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REVIEW ESSAY

Baseball and Chicken Salad: A Realistic Look at Choice of Law

CONFLICT OF LAWS, FOUNDATIONS AND FUTURE DIRECTIONS. By Lea Brilmayer.* Boston, Toronto, London: Little, Brown and Company, 1991. Pp. xvi, 240. Index. \$12.95.

Reviewed by Harold G. Maier†

*Legend has it that at a retirement dinner for the late National League baseball umpire Bill Klem, a speaker, rising to congratulate the honoree, said "The best thing about Bill Klem was that he called 'em like he saw 'em." A second speaker, not to be outdone, said, "He did better than that—he called 'em like they were." Klem rose and thanked the speakers but, as he turned away from the lectern, paused for one last word. "Thanks for the kind words, guys; but I want to remind you all: THEY WEREN'T NOTHIN' 'TIL I CALLED 'EM.'"*¹

Most conflict of laws teachers come to their calling because they are fascinated with the intellectual variety of the subject matter and the sense of systemic universality that pervades the legal decisions with which they work. We deal, after all, with some very fundamental aspects of law and the legal system in a world of fascinating abstractions mixed with concrete decisions. Although I have taken no survey, conversations with many of my colleagues suggest that they, as did I, found the course Conflict of Laws in the second or third year of law school to be one that reawakened the intellectual stimulation and excitement which pervades the first semester of law study for most law students.

One reason for this fascination is that Conflicts is one of the few remaining legal areas still dominated by common-law decisions and, therefore, by the common-law decision-making process. It is at once ar-

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1. Cf. Kaplan, *What's Killing the Umps?*, N.Y. Times, Mar. 20, 1988, at 42, col. 1.

cane and intensely practical. There is a kind of one-to-one relationship between the scholar's work and legal results that is not characteristic of many other legal disciplines.

Professor Lea Brilmayer recognizes that academic commentary takes on more significance in this field than in most others.² She is correct. A court may be a Currie Court or a Leflar Court or a Beale or a Reese or a Cavers Court. It may "follow" Brilmayer or Kay or Silberman. It may treat the works of scholars like persuasively authoritative judicial opinions. This is heady stuff in the Ivory Tower; and it proves to our students—and, perhaps, to ourselves, as well—that we can be philosopher kings and guards of the guardians while keeping at least one toe firmly planted amidst the hurly-burly that is the actual practice of law. We are listened to.

This status, however, carries with it a danger for conflict of laws scholars and their scholarship. The danger is that we will come to believe, as I fear many of us already have, that academic inquiry and debate is an end in itself; that it is the theorist and scholar who makes the law; that the courts are so compelled by the power of our logic, the flow of our prose, and the precision of our analysis that they will abandon their role as decisionmakers to sit at the feet of the scholars who articulate the rules they cite and forge and temper the theories on which they rely. This is not so.³

Conflicts scholars spend a great amount of time talking to each other—and there are not very many of us.⁴ Therefore, we talk to the same people a lot. Much of this discussion is dedicated to attacking or supporting each others' theories,⁵ rather than determining how judges are applying these theories in the real world of judicial decision making or to determining whether our theories are practically workable where the action counts.⁶

We spend far less time than we should talking with practitioners and, most important of all, with judges. I do not refer solely to judges on the highly visible courts like the New York Court of Appeals or the

2. L. BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DECISIONS* xiii (1991).

3. *See id.* at 90.

4. The 1990-91 *Directory of Law Teachers* lists a large number of persons currently teaching or qualified to teach in Conflict of Laws. A short perusal of that listing indicates that no more than 40 (counted with a tendency toward overinclusiveness) are engaged actively in both teaching and writing in the field. Of that group, less than half participate even irregularly in the theoretical debates that characterize conflict of laws scholarship.

5. *See* L. BRILMAYER, *supra* note 2, at xiii-xiv.

6. For two brilliant analyses of choice of law theory that were far too complicated for adoption in day-to-day judicial decision making, see A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 76-79 (1965); Yntema, *The Objectives of Private International Law*, 35 *CAN. B. REV.* 721, 734-35 (1957).

California Supreme Court with which some of our scholars do have occasional contact. The needs and attitudes of trial court judges who must select the rule of law under which to charge juries, or to rule on evidence, or to decide motions to dismiss are fundamentally important as well. These judges are no less committed to doing justice to the parties before them than are the high appellate courts. Trial judges also know, however, that crowded dockets and difficult trial schedules may make it more important that they settle a choice of law issue quickly and clearly than that they settle it "correctly" from the conflicts scholar's point of view.⁷

Academic interchange is, of course, of considerable value. But legal theories do not decide cases. Rules of law do not decide cases. Legal analysis does not decide cases; and therefore, law professors do not decide cases. *Courts* decide cases; and they do so by using rules of law, legal theories, and the writings of professors as tools to help them reach their decisions, but not as authoritative sources of the decisions themselves. We do not now have, and have never had, a government of laws and not of people. We have, rather, a government of people who make, and whose actions and decisions are guided by, rules of law.

Professor Brilmayer notes the importance of these practical considerations. Her preface states that the book will "highlight the issues that are raised in choice of law" to the end that understanding the "pitfalls that have arisen in the past" will permit legislators (and courts and scholars?) to "make some progress towards workable, pragmatic solutions."⁸ Portions of this thoughtful book accomplish that goal; others are less successful. A few places lack analytical clarity because they fail to quit themselves of the metaphors and conceptualizations that are the "familiar speech of choice of law."⁹ Some parts, despite Professor Brilmayer's commitment to pragmatism, place much greater emphasis on academic theory than on current decisional fact. The book is provocative and worth reading. If its content does not always live up to the promise suggested by its preface, it still provides more than enough intellectual challenge to make it a significant contribution in this field.

