BOOK REVIEW

PROFESSOR BRILMAYER AND THE HOLY GRAIL

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CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS
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INTRODUCTION

For approximately a decade, Professor Lea Brilmayer has been a prolific commentator on American conflict of laws. Many of her writings have been directed at the personal jurisdictional reach of American courts,[1] although an approximately equal number have concentrated on the distinct, but related, issue of the choice-of-law doctrine employed by American courts.[2] Her recent book, *Conflict of Laws, Foundations*

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1. *See, e.g.*, Brilmayer, *An Introduction to Jurisdiction in the American Federal System* (1986); Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77; Brilmayer & Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies and Agency*, 74 CALIF. L. REV. 1 (1986); Brilmayer, Lynch & Neuwirth, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721 (1988); Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988); Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293 (1987).

2. *See, e.g.*, Brilmayer, *Rights, Fairness and Choice of Law*, 98 YALE L.J. 1277 (1989); Brilmayer, *Governmental Interest Analysis, A House Without Foundations*, 46 OHIO ST. L.J. 459 (1985) [hereinafter Brilmayer, *House*]; Brilmayer, *Legitimate Interests in Multistate Problems: as Between State and Federal Law*, 79 MICH. L. REV. 1315 (1981); Brilmayer, *Methods and Objectives in Conflicts of Laws: A Challenge*, 35 MERCER L. REV. 555 (1984); Brilmayer & Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 VA. L. REV. 819 (1983); Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 FLA. ST. L. REV. 389 (1987); Brilmayer & Lee, *State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and the Conflict of Laws*, 60 NOTRE DAME L. REV. 833 (1985); Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 IOWA L. REV. 95 (1984); Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980) [hereinafter Brilmayer, *Myth*].

and Future Directions,[3] deals almost exclusively with choice of law. Although the other two legs of the conflicts tripod, personal jurisdiction and judgment recognition, are mentioned occasionally in passing,[4] they are discussed only by way of illustration, and not seriously evaluated. Thus, as Brilmayer makes clear in the preface, this book is about choice of law[5] and the search for the "Holy Grail"[6] of conflicts: a choice-of-law system built on uncontroverted assumptions.

In Parts I and II, Brilmayer discusses current American conflicts orthodoxy and the role of the Constitution. Although I do not find Brilmayer's assessment to be particularly novel, I agree that traditional American multilateralism, embodied in the *First Restatement of Conflicts*, and traditional American unilateralism, embodied principally in the writings of the late Brainerd Currie, are both intellectually bankrupt. I also agree that the Constitution imposes little in the way of constraints on state choice-of-law doctrine.

Brilmayer's proposal to fill the void, contained in Part III, is the most important part of this book and, consequently, the area to which I devote the most attention. I can, however, find little to recommend Brilmayer's affirmative proposals. In fact, I believe Brilmayer's "game" and "political rights" theories of choice of law rest on many of the same dubious assumptions that plague interest analysis, the very doctrine that she buries in Part I. As a consequence, her ultimate proposal for resolving choice-of-law questions is strikingly similar to interest analysis. Moreover, where her proposal deviates from interest analysis, it does so in a singularly unappealing manner, resulting in an approach even less attractive than interest analysis.

I. THE FOUNDATIONS OF THE TWO CONFLICTS ORTHODOXIES

A. History and the First Restatement

Professor Brilmayer begins her book with a brief survey of choice-of-law history.[7] This is admirable, given that American conflicts scholars have a remarkable talent for reinventing the wheel and claiming it as their own design.[8] Drawing heavily on works by professors Juenger[9]

3. L. BRILMAYER, CONFLICT OF LAWS, FOUNDATIONS AND FUTURE DIRECTIONS (1991) [hereinafter CONFLICT OF LAWS].

4. CONFLICT OF LAWS, *supra* note 3, at 129. (mentioning applicability of the full faith and credit clause to American judgment recognition); *id.* at 218 (personal jurisdiction).

5. *Id.* at xiii.

6. *Id.* at 16.

7. *Id.* at 11-18.

8. *See, e.g.*, Juenger, *A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 36 (1985)[hereinafter Juenger, *A Critique*](noting that Currie's methodology bore a striking re-

and Yntema,[10] Brilmayer notes that history has revealed only three general solutions to choice-of-law problems.

One solution is multilateralism, which attempts to derive norms for choosing between competing rules of decision from a source external to the forum's substantive law.[11] The multilateralist approach can be traced from the Dutch jurist Huber to Joseph Story and Joseph Beale, the reporter for the *First Restatement of Conflicts*.[12] The main tool of a multilateralist approach is a set of "jurisdiction-selecting rules,"[13] which allow a choice between competing rules of decision based on factors independent of the forum or the content of the substantive rules.[14]

Unlike multilateralism, unilateralism[15] searches for the solution of conflicts problems not in a separate body of rules external to the forum's substantive law, but in the forum's rules of decision. Accordingly, it does not attempt to resolve choice-of-law questions independently of the forum and substantive rules of decision. Rather, unilateralism assumes that some spatial reach can be assigned to the forum's substantive rules.[16] The unilateralist tradition can be traced through the Italian statutists, German and French scholars such as Wächter and Pillet, and to America through Currie's writing, although Currie was apparently unaware of the ancestry of his doctrine.[17]

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semblance to the medieval concept of personal law and later attempts by the statutists to determine the reach of statute by classification as "real" or "personal").

9. Juenger, *General Course on Private International Law*, 193 RECUEIL DES COURS 119 (1983) (cited at pp. 11, 13)[hereinafter Juenger, *General Course*]; Juenger, *A Page of History*, 35 MERCER L. REV. 419 (1984).

10. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297 (1953). Professor Brilmayer graciously acknowledges her debt to Yntema and Juenger, describing their historical accounts as "excellent." CONFLICT OF LAWS, *supra* note 3 at 12.

11. CONFLICT OF LAWS, *supra* note 3, at 16.

12. Juenger, *General Course*, *supra* note 9, at 207.

13. David Cavers apparently invented this term. D. CAVERS, THE CHOICE OF LAW: SELECTED ESSAYS 3 1933-83 (1985). It has taken on a slightly derogatory connotation. Juenger, *A Critique*, *supra* note 8, at 2 n. 11.

14. The American multilateralist rule, the "place of the wrong" rule in tort cases, chose the law of the jurisdiction in which the last event necessary to complete the cause of action occurred. RESTATEMENT (FIRST) OF CONFLICTS OF LAW § 377 (1934). This rule had a stranglehold on American tort choice of law until 1963, *see* Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), and still prevails in a substantial minority of American states. *See* Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 591-92 (1983) [hereinafter Kay, *Theory into Practice*]. (As of 1983, twenty two states still follow the FIRST RESTATEMENT).

