russell J. Weintraub, *The Conflict of Laws Rejoins the Mainstream of Legal Reasoning*, 65 TEX. L. REV. 215 (1986). *See also* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987). In an article describing the increasing inability of legal reasoning to stand alone, Judge Posner criticizes the "destruction of certainty in the field of conflict-of-laws . . . as a result of the replacement of mechanical rules (such as the rule of *lex loci delicti*) by 'interest analysis' and its many variants." *Id.* at 770. He indicates that this destruction is one of many legal reforms engineered by lawyers that "appear to have miscarried" because of a failure to bring social science methodology to bear. *Id.* at 769. Interestingly, the departure from *lex loci delicti* requires that courts embrace the world of policy, as Judge Posner recommends. *See infra* text accompanying notes 195-207.

81. *See* RESTATEMENT (FIRST), *supra* note 59, §§ 378, 382, 383 (1934).

82. *See* RESTATEMENT (FIRST), *supra* note 59, §§ 42, 55, 64, 311 cmt. d, 323, 325 (contract), 377-78, 384 (torts) (1934). In fact, the vested rights doctrine as articulated by Beale holds that forum courts never apply foreign law, but merely enforce rights that vested in the foreign territory. *See* 1 JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS 1-2, 53, 274-75, 290-91 (1935); 3 *id.* at 1925, 1967-70, 1973-75. This was one of its theoretical shortcomings. *See* Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 3 (1984) [hereinafter *A Critique*].

83. *A Critique*, *supra* note 82, at 2.

comparative impairment approaches, each of which requires a certain amount of analysis and judgment.

The main theoretical problem of vested rights is the assumption that it would be possible for courts or governments of different jurisdictions to agree on when a right in fact vested.[84] This assumption may be grounded in *jus gentium*, or natural law theory, which holds that there is a basic similarity among legal systems.[85] This similarity would make it possible to have the same basic set of circumstances constitute "vesting" in all jurisdictions. A related theoretical problem, with practical consequences, is the problem of characterization, that is, what sort of legal problem a given set of facts presents. If a matter is characterized as falling under one doctrinal heading as opposed to another, a different conflict of laws rule might apply.[86] Courts are thus able to manipulate outcomes by manipulating characterizations.[87] Moreover, harmony cannot be achieved because characterizations differ, in good faith, from jurisdiction to jurisdiction.[88]

More important perhaps than these theoretical weaknesses was the practical problem that the vested rights theory did not produce the predictability and administrability that it promised. Interestingly, its failure to produce predictability and administrability arose because courts rebelled against the perceived substantive injustice its strict application would work.[89] Courts developed exceptions, called "escape devices," to the clear vested rights rules of the *Restatement (First)*, which frustrated its intent to provide predictability and administrability. These devices

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84. Without such agreement, the conflict of laws benefits of predictability, certainty, and uniformity of result would not be available, as results would depend on the forum selected, which would determine the rule for determining whether the relevant rights vested.

85. *See* JUENGER, *supra* note 1, at 9. The term *jus gentium* is used by Cicero "in the sense of a legal system based on natural reason and having a universal purport." *Id.* Of course, the existence of a universal law would obviate the need for conflict of laws rules.

86. *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 47-49 (3rd ed. 1986); JUENGER, *supra* note 1, at 70-74.

87. *See, e.g.*, Haumschild v. Continental Casualty Co., 95 N.W. 2d 814 (Wis. 1959) (finding that family law, rather than tort law, was the proper doctrinal heading for an interspousal immunity issue, and consequently applying the law of the place of family domicile, rather than that of the *lex loci delicti*).

88. Again, the lack of *jus gentium* uniformity belied the possibility of uniform categories of "characterization" among jurisdictions.

89. This might be considered an instance of courts moving from an inefficient—inaccurate—common law system, to a more accurate one. *See* sources cited *supra* note 54. Here, it is clear that accuracy is not mere Weberian predictability and administrability, but something more substantive.

included the distinction between substantive and procedural matters,[90] the possibility of *renvoi*,[91] and the public policy exception.[92]

This Article's proposal values predictability, certainty, and uniformity of result. It especially values what Baxter calls "primary predictability": the ability of persons at the time they are conducting their business to predict the legal consequences of that conduct.[93] In fact, law and economics, in its liberal proceduralist zeal, might err by holding that primary predictability is the only important value in conflict of laws.[94] However, the proposal recognizes, as with Judge Posner and others, the need for a tradeoff not between conflicts justice and substantive justice, but between predictability and administrability, on the one hand, and accuracy, on the other.

Thus, this Article's proposal values the predictability and administrability promised by the vested rights theory. It would recommend the use of formulas like those established under the *Restatement (First)*, provided that the following condition is satisfied: The incremental administration and unpredictability costs that are saved by avoiding "full" analysis must exceed the costs incurred by virtue of the relative inaccuracy of the formulas.[95] The references used by the formulas must be accurate enough—sufficiently reliable proxies for a full analysis—that the use of judicially-created escape devices would not grow to diminish the amount of administrative cost savings to the extent

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90. The substantive/procedural distinction, allows the forum court to apply its local procedural law, but leaves open the definition of "procedural." *See, e.g.*, Grant v. McAuliffe, 264 P.2d 944 (Cal. 1953) (applying California survival statute, despite fact that Nevada was the *lex loci delicti* of automobile accident between California residents).

91. "Renvoi" is the curious phenomenon in which one jurisdiction's conflict of laws rules may select the law of a second jurisdiction, and that second jurisdiction's conflict of laws rules select the law of the first jurisdiction. *See, e.g.*, Arthur T. von Mehren, *The Renvoi and its Relation to Various Approaches to the Choice-of-Law Problem*, *in* XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 380, 381 (1961); WEINTRAUB, *supra* note 86, at 66-71.

92. This analysis returns to the public policy exception below. *See infra* text accompanying notes 98-101.

93. Baxter, *supra* note 14, at 3. Baxter contrasts primary predictability with secondary predictability: the ability of lawyers to predict the outcome once a matter is litigated and the identity of the forum is known.

94. Posner seems to tend in this direction in some of his work on the subject. *See supra* note 80.

95. Here I assume that accuracy can be defined and measured. *See* discussion *infra* part IV.C. Accuracy is valuable because it reduces transaction costs in allocating costs of conduct to those responsible for the conduct.

that the first condition is no longer satisfied.[96] When this condition is not met, other approaches would be indicated. In this sense, the proposal is eclectic.

2. Unilateralism Versus Multilateralism

Vested rights theory is commonly viewed as multilateralist in its perspective.[97] This theory is multilateralist insofar as it calls upon the forum to treat all jurisdictions equally according to its formulas. If the *loci delicti* is Dystopia, then Dystopian law governs the tort. Vested rights theory thus also seeks to satisfy the criterion of uniformity of result often associated with "conflicts justice."

The exception to *lex loci delicti* on the basis of inconsistent forum public policy is applied on the rationale that a forum court should not be required to contradict its own public policy.[98] The bounds of the public policy exception are uncharted,[99] and scholars sometimes refer to the border between hospitality to foreign law and assertion of forum's policy as "comity."[100] The public policy exception therefore calls into question the predict-

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96. It is only in this sense that the ability to achieve "substantive justice" seems relevant.

97. *A Critique*, *supra* note 82, at 2.

98. *See, e.g.*, Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, 249 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947):

> [I]t is a well-settled exception to the usual doctrine that a court of the forum will take as its model the rights and liabilities which have arisen where the transactions took place, that the foreign rights and liabilities must not be abhorrent to the moral notions of its own state.

Id. See also Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51 (2d Cir. 1965) (rejecting application of foreign law "contrary to our public policy and shocking to our sense of justice"), *cert. denied*, 382 U.S. 1027 (1966). This exception has its roots in Huber's *De Conflictu Legum Diversarum in Diversis Imperiis*, *reprinted in* ERNEST LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS 162-80 (1947). Huber posited that a forum state would refuse to apply rights acquired abroad if they would prejudice the forum's policies. *Id.* at 164.

99. *See* Friedrich K. Juenger, *General Course on Private International Law (1983)*, 193 HAGUE RECUEIL DES COURS [H.R.D.C.] 119, 201 (1985) ("[T]he very concept of public policy spells uncertainty, unpredictability and lack of uniformity.") Juenger explains that Savigny separated these rules of public policy from what might, for want of a better term, be called mandatory law, or "*lois de police*, rules of immediate application and self-limiting rules." JUENGER, *supra* note 1, at 81. However, one might well inquire how these rules differ from peremptory rules of public policy, or on the other hand, from the category of public law more generally.

100. For analytical discussions of comity, see Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991); Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 94 (1991).

ability, certainty, uniformity, and the very legal nature of the whole conflict of laws enterprise. It makes it possible for any forum's policy to trump otherwise applicable foreign law. It is, then, a method of shifting from multilateralism to unilateralism. Moreover, it is no less than the entire conflict of laws question embedded in a doctrinal exception.[101]

Thus, vested rights theory purports to be multilateral. But, it has significant potential for unilateralism, in part because of its inaccuracy, or failure to implement the forum's policy in appropriate circumstances.

3. Private Versus Public Interests

Vested rights theory looks to private interests, or at least private rights, seeking to hold these rights intact after they vest, despite the cross-border nature of a transaction. It does not consider public interests, except under the public policy exception discussed above. Subject to the public policy exception, it thus assumes either that conflict of laws decisions do not affect public policy or that conflict of laws decisions under the vested rights theory are congruent with public policy.[102] Yet it is clear that conflict of laws decisions can affect the implementation of public policy, and that decisions under vested rights are not necessarily congruent with effective application of public policy.[103] Currie argued that "the traditional system of conflict of laws counsels the courts to sacrifice the interests of their own states mechanically and heedlessly, without consideration of the policies and interests involved. . . ."[104]

4. Courts Versus Legislatures

Vested rights theory anticipates little need for legislative action. Rather, its private law orientation is consistent with a common law approach, and its relatively administrable formulas are appropriate for judicial application. Thus, if the vision that

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101. The public policy exception has not had as significant an effect in United States interstate conflicts of law as it has had in Europe, as United States judges are more reluctant to criticize sister-state law as offending forum public policy. JUENGER, *supra* note 1, at 88-89.

102. *See infra* text accompanying notes 245-61.

103. Some vested rights formulae may have a degree of congruence with public policy. Judge Posner argues that *lex loci delicti* may indicate the application of the law with the "best fit." *See infra* text accompanying notes 196-207.

104. CURRIE, *supra* note 1, at 278.

public policy is irrelevant to conflicts issues were correct, it would also make sense that legislatures would not involve themselves with conflicts issues. This is a commentary less on the competence of courts than on the ambit of legislatures.

C. *Forum Policy Over Predictability and Administrability: Currie's Interest Analysis*

Currie, along with Cavers and Cook, led a revolution away from the triumph of form over substance that characterized the vested rights approach.[105] This revolution was fueled by the discontent regarding the above-described theoretical and practical shortcomings of the vested rights approach.[106] A counter-revolution, or perhaps a new revolution, is currently being led, albeit in different directions, by Professors Brilmayer[107] and Juenger.[108]

Currie's early interest analysis focused unilaterally on the forum's interest, holding that forum law should apply whenever the forum had an applicable policy.[109] Thus, Currie's analysis was,

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105. *See* WALTER W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1949); CURRIE, *supra* note 1; David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933). *See also* Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210 (1946). Currie wrote that "Walter Wheeler Cook discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another." CURRIE, *supra* note 1, at 6. However, Currie extended Cook's analysis and established the interest analysis approach as a competing system.

106. This revolution was also supported by two decisions of the Supreme Court: Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939). These cases confirmed that more than one state might apply its law to a single matter, because each had a sufficient interest in giving effect to its law and policy. This departure was inconsistent with vested rights theory, holding that only the state in which the right vested, based on the occurrence of the last event, would have prescriptive jurisdiction. *See also* Freund, *supra* note 105. Currie relied on these cases to develop his interest analysis methodology.

107. *See, e.g.*, FOUNDATIONS, *supra* note 47; Lea Brilmayer, *Rights, Fairness and Choice of Law*, 98 YALE L.J. 1277 (1989); Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459 (1985). *See also infra* text accompanying notes 249-59, 268-79.

108. See, e.g., JUENGER, *supra* note 1; Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1 (1984); Friedrich K. Juenger, *Governmental Interests—Real and Spurious—In Multistate Disputes*, 21 U.C. DAVIS L. REV. 515 (1988).

109. CURRIE, *supra* note 1, at 183-84:

> 1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum . . . .

in essence, twofold. First, he found a forum policy that was potentially applicable. Second, he determined whether sufficient relationships existed between the subject matter and the forum's policy to justify application of forum policy to the subject matter: he determined whether the forum had an "interest."[110] If Currie found that no forum policy was applicable, or that no foreign policy was applicable, the matter would be termed a "false problem," or a false conflict, and the law of the interested state would be applied.[111] This method is distinct from balancing tests, insofar as it only looks at forum policy to determine the applicability of forum policy, and only considers contacts as a basis for interpreting whether the forum policy was intended to apply.[112]

1. Predictability and Administrability Versus Accuracy

The limited contribution to administrability that interest analysis provides comes not from specific rules relating particular matters or persons to jurisdictions, but from the ability of courts (and perhaps individuals) to determine governmental policies and interests by the "ordinary processes of construction and interpretation."[113] This construction and interpretation is

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4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.

5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy.

Id.

See Kay, *supra* note 1, at 60-78 (dividing Currie's work into two stages: the first stage, consisting of the "selfish state" that would pursue only its own short-term interests and not consider foreign law, and the second stage, consisting of the "moderate and restrained state" which would consider foreign law).

110. CURRIE, *supra* note 1, at 183-84. "It is true that many of the 'connecting factors' that are familiar in choice-of-law rules will be found relevant in determining the extent of a state's interest in the application of its law and policy." *Id.* at 590. For an analysis of the term "interest", see Kay, *supra* note 1, at 105-11.

111. CURRIE, *supra* note 1, at 107-10.

112. *See* JUENGER, *supra* note 1, at 99-100.

113. Brainerd Currie, *The Governmental Interest Methodology*, *in* WILLIS L.M. REESE ET AL., CASES AND MATERIALS ON CONFLICT OF LAWS 487-88 (9th ed. 1990).

intended to divine the legislative intent regarding the scope of prescriptive jurisdiction.[114]

However, in cases of false conflicts (the easy cases), Currie's interest analysis provides a relatively administrable rule: apply the law of the interested jurisdiction. In cases of conflicts of governmental interests, Currie's interest analysis values administrability as well as forum political legitimacy over accuracy, suggesting that the forum simply apply its own law.

Professor Brilmayer has led the argument that policies—legislative goals—are difficult to determine with any certainty.[115] Interests—the circumstances under which a policy is applicable—are even more difficult to determine, as legislatures rarely speak to this issue, yet presumably interests must also be determined from evidence of legislative intent.[116] Are interests to be defined subjectively or objectively? Most importantly, and similar to the attacks made on vested rights theory, Brilmayer argues that interest analysis is indeterminate, arbitrary, and manipulable.[117] "Assumptions such as the one that there are 'interests' in protecting local residents are unmasked as merely a priori assumptions about how far interest analysts think that legislation *ought to reach*."[118]

Without further empirical study, it is impossible to know whether Currie's interest analysis is more or less predictable and administrable than Beale's vested rights approach. As many have pointed out,[119] predictability is a circular argument, although one might be forgiven for thinking that vested rights, with its preset formulas, would be more predictable than interest analysis, which requires individual analysis of particular laws and legislative intent.[120] On the other hand, administrability depends on the ease with which a judge may decide the case, and both these techniques seem to have similar degrees of ambiguity

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114. Professor Juenger argues that Currie did not actually abandon the search for appropriate contacts, as the determination of interests, as opposed to policies, requires some contacts. Juenger argues that the contacts Currie found most significant were often personal, as opposed to territorial ones. JUENGER, *supra* note 1, at 99-100.