7. I have heard stories from practitioner friends about busy trial judges who, when faced with a difficult choice of law question in a particular case, have informed counsel about what law would be applied with the added injunction, "If you don't like that, you can appeal it." This often happened in situations in which both court and counsel clearly knew that the amount in question effectively precluded any legal action beyond the first instance as a matter of simple litigation economics. *Cf. Kaczmarek v. Allied Chem. Co.*, 836 F.2d 1055, 1057 (7th Cir. 1987) (Posner, J.) (stating: "The opponents of mechanical rules of conflict of laws may have given too little weight to the virtues of simplicity").

8. L. BRILMAYER, *supra* note 2, at xiii-xiv.

9. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 670 n.35 (1959); *see also supra* text accompanying note 68.

The book has three parts entitled "Traditional Theories," "Constitutional Limitations," and "The Future of Choice of Law," divided into five chapters or sections¹⁰ with a short conclusion. There is also a preface and an introduction, both of which are important.¹¹

The introduction raises a fundamental question about the appropriate normative perspective for choice of law decision making. The author asks:

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?¹²

She concludes that external and internal elements coexist with differing emphases in all choice of law theories.¹³

The remainder of the introduction summarizes the main body of the text, pointing out that the internal-external dichotomy has had significant influence, both historically and in its modern context, on choice of law theory.¹⁴ This influence is reflected especially in constitutional theories prohibiting or requiring the choice of particular local law rules. Apart from the Constitution, the author correctly finds no other authoritative legal source—no controlling body of law or political entity—external to the forum from which choice of law decisions could derive legal (as distinguished from moral or ethical) authority.¹⁵

This conclusion accurately reflects the approach of any governmental unit that seeks to derive long-term reciprocal advantages from the maintenance of an orderly system of interaction with its fellow community members when no superior legal source otherwise requires that systemic policies be followed. In such circumstances, however, it is the forum's policy decision that makes system policies relevant to its decisions, not some overarching authoritative legal source that requires the forum to follow those policies. The forum's decisions necessarily are informed by the recognition that it is in the interest of every forum state to support, when possible, the policies of the governmental system in which it operates. Otherwise, the forum could not gain maximum benefit from membership in a community that necessarily assumes mutual accommodation between the separate bodies politic that are its mem-

10. References in the index are to section numbers rather than pages.

11. Furthermore, the footnotes are placed at the bottom of each page, making this text far superior, for both the casual reader and the serious student, to similar works of this genre that often have "footnotes" at the end of the text or following each chapter.

12. L. BRILMAYER, *supra* note 2, at 1 (emphasis in original).

13. *Id.* at 3.

14. *See id.* at 3-6.

15. *Id.* at 231.

bers.¹⁶ In this sense, of course, the perspective on choice of law is always internal to the forum because the forum's choice reflects its self-interested decision to accommodate systemic needs to preserve the utility of the overall system for its own benefit.¹⁷

Part I describes and critiques the principal theories of choice of law with greatest attention to the work of the late Professor Brainerd Currie. The author sets out to demonstrate that Professor Currie's work is in many respects no less metaphysical than that of the *First Restatement* and Joseph Henry Beale.¹⁸ The section is a fascinating and well-done academic critique. Brilmayer leads the reader through a brilliant analysis of Currie's work, but she gives no indication of how his theory's shortcomings have helped create incorrect choice of law decisions in the real world milieu in which pragmatic solutions are needed most. Aside from a few illustrations,¹⁹ there is no discussion of *how* courts actually are applying Currie's governmental interests analysis, and whether the decisions and opinions in the field have modified, changed, or followed Currie's recommendations. One seeks in vain for a discussion of real cases that have been decided wrongly because of their reliance on Currie's theories, or decided correctly because they rejected his theoretical shortcomings. Consequently, the reader searching for a link between theory and function necessarily is left at the end of the chapter with the response, "so what?" This discussion's relevance to the author's pragmatic goals would have been clearer had she accompanied the critique with a demonstration of how the misperceptions that she demonstrates in Currie's theories have affected adversely actual choice of law decisions in real cases. As it is, one is left with the feeling that, although Currie may have been wrong, it is not clear why a pragmatist should care.

Part II identifies two relevant constitutional policies. One is the policy of nonintervention that protects each state in its sphere of retained sovereignty from interference by other states. The second is the policy of cooperation and assistance that encourages a state both to lend its aid to other states and to refrain from furthering its own goals

16. Cheatham, *Symposium, Comments on Reich v. Purcell*, 15 UCLA L. REV. 624, 625 (1968); see Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 962-63 (1952); Maier, *Coordination of Laws in a National Federal State: An Analysis of the Writings of Elliott Evans Cheatham*, 26 VAND. L. REV. 209, 247-52 (1973).

17. Cf. Maier, *Ethics, Law and Politics* (Review Essay), 15 YALE J. INT'L L. 190, 193-94 (1990) [hereinafter Maier, *Ethics, Law and Politics*]. For a discussion of the role of systemic interests in transnational regulatory cases, see Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 303-20 (1982) [hereinafter Maier, *Extraterritorial Jurisdiction*].