15. CONFLICT OF LAWS, *supra* note 3, at 16-17.

16. Juenger, *General Course*, *supra* note 9, at 168.

17. *Id.* at 236. In her fine Special Course at the Hague Institute, Professor Herma Hill Kay attempted to downplay the similarities of Currie's method to unilateralism. Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 12, 96 (1989)[hereinafter Kay, *A Defense*]. In this respect, it seems, Professor Kay's presentation is unpersuasive. Currie thought that he could determine the conflicts policies of statutes (and

The third historical solution is the "better law" or "teleological" solution.[18] This solution dates back at least to 1200, when Aldricus, one of the Bologna glossators, responded to a question on the appropriate choice-of-law norm by stating that the proper choice was the "better and more useful" law.[19]

Following her overview of historical approaches to choice-of-law problems, Brilmayer turns to the rise and fall of American multilateralism.[20] Beale, the reporter for the *First Restatement*, grounded his brand of multilateralism in the "vested rights" theory.[21] Beale postulated that the role of the forum court in a multistate dispute was not to apply foreign law in the strict sense, but rather to enforce existing legal rights created under foreign law.[22] Thus, the overriding philosophy of the *First Restatement* was to apply the law of the place of the last act or event necessary to create liability, such as the place of the wrong in tort cases.[23] Beale's methodology, however, assumed precisely what it was designed to prove: that territorial connecting factors were entitled to primacy in any choice-of-law scheme.

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thus their spatial reach) through "the ordinary processes of construction and interpretation." Currie, *Comment on* Babcock v. Jackson, 63 COLUM. L. REV. 1233 (1963). Professor de Boer, at one time an adherent to Currie's methodology, described it as "neo-statutist." T. DE BOER, BEYOND LEX LOCI DELICTI 1-5 (1987).

18. Juenger, *General Course*, *supra* note 9, at 141-43.

19. *Id.* at 141; Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 12 (1966). This solution has found its way into American conflicts jurisprudence in several ways. One is the writings of Professors Leflar and Juenger, who have adopted teleology as an important consideration in choice of law. CONFLICT OF LAWS, *supra* note 3, at 64-66. Leflar makes "the better rule of law" one of his five "choice-influencing considerations," *see* Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966), and, as he notes, it is one of the predominant considerations in tort choice-of-law cases. *See* Leflar, *Choice of Law: States' Rights*, 10 HOFSTRA L. REV. 203, 209-10 (1981). Juenger places teleology at the forefront as the sole determinant of choice of law, at least in tort cases. Juenger, *General Course*, *supra* note 9, at 286-332. Professor Joseph Singer also saw a role for the "better law" determinant in a recent article. Singer, *Real Conflicts*, 69 B.U.L. REV. 1 (1989). At least three states, Wisconsin, Minnesota and New Hampshire, have adopted Leflar's approach to choice of law explicitly, and in practice the "better rule" consideration dominates, at least in tort cases. Juenger, *General Course*, *supra* note 9, at 268-69; *see also* Kay, *Theory into Practice*, *supra* note 14, at 591-97. Two other states, Rhode Island and Arkansas, arguably follow Leflar as well. *See, e.g.*, Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 550 S.W.2d 453 (1977); Woodward v. Stewart, 104 R.I. 290, 243 A.2d 917 (1968). Finally, even in states that do not purport to follow a "result selective" choice-of-law approach, it is undeniable that the allegedly "result blind" methodologies have been manipulated to avoid unsavory results. *See* T. DE BOER, *supra* note 17, at 9-458; Juenger, *General Course*, *supra* note 9, at 318;.

20. CONFLICT OF LAWS, *supra* note 3, at 22-41.

21. *Id.* at 19.

22. *Id.* at 20.

23. RESTATEMENT (FIRST) OF CONFLICTS OF LAW § 377 (1934). In this manner, postulated Beale, a court simply gave the plaintiff his or her due. CONFLICT OF LAWS, *supra* note 3, at 20-21. Even before Beale adopted this approach, however, it had been exposed in Europe as nothing more than question begging on a grand scale. *See* Juenger, *General Course*, *supra* note 9, at 209.

As Brilmayer points out, this problem, and others, brought Beale and the *First Restatement* under fire from the guns of the legal realists. As Walter Wheeler Cook demonstrated, the vested rights doctrine could not explain cases in which liability creating events occurred in more than one state.[24] Following Cook, Brilmayer endorses the realist critique of the vested rights theory. As she puts it: "The problem is that 'vested rights' do not exist prior to a determination of what law applies."[25]

Left without its conceptual moorings in the vested rights theory, the *First Restatement* represented little more than an arbitrary choice of territorial connecting factors to decide conflicts cases. As Brilmayer notes, while in many cases the territorial connecting factor yielded acceptable solutions, in others it produced counterintuitive and inappropriate outcomes, which led courts to employ a wide range of "escape devices" to avoid such results.[26] The existence of escape devices provided more ammunition to the *First Restatement*'s critics, because escape devices helped reveal the *Restatement*'s flimsy foundations, and

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24. W. COOK, THE LOGICAL AND LEGAL BASES OF CONFLICTS OF LAWS 17-18 (1942). Moreover, the vested rights doctrine ran into severe difficulty in attempting to explain *renvoi* and transmission; cases in which forum state (F1) applies the law of another state (F2), but F2, if allowed to decide the case, would *not* apply its own law, because it adheres to a different conflicts rule than F1. *Id.* at 19-20. Under these circumstances it hardly makes sense to view the right as "vested" under F2's law, because F2 itself does not view the right as "vested." CONFLICT OF LAWS, *supra* note 3, at 36.

25. CONFLICT OF LAWS, *supra* note 3, at 36. Probably the most original aspect of Brilmayer's treatment of this familiar subject, however, is her discussion of "international realism." "International realism," as Brilmayer defines it, "is a school of thought that is skeptical of the existence of international legal norms, pointing out that there is no central authority to settle disputes." *Id.* at 37. Brilmayer argues that the rise of "international realism" was "as important" to the overthrow of vested rights as legal realism. *Id.* at 37.