115. FOUNDATIONS, *supra* note 47, at 45-54.

116. *See id. See also*, Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980).

117. FOUNDATIONS, *supra* note 47, at 84-86.

118. *Id.* at 90-91.

119. *See, e.g.*, Baxter, *supra* note 14, at 3-4.

120. As Brilmayer points out, Currie's interest analysis leaves open the question of what to do about judge-made law, leaving a substantial gap in the treatment of private law. In this connection, one might argue that Currie's interest analysis is a more appropriate methodology for public law than for private law. *See* FOUNDATIONS, *supra* note 47, at 90-91.

and difficulty. Juenger points out that it is difficult for judges to "divine policies," as Currie thought they could.[121]

It is also impossible, without further empirical study, to know the extent of the tradeoffs of accuracy in the selection of applicable law necessary to achieve the administrability and predictability provided by these approaches. While vested rights analysis takes a relatively static and theoretical approach to accuracy, establishing certain a priori relations on which to base decisions, interest analysis takes a more flexible and pragmatic approach to accuracy. Currie's interest analysis, however, declines to analyze and compare governmental interests, and thus abstains from accuracy.

2. Unilateralism Versus Multilateralism

The most significant aspect of Currie's interest analysis, and a significant point of departure from vested rights theory, is its unilateralist perspective, at least in its early approach of considering only the interests of the forum state.[122] In Currie's final published article, he found a way to reconcile a type of interest analysis with multilateralism by, in effect, considering the broadest interests of the forum.[123]

This reconciliation depends on a relativistic approach to the narrow policy of the forum law, reducing its scope in light of broader "interstate or international system" type forum policies.[124]

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121. JUENGER, *supra* note 1, at 132-33.

122. *See* Kay, *supra* note 1, at 48-78.

123. Currie stated:

> [T]o assert a conflict between the interests of the forum and the foreign state is a serious matter; the mere fact that a suggested broad conception of a local interest will create conflict with that of a foreign state is a sound reason why the conception should be re-examined, with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate purpose.

CURRIE, *supra* note 42, at 757.

124. By this statement, Currie let the camel's nose into the tent. It is not clear how far Currie would license a court to develop a "more moderate and restrained interpretation." Recall Currie's earlier words:

> I do not know where to draw the line between the judicial legislation that is 'molecular,' or permissible, and that which is 'molar,' or impermissible. But assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order.

Brilmayer has criticized interest analysis on the basis that it focuses only on substantive interests, not on conflicts interests or diplomatic interests (one might call these multistate policies):[125] the interest in avoiding overreaching the state's limits.[126] Thus, Brilmayer states that "[o]ne might very well question the simple assumption . . . that a state maximizes its substantive self-interest by applying its law whenever it has an interest in having its law applied to the case before it."[127] There are at least three ways, however, in which Currie's range of interests might be viewed as inclusive of multistate policies. First, Currie did not specifically exclude multistate policies and might be interpreted in some places as having included them in his formulations.[128] Second, Currie's method includes a distinct step, after policies are determined, of determining interests.[129] This interest determination includes a consideration of multi-state policies, recognizing that when no appropriate nexus exists, no interest exists.[130] Third, in Currie's later work, he recognized that a policy might be moderated in cases of true conflicts.[131] This represents an accommodation between substantive policy and multistate policy. While we may agree that Currie is at least ambiguous regarding the inclusion of multistate policies, it appears clear today that interest analysis must consider a full range of interests and that doing so complicates the endeavor considerably.[132]

CURRIE, *supra* note 1, at 182 (citations omitted).

125. *See* VON MEHREN & TRAUTMAN, *supra* note 5, at 215-326.

126. FOUNDATIONS, *supra* note 47, at 71.

127. *Id.* at 75. Thus Brilmayer asks "[w]hy is it that only substantive policies matter, as opposed to choice of law policies?" *Id.* at 76.

128. *See, e.g.*, CURRIE, *supra* note 1, at 186 ("[T]here is room for restraint and enlightenment in the determination of what state policy is and where state interests lie.").

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

130. *Id.* at 727 ("Governmental-interest analysis determines the relevance of the relationship [between the case and the state with the potentially applicable policy] by inquiring whether it furnishes a reasonable basis for the state's assertion of an interest in applying the policy."). One might argue that this "reasonableness" test imports the same kind of multilateral approach as that of the *Restatement (Third)*'s "reasonableness" test. *See* RESTATEMENT (THIRD), *supra* note 76, § 403.

131. *See* CURRIE, *supra* note 42, at 764-85.

132. *See* CURRIE, *supra* note 1, at 186-87. Currie refers to criticism of his failure to consider "governmental policies other than those that are expressed in specific statutes and rules: the policy of promoting a general legal order, that of fostering amicable relations with other states, that of vindicating reasonable expectations, and so on." *Id.* He responds:

3. Private Versus Public Interests

Governmental interest analysis has been severely criticized for its failure to consider private interests, and its consideration of public interests in private law matters.[133] The argument for a separate conflict of laws for private law—one that does not consider public policy—is that these private rules are merely facultative and entail no public policy interests whatsoever. A determination of which rules should be applied, therefore, should not consider any aspect of public policy, but only private factors. Gerhard Kegel has argued this point forcefully, from a European conflict of laws tradition, criticizing Currie's interest analysis for failing to take account of the difference between private law and public law.[134] However, one may simply define Kegel's criticism out of existence by encompassing within public policy the facilitation of private commerce. In fact, Currie did this in 1961.[135]

Provided one accepts as part of public policy—as part of society's interest—the interest in efficiency in private transactions, there is no longer a preserved sphere for private law.[136]

> [L]et us first clear away the apparatus that creates false problems and obscures the nature of the real ones. Only then can we effectively set about ameliorating the ills that arise from a diversity of laws by bringing to bear all the resources of jurisprudence, politics, and humanism—each in its appropriate way.

Id. at 187 (citations omitted). This hopeful perspective is also frustrating: Currie is not willing to proceed to incorporate a full range of policies until vested rights is first defeated. It appears that vested rights is now defeated, and it is time to fulfill Currie's promise. This Article's proposal adopts the multidisciplinary approach recommended by Currie.

133. *See* Kegel, *supra* note 25; Kay, *supra* note 1, at 79-85; Friedrich K. Juenger, *Governmental Interests—Real and Spurious—in Multistate Disputes*, 21 U.C. DAVIS L. REV. 515, 518-30 (1988); JUENGER, *supra* note 1, at 123-28.

134. *See* Kegel, *supra* note 25.

135. Currie stated: "I can find no place in conflict-of-laws analysis for a calculus of private interests. By the time the interstate plane is reached the resolution of conflicting private interests has been achieved; it is subsumed in the statement of the laws of the respective states." CURRIE, *supra* note 1, at 610. Another way of looking at this issue is that "the private interests in choice cases are necessarily in balance, and that the cases can be decided by viewing them as instances of conflicting state interests rather than of conflicting private interests." Baxter, *supra* note 14, at 22.

136. From a law and economics standpoint, all law may be viewed as serving this purpose. Under this vision, all public law, as well as private law, is intended to reduce the transaction costs—the market failures—that would otherwise be incurred. *See* COASE, *supra* note 26, at 37-47. However, one might argue that not

One might state the converse of this: There is a public interest worth considering in conflicts problems, even those that relate to private law (if the term is meaningful). It seems a tautology that if government is unconcerned, then government should be uninvolved. There is an extensive body of law and economics scholarship analyzing traditional private law topics such as torts, contracts, and property (and in fact emphasizing these topics), finding that these "neutral" bodies of law may be more or less efficient, satisfying the public interest in efficiency to a greater or lesser degree.[137] If one accepts the premise of this analysis, there is a significant public interest in efficiency implicated by private law rules. The proposal of this Article recognizes this relationship.

4. Courts Versus Legislatures

Currie opposed interest balancing by courts: an explicit comparison of links with, or policies of, the societies competing for prescriptive jurisdiction.[138] He had two reasons for this view: institutional competence and democracy. Currie opined that courts lack the resources to analyze and balance policy interests.[139] Currie argued that courts also should not engage in balancing, as they lack the political legitimacy conferred by the democratic process and must act unilaterally, in conformity with the policy decisions of the legislature.[140]

Thus, Currie found only a secondary role for courts, as handmaidens of the legislature. Brilmayer and others have criticized interest analysis because it relies too much on forum positive law; courts and scholars are left no creative function, while legislatures have abdicated the conflicts function. This leaves a gap in coverage, which in practical terms means cases are decided without analysis of what makes sense. This relates strongly to Currie's forum law default option: in case of a clash of interests, the court must back away from controversy and apply its own law.[141] Currie's position is too absolute, but it is

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all law serves this purpose; some law may be equated with consumption from an economic standpoint: it reduces efficiency in order to provide something people want.

137. *See generally* ECONOMIC ANALYSIS, *supra* note 23.

138. CURRIE, *supra* note 1, at 182, 601-02; Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 75-84 (1958).

139. CURRIE, *supra* note 1, at 182.

140. *Id.*

141. *See* FOUNDATIONS, *supra* note 47, at 4-5.

motivated by a valid concern. The proposal recognizes that legislatures, executives, and courts have a role in the conflicts process, as politics is embedded in conflicts; the allocation of authority to these types of bodies would, in an ideal world, depend on their comparative advantages.[142]

D. *Judicial Discretion and Result-Oriented Substance Over Conflicts Justice: Leflar's Choice-Influencing Considerations and Better Law Factor*

Around the time of Currie's death in 1965, Professor Leflar introduced a system that provides extreme flexibility to the judge in balancing vague and possibly contradictory factors, including one factor that seems substantively attractive, but that belies any pretense that the field of conflict of laws might make toward procedural regularity.[143] Leflar included the question of which law is better as one of the factors to be considered in determining the applicable law.[144] If one were to disregard predictability and administrability, and if one were arrogant as to one's ability to determine whether one law soberly prescribed is better than another, the answer to the conflict of laws problem would be simple: apply the better law.[145] It should be noted that Leflar sought to be descriptive of what courts actually do, not to propose a coherent theory.[146]

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142. *See generally Uncertainty and Chaos*, *supra* note 6.

143. *See* sources cited *supra* note 64.

144. *See Choice-Influencing Considerations*, *supra* note 64; *More Choice-Influencing Considerations*, *supra* note 64, at 1586-88; ROBERT A. LEFLAR ET AL., *supra* note 64, at 298. Interestingly, as noted below, a law and economics approach that considered only private sector efficiency, and ignored (i) public sector efficiency—efficiency in the allocation of governmental responsibility—and (ii) predictability and administrability, would argue that the application of the most efficient rule (the law and economics definition of "best" law) makes the most sense. *See infra* text accompanying note 319.

145. Magister Aldricus, a Bologna glossator of the Middle Ages, voiced this solution. In response to a question regarding which law should apply to parties from different jurisdictions, he responded that the proper choice would be the "better and more useful" law. JUENGER, *supra* note 1, at 12; Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 12 (1966). Application of the better rule of law, however, is only one of Leflar's eclectic list of factors. This list includes the following: (A) Predictability of results; (B) Maintenance of interstate and international order; (C) Simplification of the judicial task; (D) Advancement of the forum's governmental interests; and (E) Application of the better rule of law. *See* LEFLAR ET AL., *supra* note 64, at 279.

146. *Choice-Influencing Considerations*, *supra* note 64, at 327 ("it is a somewhat idealized description of the present system of choice-of-law decision designed to accept substantially what happens now, together with current trends, and to

There are two relevant aspects of Leflar's system: its balancing test structure and its use of the better law factor. These aspects are related, as each affords great discretion to judges charged with determining conflicts cases. Other balancing test structures include the "most significant relationship" test contained in the *Restatement (Second) of Conflict of Laws (Restatement (Second))*,[147] the similar test contained in the *Restatement (Third) of Foreign Relations Law*,[148] and the "center of gravity" test used in New York.[149]

The better law approach may provide a means of judicial escape from an archaic or otherwise disfavored legal rule,[150] but it also provides an opportunity for ethnocentrism.[151] The law

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give the real reasons (which on the whole are good reasons) for the law as it currently operates."). In effect, Leflar argued the efficiency, or at least the relative quality, of the common law approach.

147. RESTATEMENT (SECOND), *supra* note 52, § 145(1): "The rights and liabilities of the parties . . . are determined by the local law of the state which . . . has the most significant relationship to the occurrence and the parties under the principles stated in § 6." *Id.* Section 6(2) refers to the following factors:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Id. § 6(2).

The *Restatement (Second)* contains references to specific factors in connection with specific types of cases, including contract (§ 188(2)) and tort (§ 145(2)). In this sense, it is a hybrid.

148. RESTATEMENT (THIRD), *supra* note 46, §§ 401-403.

149. *See* Babcock v. Jackson, 191 N.E. 2d 279, 284 (N.Y. 1963); Auten v. Auten, 124 N.E. 2d 99, 101-02 (N.Y. 1954). *See also* Miller v. Miller, 237 N.E. 2d 877, 879 (N.Y. 1968) (emphasizing state interests in conflicts analysis). The author thanks Professor Weintraub for pointing out that the New York Court of Appeals has recently characterized its approach in some types of cases as "interest analysis" rather than as the "center of gravity" approach. *See, e.g.*, Istim, Inc. v. Chemical Bank, 581 N.E. 2d 1042 (N.Y. 1991). The court appears to retain the center of gravity approach for contract cases. *See* Allstate Ins. Co. v. Stolarz (*In re* Allstate Ins. Co.), 613 N.E. 2d 936 (N.Y. 1993).

150. *See, e.g.*, Schlemmer v. Fireman's Fund Ins. Co., 730 S.W.2d 217 (Ark. 1987) (court applies Leflar's choice-influencing factors to find that Arkansas' "archaic" guest statute cannot bar recovery to a Tennessee plaintiff injured in Arkansas, even though injury caused by loss of control of automobile by Arkansas driver).

151. These opportunities for ethnocentrism seem readily embraced in current scholarship. *See* JUENGER, *supra* note 1, at 156 ("A choice-of-law mechanism that invokes one domestic rule of decision or the other without regard to its intrinsic merits is therefore bound to produce unsatisfactory results."); Joseph W. Singer, *A*

requires escape valves in varying contexts to allow justice to override formal rules. It is nevertheless worth evaluating the cost of the escape valves in terms of frustration of predictability and administrability, not to mention judicial error regarding what exactly is the best rule of law.[152]

1. Predictability and Administrability Versus Accuracy

One may consider balancing tests as precursors of this Article's proposal, insofar as they seek to weigh all of the relevant policy factors to arrive at decisions. To the extent that they consider predictability and administrability, on the one hand, and some form of accuracy, on the other, these tests would call for a court to compromise between them.

Balancing tests are troubling, however, because they contain no instructions to courts (or other users) about how to value the varying factors, which typically point in opposite directions.[153] For example, it is not clear how Leflar would handle the tradeoff between predictability and administrability (Leflar's factors (A) and (C)), on the one hand, and accuracy, on the other, as his factors might be read to include both.[154] Balancing tests are not

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Pragmatic Guide to Conflicts, 70 B.U.L. REV. 731, 747 (1990) ("[T]he first step in any conflicts analysis should be to determine which law is better as a matter of justice and policy."). While these statements are no doubt descriptive of judicial reasoning in many cases, "[h]owever much . . . in practice the judge's choice of law may be influenced by his preference for the content of one law or another, it is inadvisable to elevate a fact of human weakness to a principle of legislative policy." Otto Kahn-Freund, *General Problems of Private International Law*, 143 (III) H.R.D.C. 139, 466 (1974).