18. L. BRILMAYER, *supra* note 2, at 45-62.

19. See, e.g., *id.* at 82-89.

when it has no right to do so.²⁰ The third section demonstrates how the due process, equal protection, full faith and credit, and commerce clauses reflect these policies. It closes by suggesting some constitutional problems raised by the presumption that forum interests should prevail in some forms of interest analysis.²¹

The author's discussion of federalism is accurate, and the entire constitutional section is very helpful. One additional consideration is relevant and would have aided the author's later discussion of a vertical rights-based theory for choice of law. The United States federal structure is linked strongly to pragmatic efforts to maintain the values of local government as an aid to the preservation and implementation of democratic principles. The smaller the decision-making political entity, the greater the influence of the individual on the decisions made by that entity.²² Therefore, there is always a greater ethical justification for coercion at the local level than at the national level because the coerced individual has a greater voice in influencing the coercing government's acts. Furthermore, the role of domicile as a relevant ethical consideration is strengthened by this relationship between principles of democracy and federalism as applied in both interstate and national-state allocations of decision-making authority.²³

The third and by far the most useful part of the book, "The Future of Choice of Law," recommends two approaches that the author believes would improve choice of law decision making. In Chapter Four, she asserts that game theory may help answer the question of how states can best use choice of law to implement their policies.²⁴ Based on this analytical format, she suggests a functional approach:

to develop a workable system of choice of law that furthers the goals that states actually have, not to dictate to states what they ought to want and how they ought to get it. Such an approach seeks to influence state decision making only by providing strategic analysis that is helpful to states in achieving the variety of goals that they actually have.²⁵

As a first step, the author borrows the postulate of "consumer sovereignty," that individuals are the best judges of their own interests,

20. *Id.* at 114.

21. *See id.* at 137-40.

22. For a brief discussion of the role of this principle in determining the states' role in foreign affairs matters under the United States Constitution, see Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT'L L. 832, 837 (1989).

23. Domicile alone, however, does not justify the application of state decision-making power to a cause of action having no other connection with the forum state. For a discussion of the relationship between this role of federalism and the allocation of judicial jurisdiction among the states, see Maier & McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. ____ (forthcoming 1991).

24. L. BRILMAYER, *supra* note 2, at 148.

25. *Id.* at 149 (footnote omitted).

from economic theory, and suggests that in this same sense, states can be viewed as expressing their choice of law policy preferences through "market transactions."²⁶ This approach treats choice of law policy as "real" state policy and argues that states genuinely may have preferences and differences of opinion about choice of law.²⁷ Postulating a hypothetical bargaining situation between the states in a choice of law situation, the author suggests that states have a great deal to gain if they can pursue their interests cooperatively.²⁸ Consequently, a functional approach that determines state interests objectively by observing state conduct is useful. Such an approach identifies actual state preferences of two general types: Those that reflect genuine empirical convictions about substantive efficacy, and those that reflect a genuine value judgment about the parties' entitlements.²⁹

Professor Brilmayer points out that states have much to gain if they can pursue their individual interests cooperatively; but such cooperation requires a forum that can identify and articulate these interests so that informed "bargaining" can take place.³⁰ Without this communication, states never can maximize their own interests in light of other states' interests. She suggests that one forum for coordination and communication might be the American Law Institute (ALI).³¹

The author identifies three different considerations that influence a state's evaluation of a proposed choice of law rule: The rule's overall utility as it effects (1) the conduct of the parties, (2) systemic considerations, and (3) how cooperation with other states will effect the distribution of advantages.³² She then suggests that a new *Restatement of Conflicts* could facilitate a new cooperation strategy by not adopting a "single unifying intellectual principle" as a guide.³³ Rather, a new *Restatement* would emphasize a pragmatic approach to identify potential gains from cooperation among states and to ensure that all states do gain from the resulting overall improvement in utility. Once the *Restatement* has described this approach, based on actual "market surveys" of decided cases, the *Restatement* regularly could modify its provisions to reflect the ongoing operation of "the market."³⁴

Three sets of policies inform all legal rules, including choice of law rules: Governmental system policies, substantive rule policies, and poli-

26. *Id.* at 150.

27. *Id.* at 151-52.

28. *See id.* at 155-75.

29. *Id.* at 154-55.

30. *See id.* at 155-67.

31. *See id.* at 185-89.

32. *See id.* at 175-79.

33. *Id.* at 186-87.

34. *Id.* at 188.

cies of practical utility.³⁵ Professor Brilmayer's recommendations in this section reflect wise concern for all three. She believes that the best solution to problems of divergent judicial conclusions is constant updating of the *Restatement* as new legal issues emerge. This would provide uniform solutions to splits in the circuits. If some particular choice of law issue produces divergent opinions or provokes the courts to manipulate the rules to avoid what the *Restatement* clearly requires, this would indicate that the *Restatement* rule may need updating or modifying. If the *Restatement* is not reaching its goal of providing clear, acceptable guidance to most courts deciding the issue, then a better solution should be drafted as soon as practical.³⁶

This approach would focus on maximizing the policies that states actually have instead of searching for intellectually compelling "correct" policies that theorists think they should have. One means to this end is focusing academic inquiry on the choice of law decision-making process "emphasizing the game theoretic possibilities that are inherent in the strategic advantages of interstate coordination."³⁷