This is a difficult proposition to evaluate, in part because of definitional issues. The proposition, as Brilmayer seems to claim, that international realism is a school of thought distinct from legal realism, and international realism was as important in the overthrow of vested rights as legal realism, is highly doubtful. The early frontline warriors against vested rights and the First Restatement, Cavers, Lorenzen, Yntema and Cook, were all avowed legal realists, *see, e.g.*, D. CAVERS, *supra* note 13, at 41 (noting that Cook was a realist), at 43 (describing himself as a "tired realist"); Juenger, *A Critique*, *supra* note 8, at 4 (Cook and Lorenzen were "[i]mbued with the spirit of legal realism. . . ."), and their influence on Currie is easy to demonstrate. *See, e.g.*, Cavers, *A Correspondence with Brainerd Currie, 1957-1958*, 34 MERCER L. REV 471 (1983) (documenting correspondence between Currie and Cavers). As Brilmayer notes, there is little, if any, direct evidence of influence by the international realist school on American writers on private international law in the relevant period. D. CAVERS, *supra* 13, at 38. If Brilmayer means to claim only that international realism was evidence of the general norm skepticism that brought down the vested rights theory, this is much more plausible, but not particularly illuminating.

26. CONFLICT OF LAWS, *supra* note 3, at 25. These escape devices included recharacterizing the issue as one of "procedure" to apply the *lex fori*, refusing to enforce the foreign rule on "public policy" grounds, *id.* at 24-25, or assigning the issue to a different legal category, such as "family relations" instead of "tort." *See, e.g.*, Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955) (issue of spousal tort immunity recharacterized as an issue of family relations instead of tort to avoid Idaho's rule of interspousal immunity).

undercut the practical arguments in favor of the multilateral system: providing decisional harmony to avoid forum shopping and ease of application.[27]

To this point, nothing in Brilmayer's book is likely to be viewed as especially controversial, particularly in American circles,[28] and I concur in her rejection of multilateralism. The next chapter, however, is likely to be much more controversial, although I believe Brilmayer's position to be sound.

B. Interest Analysis

The first serious alternative to the *First Restatement* was the late Brainerd Currie's development of "governmental interest analysis."[29] This approach, developed in a series of law review articles published in the late 1950's and early 1960's,[30] was the foundation for the alternatives to the *First Restatement* adopted in the wake of New York Court of Appeals' opinion in *Babcock v. Jackson*.[31]

Brilmayer begins her evaluation of interest analysis with a summary of Currie's method. Currie postulated that each and every rule of positive state law, whether embodied in a judicial decision or statute, represented a singular state "policy."[32] This was true, apparently, even for outmoded and antiquated rules, such as the denial of contractual capacity to married women and the rule the non-survival of tort liability.[33] From these policies spring "interests."[34] Currie argued that these policies and interests can be determined from "the normal pro-

27. Juenger, *General Course*, *supra* note 9, at 193-94.

28. It is difficult these days to find scholarly defenders of the *First Restatement*, and the courts refusing to abandon it do so largely out of dissatisfaction with the alternatives. *See, e.g.*, Paul v. National Life Ins. Co., 352 S.E.2d 550 (W. Va. 1986). However, for an unapologetic defense of European multilateralism, *see* Kegel, *Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers*, 27 AM. J. COMP. L. 615 (1979).

29. CONFLICT OF LAWS, *supra* note 3, at 43.

30. Most of these articles are collected in B. CURRIE, SELECTED ESSAYS ON THE CONFLICTS OF LAWS (1963).

31. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). Although a comprehensive survey conducted by Professor Kay concluded that only two states, California and New Jersey, substantially adhere to interest analysis in its original form, see Kay, *Theory into Practice*, *supra* note 14, at 591-92, it is clear that interest analysis heavily influenced other popular alternatives to the *First Restatement*, including the *Second Restatement* and Professor Leflar's approach, and courts use Currie's vocabulary as a matter of course. Juenger, *A Critique*, *supra* note 8, at 13-14; Kay, *A Defense*, *supra* note 17, at 36-37; Sedler, *Professor Juenger's Challenge to the Interest Analysis Approach to Choice-of-Law: An Appreciation and a Response*, 23 U.C. DAVIS L. REV. 865, 866 (1990) [hereinafter Sedler, *Appreciation*]. Thus Currie's writings represent the most appropriate common ground for evaluating choice-of-law in the thirty or so states that no longer adhere to the *First Restatement*.

32. CONFLICT OF LAWS, *supra* note 3, at 47.

33. *Id.*

34. *Id.* at 47-48.

cesses of statutory construction and interpretation."[35] Consequently, Currie invariably adopted the following methodology: each statute (or common law rule) represents a singular state policy, and the state has an "interest" in applying that policy in favor of the state's domiciliaries.[36]

The adoption of the domiciliary nexus, and substantial elimination of territorial connecting factors,[37] led to results that differed radically from the *lex loci delicti* rule. Employing the domicilary nexus, conflicts cases fall into three categories: true conflicts, false conflicts and unprovided-for cases.[38] False conflicts occur only if the parties have a common domicile.[39] In such cases, only one state has an "interest" in having its law applied, because only one domiciliary will be aided by application of his or her state's laws.[40] In these cases, Currie recommended applying the law of the only interested state, *i.e.*, the state in which the parties have their common domicile.[41] If the parties hail from different states, however, either a true conflict or an unprovided-for case arises.[42] True conflicts occur when the application of two or more states' laws will benefit those states' domiciliaries, while unprovided-for cases occur when no domiciliary will benefit from the application of his or her home state's law.[43] In either case, Currie recommended applying forum law on the grounds that the problem was "insoluble" and thus there was no good reason to displace the application of forum law.[44] At bottom, therefore, interest analysis boils down to nothing more than a mandate to apply forum law unless the parties have a common domicile in a state other than the forum.[45]

Brilmayer correctly notes that the consequence of Currie's approach is that although interest analysis purports to take into account the contents of the rules vying for application, it really does not.[46] Every

35. *Id.* at 48 (*quoting* B. CURRIE, *supra* note 30, at 183).

36. As Brilmayer notes, Currie's methodology is evident from his discussions of hypotheticals based on *Milliken v. Pratt*, 125 Mass. 374 (1978) and *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953). CONFLICT OF LAWS, *supra* note 3, at 55 (*quoting* B. CURRIE, *supra* note 30, at 85).

37. Currie did not completely dispense with territorial factors, but explained them in terms of the domiciliary nexus. For instance, the place of the accident might be relevant, but only because medical creditors domiciled in the state of the accident site might depend on a judgment or settlement favorable to the plaintiff to receive payment. D. CAVERS, THE CHOICE-OF-LAW PROCESS 52-53 (1966) (Currie's view); B. CURRIE, *supra* note 30, at 366, 369-70.