Conflict of laws should not seek to allocate power to those who use it the best, as it will never attain legitimacy on that basis. Rather, conflict of laws should seek to establish mechanisms that will encourage those allocated power to use it as best they can, by diminishing opportunities for externalization.

152. See Professor Juenger's solution *infra* in notes 155-60 and accompanying text.

153. For a scathing criticism, see Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat, 902 F.2d 1275, 1283 (7th Cir. 1990) (Easterbrook, J., concurring) ("I would be most reluctant to accept an approach that calls on the district judge to throw a heap of factors on a table and slice and dice to taste.").

154. Leflar recognizes this. *See Choice-Influencing Considerations*, *supra* note 64, at 281. Brilmayer points out that "the cases applying Leflar's system have not paid much attention to the factors of predictability and maintenance of interstate order." They have focused instead on forum interests and the choice of the better law. FOUNDATIONS, *supra* note 47, at 64-65. However, it is necessary to note that the choice of the better law is not the same as accuracy in the sense that I have used it. I have referred to accuracy as a type of conflicts accuracy—the

accurate, absent appropriate factors and a metric by which to measure each factor, and lack predictability if applied in a blanket fashion.

Professor Juenger has taken up the argument for the better law approach, calling it the "substantive" or "teleological" approach.[155] He points to the escape devices used to avoid the harsh results of the *Restatement (First)* and to the soft connecting factors of the *Restatement (Second)* as manifestations of this better law approach.[156] He argues that, since conflicts law never provided predictability in the past and judges are often in the position to make law,[157] one should not cavil at the possibility of diminished predictability and increased judicial legislation.[158] He accords little value to conflicts justice or to the procedural and systemic values provided by consistent and predictable rules.[159] However, he argues that his substantive approach "would yield

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application of the better-matched law, not necessarily the application of the better law.

155. *See* Friedrich K. Juenger, *What Now?*, 46 OHIO ST. L.J. 509, 523 (1985); JUENGER, *supra* note 1, at 191-237.

156. *Id.* at 233.

157. One scholar notes:

> In a democratic and pluralist society, the standards for judgment cannot be purely personal or irrational; the judge must be guided by generally recognized standards capable of rational cognition. This is the essential difference between a democratic legal order and a so-called Khadi justice which decides individual cases in accordance with the judge's sense of equity and without reliance on any objective standards.

Neuhaus, *supra* note 66, at 802 (citations omitted).

158. JUENGER, *supra* note 1, at 199-202.

159. "Concepts like conflicts justice and governmental interests are but verbal justifications for approaches premised on a preconceived notion, namely that judges should adjudicate multistate disputes in a rarefied atmosphere unpolluted by ordinary human concerns." *Id.* at 200. Juenger later explains why most United States scholars have ignored the pragmatic turn by courts to this "substantive" approach with a quote from Cavers: ". . . asking the judge simply to express a preference between . . . two rules on the score of 'justice and convenience' is to abolish our centuries-old subject." *Id.* at 234-35 (quoting DAVID CAVERS, THE CHOICE-OF-LAW PROCESS 86 (1965)).

I agree with Cavers, but unlike Juenger, find important procedural and constitutional values in "our centuries-old subject." In fact, as noted at the beginning of this Article, these values have become more important in the latter half of the 20th century. Thus, I view the better law principle as a dangerous conceit, as it is lawless and unprincipled. It trivializes the work of legislators, lawyers, and judges by holding that in cases of uncertainty, multistate society does not care which law is applied, but will leave this question to the unguided discretion of its judges. Some may argue that the discretion is guided by the qualifier "better". If this were acceptable in a government of laws, and not of men, it would not be necessary to have laws at all, but only Khadis.

greater predictability and uniformity than either unilateralism or multilateralism" because it would diminish incentives for forum shopping.[160]

As any lawyer knows, the legal vocation is to synthesize, integrate, and balance competing policies, including substantive and procedural ones. In a system of divided sovereignty,[161] an important procedural policy is that of local legislative autonomy. Of course, this procedural policy has substantive values rooted in the nature of our society. Juenger would subordinate this local legislative autonomy to the independent decisions of judges seeking the substantive best results in each particular case.[162] Thus, the better law factor is somewhat inconsistent with the type of accuracy posited here as a value: which legal rules best match the particular matter.

2. Unilateralism Versus Multilateralism

Leflar's formulation is a hybrid, but is more unilateral than multilateral in character. It refers to the "advancement of the forum's governmental interests," but not to foreign governmental interests, except indirectly through "maintenance of interstate and international order" and, perhaps, "application of the better rule of law."[163] The better rule of law would be determined multilaterally, on the basis of modernity, effectiveness, and justice. It would not be determined situationally, on the basis of

160. JUENGER, *supra* note 1, at 236.

161. Divided sovereignty exists in both international and domestic realms.

162. It is submitted that what I would term Juenger's "conflicts nihilism" would undermine not only local legislative autonomy, but also the mutual deference and respect that is the glue of any horizontal intergovernmental system. One response to this argument might be that Juenger is not a nihilist, but has actually taken a leap of faith to cast aside the narrow and inhumane proceduralism of the discipline that he leads. I would argue that what is needed is neither conflicts nihilism nor conflicts theology, but rather conflicts existentialism.

163. *Choice-Influencing Considerations*, *supra* note 64, at 287 ("The most that can be safely said of [other states' interests] is that they constitute a relevant factor for consideration."). *See also More Choice-Influencing Considerations*, *supra* note 64, at 1586 ("No forum whose concern with a set of facts is negligible should claim priority for its law over the law of a state which has a clearly superior concern with the facts; nor should any state's choice-of-law system be based upon deliberate across-the-board 'forum preference.'").

which rule of law provides the better answer to the case at hand.[164]

Juenger argues in support of his substantive or teleological approach that "if unilateralism and multilateralism have been failures, the only choice-of-law approach left is one that looks to values that transcend state boundaries."[165] Thus, Juenger sees a substantive approach as accessing an abstract, delocalized justice, a "brooding omnipresence in the sky." While this approach indeed appears neither multilateral nor unilateral, it seems to have no political or social base. Other balancing tests may be considered precursors of the proposal insofar as these tests are often, although not always, relatively multilateral in their approach.[166]

3. Private Versus Public Interests

Leflar's choice-influencing factors, as well as both the *Restatement (Second) of Conflicts of Law* and the *Restatement (Third) of Foreign Relations Law*, incorporates both public policy and, in the form of protection of justified expectations, private interests.[167] In this sense, they might be considered precursors of the proposal, although they do not aid in indicating what expectations are justified and when such justified expectations should be frustrated in consideration of other policies. Again, the lack of a metric by which to measure private interests against public interests is problematic.

4. Courts Versus Legislatures

Balancing tests, when placed in the hands of courts,[168] impose a heavy burden on courts, in terms of legitimacy and in terms of competence. This Article's proposal would do so as well, but would seek to allocate responsibility to resolve conflicts problems on an ex ante basis to the legislature and to the

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164. *Choice-Influencing Considerations*, *supra* note 64, at 297 ("A choice made between competing rules of law is more impersonal, less subjective, more in keeping with the traditional law-discovering functions of a common-law court.").

165. JUENGER, *supra* note 1, at 236.

166. See the balancing tests contained in *Restatement (Second)* and *Restatement (Third)*. *See* RESTATEMENT (SECOND), *supra* note 52, § 6; RESTATEMENT (THIRD), *supra* note 76, § 403.

167. RESTATEMENT (SECOND), *supra* note 52, § 6; RESTATEMENT (THIRD), *supra* note 76, § 403.

168. Comments (a) and (g) of § 403 of the *Restatement (Third)* would encourage the application of its balancing tests by legislators and executives, as well as by courts. RESTATEMENT (THIRD), *supra* note 76, § 403 cmts. a, g.

executive, when appropriate, assigning these problems to courts on an ex post basis only when it would be most efficient to do so.

The better law test exalts judges over legislators, allowing conflicts to provide an opportunity for judges to evaluate and accept the better law, something they are not explicitly permitted to do in other cases.

III. ANTECEDENTS OF THE PROPOSAL

Baxter's comparative impairment approach, based on his 1963 article, continues to provoke comment.[169] The comparative impairment approach is a precursor of, or an initial attempt at, a law and economics approach to conflicts. The comparative impairment approach, and the law and economics approaches described below, are antecedents of this Article's proposal.

A. *Embracing Complexity to Improve Interest Analysis: Baxter's Comparative Impairment Approach*

Baxter's comparative impairment methodology constitutes another attempt, more modest than that of the better law approach, to provide normative criteria to the conflict of laws process. Baxter's proposal may be viewed as a middle ground between Currie's refusal to address real conflicts, and the Juenger argument[170] that only substantive policy should be considered. Baxter addresses real conflicts by reference to substantive policy, but refuses to try to evaluate substantive policy,[171] merely measuring the extent to which each jurisdiction's substantive policy is engaged.

Baxter carefully rejects the better law approach. He argues that it is inconsistent with predictability and, given liberal rules of personal jurisdiction allowing suit in the jurisdiction whose law would lose in the better law comparison, it is unlikely to work.[172] Baxter's normative criterion is "maximum attainment of

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169. As noted below, Judge Posner and Professors Brilmayer, Juenger, and Solimine each take special note of Baxter's approach. See *infra* text accompanying notes 184-87, 197.

170. As noted above, Leflar considers the better law criterion to be only one of several bases for decision. See *supra* text accompanying note 144.

171. Baxter refers to this as "super-value-judgment", as it entails deciding between the competing value judgments already made by the relevant jurisdictions. Baxter, *supra* note 14, at 5.

172. *Id.* at 5-6.

underlying purpose by all governmental entities."[173] Baxter begins with Currie's interest analysis, which he adopts as to false conflict cases.[174] Baxter's point of departure is his disagreement with Currie's early postulate that true conflicts should simply be resolved in favor of forum law.[175]

More importantly, perhaps, Baxter begins to provide a normative mandate to interest analysis or balancing. His method provides a real advance over Currie's interest analysis. His approach to determining conflicts problems, at least in its analysis, allows continuous adjustment rather than limiting itself to discrete adjustment, for Baxter is willing to assess multiple positive interests, a state of affairs at which Currie threw up his hands.[176] However, Baxter's approach is not completely continuous in this sense: He is willing to consider circumstances in which two states have interests, but then would assign complete prescriptive jurisdiction to the state with the applicable rule "more pertinent to the case than the competing rule."[177]

Thus, Baxter's approach is continuous in its analysis, but discrete in its assignment. This is interesting, given that Baxter uses a hypothetical negotiation, two states negotiating the resolution of conflict of laws problems, as an expository vehicle. Baxter hypothesizes that the rule of decision the states would arrive at in cases of true conflicts is that the state whose interests are impaired most should be accorded jurisdiction.[178] The question left is, in a circumstance in which State A's interests are potentially impaired forty-nine percent, and State B's interests are potentially impaired fifty-one percent, why should State A yield? Would it not be a dereliction of its government's duty for State A to accept this significant impairment? One would expect a more refined negotiation, in which the state with the smaller

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173. *Id.* at 12.

174. *Id.* at 8. *See supra* text accompanying notes 105-42.

175. Baxter, *supra* note 14, at 8.

176. Baxter criticizes Currie for providing little rationale for his position that, in cases of real conflicts, the court should simply apply forum law. Baxter points out that this choice, dependent on the vagaries of liberal theories of personal jurisdiction, frustrates predictability. *Id.* at 9-10. He cites two rationales advanced by Currie: first, that courts lack the competence to discover the facts that further analysis would require, and second, that this job is too political for courts. *Id.* at 18 (citing Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176; Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 75-84 (1958)).

177. *Id.* at 9.

178. *Id.* at 17 ("In each real conflicts case the external objective of one state must be subordinated."). In other parts of his article, Baxter might be read to be more flexible.

impairment might seek to ensure that its impairment is minimized or eliminated, or at least that it is compensated. On the other hand, it might be more efficient for the state whose interests are impaired less to apply its law, and compensate the other state.

1. Predictability and Administrability Versus Accuracy

Comparative impairment would seem to suffer from the same defect regarding predictability as interest analysis and the better law approach; it requires a judicial analysis of the outcome that a private person would have trouble predicting.[179] It would raise greater problems in terms of administrability, requiring not just that the judge divine the legislature's policy, but also that the judge analyze each competing jurisdiction's policy and determine the degree of impairment of that policy. Professor Weintraub has stated that, "Unless supplemented by specific objective criteria, 'comparative impairment' is unlikely to be a method that is cogent, feasible to administer, and predictable." Weintraub argues that empirical data is needed in order to determine comparative impairment.[180] He recognizes that some types of cases might be more conducive to a comparative impairment approach, such as cases in which empirical data is available, and cases of nearly false conflicts, in which one state's policy is only slightly implicated or one state repeals its law.[181] Baxter argues that comparative impairment is more predictable than Currie's forum-default option because comparative impairment is less subject to forum shopping.[182] He also argues that the gains from the use of comparative impairment "in effectuation of local policies will more than offset the costs incurred by marginal reduction of primary predictability."[183]

Professor Brilmayer criticizes comparative impairment, arguing that in order to achieve administrability, this method must narrow the range of interests that it considers: "Baxter's system offers clear guidance only by narrowing the range of

179. *See* FOUNDATIONS, *supra* note 47, at 146-47.

180. WEINTRAUB, *supra* note 86, at 338 (discussing Bernhard v. Harrah's Club, 546 P.2d 719 (Cal. 1976), *cert. denied*, 429 U.S. 859 (1976)). *See also* Herma H. Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577 (1980).

181. WEINTRAUB, *supra* note 86, at 339.

182. Baxter, *supra* note 14, at 21.

183. *Id.* at 22.

things states are entitled to want."[184] Brilmayer finds that the range of interests Baxter is willing to consider is narrow because it refers to Currie's range of interests, which Brilmayer believes is confined to substantive policies and does not extend to what one might term "multistate policies."[185] As noted above with respect to Currie's interest analysis, this may be in part an attack on a straw man.[186] In fact, one might argue that Baxter's comparative impairment system is established to give content to the term "multistate policies," by establishing a multilateralist methodology for determining the circumstances under which domestic substantive policies should be subordinated to foreign substantive policies.[187]

The difficulty that Brilmayer identifies with Baxter's approach is a real one, but it does not necessarily require restrictive assumptions for its resolution. Rather, the same type of metric that may allow varying policies of a single state to be weighed accurately against one another also allows policies of multiple states to be weighed against one another.

2. Unilateralism Versus Multilateralism

Baxter argues for the application of norms beyond those of the "internal" or substantive laws of the competing jurisdictions. The normative principle he proposes "is to subordinate, in the particular case, the external objective [the objective to apply internal substantive policy to a multistate transaction] of the state whose internal objective will be least impaired in general scope and impact by subordination. . . ."[188] This approach reflects the incorporation of multistate values to address true conflicts.

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184. FOUNDATIONS, *supra* note 47, at 147.

185. *Id.* at 70-76.

186. *See supra* text accompanying notes 124-31.

187. Brilmayer has a more penetrating criticism of the predictability and administrability of comparative impairment, which is also applicable to this Article's proposal:

> If a theory were genuinely accepting of all manner of interests and permitted states to attach whatever weight to those interests that they choose, then when the time came to estimate the extent to which interests are likely to be impaired no hard and fast assumptions could be made about the extent to which a state is concerned about a particular case . . . . Absent such restrictive assumptions, however, we can offer no guidance in advance, but only subject the case to ad hoc judicial decisionmaking.