Professor Brilmayer's suggestions concerning the role of the ALI and the need for a new *Restatement* are well taken. If the approach that she recommends is adopted, then as a very first step the reporters should conduct a case-law survey to identify and synthesize what actually is going on in the courts, without too much concern about whose theories are being used to explain the results. Conflict of laws scholarship over the years has become so stridently competitive that its ultimate objective—to facilitate, explain, and influence the functioning of the legal system—is obscured and inhibited. It is especially important to recall that the *Restatement (Second)* never was intended to be the last word in choice of law. Rather, it was designed to facilitate judicial experimentation and permit incremental change in choice of law decision making.³⁸ The late Professor Willis Reese, its Reporter, characterized the *Restatement (Second)* as a "transitional document."³⁹ That transition, as the late Professor Elliott Cheatham often said, was to be from the old unreasonable rules, through a period of "unruly reasonableness," to the development of reasonable rules that addressed choice of law problems with more precision.⁴⁰ Many, perhaps most, states in

35. Maier, *supra* note 16, at 246.

36. L. BRILMAYER, *supra* note 2, at 188.

37. *Id.* at 189.

38. Reese, *American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases*, 33 VAND. L. REV. 717, 734 (1980).

39. *Id.*

40. The aphorism is originally from the facile pen of Professor Maurice Rosenberg. See Rosenberg, *Two Views on Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 464 (1967), quoted in *Tooker v. Lopez*, 24 N.Y.2d 569, 584, 249 N.E.2d 394,

the United States still are rooted firmly in the second of these periods. Thus, the preparation of any new *Restatement* must begin with a careful look at what actually has happened in the courts during the theoretical storm of the last sixty years before its Reporters determine what their greatest contribution might be to the development of a pragmatic and functional system of choice of law.

The final chapter suggests and develops some principles for choice of law based on fairness, rather than state self-interest.⁴¹ Brilmayer derives the fairness norms under this analysis from general principles, not from constitutional considerations. Put another way, merely because a state may take an action without controverting constitutional limitations, does not mean that the state *ought* to take such action as a wise or fair choice of law policy.⁴² Therefore, under this analysis a forum court should ask not only *may* I apply the law of state X without controverting the Constitution but also, *should* I apply the law of state X even though it would not be unconstitutional to do so.

One of Professor Brilmayer's principal criticisms of modern choice of law theory is that it is consequentialist in nature,⁴³ that alternative courses of action are evaluated according to their consequences.⁴⁴ She writes:

A major problem with strictly consequentialist reasoning is that there are strongly held moral intuitions that human beings are not just means to an end, but must be treated as ends in themselves. This is one basis of a moral theory of rights. It is also the basis of a rights-based theory of adjudication, generally, and of adjudication of choice of law cases, specifically.⁴⁵

In her view, litigants should make, and courts and legislatures should consider, rights-based arguments, normative claims that the right in question ought to be honored, even in nonconstitutional contexts.⁴⁶

To address this question, Professor Brilmayer develops what she calls "a political rights model" for choice of law that "requires a state to justify its exercise of coercive authority over an individual aggrieved by the application of the state's law."⁴⁷ The rights in this model are primarily negative rights, rights of the individual to be left alone.⁴⁸ Two

403, 301 N.Y.S.2d 519, 532 (1969) (Fuld, J., concurring).

41. L. BRILMAYER, *supra* note 2, at 192.

42. *See id.* at 204-05 n.38; Cheatham, *Conflict of Laws: Some Developments and Some Questions*, 25 ARK. L. REV. 9, 25 (1971) (stating, "[t]o say that a law does not violate the due process clause is to say the least possible good about it").

43. *See* L. BRILMAYER, *supra* note 2, at 197-203.

44. *Id.* at 197.

45. *Id.* at 203.

46. *Id.* at 204.

47. *Id.* at 210.

48. *Id.* at 207-08.

bases that justify the state's coercion are domicile, because it gives an individual the right to influence the content of the local laws that the state is applying,⁴⁹ and presence within the territory, because the entering party has "chosen" to be subject to that jurisdiction's legal rules.⁵⁰ Both of these considerations contain overtones of consent because both include inferences that the aggrieved party has submitted voluntarily to the law that is chosen.⁵¹

Professor Brilmayer then discusses what she calls the principle of "mutuality"—that a "substantive rule not be applied to an individual's detriment unless the individual would be eligible to receive the benefits if the tables were turned."⁵² Law selection under such an approach would not depend on which party would benefit from the local law rule selected.⁵³ This goal of mutuality, however, is achieved largely by the use of jurisdiction-selecting rules.⁵⁴ In that sense, this approach parallels the Bealean method of the first *Restatement*.

The author concludes that the fairer solution to choice of law problems, when a "true conflict" exists, is to apply the law of a state having adequate territorial connections to both parties.⁵⁵ Thus, courts would give due regard to the political rights of both parties, and fairness to them would result through otherwise evenhanded adjudication.⁵⁶

The principal political right that Professor Brilmayer asserts is the right of the individual to be left alone by the state.⁵⁷ She correctly distinguishes this proposition from problems raised by state sovereignty. State sovereignty considerations address the rights of states with respect to each other.⁵⁸ The author's rights-based theory addresses the right of the individual not to be subject to unfair treatment by the state.⁵⁹ The book identifies two connecting factors that are relevant to the application of the political rights-based theory: Domicile and presence in the territory.⁶⁰ Rights analysis looks at burdening links. A political rights analyst asks whether an individual's connections with a state

49. *Id.* at 211.