38. CONFLICT OF LAWS, *supra* note 3, at 58.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 59.

state has an "interest" in applying every rule of its substantive law for the benefit of its domiciliaries. Currie allowed for no "weighing" of interests; forum law was the trump suit unless the forum was truly disinterested.[47]

In her earlier writings criticizing interest analysis, Brilmayer took the position that interest analysis was being marketed as a device to give effect to the undisclosed intent of state legislatures.[48] She reached this conclusion by focusing on Currie's insistence that his doctrine was an aspect of the "ordinary processes of construction and interpretation."[49] As an empirical proposition, Brilmayer argued, this was extraordinarily unlikely, because nothing suggests that legislatures really have an undisclosed collective intent as to the spatial reach of their enactments, and nothing suggests that they would necessarily choose the domiciliary nexus if forced to state their desires explicitly.[50]

As Brilmayer now notes politely, "[t]his argument caused something of an uproar."[51] Normally mild-mannered[52] Professor Sedler accused Brilmayer of advancing an "almost . . . deliberate[] . . . misconception" of Currie's position.[53] Professor Kay termed Brilmayer "impervious to constructive criticism."[54] I, for one, am sympathetic to Brilmayer's position, even as expressed in her earlier articles. While the search for a non-existent intent may not be the only possible interpretation of Currie's quest, it certainly is a fair interpretation.

Unlike her earlier articles, Brilmayer now meets interest analysis not only on these terms but on the terms of her critics Sedler[55] and Kay[56] as well. The ambiguities that plague Currie's writing, Brilmayer notes, rest in part on the use of the terms "construction and interpre-

47. B. CURRIE, *supra* note 30, at 109 (all interests have "equal dignity"), at 144, 181 (impossibility of "weighing" interests or policies). In later writings, Currie proposed that in true conflict situations that a state might take a "moderate and restrained" view of its interest in an effort to avoid a true conflict, but with this exception, Currie's methodology, as a practical matter, ignores the contents of rules vying for application. CONFLICT OF LAWS, *supra* note 3, at 60.

48. *See* Brilmayer, *Myth*, *supra* note 2, at 430-31.

49. *Id.* at 392 n. 1.

50. CONFLICT OF LAWS, *supra* 3, at 49-51.

51. *Id.* at 50 n.23.

52. *See*, for instance, Professor Sedler's gracious reply to Professor Juenger. Sedler, *Appreciation*, *supra* note 31.

53. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the New Critics*, 34 MERCER L. REV. 593, 609 (1983) [hereinafter Sedler, *New Critics*].

54. Kay, *A Defense*, *supra* note 17, at 127.

55. Sedler, *New Critics*, *supra* note 53, at 607.

56. Kay, *A Defense*, *supra* note 17, at 53-54 (whether a state has an interest "in Currie's sense depends on circumstances beyond the state's control.") Even an express declaration of legislative "interest" is not sufficient to create an "interest" in the Currie sense. *Id.* at 123-27.

tation."[57] There are at least two different types of canons of interpretation. One is interpretation designed to give effect to the undisclosed "actual" collective "intent" of legislatures, and thereby yield the result that the legislature would have reached had it addressed the issue explicitly.[58] The second is interpretation designed to give effect to what Brilmayer calls the "constructive" intent of legislatures; such canons represent a normative choice, not simply a decision to ascertain the legislature's preferred result.[59]

As Brilmayer notes, it remains unclear whether Currie thought that interest analysis represented "interpretation" in the first or second sense.[60] If he meant it in the first sense, *i.e.* he saw state interests as a "subjective" phenomenon, the doctrine is highly implausible as an empirical matter and fails to make any room for actually expressed legislative and judicial preferences.[61] If, however, as Sedler and Kay insist,[62] Currie meant that interest analysis was a canon of construction in the second sense, *i.e.* Currie saw state interests as an "objective" phenomenon, then it contains an entire universe of propositions that need defending if interest analysis is to survive.[63]

As Brilmayer argues, an "objective" defense of interest analysis is laden with difficulties because there is nothing obvious about forum bias and the domiciliary nexus as "first principles" of choice of law.[64] It might well further substantive goals and therefore be in a state's "interest" to adopt a choice-of-law approach based on some connecting factor other than domicile.[65] At bottom, therefore, interest analysis represents the analysts' raw preference for domiciliary connecting factors and forum bias, just as the *First Restatement* represented a raw preference for territorial connecting factors and decisional harmony. As she puts the matter: "It is time to recognize the concept of an interest for what it is; an externally determined and supposedly objective concept that is imposed on state legislatures and state judges by scholars."[66]

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57. CONFLICT OF LAWS, *supra* note 3, at 49-50.
58. *Id.* at 49.
59. *Id.* at 50-51.
60. *Id.* at 53.
61. *Id.* at 72-73.
62. *See supra* notes 55-56 and accompanying text.
63. CONFLICT OF LAWS, *supra* note 3, at 76.
64. *Id.* at 76-82.
65. *Id.* at 81-82.
66. *Id.* at 99. It is worth noting that by taking this line of attack on interest analysis, Brilmayer's view now closely parallels Professor Juenger's. In his 1983 General Course at the Hague Institute, and in an influential article published at approximately the same time, Juenger argued that interest analysis amounted to little more than a rule of *lex fori* with a common domicile exception. Juenger, *General Course*, *supra* note 9, at 217; Juenger, *A Critique*, *supra* note 8, at 39, 44. As Juenger also argued, this rule did not follow in any real sense from the term "interest" or from statutory "construction." Juenger, *A Critique*, *supra* note 8, at 37. In fact, Brilmayer quotes Juenger's scathing conclusion that Currie "'forged

The interest analysts, as Brilmayer notes, have defended their program with the fallback, pragmatic argument that interest analysis tends in practice to produce acceptable and just results.[67] But this is hardly any defense at all. As an exhaustive review of the case law has demonstrated, the reason that interest analysis tends to produce good results is that the concept of "interest" is so vacuous that courts have been able to manufacture interests at will to support any result.[68] Unlike the *First Restatement*, which had a set of fairly discrete and well-recognized "escape devices," the *nouvelle vague*[69] in practice turns out to be one giant escape device.[70] The need for escape devices, once considered the smoking gun in the case against the *First Restatement*, hardly amounts to a defense of interest analysis.

Brilmayer, therefore, places interest analysis exactly where it belongs, in the ashbin of conflicts history, right beside the vested rights doctrine. Like the *First Restatement*, it rests on arbitrary choices and circular reasoning. But, as is so often true, filling the void is another matter entirely.

II. CONSTITUTIONAL ISSUES

Before outlining her affirmative proposals for replacing interest analysis, Brilmayer detours briefly in Part II to discuss the constitutional issues in choice of law. Her treatment suggests that she does not view the constitutional issues as central. As she makes clear later, she does not view her program as one of constitutional dimension, nor does she believe that the Constitution voids any of the familiar approaches.