FOUNDATIONS, *supra* note 47, at 147. *See also infra* text accompanying notes 315-17.

188. Baxter, *supra* note 14, at 18.

Comparative impairment is thus multilateral in its perspective, taking the selfless view that the jurisdiction risking the greatest impairment of its policy should be allocated prescriptive jurisdiction. Comparative impairment is, in a sense, the height of liberalism in conflict of laws, as it declines to evaluate the quality of the potentially applicable laws, but merely measures the extent to which their policies are frustrated. This outcome is appropriate, given Baxter's expository method, using a hypothetical negotiation between legislators of two jurisdictions.[189] At some point, however, negotiators determine that they have a community of interests; it then may become evident that the quality of their potentially applicable laws is worth collective evaluation. It is at this point that perhaps the better law factor, or Juenger's substantive approach, might become viable. The proposal of this Article goes beyond Baxter's approach by indirectly allowing consideration of the quality, or at least the relative efficiency, of different jurisdictions' laws.[190]

Half of Baxter's article setting forth the comparative impairment theory is devoted to an argument that, in the United States domestic conflicts system, these issues should be addressed by federal courts, rather than state courts.[191] Baxter's is an argument for multilateralism in the decisionmaking institution.

3. Courts Versus Legislatures

The comparative impairment theory puts a great responsibility on courts to identify policies, as in Currie's interest analysis, and in addition asks them to determine the comparative extent of their potential impairment. This is the price that comparative impairment pays to be able to address cases of true conflicts. Baxter defends his assignment of this task to courts: "The objection that courts are not equipped to discover the facts upon which resolution must turn is equally applicable to a very

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189. *Id.* at 7-17.

190. *See infra* text accompanying notes 301-17.

191. Baxter's argument is as follows:

> The courts of each state are active participants in the formulation and implementation of local policies. To place in their hands extensive responsibility for deciding when those policies will yield to and when they will prevail over the competing policies of sister states seems unsound. Baseball's place as the favorite United States pastime would not long survive if the responsibilities of the umpire were transferred to the first team member who managed to rule on a disputed event.

Baxter, *supra* note 14, at 23.

large percentage of our judge-made rules of law."[192] With respect to the argument that assignment of comparative impairment tasks to courts is antidemocratic, Baxter correctly points out, "This argument is irrelevant to the situation of a court required to decide cases not covered by legislative choice rules, the situation most frequent in this area."[193]

A regime of federal choice of law rules administered by federal courts would make sense;[194] however, it also would appear that, if the decision must be made locally, administration by the political branches might have some advantages. One advantage is that political branches are in a position to negotiate with other jurisdictions, whereas courts rarely do so. Another is that for courts, choice of law decisions have a strong characteristic of ex post, single-play games. Courts only see conflicts cases after the facts are known. Generally, courts will not deal with these cases on anything approaching a continuous or regular basis. On the other hand, a legislature may make conflicts rules generally and in advance, and it may negotiate, or order the executive branch to negotiate, with other governments in a horizontal system.

B. *Early Applications of Law and Economics*

In his book *Economic Analysis of Law*, Judge Posner briefly criticizes interest analysis, arguing that "the issue ought not to be interests; it ought to be which state's law makes the best 'fit' with the circumstances of the dispute."[195] This initially might be viewed as a variant of, and an improvement on, the better law approach: Which is the best law under the circumstances? However, both in his book and in a judicial opinion, Judge Posner asserts that the *lex loci delicti*[196] approach to conflict of laws in tort will ordinarily provide the best fit.[197] This assertion contains

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192. *Id.* at 21.

193. *Id.* at 22.

194. *See, e.g.*, Gottesman, *supra* note 47.

195. ECONOMIC ANALYSIS, *supra* note 23, at 587.

196. "*Lex loci delicti*" is the method of choice of law for tort associated with the vested rights theory. *See supra* text accompanying notes 80-96.

197. Kaczmarek v. Allied Chem. Corp., 836 F.2d 1055, 1058 (7th Cir. 1987). One might note that Judge Posner has also written approvingly of Baxter's comparative impairment approach. THE FEDERAL COURTS, *supra* note 23, at 305-06. One might argue, on this basis, that Judge Posner has been inconsistent. However, a broad law and economics approach to conflict of laws might reconcile these varying perspectives. This Article seeks to provide such an approach. One should note that Judge Posner is not "fully persuaded" by the comparative im-

an implicit assumption that the law with the best fit should be applied. Combining this assertion and assumption, and making explicit an implicit assumption, we might arrive at the proposition that, taking into account transaction costs—including the cost of determining which law actually provides the best fit—the most efficient way to seek the best fit in tort (even if it is not always successful) is simply to refer to *lex loci delicti*.[198] This proposition implicitly accepts that *lex loci delicti* will not always indicate the law with the best fit, but holds that it nevertheless is the best rule to apply.

1. Predictability and Administrability Versus Accuracy

If the best fit is to be sacrificed, it must be for other savings. Those savings presumably are derived in the form of reduction of judicial system transaction costs and judicial error.[199]

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pairment analysis, as he is concerned that the impairment of each state will cancel out the impairment of the other. *Id.*

198. Earlier in his book, Judge Posner characterizes the object of a procedural system, in which he includes conflict of laws, as minimizing the sum of (a) the cost incurred as a result of erroneous judicial decisions, and (b) the cost of operating the procedural system. ECONOMIC ANALYSIS, *supra* note 23, at 549.

199. *Id.* In *Kaczmarek v. Allied Chem. Corp.*, Posner criticizes interest balancing:

> The opponents of mechanical rules of conflict of laws may have given too little weight to the virtues of simplicity. The new, flexible standards, such as "interest analysis," have caused pervasive uncertainty, higher cost of litigation, more forum shopping (a court has a natural inclination to apply the law it is most familiar with - the forum's law - and will find it easier to go with this inclination if the conflict of laws rules are uncertain), and an uncritical drift in favor of plaintiffs.

836 F.2d at 1057 (citing Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459 (1985), and Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980).

In his 1985 book, Posner establishes the following equation:

> The basic tradeoff is between the costs of information (of which the major cost in this context is the reduction in the deterrent effect of the law) that are created by uncertainty as to which state's law will govern a particular dispute, and the costs of applying to the dispute the law of a state that does not have the comparative advantage in resolving the dispute most efficiently.

THE FEDERAL COURTS, *supra* note 23, at 307.

With some license, we might equate this with the tradeoff described above between predictability and administrability, on the one hand, and accuracy on the other.

Referring to this Article's hypothetical example of the United States auto manufacturer exporting to Dystopia, one would have to consider which law provides the best fit: United States law or Dystopian law. One might be able to convince Judge Posner that the United States liability standard is the best fit, as it results in a uniform standard of responsibility for the manufacturer. On the other hand, one might not, if by best fit Judge Posner means the best rule for the relevant society. Judge Posner, however, has not shown how to select the relevant society or the best fit; this is the work of conflict of laws.

Moreover, the best fit must be determined with the interests of all jurisdictions in mind, not just those of a single jurisdiction.[200] What if the best fit is truly achieved by splitting responsibility among multiple jurisdictions? Thus, it is not enough to say, as Posner does, that the jurisdiction with the comparative advantage in regulating the particular conduct should be allocated jurisdiction. Even if the United States has the comparative advantage in regulating automobile safety, it may have incentives to regulate in a manner that causes negative externalities, or declines to provide positive externalities, to the constituents[201] of Dystopia. It is inadequate to say that Dystopia must suffer these externalities in silence.

The next issue is that of transaction costs: the values of predictability and administrability. Here, the concern is not with determining the best fit, but with the costs related to finding the best fit, and the costs incurred as a result of uncertainty about the best fit. Given the complexity of the answer to the best fit question, the costs of reaching it may be high, both ex ante (predictability) and ex post (administrability). The costs are related to the facts: some circumstances will be easier to evaluate for best fit; some will be more difficult. Certainty may

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200. I assert this point conclusively here, but it represents a difficult judgment that others would reject in favor of a unilateral approach to conflict of laws. *See infra* text accompanying notes 239-63. I do not dwell on this issue, as Posner seems to agree with the multilateral approach, but feels it appropriate to allocate jurisdiction unilaterally—to a single jurisdiction—despite the fact that other jurisdictions are affected.

201. I am attempting for the moment to avoid words like citizen, resident, or domiciliary, as these terms are formal and not necessarily substantively related to the interests of the related jurisdiction. The appropriate relationship to refer to is "members of the community." However, this begs the question, at least in part, as any particular person is a member of many communities. I would resolve this circularity by defining the membership in the community by reference to the purposes of the community. Thus, if a person is a member of a bar association, it has jurisdiction over that person with respect to bar membership, most types of legal ethics matters, and, unfortunately, dues. For now, I uses the nonlegal term, "constituent", imprecisely, to convey this concept.

provide greater rewards in some areas than in others. It is often argued, for example, that people do not plan unintentional torts.[202] To the limited extent that this is true,[203] predictability is unimportant, but certainty or administrability is useful to promote settlement and reduce judicial workload. Moreover, in doctrinal areas in which intent is required to constitute the offense or incur liability, predictability is more useful.

In order to analyze the connection between information or uncertainty costs in Posner's equation and the diad of accuracy versus predictability and administrability, it is necessary to address another question regarding Posner's approach: Why is it that Posner infers that the *lex loci delicti* would ordinarily provide the best fit?[204] Posner argues that "the tort law of the state where the accident occurs is likely to be the law most closely attuned to the conditions in the state affecting safety, such as climate, terrain, and attitudes toward safety."[205] This may be an appropriate way to look at a particular litigated case from an ex post standpoint. Perhaps from an ex ante standpoint, Posner would also assume that when the harm occurs in the situs, it is *felt* in the situs. The fact that effects are felt in the situs would be expected to provide a stimulus for the government of the situs to provide rules that address the effect efficiently, assuming that the cause also originates in the situs.[206] The government may or may not respond to this stimulus, but this is presumably why Posner expects the *lex loci delicti* rule to provide the best fit. As is obvious, however, Posner is approximating in order to reduce transaction costs. Two types of transaction costs seem most relevant. First, it is difficult after litigation arises for a judge to assess exactly which legal system provides the best fit (the problem of administrability). Second, it is difficult in a counselling context, before litigation arises, for a lawyer or businessman to determine the best fit, the law that will apply, to guide his conduct (the problem of predictability).[207]

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202. Solimine, *supra* note 23, at 65.

203. *See infra* note 207.

204. Posner is referring to tort cases; other types of cases might have other references for "best fit". Indeed, it might be argued that *lex loci delicti* is only appropriate for certain types of torts. *See* Solimine, *supra* note 23, at 65.

205. Kaczmarek v. Allied Chem. Corp., 836 F.2d 1055, 1058 (7th Cir. 1987).

206. If the cause originates elsewhere, there might be little inhibition on the government in the situs over-regulating the conduct that constitutes the cause. *See* Hay, *supra* note 26, at 617.

207. *See* Baxter, *supra* note 14, at 3. Posner argues that the largest part of the transaction costs associated with conflict of laws relates to the ineffectiveness of the deterrent effect of the law because of uncertainty as to its application. *See*

The *lex loci delicti* rule may diminish these transaction costs, possibly at the expense of reduced accuracy of decision, by selecting the state whose law provides the best fit. Conversely, interest analysis and balancing tests may reduce certainty at each stage, and therefore increase transaction costs, while possibly providing a better chance of achieving the best fit.

2. Unilateralism Versus Multilateralism

Professor Solimine likes the territorial aspect of Posner's *lex loci delicti* preference.[208] Solimine finds, perhaps eliding some of the implicit subtlety of Posner's brief and unsystematic treatment of this topic, that Posner's approach supports a *lex loci delicti* rule; but Solimine seeks to explain why this efficient rule[209] has not been adopted by a majority of states. Solimine examines competition in regulation—the economics of federalism—and interest group politics as sources of explanatory theories.[210]

Economics of federalism examines the quality of competition among jurisdictions: whether it promotes a problematic race to the bottom or a beneficial race to efficiency.[211] Solimine considers conflict of laws in tort and finds that there are two methods of competition, one for substantive law and one for choice of law.

In the substantive law arena, the assumption is made that the state wishes to enrich its plaintiffs and protect its

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Posner's quotation from THE FEDERAL COURTS, *supra* note 199. While one accepts that this is one of many types of transaction cost, it is difficult to understand why this would generally be larger than, for example, the effect of causing people to comply with law that should be inapplicable as it does not provide the "best fit." One might accept Posner's statement if it referred to "the inaccurate imposition of deterrent effect" instead of "the reduction of the deterrent effect." Solimine argues that, combined with liberal choice of forum rules, conflict of laws uncertainty may actually enhance deterrence. Solimine, *supra* note 23, at 64. Solimine continues to point out that there is a real question regarding the "deterrent effect of law in general and tort law in particular." *Id.* The argument makes sense on its face, based on the proposition that people do not plan unintentional torts. However, a quick look at "Corporate America" shows that standards of care and diligence followed by corporations are mightily influenced by concern regarding tort liability, or at least by the concerns of liability insurers who absorb tort liability.

208. However, he criticizes Posner's analysis on several grounds, some of which are noted above. See *supra* text accompanying notes 202, 207.

209. *See supra* note 54.

210. Solimine, *supra* note 23, at 68-74. I consider here only the economics of federalism theory.

211. *See, e.g.*, Trachtman, *supra* note 26; McConnell, *supra* note 26; David A. Rice, *Product Quality Laws and the Economics of Federalism*, 65 B.U.L. REV. 1 (1985).

defendants.[212] In the United States federal system, a collective action or free rider problem arises. Each state may adopt pro-plaintiff substantive law that, by virtue of liberal rules of personal jurisdiction allowing for forum shopping,[213] imposes disproportionate costs on external defendants.[214] This strategy is supported by pro-plaintiff conflict of laws rules, which would allow the application of forum law in these multistate cases. Recall that the *lex loci delicti* rule would not contain a pro-forum bias, whereas Currie's interest analysis and other formulations would contain this bias. This is why Solimine finds that "a decidedly imperfect market of competition among states could explain the race to reject traditional choice of law rules."[215] Solimine supports this hypothesis with an empirical study, concluding that "resident plaintiffs are favored under modern choice of law theories, and are not favored under the *lex loci* approach."[216] On this basis, Solimine endorses McConnell's preliminary proposal for a federal conflict of laws rule in tort, which would apply the law of the place of sale of the product to a consumer.[217] This would be a relatively multilateralist solution, providing some of the benefits of *lex loci*, but developed based on a different perspective from that of vested rights theory.

McConnell proposes the implementation of a federal conflict of laws rule applying the law of the place of sale as a means to impose discipline on state substantive product liability law. The problem he sees involves the discontinuity between a segmented legal system and an integrated product market. Manufacturers are subject to varying liability systems in each state, but are not able to price their products—or indeed to avoid having their products flow to certain states—to reflect these liability

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212. These assumptions may be subject to qualifications regarding the possibility of cooperation. *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984); Larry B. Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 339-44 n.227 (1990); Note, *To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation*, 102 HARV. L. REV. 842 (1989).

213. *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

214. *See* McConnell, *supra* note 26.

215. Solimine, *supra* note 23, at 71-72. Solimine also finds that "[s]imilar conclusions can be extrapolated from an interest group theory of litigation." *Id.* at 72. However, this part of his analysis is beyond the scope of this Article.

216. *Id.* at 88-89.