50. *Id.* at 221.

51. *Id.* at 211, 216.

52. *Id.* at 225.

53. *Id.*

54. *Id.* at 225-26.

55. *Id.* at 229.

56. *Id.* at 230.

57. *Id.* at 208.

58. *But see* Maier & McCoy, *supra* note 23.

59. L. BRILMAYER, *supra* note 2, at 209.

60. *See id.* at 210-21.

make it fair to impose on that individual the state's conception of substantive justice.⁶¹

A state can justly apply its burdening law to its domiciliary, Brilmayer argues, because the domiciliary is part of the population of the state and legitimately subject to its burdening authority.⁶² Furthermore, territorial factors can justify the application of a state's law if those factors reflect the aggrieved party's voluntary submission to the law that is chosen.⁶³

Rights-based analysis asks whether the state whose law is chosen has enough connections with the burdened party to exercise political authority fairly.⁶⁴ Furthermore, the judge should consider the connection between the state whose law is applied and the individual who stands to benefit from that application to determine whether a party who will benefit from a given choice of law would suffer an equivalent detriment if the situation between the parties were reversed.⁶⁵

Political rights, however, necessarily exist only in the abstract until some authoritative decisionmaker converts them into legal rights that have real-world results. Only the forum courts can accomplish this conversion for the parties in the case.

The political rights argument that Brilmayer advances suggests that those fundamental considerations of political ethics explored in her earlier book, *Justifying International Acts*,⁶⁶ should be introduced into conflict of laws decision making. In that book she addresses the theories that justify the exercise of a state's coercive power and suggests that the principles that justify such coercion vis-à-vis the state's own citizens similarly must be examined to determine the justification for the exercise of coercive power against noncitizens.

But it is the *exercise* of coercive power, not its abstract existence, that those theories justify. It is the abstract "oughtness" of that exercise, however, that Brilmayer argues courts should consider in choice of law cases to arrive at choice of law decisions that are fair to the parties in the case. The author argues that this analysis should be used to determine whether the local law rules and, thus, the choice of law rules that the forum court applied are appropriate.⁶⁷ This approach misses the point.

Rules of law have no coercive force solely by virtue of their exis-

61. *Id.* at 219.

62. *See id.* at 214-15.

63. *Id.* at 221.

64. *See id.*

65. *See id.* at 221-30.

66. L. BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS* (1990); *see also* Maier, *Ethics, Law and Politics*, *supra* note 17, at 194-95.

67. L. BRILMAYER, *supra* note 2, at 219.

tence. The threat of a decision made under their guidance or the decision itself has the coercive effect. No one reasonably could feel herself coerced by the bare existence of a rule of law that was never likely to be used to determine her rights and duties. The rule's use as a guide to decision making invokes the coercive power of the forum state, not of the rule-making state. The decision about whether the forum shall "apply" the rule likewise invokes the forum's coercive power over the parties, not that of the state from which the rule came. The forum state does not act as the agent of the state whose rule it borrows or as a surrogate for that state's courts.⁶⁸ A rule does not resolve automatically the issue in a case for which it is selected. The assumption that it does, however, is implicitly part of the metaphor referenced by the word "application" and its other related forms.

Professor Brilmayer seems to argue that when the forum uses a foreign rule of law, in some sense the coercive power of the rule-making state is invoked against the parties.⁶⁹ But the foreign rule does not operate until the political authority of some forum gives it effect. To the extent that the rule burdens one of the parties, it is the forum that creates the burden, not the original rule maker. There can be no burden and no political right not to be burdened until some authoritative decisionmaker realistically contemplates applying the rule to a party in a case, and the only authoritative decisionmaker that can apply it is the forum court. The court derives that authority solely from its own body politic.

Until a decision is made, or at least realistically contemplated, the foreign rule's coercive effect is in limbo in the forum. How it will influence the result in the case may be seen in broad outline, but it is the manner in which the forum uses the rule to guide its decision that determines the rights of the parties, not some metaphysical presence of the foreign sovereign brooding over the forum court. Consequently, if the party has any political right not to be burdened, it is a right against the forum sovereign, not a right against the sovereign who created the abstract rule but who is not controlling its application in the instant case.

Thus, Professor Brilmayer's point that "all state law and state interests are by definition what the state judge says they are"⁷⁰ is correct, but imprecise. It is the state judge (or, in diversity, the federal judge) who is *deciding the case* who says what the law is in that case. This

68. Maier & McCoy, *supra* note 23.

69. See L. BRILMAYER, *supra* note 2, at 206-07, 219, 228-29.

70. *Id.* at 232.

conclusion is not merely one of definition. It is an accurate description of functional reality.

The recognition of this truism gave rise to the principle of comity that explains how rules taken from the laws of one absolute territorial sovereign could be given effect within the territory of another absolute territorial sovereign without making the forum's sovereign subservient to the foreign legislative power.⁷¹ Comity recognized that the only law-creating authority in the forum was the authority of the forum's sovereign. Thus, solely that sovereign's coercive power functioned within that forum's territory.⁷² This local law interpretation employing the comity principle informed United States choice of law decisions in the first three-quarters of the nineteenth century.⁷³

Justice Joseph Story in his great treatise on conflicts⁷⁴ argued, in much the same manner as does Professor Brilmayer,⁷⁵ that considerations of fairness and practicality are important in the forum's determinations of whether and when to look to foreign-created rules in conflicts cases.⁷⁶ Story also rejected the proposition that extra-forum legal norms in the form of a *jus gentium* controlled choice of law rules,⁷⁷ a view held principally by continental jurists⁷⁸ and some American scholars.⁷⁹

This conclusion is much like that reached by the legal realists,

71. See Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again,"* 25 VA. J. INT'L L. 7, 14-15 (1984) [hereinafter Maier, *Resolving Conflicts*]; Maier, *Extraterritorial Jurisdiction*, *supra* note 17, at 282-84.