To Brilmayer, the cases provide "very little guidance" on the boundaries set by the due process and full faith and credit clauses of the Constitution.[71] As a whole, however, the Court has taken a deferential attitude toward state development of alternatives to the *First Restatement*.[72] Brilmayer endorses this view, and would strike down state applications of forum law only if supported solely by "a purely

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new metaphysical irons and many law professors wear them with pride.'" CONFLICT OF LAWS, *supra* note 3, at 99 (quoting Juenger, *A Critique*, *supra* note 8, at 49-50).

67. CONFLICT OF LAWS, *supra* note 3, at 82 (citing Sedler, *Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer's "Foundational Attack"*, 46 OHIO ST. L.J. 483, 484-85 (1984)).

68. T. DE BOER, *supra* note 17, at 8-440.

69. Juenger, *Multistate Justice*, *supra* note 53, at 239.

70. CONFLICT OF LAWS, *supra* note 3, at 76 (citing T. DE BOER, *supra* note 17, at 8-440 (1987)).

71. *Id.* at 123.

72. *Id.*

subjective desire to have local law applied or some pretextual basis for rationalizing the application of local law."[73]

Brilmayer sees some potential for the use of the dormant commerce clause as a limitation on state choice of law doctrine.[74] However, all of the cases that she cites,[75] in a strict sense at least, deal not with the power of state courts to apply their own law, but rather with the power of any state to enforce such a law, given the potentially negative impact on interstate commerce. Furthermore, all of the cases she discusses deal with activity primarily within the state, which would doubtless be an acceptable basis for applying forum law.[76] In this broad sense of "choice of law" almost any declaration of unconstitutionality could be viewed as a directive to the state court not to apply its state law. For instance, *Brown v. Board of Education*[77] could be viewed as a directive to the Kansas state courts not to "choose" the forum law allowing racially segregated schools because it violates the equal protection clause.

I doubt there is much to be gained by recasting constitutional doctrine in choice-of-law terms. True choice-of-law cases, such as *Allstate Insurance Co. v. Hague*,[78] have dealt with state rules of undoubted constitutionality as a general proposition (in *Allstate* it was the Minnesota rule allowing "stacking" of uninsured motorists benefits), and considered only whether the forum could apply its law given the minimal connection the parties and the events have with the forum.

Perhaps, though, my concerns here are overwrought. Professor Brilmayer does not advocate any particularly searching review of state choice of law under the commerce clause. To the contrary, she concludes that choice-of-law analysis under the commerce clause is as fruitless as under the due process clause.[79]

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73. *Id.*

74. *Id.*

75. South Carolina State Highway Dept. v. Barnwell Bros., 301 U.S. 177 (1938) (cited p. 124); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (cited p. 124); Edgar v. MITE Corp., 457 U.S. 624 (1982) (cited p. 124); Healy v. Beer Inst., Inc., 109 S. Ct. 2491 (1989) (cited p. 126); Brown-Forman Distillers Corp. v. New York Liquor Auth., 476 U.S. 573 (1986 (cited p. 126). It is true that one of the cases, *Edgar*, 457 U.S. 645, cited the *Second Restatement of Conflicts* and common law "internal affairs" doctrine, but I doubt that the Court's conclusion that the Illinois statute violated the dormant commerce clause implied a constitutional limit on choice-of-law in any traditional sense.

76. CONFLICT OF LAWS, *supra* note 3, at 124 ("The problem with such a regulation is not absence of any legitimate nexus with the state that would justify the state's interest in imposing the rule.").

77. 347 U.S. 483 (1954).

78. 449 U.S. 302 (1981).

79. Brilmayer also considers the thesis, initially advanced by Professor Ely, that interest analysis violates the privileges and immunities clause. Ely, *Choice of Law and the States' Interest in Protecting its Own*, 23 WM. & MARY L. REV. 173 (1981). Brilmayer, however, concludes that the "common domicile" rule, coupled with interest analysis' haphazard operation, saves it from unconstitutionality. CONFLICT OF LAWS, *supra* note 3, at 139.

On the whole, Brilmayer's treatment of the constitutional issues is appropriately evenhanded and non-interventionist.[80] As she summarizes the matter, not "all conceptions of fairness and interests are equally good, but . . .as a constitutional matter, the state need not adopt the one that is best."[81]

III. Affirmative Recommendations

The third part of the book is devoted to an effort to replace interest analysis. The recommendations are split into two parts. Those which Brilmayer derives from "game theory" are contained in chapter 4, the somewhat more specific recommendations based upon her theory of "political rights" in chapter 5.

A. Game Theory

Having concluded in Part I that interest analysis probably rests upon an "objective" conception of governmental interests, Brilmayer begins chapter 4 by endeavoring to explore whether a "subjective" conception of state interests holds any promise as a choice-of-law approach.[82] Brilmayer argues that "[t]he undeniable appeal of governmental interest analysis is that it sets out to implement the interests of the states, rather than to derive choice-of-law rules from abstract first principles oblivious to the purposes of substantive legal norms."[83] Brilmayer decides to "take for granted that states use choice of law to implement their policies,"[84] and further opines that this "goal—maximizing state objectives—is one that is no longer taken as controversial by many choice-of-law experts. . . ."[85]

I *do*, however, take as controversial the assumption that state interests exist in private disputes, even in the "subjective" sense. Taking "for granted" that choice of law is aimed at "maximizing state objectives" is a "first principle" no less abstract than those that Brilmayer criticizes. Besides being abstract, this principle is problematic. Even the notion of "subjective" state interests is inconsistent with rules such as party autonomy in contract choice of law, the doctrine that parties to a tort case can waive the potential application of foreign law by

80. Elsewhere I have argued for a non-interventionist constitutional doctrine in the related area of personal jurisdiction. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: from* Pennoyer *to* Burnham *and Back Again*, 24 U.C. Davis L. Rev. 19 (1990) [hereinafter Borchers, Pennoyer *to* Burnham].

81. Conflict of Laws, *supra* note 3, at 142.

82. *Id.* at 145. *See supra* notes 65-67 and accompanying text.

83. *Id.*

84. *Id.*

85. *Id.* at 149.

failing to raise the issue and allowing parties to arbitrate their civil disputes in non-judicial fora.[86] If states really are so "interested" in the outcome of civil lawsuits between private parties, one would expect them to routinely step in and void parties' choices in this regard. But few commentators, and certainly not Professor Brilmayer,[87] suggest limiting party autonomy in this radical fashion.