217. *Id.* at 89-90 nn.173-74 (citing McConnell, *supra* note 26, at 97-100) (arguing for uniform conflicts rule); P. John Kozyris, *Choice of Law for Products Liability: Whither Ohio?*, 48 OHIO ST. L.J. 377, 383-84 (1987) (arguing for reference to law of place of sale).

systems.[218] This inability to price accurately[219] makes it possible for states to externalize costs by establishing pro-plaintiff product liability laws. These laws enrich local plaintiffs at the expense of disproportionately external manufacturers.[220]

If a federal rule could be constructed that would force states to internalize the costs resulting from their law (a condition of autarky), according to law and economics theory, the states would arrive at optimal, or at least better, product liability laws.[221] Thus, as the title of this Article indicates, more accurate conflict of law rules may give rise to more accurate allocation of government responsibility and therefore more efficient government.

Although he recognizes that his proposed rule would "fall short of perfect neutrality in state incentives," McConnell argues that the rule would eliminate "law shopping"[222] and thus diminish incentives for forum shopping. This, in turn, would allow more accurate planning and pricing by producers and create modest incentives for more optimal—anticipated to be less pro-plaintiff—product liability laws.[223]

Bruce Hay provides a careful critique of McConnell's methodology and conclusions, focusing on the motivations of states to establish either *lex loci delicti* or interest analysis conflict of laws rules for product liability.[224] His analysis indicates that the phenomenon that McConnell observes—pro-plaintiff choice of law

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218. They are unable to do so largely because of the possibility of parallel importation: If goods are sold more cheaply in a state with a pro-defendant product liability system, people will buy them there for resale in states with pro-plaintiff product liability systems. In addition, the Robinson-Patman Act, 15 U.S.C. § 13(a) (1988), may restrict this type of pricing as a form of price discrimination. *See* Rice, *supra* note 211, at 5.

219. In this regard, law is a product of governments (the government establishes its product liability law). The price of the product—the costs that it imposes—could be established and imposed on the appropriate persons (those the law protects). However, the need for a single national market makes it unacceptable to allow firms to engage in, or to enforce through limitations on resale, differential pricing.

220. McConnell assumes that most, or at least a disproportionately large number of, product liability suits will be between a local plaintiff and an external defendant.

221. McConnell, *supra* note 26, at 98-99. The proposal advanced by this Article is that conflict of laws rules can be reformulated to approximate autarky more closely.

222. I use this term to describe a phenomenon noted by Hay: the use of forum shopping in order to take advantage of the forum's substantive law or conflict of laws rules. Indeed, law shopping is the major incentive for forum shopping.

223. McConnell, *supra* note 26, at 99.

224. Hay, *supra* note 26, at 617.

rules in product liability—provide incentives for, and result in, state substantive product liability laws that are not pro-plaintiff. Thus, he argues that liberal conflict of laws rules do not promote a pro-plaintiff race to the bottom; on the contrary, they make it possible for each state to have the benefit of pro-plaintiff substantive law without actually prescribing it. Thus, states possessing relatively lenient liability laws prefer to adopt a pro-plaintiff 'governmental interest' rule in place of a traditional territorial rule. These states are motivated to make this change, because this adoption allows domestic consumers to reap the benefits from other states' relatively stringent laws, without the increasing liabilty exposure of domestic manufacturers.[225]

Therefore, "one cannot say a priori that manufacturer liability in a decentralized product liability system is higher than states would collectively prefer; it may be lower."[226] Hay reaches this result by recognizing an additional motivation for states: attraction and retention of investment.[227] This motivation operates differently under a *lex loci delicti* regime than under certain types of interest analysis. Under *lex loci delicti*, the domicile of the manufacturer is viewed as irrelevant and thus is not affected by the relative stringency of the domicile's product liability rules. By contrast, under interest analysis the domicile of the manufacturer could be relevant in cases in which the plaintiff is domiciled elsewhere. Thus, onerous product liability rules might be applicable to the manufacturer by virtue of its domicile in a jurisdiction where these rules are in effect. This has two potential consequences. First, manufacturers increasingly might leave or avoid establishment in the jurisdiction. Second, such departures or potential departures might motivate the jurisdiction's legislators to reduce the stringency of their product liability regime. Hay envisions the possibility of a race to the bottom in reducing liability standards; he concludes that "[t]he most one can say with confidence is that the governmental

225. *Id.* at 621.

226. *Id.* at 618. Hay's criticism of McConnell's proposal is based on the idea that complete conflict of laws predictability, allowing the consumer and the producer by virtue of their behavior to select the standard of liability, is somewhat analogous to a repeal of tort law: it leaves standards of liability more or less to contract. See also Trachtman, *supra* note 26, at 67, in which the author notes that the problem with regulatory arbitrage is that the protected parties can police neither the substantive conduct of the regulated persons nor the choice of governing law by virtue of the behavior of the regulated person. Thus, in cases where manipulable (externalization-permitting) conflict of law rules apply, the effectiveness of regulation may be diminished.

227. Hay, *supra* note 26, at 627-32.

interest rule, unlike the territorial rule, introduces a sharp tension in the incentives states face in setting liability levels."[228] He notes that this competition would not arise under McConnell's proposal.[229]

The critical advance of Hay's analysis over McConnell's is that Hay takes into specific account an additional side of the regulatory competition phenomenon. In addition to considering competition among states to favor local plaintiffs and to burden foreign manufacturers, Hay considers competition among states to attract and retain manufacturers.[230] He recognizes that, to the extent that an interest analysis approach would make the location of a manufacturer relevant for liability purposes, the latter competition grows in importance. This recognition adds complexity to the conflict of laws equation.

This Article's proposal recognizes and embraces this complexity, accepting the need for a multifactor, multiweight analysis. In effect, the proposal accepts that the ability to provide greater recoveries for resident plaintiffs, and the ability to reduce liability of resident defendants, are the types of state policies that give rise to the need for prescriptive jurisdiction.

IV. THE PROPOSAL ARTICULATED[231]

To more definitively develop the proposal, it is necessary to begin by referring to foundational or normative principles.[232] However, the norms referred to are norms of governmental legitimacy and federalism, not norms of substantive law. They are meta-substantive in the sense that they are ordinately before substantive law.[233] Before one knows which substantive law to

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228. *Id.* at 631-32.

229. *Id.* at 647 n.83.

230. Thus, law is a product with many customers. *See* Trachtman, *supra* note 26, at 75-80.

231. This part of the Article seeks further to articulate the proposal, drawing on the discussion in Parts II and III. The structure of this part is based on the four diads that formed the analytical structure of Parts II and III. First, this part shows the relationship between the issues of private versus public interests and unilateralism versus multilateralism. Second, it addresses the relationship between predictability and administrability, on the one hand, and accuracy on the other hand.

232. *See, e.g.*, Baxter, *supra* note 14, at 1; FOUNDATIONS, *supra* note 47, at 1.

233. This is flatly inconsistent with Currie's thinking: "A choice-of-law rule does express a policy, but it is not of the same order as the social and economic policies which are normally developed by a state in the pursuit of its governmental interests and the interests of its people." CURRIE, *supra* note 1, at 52-53. Juenger criticizes this statement:

apply, one must know to which society or societies the relevant persons or conduct belongs.[234] Each of us, and each of our transactions, belongs to multiple societies, organized both geographically and functionally.[235] Each of these societies comprises a bundle of relationships. The bundle may be large, as in the case of United States citizenship, or it may be small, as in the case of one's membership in a professional association or one's visit to a particular foreign state during a vacation.

It is not circular to say that the decision of which society or societies the relevant persons or conduct is located in and accountable to—of which law is to govern—must take into account the goals and purposes of the relevant societies. Currie was correct about this, and Brilmayer is incorrect in her criticism.[236] The point is to look at the goal of the community for two purposes. First, what is the social contract between the person to whom the law is sought to be applied and the community seeking to apply it? Second, to what extent, regardless of any social contract, are the person's activities impeding the ability of the community to achieve its purposes? Each is relevant, and the latter consideration may be a basis for application of law without the former.[237]

> That passage, unsupported by authority, contradicts a record compiled over centuries by courts, scholars and legislatures. It also flies in the face of worldwide agreement on the need for conflicts law and express Congressional policy. Finally, it clashes with the rationale of two landmark decisions in which the Supreme Court emphasized the need for worldwide comity, even at the expense of local policies. As the Justices pointed out, multistate transactions involve policies and considerations quite different from those that control purely domestic disputes.

Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 37 (1984) (citations omitted) (citing, *inter alia*, Scherk v. Alberto Culver Co., 417 U.S. 506 (1974); The Bremen v. Zapata Offshore Co., 407 U.S. 1 (1972)).

234. By this reference, I mean something much broader than narrowly-conceived territoriality—I mean effects on the relevant society in the broadest sense. *See* Luther L. McDougal III, *Comprehensive Interest Analysis Versus Reformulated Governmental Interest Analysis: An Appraisal in the Context of Choice-of-Law Problems Concerning Contributory and Comparative Negligence*, 26 UCLA L. REV. 439, 451 (1979).

235 "If human society were so organized that all aspects of life flowed within coextensive spheres the problems studied in this book could never arise." VON MEHREN & TRAUTMAN, *supra* note 5, at 3.

236. FOUNDATIONS, *supra* note 47, at 74.

237. To show the appeal of this idea, we may refer to the domestic law idea that "your rights end at my nose"; we may extend this idea to hold that I have the right to regulate your conduct where it affects my (as yet undefined) right to construct my vision of the good life. Thus, one might argue that legislative

So, while conflict of laws is meta-substantive, it uses substantive policy as data. It should seek to enable societies to achieve their substantive policy goals as effectively as possible. Just as domestic society should be structured to provide power linked with responsibility to citizens, so intergovernmental society—conflict of laws—should be structured to match the power of societies with their responsibility.

A. *Private Versus Public Interests; Unilateralism Versus Multilateralism*

Unilateralism alone seems unsatisfactory, and the formulas devised so far for multilateralism—vested rights and comparative impairment—seem insufficiently accurate or insufficiently predictable and administrable. Perhaps more importantly is the issue of motivation. Why should any forum act multilaterally?

The end-goal of conflict of laws—as of law more generally—is the maximization of the welfare of the constituents of the relevant society.[238] If international conflict of laws rules are analogous to constitutional law—describing the allocation of power horizontally within a unitary order—the relevant society whose welfare these rules must maximize is international society.[239] Of course, there is nothing quite comparable to a world constitution, and world society is far more decentralized than, for example, the federal society of the United States.

However, in addition to engaging in transactions in different societies in a horizontal order, all persons belong to societies at multiple vertical levels. At which vertical level should one maximize? The answer to this question depends on the subject matter involved, the potential gains from centralization, the potential losses from centralization, and the degree of difference or similarity in social preferences.[240] The answer to this question is relevant in determining how to deal with conflicts problems.

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authority is legitimated by two principles: social contract and social tort. Social tort in this sense involves the circumstance in which one person diminishes the ability of a community of other persons to achieve their social goals. Of course, as with tort law more generally, it is necessary to define a duty in order to determine whether a tort has been committed.

238. Welfare may be defined in both absolute and relative terms. It is critical to the proposal that we develop some absolute measures for welfare. *See infra* text accompanying notes 283-319.

239. Similarly, United States domestic—interstate—conflict of laws rules should maximize welfare for the United States.

240. For a sustained discussion of these issues, see Trachtman, *supra* note 26.

By simplifying the vertical world into three societal levels for the moment—the private level, the domestic level, and the multistate level—one may examine why this is so. The following analyzes the conflicts goals of society, seen from the perspective of each of these three levels.

At the multistate (multilateral) level, there are two goals: (1) Multistate predictability and administrability, including values such as mutual cooperation and system order (which might be derived from predictability); and (2) Multistate accuracy: optimal allocation of responsibility among states—maximizing the simulation of autarky, and thereby minimizing externalization.

At the domestic (unilateral) societal level, there are five conflicts goals. The first three categories relate to the multistate system, and the last two categories relate to the domestic system (applicable only if the domestic system is non-unitary): (1) Multistate predictability and administrability; (2) Offensive international externalization: legislating and applying law when possible in a manner designed to impose costs on outsiders (either as defendants or as plaintiffs, or otherwise).[241] This goal is inconsistent with the goals at the multistate level, and may in particular cases be inconsistent with multistate predictability and administrability; (3) Defense against foreign international externalization. This goal is consistent with the goals at the multistate level; (4) Domestic predictability and administrability, to the extent that the domestic system is non-unitary; and (5) Domestic accuracy, again to the extent that the domestic system is non-unitary.

At the private societal level, there are six conflicts goals. Here, similarly, the first three categories relate to the multistate system, and the last three categories (applicable only if the domestic system is non-unitary) relate to the domestic system: (1) Multistate predictability and administrability; (2) Offensive international externalization. This goal, in particular cases, may be inconsistent with multistate predictability and administrability; (3) Defense against foreign international externalization; (4) Domestic predictability and administrability, to the extent that the domestic system is non-unitary; (5) Offensive domestic externalization, to the extent that the domestic system is non-unitary. This may be equated with application of the most favorable law. Again, this goal, in particular cases, may be inconsistent with domestic predictability and administrability; and (6) Defense against domestic externalization, to the extent that

241. *Id.* at 57.

the domestic system is non-unitary. This may be equated with avoiding the ability of opponents to obtain application of the law most favorable to them.

Although there are some commonalities among the varying societal levels, conflicts goals differ, depending upon the level at which maximization is being sought. Thus, a unilateral approach will differ from a multilateral approach.[242] This analysis also highlights the difference between the private interests and public interests perspectives.

One may analyze how these approaches might begin to coincide, and how their coincidence might be facilitated. Thus, one can view the private versus public interests diad as merely the beginning of a continuum of vertical levels of analysis, each of which provides a different perspective. However, to a certain extent, each societal level incorporates the perspectives of the levels below.[243] The critical area of difference is between the interest in externalization from a unilateral or private perspective, and the interest in accuracy from a multilateral perspective. Thus, offensive externalization and defense against externalization might offset one another.[244]

This Article explores in more detail below how these three societal levels relate to one another, how to determine the correct level at which to maximize, and what the implications of the answers to these questions are for the proposal's approach to the public-private issue and the unilateral-multilateral issue.

1. Relating the Private-Public Interests Diad to the Unilateral-Multilateral Diad

As noted above, one may consider the vertical spectrum of levels of organization as a continuum, from the private level to the domestic public level to the multistate level, with other levels in between, below, and above these three. If an optimal conflict of laws proposal is to optimize values, which level's values should be optimized?

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242. The above analysis does not include differences in substantive policy goals.

243. *See supra* note 135.

244. While these factors might offset one another, providing a basis for cooperation, it is important to recognize that one society might have a comparative advantage in externalization, either because of the extensiveness of its regulation or because of its economic hegemony more generally. The United States comes to mind. Such comparative advantage might limit the incentives to cooperation. *See generally* Trachtman, *supra* note 26, at 57.

2. The Partial Congruence Between Private and Public Interests

The private-public distinction is inappropriate in the context of conflict of laws, assuming it is valid in any context.[245] From a law and economics perspective, the private sphere is the sphere normally left to market ordering.[246] Thus, the private sphere, in theory, absent transaction costs or market failures, needs no law. However, it is generally agreed by even the most extreme law and economics theorists that in practice, the private sphere needs law to reduce transaction costs by facilitating the assignment of stable property rights and rules of tort liability and contractual responsibility.[247]

Thus, public policy—values at the state level—would be expected to incorporate certain values from the private level. As described above, those expected to be incorporated include the interests in multistate predictability and administrability. One might also assume that other private interests would be expressed in public policy, including those in offensive international externalization, defense against foreign international externalization and defense against domestic externalization. Of course, each of these interests must be integrated with one another (they already are informed by substantive values at the state level) in order to forge public policy. However, public policy would not be expected to incorporate private interests in offensive domestic externalization, although public choice theory might indicate that it would. It is in this sense that the public-private distinction retains some validity. On the other hand, while conflict of laws—relating either to public law or private law—should operate only at the public policy level, public policy incorporates some values from the private level.