72. See Davies, *The Influence of Huber's de Conflictu Legum on English Private International Law*, 18 BRIT. Y.B. INT'L L. 49, 59 (1937).

73. See Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 26 (1966). Professor Brilmayer, in her historical review in § 1.1, gives exceedingly short shrift to the principle of comity, devoting most of her attention to the vested rights and modern choice of law theories. L. BRILMAYER, *supra* note 2, at 11-18. This treatment is unfortunate because the comity principle was really, as applied in United States courts, hardly different from the principles of legal realism which led to the conclusion that the forum controlled the results in the cases before it, based on its own choice of law policies. See Maier, *Extraterritorial Jurisdiction*, *supra* note 17, at 285. She incorporates the concept of reciprocal beneficial response that is the informing principle of the comity doctrine into her discussion of fairness: "[S]tates should prefer to behave fairly to encourage other states to behave fairly in response." L. BRILMAYER, *supra* note 2, at 234. This fundamentally pragmatic approach resembles that other pragmatic principle, The Golden Rule. Treat others as you would have them treat you. See Maier, *Resolving Conflicts*, *supra* note 71, at 15.

74. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (8th ed. 1833).

75. L. BRILMAYER, *supra* note 2, at 234.

76. He wrote:

The true foundation on which the administration of [private] international law must rest is, that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.

J. STORY, *supra* note 74, at 33.

77. See Maier, *Extraterritorial Jurisdiction*, *supra* note 17, at 283-85.

78. See Yntema, *supra* note 73, at 21-25.

79. See generally S. LIVERMORE, DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS (1828).

some one hundred years later.⁸⁰ Professor Brilmayer also rejects the existence of a controlling superlaw, but appears to substitute an equally metaphysical concept of political rights for forum courts to consider. Rules of law cannot perform their function as "signs mediating human subjectivities" apart from their invocation by a decisionmaker as guides to the exercise of that forum's coercive power.⁸¹ Although law can be said to exist in some abstract metaphysical sense apart from its actual use as a guide to decision by a decisionmaker, the forum state and only the forum state has coercive power to affect the legal rights, and therefore the political rights, of the parties in a case before a forum court.

This is the point made by Bill Klem in the anecdote that introduces this Essay. Although in an abstract sense there are rules in baseball about when a pitch is a ball and when it is a strike, a pitch is neither, in any realistic sense, until the umpire calls it. All good ball players know this and adjust their hitting during each game to reflect the umpire's propensity to call high strikes or "give" the pitcher the inside or outside corner. The "law" is what the umpire does, not what the rule book says.

The abstract rules of baseball, like the rules of law, strongly influence both the umpires' and the players' conduct, but have real coercive force only when actually applied to a given set of real world facts. The way in which they are applied to those facts is a function of the total environment of the forum in which they are used,⁸² not solely a function of the intent of Abner Doubleday or of the league rule book. When the catcher argues to the umpire, "That was over! It was a strike!" he knows that he cannot change the call already made. He is, therefore, really attempting to affect the call on the *next* pitch, to modify the umpire's decision-making behavior, to bring the actual decision making closer to the abstract normative standard of the rules—and, therefore, to modify the strike zone for the rest of the game.

In this same sense, all legal arguments are arguments about how decisionmakers ought to exercise their judgment in the light of multiple considerations including principles of fairness, precedent, morality, practicality, systemic values, and the abstract norms embodied in rules of law. Every legal decision, like every call of every pitch in a baseball game, is a judgment call. There is no law on any given issue in any realistic sense until the judge renders a decision. Every legal decision is a choice between at least two competing rules of law, and the law for

80. See, e.g., J. FRANK, *LAW AND THE MODERN MIND* 65-66 (1947); K. LLEWELLYN, *HOW APPELLATE COURTS DECIDE CASES* 1-28 (1951).

81. Dillard, *The Policy Oriented Approach to Law*, 40 VA. Q. REV. 626, 629 (1964).

82. See Maier & McCoy, *supra* note 23.

that issue in that case does not exist until that choice is made by a decisionmaker with the authority to make it. This is no less true when one or more of the available rules is from foreign law. Conflict of laws rules are merely policy guides to making that choice. As Professor Brilmayer correctly points out, choice of law rules include policies that are different from substantive local law policies, but they are policies nonetheless.⁸³

Professor Walter Wheeler Cook had the realities of the choice of law process in mind when he wrote that under local law theory no court can apply foreign law.⁸⁴ A corollary is that neither can a court "apply" its own law because law is not something that one "applies." Law is a process of decision making by authoritative decisionmakers, and the results of that process are the only "law" in any pragmatic sense.⁸⁵ Rules of common law are generalizations about those results, but are the law only to the extent that they accurately predict the conclusions of future decisionmakers.⁸⁶ Used in any other sense, the concept "law" is metaphysical, not realistic. Referring to this argument, Professor Brilmayer offers the following anecdote recounted by Professor David Cavers. He wrote:

Theories that explain how it is that a foreign rule isn't foreign law when it is used in deciding a case in another country might seem more useful if I could forget the way in which my son resolved a like problem when, at the age of four, he encountered tuna fish salad. "Isn't that chicken?" he inquired after the first bite. Told that no, indeed, it was fish, he restored his world to order and concluded the matter by remarking to himself, "Fish made of chicken."⁸⁷

The problem with the anecdote is that it demonstrates precisely the opposite of what it is intended to prove. The story is cute precisely because of the touching naiveté of the child consumer. The four year old is in a position parallel to that of the parties in a suit, not parallel to the position of the legal theorist or the judge. To the child, a salad is salad, and because his unsophisticated taste buds were unable to distinguish between chicken and fish, his explanation was not only adequate but in a very real sense correct in terms of his world perception. For his purposes, chicken and fish were the same.