If we can suspend for a moment our rather unusual conflicts sense of the word "interest," and consider it in a more ordinary light, perhaps the strangeness of ascribing such "interests" to states, even in a subjective sense, will become clearer. Webster's lists two principal uses of the word "interest." One is "interest" in the sense of "to concern, to be of importance."[88] The other is "interest" in the sense of "to cause to share or participate."[89] Thus, in ordinary parlance, "interest" in this context can mean either having "concern" for, or a "stake" in, the outcome of an event. In Brilmayer's terms, the "concern" sense of interest is subjective, while the "stake" sense is objective. Brilmayer argues that the notion of state interests in an objective ("stake") sense is hollow. But interest in a subjective ("concern") sense is laced with difficulties.

Even leaving aside the problem of anthropomorphizing states in order to ascribe subjective interests to them, it seems very unlikely that states are subjectively interested ("concerned") in the outcome of multistate cases between private parties. Certainly most cases pass by without anyone in the state government, except perhaps the judge, becoming aware that the case ever existed. If subjective interests exist, one would expect to see some empirical evidence of their existence, such as regular legislation directing how and when to apply various of the legislature's enactments in a multistate context. But, as Professor Brilmayer herself has recognized, such a legislative response is rare indeed.[90] In the vast majority of cases in which the state is not itself a party, the states appear perfectly content to let the cases pass by unnoticed, allowing the parties to call the shots.[91]

Even if states have a weak subjective interest, it is unclear why choice-of-law rules are to be directed at vindicating such feeble con-

86. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636 (1985) (antitrust cases are arbitrable because "the antitrust cause of action remains at all times under the control of the individual litigant; no citizen is under an obligation to bring an antitrust suit, . . . and the private antitrust plaintiff needs no executive or judicial approval before settling one.").

87. CONFLICT OF LAWS, *supra* note 3, at 210 (consent is an "intuitively" appealing basis for choice-of-law decisions).

88. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1178 (1986).

89. *Id.*

90. Brilmayer, *Myth*, *supra* note 2, at 428.

91. *See, e.g.*, *Mitsubishi*, 473 U.S. at 636.

cerns, when compared with the undeniably stronger interests that parties have in lawsuits. We can debate, I suppose, whether a state has an "interest" in applying its rule of, say, interspousal immunity to an interstate case, but to the injured widow who stands to be nonsuited, it is truly a matter of the most pressing concern. Thus Brilmayer falls into the trap of accepting Currie's vocabulary. As a consequence, she makes the unfortunate decision to accept the most doubtful of Currie's premises, essentially his "first principle," that choice-of-law questions in private disputes should be resolved from a governmental perspective.

Even if, however, one could agree that states have interests in lawsuits that are more powerful than individuals, I have great difficulty with the rest of Professor Brilmayer's analysis. Assuming that the goal of choice of law is to maximize subjective state "interests" —which Professor Brilmayer renames "multistate policies" and "internal policies" in order to avoid confusion with Currie's terminology[92]—Brilmayer postulates that states are akin to "consumers" in an economy, and therefore in the best position to make their own choices.[93] From this perspective, Brilmayer argues that states are on the horns of a dilemma. If they "cooperate" with other states, they may improve the long-run realization of their "policies," even though this may require some short-run sacrifices.[94] One route, suggests Brilmayer, might be to have states actually "bargain" with each other. However, she rejects this solution—and rightly so—on practical grounds.[95]

In an effort to resolve the perceived dilemma, Brilmayer turns to game theory. She compares states to the prisoners in the well-known cooperation/defection game the Prisoners' Dilemma.[96] In this game, two conspiring criminals are caught by the police and have no way of communicating with each other.[97] Both prisoners have the option of cooperating with each other by remaining silent, or defecting by "ratting" on the other.[98] The consequences of all four possible scenarios are well-defined and known to each.[99] If they cooperate with each other each receives a short prison term; if one rats and the other remains silent, the rat goes free and the stooge gets a long term; if both rat, each gets a moderate term.[100]

Brilmayer notes that game theory, including developing strategies for the Prisoners' Dilemma, has proved useful in some international

92. CONFLICT OF LAWS, *supra* note 3, at 151.
93. *Id.* at 150-55.
94. *Id.* at 155.
95. *Id.* at 145-46.
96. *Id.* at 156.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*

settings, such as in evaluating strategies for nuclear deterrence and disarmament.[101] Brilmayer believes game theory to be a powerful tool in the multistate context. She asserts: "What makes the game theory literature so helpful is that it illustrates the possibility of developing rational strategies that achieve better results through cooperation than through short-run pursuit of selfish goals."[102] Brilmayer believes multistate disputes to be an "ideal opportunity" to employ game theory and "reciprocity" solutions.[103]

There are, however, some marked differences between courts deciding multistate disputes and game participants. The prisoners have a sure-fire method of finding out whether the other one ratted or stayed silent: they will know just as soon as they are set free or sentenced. A state, by contrast, feels no palpable impact when one of its citizens has a case decided for or against it in a foreign court. In fact, unless the state makes an investigation into foreign litigation, it will not even come to the attention of anyone in the state government how foreign lawsuits to which the state's citizens are parties are proceeding. Brilmayer asserts that the communications problems are not "severe" because "a state's choice-of-law precedents are relatively public because they are published in case reports."[104] But this consideration is clearly off the mark. Only a minute fraction of all cases end in published decisions; and, as we all know, how choice-of-law issues are being resolved at the trial level is not at all discernable from the state high court's vague pronouncements.[105]

The difference is between communication before and after the fact. The prisoners have no opportunity to communicate before their decision, but they always learn the outcome after the decision. In contrast, states have an opportunity for vague communication before the fact, but no opportunity for communication after the fact, unless someone in each state is put to the mind-boggling task of monitoring all the courts (trial and appellate) in the other forty-nine states and foreign countries to determine how the state's citizens are being treated in foreign litigation. The nuclear deterrence, and other international relations, examples cited by Brilmayer[106] are beside the point because

101. *Id.*
102. *Id.* at 157.
103. *Id.* at 159.
104. *Id.*
105. *Compare* Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (state court of last resort applying the law of the common domicile instead of *lex loci*) *with* Kell v. Kell, 47 Misc. 2d 992, 263 N.Y.S.2d 442 (1965) (trial court decision shortly after Babcock applying *lex loci* instead of law of common domicile); Fusillo v. Matthews, 59 Misc. 2d 539, 299 N.Y.S.2d 872 (1968) (same); DuBois v. Siewert, 57 Misc. 2d 617, 293 N.Y.S.2d 802 (1968) (same).
106. *Id.* at 156.

central governments, in contrast to state governments, invest billions of dollars in satellite and other verification mechanisms to ensure both before-the-fact and after-the-fact communication. State governments, on the other hand, do not, and would be ill-advised to, invest their precious resources in monitoring other state courts to see how their citizens fare in interstate cases.