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245. *See supra* text accompanying notes 75-78. On the public/private distinction more generally, see Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267 (1986); Kenneth M. Casebeer, *Toward A Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379 (1983); Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237 (1987); L. Harold Levinson, *The Public Law/Private Law Distinction in the Courts*, 57 GEO. WASH. L. REV. 1579 (1989); John H. Merryman, *The Public Law-Private Law Distinction in European and American Law*, 17 J. PUB. L. 3 (1968); Roscoe Pound, *Public Law and Private Law*, 24 CORNELL L.Q. 469 (1939).

246. *See, e.g.*, COASE, *supra* note 26, at 37-47.

247. *See, e.g.*, ECONOMIC ANALYSIS, *supra* note 23, at 33-34, 90-91, 367-69.

3. The Potential for Alignment Between Unilateral and Multilateral Interests

Similarly, there is an overlap, but not exact congruence, between the values at the domestic level and those at the multistate level, between unilateralism and multilateralism. Given the incongruence, how can one expect states to agree to action at the multistate level (which is equivalent to cooperation)? Game theory predicts that cooperation may occur in cases in which there are some interests in common, despite the possibility for individual gain from defection. The possibility of trading the opportunity to externalize for protection from externalization noted above[248] indicates a basis for cooperation.

Professor Brilmayer recently has advanced a game theoretic approach to maximization of state interests.[249] This approach analyzes the possibility of cooperative behavior. It shows that unilateral consideration of forum substantive goals is inefficient, frustrating the possibility of efficient cooperative behavior in a multilateral mode. Brilmayer adopts a bifurcated approach. She describes first a game theoretic approach to maximization of state values, without making assumptions about what values are to be protected.[250] Separately, she seeks to ground conflicts in individual rights to be free of inappropriate government interference.[251]

Brilmayer begins her discussion, designed to show how cooperation arises,[252] by suggesting that the reason few states have adopted Currie's approach to true conflicts—default to forum law—is that "states have much to gain if they can find a way to pursue their interests cooperatively."[253] She adopts a game theoretic approach to examine how cooperation might

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248. *See supra* text accompanying notes 243-44.

249. FOUNDATIONS, *supra* note 47, at 145-89. See Professor Weinberg's criticisms of these arguments in Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991). *See also* Kramer, *supra* note 212, at 341; Note, *To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation*, *supra* note 212, at 844-47.

250. FOUNDATIONS, *supra* note 47, at 145-89.

251. *Id.* at 191-230. Her rights-based approach will be referred to in connection with the discussion of the predictability and administrability versus accuracy diad below. *See infra* text accompanying notes 268-79.

252. *See generally*, AXELROD, *supra* note 212; KENNETH OYE, COOPERATION UNDER ANARCHY (1986).

253. FOUNDATIONS, *supra* note 47, at 155. Brilmayer is discussing cooperation among states within the United States; it is not clear whether her views would translate to international cooperation. Obviously, the international system contains more diversity in domestic substantive law, more diversity in approach to conflicts of law, and probably more diversity with regard to extent of trading relationships.

proceed absent actual negotiations, associating the rise of cooperation with comity and reciprocity. It is perhaps worth noting that game theory may approximate actual negotiations. It can assume that players develop a way of operating, and implicitly communicating and agreeing, absent actual communications and agreement. Brilmayer would agree that actual negotiations are preferable to this method, but despairs of their realization.[254] On the other hand, she shows how conflict of laws activities—enactment of relevant statutes and court decisions determining which law to apply and how—constitute a means of communication and at least unilateral commitment, if not a means of formal agreement.

Brilmayer uses Baxter's technique of hypothetical negotiations to show how states might behave when evaluating the relative costs and benefits of cooperative conflict of laws behavior. She asserts that because states would have different degrees of interest in particular cases, cooperation in the form, in effect, of horse-trading would be useful: one state takes jurisdiction over the cases more important to it and vice versa.[255] Brilmayer further points out that increased accuracy is in everyone's interests. The ability to reduce overbreadth and underinclusiveness indicates the existence of a plus-sum game. The plus-sum aspect of the game provides incentives for cooperation.[256] However, Brilmayer also notes the fact that conflict of laws provides opportunities for states to take advantage of one another and thereby profit from lack of cooperation through externalization.

Brilmayer examines the theoretical possibilities for development of cooperation, based on either specific reciprocity or institutionalization. She finds that specific reciprocity—a tit-for-tat strategy of cooperating in response to cooperation—is inadequate to the complexity of conflicts issues because it lacks

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254. *Id.* In Part 5, the author discusses the range of institutional alternatives, and how they might relate to one another. *See infra* text accompanying notes 323-28.

255. Brilmayer relates this approach to both comparative impairment and interest analysis, and recognizes that one problem with this approach is that it does not begin with any initial claims over particular cases. (She does not use the term "horse-trading".) *Id.* at 169-170. This latter point, although Brilmayer does not explore it further in connection with her game theoretic approach, is critical: Is there a set of initial property-type rights that one could establish in order to initiate bargaining. The effects test provides a source of such "property" rights: If certain conduct affects State A persons, then State A should be accorded some right to regulate the conduct. *See infra* text accompanying notes 280-319.

256. FOUNDATIONS, *supra* note 47, at 177.

standards. Without some set of norms, or agreed guidelines, there is little guidance about what reciprocity would mean and on what basis it would occur.[257] Brilmayer turns, therefore, to institutionalization as a source, not of norms, but of agreed rules and means of identifying (and punishing) defection from these rules. She believes that institutionalization provides a more promising means of cooperation in light of the failure of reciprocity. Brilmayer does not posit how this institutionalization would take place, although she considers some precedents for institutionalization in the United States federal system, including the adoption of uniform laws[258] and the American Law Institute's *Restatements of Conflicts*.[259]

Institutionalization of course is only useful to reduce the transaction costs relating to the negotiation of rules and the enforcement of rules. Brilmayer is describing an issue of priorities. It is useful to develop institutions that can facilitate the establishment of rules and provide enforcement mechanisms, and efforts should be turned this way, rather than toward establishing rules without institutions.

4. The Vertical Continuum of Interests

Game theory provides support for the idea that cooperation may develop, based on the self-interested actions of states in a multistate system.[260] Cooperation develops to the extent that unilateral and multilateral perspectives are congruent, because at

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257. *Id.* at 180-81. This problem is a transaction costs problem: it is too difficult to define standards of behavior and enforce compliance with defined standards, without negotiating the specifics of the standards, and creating an institution to facilitate enforcement.

258. Brilmayer refers to the Uniform Child Custody Jurisdiction Act as an illustration of "some of the advantages of assigning responsibilities to a detached body with no adjudicative responsibilities and no allegiance to any particular state." *Id.* at 183.

259. Among the interesting advantages of the Restatement technique emphasized by Brilmayer is the fact that "because the Restatements are comprehensive documents, they can cover a broad enough range of topics to link issues on which some states stand to benefit with issues on which the others do." *Id.* at 185. Thus, transaction costs are reduced by establishing a wide enough forum so that it encompasses issues of value to all participants. Interestingly, Brilmayer criticizes the Restatement technique as applied in the *Restatement (First)* and *Restatement (Second)*, on the grounds that they sought to rely on a "single fundamental principle." Thus, Brilmayer argues for an eclectic approach in recognition of the basic nature of conflict of laws as a compromise. *Id.* at 187. I support an eclectic approach also, but one that is informed by the single fundamental principle expressed here.

260. I address below the question of how and when cooperation may develop. *See infra* Part V.

least some unilateral goals are best expressed in terms of multilateral cooperation. In fact, one might argue that cooperation may make the unilateral and multilateral perspectives more congruent. This is because the establishment of institutions—including conflict of laws rules to the extent appropriate, means of resolving other conflict of laws problems, and methods to limit defection[261]—may have spillover effects in which states recognize additional avenues of cooperation as appropriate to address additional areas of externalization.[262] Therefore, from the standpoint of interstate negotiations, the unilateral or multilateral issue is, to some extent, a false issue. Multilateral perspectives are taken for unilateral reasons. The question remains whether it makes sense to direct courts to view cases from a unilateral or multilateral perspective. It is likely that this question can be answered by negotiation. To the extent that directing courts to adopt a multilateral perspective satisfies unilateral goals, states will so direct, subject to issues of competence regarding the ability of courts to apply a multilateral perspective.

This subpart has indicated that the private or public diad and the unilateral or multilateral diad have limited validity, and should be viewed as sectors of a continuum of vertical cooperation. There is partial congruence among these vertical levels of interests. In another article, it has been argued that the level at which society should operate in respect of particular functions—the level at which cooperation in regulation should occur—will depend on a calculus of the benefits of cooperation against the detriments of cooperation in each particular functional case.[263] The same is true of conflict of laws rules. It was argued previously that it would always be efficient on this basis to cooperate in the establishment of conflict of laws rules, as accurate conflict of laws rules would provide efficient allocation of regulatory jurisdiction. Despite this efficiency at the multilateral level, it may be that cooperation would not occur, due to disparities in distribution of: (a) the benefits of efficient allocation of regulatory jurisdiction and; (b) the detriments of prevention of

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261. This is a reference to the full range of enforcement and dispute resolution institutions, including surveillance, reporting, mediation, arbitration, adjudication, and enforcement.

262. *See supra* note 259. *See also* Jacques Pelkmans, *The Institutional Economics of European Integration*, *in* INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE 318 (Cappelletti et al. eds., 1986).

263. Trachtman, *supra* note 26.

offensive international externalization, and transaction costs in the reallocation of these benefits and detriments.

B. *Predictability and Administrability Versus Accuracy*

Recall that the proposal allocates prescriptive jurisdiction over a subject matter to governments whose constituents are affected by the subject matter pro rata in proportion to the relative magnitude of such effects, as accurately as is merited given transaction costs in allocation of prescriptive jurisdiction.[264] Accuracy is the critical term in the proposal, and it is aligned with effects on constituents of the government to be accorded prescriptive jurisdiction. This subpart explains this proposal and defends it from some anticipated criticisms.

The central and most problematic issue is the definition of accuracy in choice of law. Defining accuracy requires delineating the relationship of a person to a community.[265] Even after a definition for accuracy is developed, the task is still not complete; a means by which to measure and compare levels of accuracy must then be developed. Finally, once measuring accuracy becomes possible, one must be able to determine how to value predictability and administrability to establish a tradeoff between accuracy and predictability and administrability. The determination of the appropriate tradeoff in turn will help to determine the appropriate roles of courts and legislatures, respectively, in making conflict of laws decisions. Thus, under the reasoning of the proposal, the accuracy versus predictability diad subsumes the courts versus legislatures diad.

1. Defining Accuracy

The definition of accuracy in connection with conflict of laws depends on the purpose of conflict of laws: What is it trying to achieve? On what basis does it seek to allocate prescriptive jurisdiction? There are two basic definitional approaches. The first approach seeks to establish a human rights basis for conflict of laws and to define accuracy in terms of protection of these

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264. The predictability/administrability versus accuracy diad is a simplified restatement of the proposal itself, insofar as (i) the multilateral versus unilateral and private versus public diads relate more to the politics of implementation than to efficiency, and (ii) the courts versus legislatures diad is subsumed in predictability/administrability versus accuracy.

265. *See supra* note 201.

rights.[266] The second approach seeks to establish a community rights, or sovereignty-based,[267] foundation for conflict of laws and to define accuracy in terms of protection of community rights. If individual rights are expressed within community rights, however, these bases may be merged. In this sense, accuracy may be based on human rights, both as expressed in community rights, and as articulated directly.

2. The Centrality of Rights

Professor Brilmayer argues that rights analysis "only establishes what Robert Nozick has called 'side constraints,' namely principled limits, based on fairness, on what the state may do."[268] If this argument is correct, it sets a severe constraint on the utility of rights-based analysis. This analysis cannot tell one where to go, but only where not to go. Brilmayer also argues that the rights that are relevant in rights analysis "are primarily negative rights rather than positive rights—shields not swords. By and large, they grant the right to be left alone."[269] It seems correct that in the context of litigation alone—of deciding particular cases—rights analysis cannot go much further than negative side constraints. However, it is worth considering whether rights analysis can form a central basis for a broader approach to discourse, adjudication, legislation, and intergovernmental negotiation regarding issues of prescriptive scope. After all, if the search is for a normative basis for conflict of laws, then rights analysis would seem a likely place to begin.

Brilmayer distinguishes consequentialist approaches to rights in conflict of laws from deontological approaches, finding that modern conflict of laws theory is consequentialist. Put simply, consequentialist theories, like utilitarianism or law and economics, seek to maximize some defined utility. Deontological approaches, on the other hand, work from a notion of what is

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266. This approach provides a partial rationale for the vested rights theory. On the other hand, the vested rights theory is not the only possible rights-based approach. In fact, Brilmayer shows that vested rights, while creating territoriality-based rights, is not grounded in a vision of human rights as such. FOUNDATIONS, *supra* note 47, at 203, 207-10.

267. I hasten to note that this sovereignty-based approach assumes that sovereignty has roots in human rights and aspirations, and is not intended to support or depend on an arid a priori concept of sovereignty. For a discussion of sovereignty in this context, see Trachtman, *supra* note 38, at 459.

268. FOUNDATIONS, *supra* note 47, at 194. I will not pursue in this Article the issue of "side constraints" or constitutional type limitations based on fairness.

269. *Id.* at 195 (footnote omitted).

right—from a theoretical perspective—and apply this notion regardless of outcomes.[270]

Brilmayer separates consequential from deontological thinking, arguing that a rights-based approach focuses on individual fairness: that "states are limited in their pursuit of the common good at the expense of the individual."[271] This is why rights analysis can only provide side limits. There is only a limited category of individual rights to which one is willing to accord peremptory effect. Beyond that, individual rights are merely private interests, subject to the analysis in subpart A(1) of Part IV. It is worth noting that Brilmayer assumes that the protection of rights cannot be accommodated in a consequentialist perspective—incorporating principle into policy. By comparison, law and economics theory would put a price—perhaps a high one—on fairness or rights.[272]

Brilmayer finally rejects, or severely limits, the applicability of law and economics theory and its consequentialist approach to conflict of laws. She does so regardless of the merits of consequentialism more generally,[273] on the assumption that the forum will act from a unilateral, not multilateral, perspective.[274] She thus finds "normative difficulties in applying consequentialist

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270. Brilmayer refers to the use of the term "policy" in writings by authors such as Ronald Dworkin: "Adjudication based on 'principle' [deontological] is said to effectuate the parties' *rights*, and adjudication based on 'policy' [consequentialist] is said to further collective social *goals*." *Id.* at 200 (citing RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 90-100 (1976)).

271. *Id.* at 204.

272. *See, e.g.*, ECONOMIC ANALYSIS, *supra* note 23, at 27. It might comport with social preferences to place a high price on fairness, but it is seldom the case that fairness is the only value to be considered in legislation or adjudication.

273. FOUNDATIONS, *supra* note 47, at 205:

> If a local citizen challenges a consequentialist local rule on the grounds that it unfairly sacrifices his or her rights to the common good, there may at least be the response that the rule is a product of political processes in which the individual has participated. In cases where one or both of the litigants may hail from other states, this response may not be available. The question then arises whether there is a legitimate basis to require the individual's contribution.