The chef's position, on the other hand, is entirely another matter.

83. L. BRILMAYER, *supra* note 2, at 152.

84. W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 20-21 (1942).

85. *See id.* at 30.

86. *See* Maier & McCoy, *supra* note 23.

87. L. BRILMAYER, *supra* note 2, at 13 (quoting D. CAVERS, *THE CHOICE OF LAW: SELECTED ESSAYS, 1933-1983*, at 46-47 (1985)). Professor Brilmayer also quotes Professor Friderich Juenger: "Such a fatuous explanation may appeal to some, but it hardly supports the conclusion that the conflict of laws has made much progress in our times." *Id.* (quoting Juenger, *A Page of History*, 35 *MERCER L. REV.* 419, 457 (1984)). I suspect that Professor Juenger never played baseball.

It parallels that of the lawyer or the judge. Whether the salad is made with tuna or chicken will make a great deal of difference to adult customers who can distinguish the two. The choice of which to put on the menu on a given day will be influenced by many factors including the current market price, the quality of the tuna and chicken available, an understanding of customer preferences, the availability of other ingredients, and whether the chef wishes to make enough to use for more than one day (chicken keeps longer than tuna). If the supplier delivers tuna in place of chicken, perhaps because the tuna was mislabeled, it will make a great deal of difference to the chef. One cannot make a tuna salad out of a Rhode Island Red, and no amount of calling it chicken will make it anything other than a tuna salad. The point here is that the chef has a choice and the choice is meaningful. If chicken and fish were the same, there would be no choice. If the chef *thinks* they are the same, his ability to make meaningful choices is limited by the failure to perceive that there is a choice.

To argue that using a rule from a foreign jurisdiction amounts to using the law of that jurisdiction puts one in the same intellectual position as the four year old in the anecdote above. For most general purposes, descriptive precision about the nature of the forum court's decision-making processes—whether it uses foreign rules or whether it makes its own law—will make no real difference in how either the lawyer or the theorist conducts herself. When one engages in discussions in which the verbal abstractions about law and decision making cloud accurate analysis or obfuscate communication, however, descriptive precision about the nature of that process is essential. The realist description of the relationship between law and decision making is precisely that—realistic. The forum judge knows that the result in each case is the judge's responsibility. A decisionmaker cannot evade that fact by adopting the concept that a court "applies the law" of a foreign state or nation. The judge may seek guidance in those foreign rules, as in those of the forum state, but it is the judge's decision that is the law for that case. There is no law in any case until an authoritative decisionmaker has decided the outcome. Until then, there are only abstract arguments about what the law ought to be.

The authoritative decision-making process that determines the parties' rights is selected when the forum is selected. Any issues of vertical unfairness between a coercive law-making sovereign and an aggrieved party necessarily must be matters related to the decision-making authority of the court—to its judicial jurisdiction—rather than to its determinations about which, if any, foreign legal rules it will use as guides

to its decision.⁸⁸ To achieve the pragmatic results that Professor Brilmayer describes in her preface,⁸⁹ the author should direct her arguments to the fairness of the exercise of coercive power by the actual decisionmaker in the case. The important considerations for that issue, as she seems to suggest at several places, are matters relevant to determining the jurisdiction of the forum court, not to that forum's selection among available rules of law to guide its authoritative decisions.⁹⁰

Throughout a brilliant discussion of the possible role of rights analysis in conflicts cases, Professor Brilmayer repeatedly refers to the similarities between the required determinations of fairness and the policies underlying the legal limitations on judicial jurisdiction.⁹¹ She points out this similarity early in the book when she writes:

The rights-based analysis of choice of law thus resembles traditional approaches to personal jurisdiction, where any one of several states might act as a permissible forum. . . .

. . . [T]he rights are primarily negative rights rather than positive rights—shields, not swords. By and large, they grant the right to be left alone. . . . They attempt to specify the preconditions for the exercise of legitimate state coercion; they are founded on principles limiting the power of the state over the individual. The rights-based approach applies a model of political rights in the interstate setting.⁹²

If, as is clear, only the forum state can exercise coercive power over the parties before it, then every decision by that forum, including its choice of law decisions, is an exercise of the forum state's coercion.⁹³

Thus, Professor Brilmayer's rights-based approach is more appropriately applicable at the jurisdiction-selecting stage than at the choice of law stage. The due process restraints on the exercise of judicial jurisdiction are precisely the kind of negative limitations on state coercion that Professor Brilmayer seeks to identify by means of political rights analysis. These rights-based arguments are directed to the propriety of governmental coercion, and there is no such coercion until the forum applies the abstract rules to a person or persons in a specific factual context.