Thus, even assuming that the goal of conflicts is to "maximize [subjective] state policy objectives,"[107] game theory is not likely to provide an effective strategy. Moreover, even if the strategy could be made to work, the results should please no one. As Brilmayer notes in a famous computer derby held to play the Prisoners' Dilemma game, a successful strategy was "Tit for Tat"; that computer program cooperated until crossed, at which point it defected once in order to "retaliate," at which point it returned to cooperating, until crossed.[108]

Imagine an Indiana trial judge telling a California plaintiff that although the plaintiff would normally receive the benefit of the California "ordinary care" rule, the judge had information that in a recent (wholly unrelated) California case, an Indiana defendant had been denied the aid of Indiana's contributory negligence rule. So, in "retaliation," the judge announces, he is nonsuiting the California plaintiff on the basis of Indiana's guest statute. "Tit for Tat" may be an acceptable game strategy, but it hardly seems like a way to decide real lawsuits involving real parties. Certainly it is not likely to inspire public confidence in the courts.

Unconcerned about such details, however, Brilmayer presses on, urging at least consideration of a program of "specific reciprocity." In one passage, she specifically invokes the "Tit for Tat" strategy in the context of adjudication:

> Specific reciprocity seems better calculated to motivate other states to be cooperative as well because it conditions cooperation on reciprocation. The Tit for Tat strategy did so well in [the] prisoner dilemma computer tournament for exactly this reason. One wonders whether requiring reciprocity in the choice of law context wouldn't prove just as advantageous.[109]

As should be clear from the above discussion, I, for one, do not wonder. "Retaliation" hardly seems like a way to decide real cases.

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107. *Id.* at 145.

108. *Id.* at 158, 179.

109. *Id.* at 180. Although Brilmayer does not discuss at any length reciprocity in the related area of judgment recognition, it has enjoyed some favor in this context. *See* Hilton v. Guyot, 159 U.S. 113 (1895). Even in the less complex matter of recognition, however, reciprocity leads to severe complexities and unfairness in application. *See* Joiner, *The Recognition of Foreign Country Money Judgments by American Courts*, 34 AM. J. COMP. L. 193, 212-13 (Special Supp. 1986); Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 31-34 (1988).

Sensing, perhaps, the practical problems with "specific reciprocity," Brilmayer urges an alternative program of "diffuse reciprocity."[110] In Currie-esque fashion, she makes assertions that are difficult to evaluate without reference to her examples. These examples, however, make clear that "diffuse reciprocity" bears a striking resemblance to the old multilateralist battle cry of "decisional harmony." Nothing could make this clearer than her notation that the *First Restatement* was the closest America ever came to "diffuse reciprocity."[111]

Brilmayer cites the Uniform Child Custody Jurisdiction Act ("UCCJA") as an example of "diffuse reciprocity."[112] The UCCJA, however, does not represent a national commitment to decisional harmony or "diffuse reciprocity." Instead, it is an effort to put an end to the horrid practice of post-adjudication forum shopping through kidnapping by non-custodial parents.[113] Rather than attempting to safeguard the choice-of-law desideratum of decisional harmony, the UCCJA pursues a substantive goal: to protect parents and children from the psychologically devastating effects of kidnapping.[114] It does so *not* by choice-of-law rules, but by *jurisdictional* and *judgment-recognition* rules.[115] Brilmayer fails to explain adequately why this "procedural solution" holds lessons for choice of law, nor does she explain the connection between the "decisional harmony" she supports and substantive goals.

Here, although she notes it earlier, Brilmayer overlooks that even under the *First Restatement* the United States never enjoyed true decisional harmony.[116] Indeed, forum shopping has not been viewed as sufficiently evil to warrant a serious counter-offensive.[117] Over a century of experimentation in Europe with Savigny's multilateral rules has failed to produce decisional harmony there.[118] Unless there are substantive values worthy of protection threatened by forum shopping,

110. *Id.* at 162.

111. *Id.*

112. *Id.* at 165.

113. *See, e.g.*, N.Y. DOM. REL. LAW § 75-b(c)(McKinney 1988) (New York adoption of the UCCJA)(purpose of the act is to "deter abduction and other unilateral removals of children."); *see generally* Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation*, 46 U. COLO. L. REV. 495 (1975); Bruch, *Brigitte M. Bodenheimer, September 27, 1912–January 7, 1981*, 14 FAMILY L.Q. vii (1981); Katz, *Brigitte Bodenheimer–Protector of the Children*, 16 U.C. DAVIS L. REV. vii (1982).

114. *See, e.g.*, N.Y. DOM. REL. LAW § 75-b (McKinney 1988) (adopting UCCJA).

115. *Id.* § 75-d (limiting jurisdiction of custody determinations to child's "home state" and other appropriate jurisdictions), § 75-i (jurisdiction to enter custody decree cannot be based on kidnapping of child), § 75-n (custody decrees to be recognized only if based upon jurisdiction consistent with the jurisdictional standards of the act).

116. R. LEFLAR, AMERICAN CONFLICTS LAW 176-80 (3d ed. 1977).

117. *See generally* Juenger, *Forum Shopping: Domestic and International*, 63 TUL. L. REV. 553 (1989).

118. Juenger, *General Course*, *supra* note 9, at 163-68.

states and nations have little incentive to wipe out the practice. Thus, "decisional harmony," "diffuse reciprocity" and "preventing forum shopping" are but words, not a program for action.

This sobering realization may account for Brilmayer's tepid conclusion to her chapter on "game theory" and "reciprocity." As she notes at the chapter's beginning, her approach "will not yield concrete recommendations about the choice of law rules, methods, or principles, we ought to have."[119] Brilmayer is left simply calling for yet another *Restatement of Conflicts*.[120] But, as she notes, neither of the previous two have produced true decisional harmony, or, if you prefer, "diffuse reciprocity."[121]

Nor are we told what the *Third Restatement* would look like, except that it should avoid the vice of "trying to derive all choice of law from a single unifying principle. . . ."[122] This is a strange criticism, particularly of the eclectic *Second Restatement*, which hardly can be accused of "over-unification."[123] Brilmayer's further suggestion of "constant updating . . .as new legal issues come to light"[124] is as strange as it is impractical. Restatements are supposed to serve as a codification of the conventional wisdom as a guideline for future decisions. While it may need updating occasionally, constant revision undermines a *Restatement*'s *raison d'être*. Rewriting to accommodate each new case would deprive a *Restatement* of its persuasive character altogether, and degenerate the venture into an update service.