Id.

Instead of responding to this question, Brilmayer rejects it, arguing that consequentialism is inappropriate for application to conflict of laws. Brilmayer declines to accept the notion that if an individual frustrates the ability of a community to achieve its goals, even if the individual is foreign to the community, the community may act to stop the individual: that the individual's freedom stops at the community's nose. I argue below that the effects of the individual's conduct may yield a legitimate basis for his contribution. *See infra* text accompanying notes 283-319.

274. *See supra* text accompanying notes 249-63.

reasoning in cases that transcend state borders" and requires a showing "that the individual is properly subject to the state's authority" before permitting the good of the individual to be sacrificed for that of the state.[275] In this regard, Brilmayer merely restates the conflict of laws problem: Which individuals should be subjected to a particular state's authority? She eschews the possibility of finding justification for the state's authority in the effects that the individual's conduct may have on the state. This perspective is inconsistent with the proposal of this Article, which focuses on effects as a basis for prescriptive jurisdiction. Her perspective is based on the false notion that each person is a member of, or is beholden to, only a single community. It is necessary to recognize that formal politics—formal citizenship—is not the sole factor that relates people to communities. This approach seeks to establish a threshold fairness test as a source of side limits on governmental power. Consequently, it fails to admit into its calculus all of the complexity of modern society and the variety of ways that, and degrees to which, the individual may influence the state and may affect the ability of the state to realize its goals, and the variety of ways that, and degrees to which, the state may affect the individual.[276]

Brilmayer's concerns regarding the application of a jurisdiction's laws to a person not a part of that jurisdiction's political process is an expression in political terms of the economic concept of externalization. It is somewhat different, however, as it focuses on lack of voice, rather than on lack of cost internalization. Howéver, lack of voice is neither necessary nor sufficient for externalization to occur. Political rights are insufficient to protect against externalization, so long as the dominant voting group externalizes to the minority. Even those without a voice may be able to protect themselves from externalization by avoiding personal jurisdiction or seeking the diplomatic or political espousal of a coordinate sovereign. In addition, Brilmayer considers domicile, consent, territoriality, and mutuality (the availability of coordinate rights) as bases for legitimacy.[277]

It is necessary to agree with Brilmayer that rights are relevant to conflict of laws and that political legitimacy is required to support the application of a particular jurisdiction's law to a

275. FOUNDATIONS, *supra* note 47, at 206.
276. *Id.* at 227-29.
277. *Id.* at 210-27.

particular individual. However, political legitimacy has a much more complex source in a social contractarian consequentialism. Furthermore, as Brilmayer recognizes, legitimacy of legislation is not necessarily exclusive (that is, it may be legitimate for more than one jurisdiction to purport to govern the same individual or conduct). The argument of this Article is based on the different perspective that fairness and rights are not substitutes for consequentialism, but rather may be the results of consequentialism.[278] This perspective is grounded on the same observation as Brilmayer's rights-based approach: "that a state must be able to justify the burdens that it imposes, as well as to explain the benefits that it seeks to achieve, when it applies its law."[279]

C. *The Ex Ante Importance of Effects: A Step Beyond Comparative Impairment*

In the *Laker Airways* case, Judge Wilkey made the following statement by way of justifying the burden that the United States imposes on foreign persons by extraterritorially applying its antitrust laws:[280]

> Certainly the doctrine of territorial sovereignty is not such an artificial limit on the vindication of legitimate sovereign interests that the injured state confronts the wrong side of a one-way glass, powerless to counteract harmful effects originating outside its boundaries which easily pierce its "sovereign" walls, while its own regulatory efforts are reflected back in its face.

This argument is a consequentialist argument that a community's regulatory jurisdiction should be congruent with, or at least sufficient to address, effects on the community.[281] The argument has considerable theoretical appeal, despite considerable theoretical and practical problems.

In a world of truly private law in which the community has no public interest other than administrability, perhaps predict-

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278. This perspective does not entail a disregard for the essential dignity of humanity, or for human rights. Rather, it entails skepticism about the ability to construct fixed formulae by which to translate these concepts into conflict of laws decisions.

279. *Id.* at 229.

280. Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 923 (D.C. Cir. 1984). *See also* Weinberg, *supra* note 249, at 71 nn. 95-97 and sources cited therein.

281. Judge Wilkey recognizes some limits imposed on this concept by international law in the form of a requirement of reasonableness. He also sees a requirement that the effects be intended. 731 F.2d at 923. The proposal would not necessarily accept these qualifications on jurisdictional accuracy.

ability, and the assertion of sovereignty, there are, by definition, no relevant effects.[282] Thus, neither Wilkey's argument nor the proposal of this Article would be applicable, and the vested rights theory, or Brilmayer's rights-based approach, would make perfect sense. Given, however, a world in which, as argued above, all law is public, and all legal concerns are public law or regulatory concerns, conflict of laws has nothing to take account of besides effects on the community.

1. Law as a Public Good

Communities are formed to share in the creation of public goods[283] at various vertical levels and in various geographic and functional horizontal relationships. Public goods are defined as goods that are subject to neither exclusivity nor rivalry. That is, once the good is created, any consumer may appropriate it, and the consumption of it by one consumer does not diminish its availability to others.[284] From the standpoint of public finance economists, these characteristics are important because they indicate that, due to collective action problems, government should provide these services. These public goods include regulation that facilitates economic activity and protects against domestic externalization. Activities or persons that reduce the utility of these public goods to the community impose a cost on the community. Conflict of laws becomes relevant when these activities or persons relate to multiple communities.

Thus, we are dependent on a definition of "public good" in order to provide a definition of "effects," on which to base jurisdiction. It is necessary to include, in addition to positive public goods, such as food and drug regulation or police services, public goods that arise from laissez-faire—from the decision not to regulate.[285] Thus, in calculating effects, one considers not just reduced utility of positive public goods such as regulation, but also reduced utility from the imposition of regulation in place of laissez-faire. To put this in interest analysis terms, or comparative impairment terms, one must weigh not only the positive policies of other governments, but also the negative

282. *See supra* text accompanying notes 245-47.

283. *See generally* RICHARD MUSGRAVE, THE THEORY OF PUBLIC FINANCE (1959).

284. *Id.*

285. This is really the same idea as that expressed above to the effect that private interests in having the market work efficiently (in this case *free* of regulation) may be incorporated in public policy. *See supra* text accompanying notes 245-47.

policies.[286] To put it in Coase's terms, "We are dealing with a problem of a reciprocal nature."[287]

2. The Coase Theorem and Conflict of Laws

Viewing law as a public good—as the product of or even as a factor of production owned by governments—provides an important analogy to the private sector. In the private sector, the law of property rights determines the initial distribution of goods and rights. In the intergovernmental sector, conflict of laws determines the initial distribution of power.[288] In both cases, the Coase Theorem would indicate that, absent transaction costs, this initial allocation of property rights would not have efficiency ramifications.[289] The reason this initial allocation would, in theory, not affect efficiency is that market participants would engage in transactions resulting in efficient outcomes. Thus, in the intergovernmental sector, if it is clear that the laws of State B govern a particular transaction that imposes costs on State A, State A may compensate State B to prohibit the transaction.

Coase further argues (perhaps somewhat inconsistently) that "if market transactions were costless, all that matters (questions of equity apart) is that the rights of the various parties should be well defined and the results of legal actions easy to forecast."[290]

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286. It might be better to term these the "apparently" negative or "relatively" negative policies, as there is no necessary judgment that one is normatively inferior, or less considered, than the other.

287. COASE, *supra* note 26, at 96. This characteristic has been recognized by the United States Supreme Court in the context of extraterritoriality, in a case involving a fairly assertive "negative" French policy: "Extraterritorial assertions of jurisdiction are not one-sided . . . . The lesson of comity is that neither the [United States] discovery order nor the [French] blocking statute can have the same omnipresent effect that it would have in a world of only one sovereign." Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522, 545 n.29 (1987).

288. I refer here to familiar governmental powers, such as the power to tax, the power to regulate, and the power to enforce these prescriptive powers. The *Restatement (Third)* divides jurisdiction into three components: jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce. RESTATEMENT (THIRD), *supra* note 76, § 401.

289. COASE, *supra* note 26, at 95-185 (reprinting and commenting on *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960)).

290. COASE, *supra* note 26, at 119. Indeed, even this may be too conservative a position. In the absence of transaction costs, even property rights may be unnecessary to be specified. Steven N.S. Cheung, *Will China Go "Capitalist"?*, Hobart Paper No. 94 (1986). Thus, in a world without transaction costs, not only is the firm unnecessary, but law, the state, and international law are also unnecessary. As Coase says, "[i]t would not seem worthwhile to spend much time investigating the properties of such a world." COASE, *supra* note 26, at 115.

In the intergovernmental sector, this is an argument that the specifics of the conflict of laws rules are irrelevant, so long as their results are predictable and their application is administrable. However, as Coase noted with respect to the private sector, transaction costs exist. In fact, they may be greater in the intergovernmental sector. In connection with the private sector, Coase notes that legal decisions should be made with a view to "reduce the need for market transactions and thus reduce the employment of resources in carrying them out."[291]

Thus, conflict of laws rules in the intergovernmental sector may be equated with property rights in the private sector: each determines which decisionmaker initially controls the use of factors of production. The goal of conflict of laws rules in this context is to minimize transaction costs, in order to maximize the extent to which transactions that may result in optimal allocation of the factors of production of public goods occur.

Conflict of laws rules may achieve this goal in two ways. First, conflict of laws rules may by their predictability, administrability, and transparency facilitate market transactions that reallocate authority. In the intergovernmental sector, market transactions are agreements allocating authority: treaties, constitutions, uniform laws, practices (such as comity),[292] or other means of circumscribing claims of authority. The extent to which conflict of laws rules satisfy this condition amounts to predictability in this context. Administrability and transparency may be considered as incorporated into predictability.

Second, conflict of laws rules may provide starting positions—allocations of authority—that reduce transaction costs by obviating the need to transact. The extent to which conflict of laws rules provide such allocations amounts to accuracy in the intergovernmental sector.

One may relate the first method—predictability—to the prisoner's dilemma used by game theory.[293] If each prisoner is

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291. *Id.* at 119. Coase stated: "The same approach which, with zero transaction costs, demonstrates that the allocation of resources remains the same whatever the legal position, also shows that, with positive transaction costs, the law plays a crucial role in determining how resources are used." *Id.* at 178. Coase argues that with positive transaction costs, the "market transactions" by which private action would reallocate resources may become too costly to effect. *Id.*

292. I consider comity to be a method of communication, perhaps but not necessarily including an element of reciprocity. *See supra* note 100.

293. For an explanation of the prisoner's dilemma, see R. DUNCAN LUCE & HOWARD RAIFFA, GAMES AND DECISIONS (1957). *See also* AXELROD, *supra* note 212, at 27. Essentially, the prisoner's dilemma is a game theoretic illustration of a cir-

able to know what her comrade intends to do, and to bind her comrade to cooperative action through a binding contract, the negotiation of an optimal solution will be facilitated and the prisoner's dilemma will be resolved. Thus, conflict of laws rules that are predictable, administrable, and transparent will allow State B to negotiate an exchange with State A, whereby State A changes its rule of substantive law for application to a particular class of transactions, and State B confers something of value on State A.[294] On the other hand, conflict of laws rules that are unpredictable or opaque because they are result-oriented ("substantive," using Juenger's terminology),[295] or that depend on an analysis of forum policy that has not yet been undertaken (as in interest analysis absent the role of binding precedent), reduce the ability of states to negotiate these exchanges.

The second method—accuracy—seeks to establish in advance an allocation of authority that market participants—governments—would come to themselves in the absence of transaction costs. It is thus a theoretical exercise that might, if it were not for transaction costs, be subject to empirical testing on the basis of whether the initial allocation of authority is revised through subsequent negotiation. Under these circumstances, what theoretical allocation of authority is most likely to be relatively stable? One might begin by seeking to assess what allocations would be unstable.[296]

First, as illustrated by Judge Wilkey's views above, an allocation of authority is likely to be unstable if it fails to accord authority to a government whose constituents are affected by the circumstance in question. This is nothing less than the principle that each community should have control over its own destiny and be able to negotiate with other communities, or foreign individuals,[297] when their destinies collide. The term "affected"

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cumstance in which each player's individual choices are less attractive in an aggregate sense than cooperation; if the players fail to cooperate, their aggregate welfare is diminished.

294. For example, if the United States and Brazil could agree that Brazil owes no *obligation* to the United States to protect its rain forest, or its biodiversity, negotiations could proceed with greater clarity, albeit to the greater cost of the United States.

295. *See supra* text accompanying notes 155-57.

296. Baxter's methodology of hypothetical negotiations seems to be an appropriate tool. *See* Baxter, *supra* note 14.

297. Here, recall Brilmayer's rights-based approach that would protect foreign individuals from inappropriate exercises of prescriptive jurisdiction. Perhaps one reason that Brilmayer finds this protection necessary is that individuals, foreign or domestic, are not often accorded the opportunity to *negotiate* with governments over their regulation.

must be interpreted very broadly, to include not just the frustration of a positive governmental policy, but any harmful effects that a constituent would pay to abate, including frustration of a decision, or of a laissez-faire policy. One normally thinks of these effects as externalities. Conversely, (and illustrating that this is, in Coase's terms, a "problem of a reciprocal nature"), an allocation of authority is likely to be unstable if it accords authority to a government whose constituents are not affected, in derogation from the authority of a government whose constituents are affected.[298]

Second, an allocation might be unstable if it allocates authority to a government other than the one holding a comparative advantage in regulating the subject matter. These may be first-mover advantages,[299] that is, advantages due to greater experience with the type of business or type of regulatory problem, or other advantages in regulating.[300]

These potential components of instability would appear to indicate that stability may be obtained by allocation based on a calculus that considers effects and regulatory comparative advantage. Allocation of authority on the basis of regulatory comparative advantage, however, presents problems of moral hazard[301] or agency costs.[302] The regulator with comparative advantage will not have appropriate incentives to safeguard the interests of other states. In addition, the determination of comparative advantage is reminiscent of the determination of

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298. This is Currie's disinterested third state problem. *See* Currie, *supra* note 42, at 754.

299. *See* Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985).

300. One example might be drawn from the perspective of the United States Securities and Exchange Commission (SEC). In discussions of allocation of regulatory authority, the SEC is extremely reluctant to cede authority to other regulators. It might be argued that the SEC's position is supported by its leading position and extensive experience in securities regulation, compared to that of other securities regulators. For a discussion of the SEC's approach to allocation of regulatory authority, see *Recent Initiatives*, *supra* note 19.

301 "Moral hazard arises when an individual has the ability to affect his loss in some or all states by taking some 'discretionary' action." Richard Kihlstrom & Mark Pauly, *The Role of Insurance in the Allocation of Risk*, 61 AM. ECON. REV. PAPERS AND PROC. 371, 378 (1971). Another way of looking at moral hazard is as a type of conflict of interest: the person in control of a decision bears less than all of the consequences of the decision.

302. Agency costs are the costs of avoiding conflicts of interest or moral hazard. *See, e.g.*, Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308-10 (1976); Anthony Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980).

better law. It raises similar problems of institutional competence and legitimacy.[303] Therefore, it is provisionally deleted from the list of considerations.[304] The remaining basis for allocation of authority is effects.