If the decision is the law in the case, then in this sense forum law is *always* applied, even though the forum court may look to foreign rules or principles to find guides for its decision. The foundational sources of the forum's decisional law are the jurisdictional principles that make

88. See Maier & McCoy, *supra* note 23.

89. See *supra* note 8 and accompanying text.

90. See, e.g., L. BRILMAYER, *supra* note 2, at 195, 207-09, 229.

91. See, e.g., *id.* at 208-09.

92. *Id.* at 194-95.

93. Professor Brilmayer recognizes this conclusion but fails to consider its full implications. See *id.* at 221 n.90.

the forum court the appropriate decisionmaker. The law applied in the case is not in any realistic or helpful sense an abstract legal rule. Rather, the law applied is the result commanded by the authoritative decisionmaker, and the decisionmaker's authority is the foundational source for the forum's decisional law. This analysis answers the issue raised by Professor Brilmayer when she writes:

One of the perennial searches in choice of law theory, therefore, has been for good reasons to explain why we might treat foreign law as on a par with local law. The search has been for a foundational basis and the decisional criteria for making a genuine choice, free of automatic preference for one of the alternatives.⁹⁴

The trouble here is created by imprecise use of language. We do not treat foreign law as being on a par with local law. Rather, we treat the foreign rules as equally available guides for decision; and there is no particular reason, barring an explicit command from the forum's legislature, why the forum should seek guidance in its own, rather than in some foreign state's, rules if that selection furthers the policies that inform the forum's choice of law rules.⁹⁵

Professor Brilmayer's efforts to encourage courts to examine standards of political fairness as part of the law selection process derives from her perception that fairness requires an appropriate relationship between the coercing state and the party subject to its legal coercion.⁹⁶ She writes:

Whatever the merits of adjudicative efforts to further social policy, one cannot simply take for granted the fairness of using a multistate litigant as a means to that end. One must show that the individual is properly subject to the state's authority before he or she can be called on to contribute to the state's social good. The existence of choice of law rights should, for this reason, be even less controversial than the existence of domestic rights.⁹⁷

But a state's authority does not apply to people in the abstract. It applies to people *doing things* in a particular context, and it is applied by a decisionmaker who makes the abstract rights and duties embodied in legal rules concrete by articulating and enforcing their application to real people in a specific fact situation. If a rights-based analysis has a place in conflict of laws it is applied appropriately to determine the fairness of the exercise of judicial jurisdiction by a particular forum, not to the law selection process once jurisdiction is determined.

This distinction must be accurate because the rules of law selected are only one set of factors that influence the legal rights of the parties

94. *Id.* at 14.

95. Those policies include, of course, relevant systemic policies. *See supra* text accompanying note 16.

96. L. BRILMAYER, *supra* note 2, at 204.

97. *Id.* at 206.

before a forum. The selection of a forum is the selection of an entire decision-making process, not merely the selection of a physical location for adjudication.⁹⁸ Consequently, in determining the validity of jurisdiction in a particular case, the court must consider the factors of fairness in the context of that case. Thus, that a party is domiciled within a forum state does not suggest necessarily that all of that party's acts are adjudicated appropriately under the authority of that body politic. If the law of the domicile should not apply automatically in governmental interest analysis or under the author's rights-based inquiries, domicile standing alone would not justify the exercise of judicial jurisdiction without some other relationships between the cause of action, the forum, and that domiciliary's acts. In other words, the relationship between the acts of the defendant and the forum whose decision will attach legal significance to those acts is properly the subject of Professor Brilmayer's rights-based inquiries.

In this book, Professor Brilmayer walks up to the door, opens it, looks inside, then turns and walks away without recognizing what she sees. Her problem is not really with the existing systems of choice of law. Rather, her analysis would be directed more accurately toward the rules permitting general jurisdiction. Those rules permit the exercise of judicial jurisdiction by forums that have no relationship to the acts of the defendant.⁹⁹ In such a situation, the defendant and the plaintiff's legal rights to do or not to do those acts are determined by a decisionmaker empowered by a political authority that has no political relationship to the acts that create the legal and political issues. Neither the defendant's bare physical presence, nor the defendant's political allegiance, standing alone create a sufficient relationship to the forum state to permit it to invoke its political authority over the parties. Neither political allegiance nor presence alone justify the exercise of state coercive power when the territorial link and political interest created by forum-related conduct is missing.¹⁰⁰

The unfairness to the parties that Professor Brilmayer seeks to avoid is eliminated most easily by the simple expedient of abandoning the archaic and unrealistic concept of general jurisdiction. Adopting such an approach would require "a state to justify its exercise of coercive authority over an individual aggrieved by the application of the state's law"¹⁰¹ more effectively than any adjustment to the choice of law process. The parties would be "left alone" in circumstances in which

98. Maier & McCoy, *supra* note 23.

99. See, e.g., *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990).

100. See generally Maier & McCoy, *supra* note 23.

101. See *supra* text accompanying note 47.

the coercive power of the real decisionmaker is applied inappropriately to determine if acts unrelated to the forum create legal duties for parties having only a general connection with it.

Once again, Professor Brilmayer has presented the conflicts world with a provocative and insightful piece of work. This book will stimulate a great deal of useful discussion. This Review is among the first of such response, but it assuredly will not be the last. If the book, on occasion, strays somewhat from its stated pragmatic aims, those deviations will generate some fundamental rethinking of existing theoretical approaches to choice of law that are considerably overdue.