3. The Role of Effects

There are two critical qualifications to the role of effects as a basis for allocation of authority. First, a stable system would not, like the comparative impairment approach, measure the effects on each state and simply award plenary authority to the state most affected.[305] Greater complexity must be embraced in order to avoid moral hazard, illegitimacy, and consequently, instability. Accuracy will be enhanced by a kind of *depeçage*[306] (*nouveau depeçage*) that spreads authority, pro rata, to all governments whose constituents are affected.[307] For those shaking their heads incredulously at the administrative complexity and apparent folly of this notion,[308] consider Judge Wilkey's per-

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303. *See supra* text accompanying notes 143-68.

304. I return to regulatory comparative advantage below. *See infra* text accompanying note 319. It may be that regulatory comparative advantage becomes a basis for allocating regulatory authority in certain areas. For example, under the Basle Convention on Transboundary Movement of Hazardous Wastes, only states with the ability to dispose properly of hazardous wastes are permitted to be recipients of transboundary shipments of hazardous wastes. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* Mar. 22, 1989, art. 4, para. 9(a), *in* 28 I.L.M. 657. Thus, a defined level of technological and regulatory competence, in a circumstance that offers few opportunities to externalize costs, may be a basis for allocating regulatory jurisdiction in accordance with competence.

305. Of course, each of the conflict of laws systems discussed here, or otherwise known to the author, would assign full authority to one or more jurisdictions, but would not Solomonically divide authority among jurisdictions.

306. *Depeçage* is normally associated with the application of laws of different states to resolve *different* issues in the same case. *See, e.g.*, Willis L.M. Reese, *Depeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973). Here, I use the term to refer to the application of laws of different states to resolve the *same* issue in the same case.

307. Of course, this is the way shareholders vote in corporations and banks vote in syndicates: each has control in proportion to the extent to which it is affected. Share ownership and loan commitments measure both voting rights and economic interests, ensuring that these are congruent.

308. The reader is properly concerned about administrability. I address this issue below. *See infra* text accompanying notes 322-37. The author thanks Professor Weintraub for pointing out that he and Professor von Mehren have both made a somewhat different, perhaps broader, "creative" proposal. Professor Weintraub suggests that, in otherwise intractable circumstances, "[i]t may be possible to fashion a rule for the case in issue that differs in some respects from the domestic law of either contact state but that permits the accommodation of otherwise irreconcilable policies." WEINTRAUB, *supra* note 86, at 79. *See also*

spective in the *Laker Airways* case. The United States should not be prevented from asserting regulatory jurisdiction over conduct that has adverse effects in the United States. One might go on to say that other affected states should not be required to abdicate authority simply because the United States asserts authority. Shared effects indicate a need for shared authority.[309]

Second, the effects worth considering are not confined to those implicated in any particular case or transaction. If these effects were considered alone, the rule would be unstable, not to mention unpredictable. The effects to be considered are not the effects on a particular claimant, or even the effects of a particular policy or its frustration, but the total social effects on the constituents of the relevant state on a long-term basis.[310] In addition to considering effects on plaintiffs, it is necessary to consider effects on defendants; in addition to considering the positive effects of regulation, it is necessary to consider the negative effects.

These effects should not be considered as limited to narrow monetary loss or gain. Rather, they might be considered very broadly to include problems of reciprocity, diminution of the happiness of constituents through disrespect of the rights of nonconstituents, or other concerns that might require consideration of rights.[311] Thus, in a world without a priori definitions of human rights, or even in a world with such definitions, but in which human rights sometimes must be compromised for other values, a consideration of aggregate effects may incorporate human rights.[312] However, the effects must be quantified in order to provide a basis for accurate weighing.

Arthur T. von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974). Professor von Mehren also suggests that, in certain cases, a "special substantive rule" should be fashioned to accommodate competing governments' interests. *Id.*

309. *See, e.g.*, Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 423 (1956) (indicating that where externalities are of sufficient importance, "some form of integration may be indicated"); Trachtman, *supra* note 26, at 71.

310. See Luther L. McDougal III, *supra* note 234, at 439; Alexander, *supra* note 28.

311. *See, e.g.*, John H. Ely, *Choice of Law and the State's Interest in Protecting its Own*, 23 WM. & MARY L. REV. 173 (1981).

312. Even Brilmayer's rights-based approach recognizes that human rights must sometimes be compromised; her concern is with the legitimacy of doing so when the person whose rights are expropriated is not a part of the expropriating community. FOUNDATIONS, *supra* note 47, at 205. Thus her concern may be viewed as a concern for externalization, more than for rights on an a priori basis.

It is necessary to address the problem of relativity of effects. This can best be illustrated by the United States assertion of so-called "extraterritorial"[313] application of its law. Other states argue that they refrain from such extraterritorial application; that they do not seek to assert the wide applicability of their policies. Other states may refrain from such application for two reasons. First, they may not have as highly articulated a policy in fields such as antitrust or securities. Second, they may be more reticent to apply their policies to multistate activity.[314]

Assuming for a moment this disproportionate level of policy and willingness to assert it in the international market, how can it be fair to allow the United States, in effect, to rule the world? There are two levels of response to this question. First, as noted above, one must weigh not only the positive policies of other governments, but also the negative or laissez-faire policies. Thus, under this approach, the interest of the United States in regulating an international uranium cartel could be offset by the interest of other states in maintaining an international uranium cartel.

Second, while Brilmayer is correct that "no hard and fast assumptions can be made about the extent to which a state is *concerned* about a particular case,"[315] one may posit that a state's legitimate interest may be measured in dollar terms. In this way, the subjective question of the level of state concern is replaced by a more objective question: What is the actual cost that would be imposed if a state cannot regulate, or what is it worth to the state to be able to regulate? Thus, the question is,

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The proposal addresses the problem of externalization in a different way: not by establishing barriers to the reach of the state, but by ensuring that the reach of the state is congruent with the effect on the state.

313. As noted elsewhere, extraterritoriality has no agreed or obvious meaning. One way to regard the concept of extraterritoriality is to view it broadly, as Professor Brilmayer and Mr. Norchi have done: "As used here, a case involves extraterritoriality when at least one relevant event occurs in another nation." Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1218 n.3 (1992). While this definition may be extremely broad, it encompasses the extensive range of problems that conflict of laws must address.

314. On the other hand, the European Community and Germany have active antitrust laws, and apply their laws in ways that may be viewed as "extraterritorial." *See* Joined Cases 89, 104, 114, 116, 117 & 125-29/85, A. Åhlstrom Oaskeyhtio v. Commission, 1988 E.C.R. 5193, 4 Common Mkt. Rep. (CCH) ¶ 14,491 (1988); James J. Friedberg, *The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine*, 52 U. PITT. L. REV. 289 (1991); David J. Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 AM. J. INT'L L. 756 (1983).

315. FOUNDATIONS, *supra* note 47, at 147 (emphasis added).

what are the comparative costs (comparative financial impairment) to State A and State B resulting from a decision to apply the law of one or the other? As Professor Alexander proposes, "when the actual effects on competing states of the application or nonapplication of their rules can be assessed, these effects rather than the rules' objectives should form the basis for any findings of 'interest' or comparisons of 'impairment.'"[316]

The difficult question, of course, is how are these costs to be calculated? In order to do so, it is necessary to posit a methodology for quantifying the effects of legal rules; the law and economics school as a whole, and indeed economics as a separate discipline, is concerned with this endeavor.[317] Of course, monetizing social preferences and incursions thereon is complex and inexact. This is a frontier area of economics and of law and economics. For some types of preferences, it is not terribly difficult to determine a money value. There may be a parallel private market, for example, for transportation services. For other types of preferences, such as an unpolluted environment, valuation may be much more difficult, although it is being attempted.[318] It is correct to say that these efforts are primitive and inexact; yet there seems little alternative. Unless one measures and compares impairment of policies, there can be no principled negotiation of which state is to be accorded prescriptive jurisdiction.

Interestingly, quantification of the effects of legal rules would incorporate, to a marginal extent, a law and economics-oriented better law component. This is so because the state with the more efficient rule of law would incur greater costs by virtue of the application of a less efficient foreign rule. In this sense, one also reincorporates the issue of comparative regulatory advantage as part of the calculus of stability.[319]

This analysis of a Coasean approach to conflict of laws has thus replicated the predictability or accuracy diad, describing the importance of predictability and accuracy. In fact, under this

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316. Alexander, *supra* note 28, at 1090.

317. *See generally*, ECONOMIC ANALYSIS, *supra* note 23.

318. *See, e.g.*, Peter Passell, *Disputed New Role for Polls: Putting a Price Tag on Nature*, N.Y. TIMES, Sept. 6, 1993, at 1, col. 1 (describing the use of opinion surveys to perform "contingent value studies" in order to value environmental degradation); Note, *"Ask a Silly Question . . .": Contingent Valuation of Natural Resource Damages*, 105 HARV. L. REV. 1981 (1992). For some of the economics literature, see ROBERT C. MITCHELL & RICHARD T. CARSON, USING SURVEYS TO VALUE PUBLIC GOODS: THE CONTINGENT VALUATION METHOD 65 (1989); ENVIRONMENTAL ECONOMICS: A READER 81-112 (Anil Markandaya & Julie Richardson eds., 1992).

319. *See supra* text accompanying notes 299-304.

analysis predictability is subsumed within accuracy. One component of accuracy—of determining the most stable allocation of jurisdictional competencies—is determining how to make these allocations predictable. Other components of accuracy may be subsumed within stability, as discussed above. These factors should be traded against one another in order to minimize transaction costs and achieve efficient allocation of authority. The optimum tradeoff between these factors may be defined as accuracy.

D. *Achieving Accuracy: Courts Versus Legislatures*

Brilmayer finds that her work in this regard is by necessity "an effort to recommend institutions, not particular solutions."[320] The immense complexity of the problem of conflict of laws indicates that it probably is not optimal to specify discrete rules on a general basis. Thus, the best approach is to devise institutions capable of determining when and how to particularize. It will be useful, however, under certain circumstances, to develop particular solutions.[321]

Having developed a theoretical definition of accuracy in conflict of laws, it is necessary to proceed to seek to understand how accuracy might be achieved. The analysis sketched above requires that various types of effects be valued and compared with other types of effects. The valuation decisions would have significant political ramifications, but this fact does not lead to the conclusion that courts are inappropriate fora, despite the criticisms often leveled at conflict of laws approaches that require courts to value and balance factors.[322]

As noted by Baxter, courts are the default option.[323] If the legislature or other body fails to instruct them on how to decide conflict of laws, it is left to courts to devise a method for decision. Therefore, from a practical standpoint, until the complete resolution by the political branches of conflicts issues, courts must stand ready to decide conflicts cases.[324] In addition to this passive role, however, courts may have three active roles.

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320. FOUNDATIONS, *supra* note 47, at 149.

321. *See infra* text accompanying notes 322-28.

322. *See, e.g.*, Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 948-52 (D.C. Cir. 1984). In *Laker Airways*, Judge Wilkey argued that courts are unable to apply the jurisdictional balancing test contemplated in the *Restatement (Third)*. *See* RESTATEMENT (THIRD), *supra* note 76, § 403.

323. *See supra* text accompanying note 193.

324. *See* Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585 (1985).

First, courts can play a role in developing conflicts law, by experimenting with approaches to reciprocity and comity. In this sense, one might view comity as a kind of "meta-law" that may precede the development of legislation or treaties which might fix more discrete rules. While, as Brilmayer argues,[325] reciprocity may be a weak approach because it lacks clear standards and allows defection, it might be useful as an initial approach to explore the possibilities for multilateralism. Reciprocity and comity, to the extent exercised by courts, may be viewed as a somewhat mystified, sub-political approach used to muddle through on issues that are not yet suitable for political resolution. These issues of overlapping scope of governmental authority are extremely difficult and have been ignored in, and belie, our public international law system of territorial sovereignty.[326] Until one can overcome the presumptions of this system, comity and reciprocity may be appropriate responses.

Second, courts may help goad legislatures into action. *Nouveau depeçage* is proposed soberly and it may be the most accurate—albeit Solomonic—approach in many cases. However, its very Solomonic aspect, if implemented by courts, might goad legislatures into action. When legislatures have not acted, but should and can, perhaps it is best for courts not to seek to fill the gaps, but merely to embrace and address complexity.[327]

Third, as this Article illustrates, conflicts issues are often complex and particular. Until one is able to develop a legislated or agreed system for addressing the complexity and particularity, courts and the common law system have the flexibility and the ability to address complexity to the degree necessary to handle

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325. *See supra* text accompanying note 257.

326. In *De Conflictu Legum Diversarum in Diversis Imperiis*, Ulrich Huber developed a three-part logic that has defined the territorial approach: states are sovereign; each state has exclusive territorial jurisdiction; and no state may apply its laws in the territory of another. *See* D.J. Llewelyn Davies, *The Influence of Huber's* De Conflictu Legum *on English Private International Law*, 18 BRIT. Y.B. INT'L L. 49, 57 (1937); Friedrich K. Juenger, *A Page of History*, 35 MERCER L. REV. 419, 434-35 (1984). See also The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824), in which Justice Story wrote that "[t]he laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction." *Id.*

327. *See, e.g.*, E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244 (1991) (applying a presumption of territoriality, and thereby challenging Congress to speak clearly to the issue of extraterritoriality in worker discrimination law, which challenge Congress took up); Zoelsch v. Arthur Andersen & Co., 824 F.2d 27 (D.C. Cir. 1987) (Judge Bork declining to apply United States securities law where Congress had not made clear its desire to do so).

these types of cases. Once a legislated or agreed system is established to address conflicts in a particular doctrinal area, it is likely to be incomplete, in the sense that it will contain issues for courts to analyze and address.[328] One would expect any regime developed by the political branches to delegate at least some issues, such as those relating to the assessment and balancing of facts, to courts or to regulatory agencies.

Obviously, when it is possible through interstate negotiation or legislation to develop a formula for resolving conflicts in advance, for application by courts or other bodies, this should be done. In some cases, the transaction costs involved in negotiation, or in developing formulae, may be greater than can be justified by the additional legitimacy and predictability that agreed or legislated formulas may provide. In these cases, there remains an important role for courts.

V. CONCLUSION

The question remains of what law to apply in connection with a Dystopian harmed by a United States-manufactured automobile, when the automobile complies with all Dystopian standards. If the conflict of laws issue could be clarified, Dystopians would know in advance what protection they have, and United States auto manufacturers would know in advance the standard of care to which they will be held. This clarity would allow each side to negotiate (either by voice or by exit) for a different standard, should the applicable one be unacceptable. This clarity would delineate the distribution of responsibility between the United States and Dystopian governments and thereby discipline them to provide their respective constituents with an appropriate level of protection and responsibility for their respective societies and for the area in which their societies intersect.

As courts, legislators, or interstate negotiators seek to resolve conflicts issues, they should recognize what accuracy means: the ability to empower communities to determine their own destinies. This simple goal entails great complexity in realization. Once the full complexity is accepted, it is appropriate to simplify it: to develop mechanisms that allow optimal tradeoffs between accuracy, on the one hand, and predictability and administrability, on the other.

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328. *See supra* note 17.

The proposal made here merely provides a methodology designed to inform discourse, adjudication, legislation, and intergovernmental negotiation regarding conflicts issues. The proposal would welcome discrete rules such as those posited by the vested rights approach, provided those rules succeed in minimizing transaction costs through an optimal combination of accuracy and predictability or administrability. Alternatively, it would accept balancing tests informed by this approach, if they meet the same requirements. This seeming inconsistency in accepting both of these alternatives may be consistent when viewed from a broader perspective. It is necessary to examine specific components of specific doctrinal areas to determine what works in those areas. Of course, transaction costs might be diminished if there is a degree of uniformity, or at least coherence, across doctrinal areas and their components. It is also necessary to examine specific types of institutions, in order to determine how most efficiently to respond to conflicts questions.