B. Political Rights

Brilmayer seems to feel firmer ground in her discussion of a "political rights-based approach" to choice of law.[125] Plunging straight into difficult issues of moral philosophy, she attributes to interest analysis a "consequentialist," rather than a "deontological," theory of ethics.[126] Brilmayer is certainly correct that interest analysis has a consequentialist flavor. As she notes, interest analysis, particularly its preoccupation with finding a sovereign-backed source for choice-of-law norms, is closely linked to legal positivism.[127] Although Brilmayer does not

119. CONFLICT OF LAWS, *supra* note 3, at 148.
120. *Id.* at 185-88.
121. *Id.*
122. *Id.* at 186-87.
123. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 508 (1984) (Reporter for *Second Restatement* describing it as "eclectic in nature [because it] rel[ies] on a variety of different theories and values.").
124. CONFLICT OF LAWS, *supra* note 3, at 188.
125. *Id.* at 195.
126. *Id.* at 199.
127. *Id.* at 14.

make this specific connection, the foundations for modern legal positivism were laid by John Austin, who defined law as existing only "by the express or tacit authority of [the] sovereign or supreme government."[128] A fellow-traveler with Jeremy Bentham, James Mill and John Stuart Mill, the founders of utilitarianism, Austin tied his philosophy of law to their moral philosophy.[129] As Brilmayer notes, utilitarianism is the paradigmatic consequentialist theory of ethics.[130]

Brilmayer, however, finds the deontological account more appealing. The deontological account stresses the need for limits on state power, called "rights," even if the state action might promote the collective good. Ronald Dworkin, for this reason, has described rights as "trumps" against state action that might otherwise promote the collective good.[131] Brilmayer concludes that deontological ethical theory is more in tune with her "moral intuitions."[132] Brilmayer finds this to be especially true in the multistate context because "the claims of one of the parties are being sacrificed to further the general good of a community of which he or she may not even be a part."[133] She goes on to assert that "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."[134]

This essay is hardly the place to take up the age-old debate about the best ethical theory, a debate that began, at the latest, during Homer's time.[135] It is unnecessary, however, to resolve the "consequentialist"/"deontological" debate to conclude that Brilmayer's reasoning here is either circular or loaded with unarticulated assumptions. Demanding that the party being "sacrificed" be "properly subject to the state's authority" begs the question, because the conflict of laws seeks to answer precisely that question. Consequently, appealing to an intuitive notion of what it means to be "properly subject" does not get us very far down the road. A clue to Brilmayer's notion of "properly subject" lies in her insistence that the person be "part" of the community. But what does it mean to be "part"? A national? A domiciliary? A resident? Transiently present? A plausible case can be made for each of these

128. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 365 (H.L.A. Hart ed. 1954).

129. Haeflich, *John Austin and Joseph Story, Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer*, 29 AM. J. LEGAL HIST. 36, 37- 38, 44 (1985); *see also* R. DWORKIN, TAKING RIGHTS SERIOUSLY xi (rev. ed. 1978) (noting the connection between utilitarian moral philosophy and positivism).

130. CONFLICT OF LAWS, *supra* note 3, at 199-200.

131. R. DWORKIN, *supra* note 129, at xi.

132. CONFLICT OF LAWS, *supra* note 3, at 203.

133. *Id.* at 205.

134. *Id.* at 206.

135. A. MACINTYRE, A SHORT HISTORY OF ETHICS 5 (1966).

possibilities, and conflicts theories have depended on these various connecting factors in differing combinations throughout history.[136]

At any rate, not much turns on Brilmayer's discussion of moral philosophy given the way she describes these "political rights" in the choice-of-law context. She is, of course, acutely aware that the use of word "rights" in this context conjures up Beale's theory of vested rights. However, Brilmayer argues that Beale's theory involved a "positive" right to have the law of a certain jurisdiction applied,[137] whereas her theory of "political rights" involves "negative" rights, *i.e.* the right avoid application of one of the laws vying for application.[138]

Like most "positive"/"negative" distinctions, Brilmayer's evaporates on closer inspection. Any legal right can be thought of as positive or negative in nature. The first amendment right to free speech imports the "positive" right to speak as one chooses, or a "negative" right not to be punished for speaking. The same is true in choice of law. The "positive" right to have the law of state X applied entails the "negative" right *not* to be subjected to the law of some other state.

Brilmayer also describes her conception of choice-of-law rights as involving "vertical" rights, *i.e.*, rights against the government, as opposed to Beale's rights, which involved "horizontal" rights, *i.e.*, rights against the other party.[139] This distinction also evaporates once one begins to ponder it. It makes no difference whether we say that a party has a "right" to force the state (court) to apply a certain law, or we say that a party has a "right" to force the other party to submit to his preference with regard to the applicable law. The consequence is the same, one law or the other governs the dispute between the parties.

The point is not to show that Brilmayer's theory is a reincarnation of Beale's; it clearly is not. But despite Brilmayer's novel terminology, there is nothing new about this formulation. When Brilmayer speaks of a party having a "right" not to have some law applied, what she means is that law represents an improper choice, and some other law must be chosen. And when she says that these "rights" depend upon

136. Mancini argued for nationality as the primary connecting factor. Juenger, *General Course*, *supra* note 9, at 164-65 (*citing* Mancini, *Della nazionalita come fondamento del diritto delle genti* (1851), *reprinted in* P. MANCINI, DIRITTO INTERNAZIONALE (1873)). Currie variously referred to domicile and residence. B. CURRIE, *supra* note 30, at 103. The United States Supreme Court recently reaffirmed transient presence, accompanied by in-state service, as a basis for personal jurisdiction. *See* Burnham v. Superior Court, 110 S. Ct. 2105, 2116-17 (1990); *see generally* Borchers, Pennoyer *to* Burnham, *supra* note 80. The notion that persons temporarily within a state's borders owe it allegiance has ancient roots. Lorenzen, *Huber's de Conflicto Legum*, 13 ILL. L. REV. 375, 403-04 (1918) ("the proposition tha all within the boundaries of a government are to be deemed subjects thereof is nevertheless perfectly correct. . . ." (translation of Huber's treatise)).

137. CONFLICT OF LAWS, *supra* note 3, at 208.

138. *Id.* at 207.

139. *Id.*

the party being "part" of the community, or "properly subject to a state's authority," she means an appropriate connecting factor must justify the choice. Consider the faintly familiar tone of this passage:

> The political rights-based argument is related to the issue of state sovereignty in that the individual's claim of immunity from state law is a claim that the state would be exceeding its legitimate sovereignty if it were to apply its law. It is unfair (and thus a violation of individual rights) for a state to exceed the scope of its sovereign powers.[140]

Thus far, at least, nothing depends on the outcome of the "consequentialist"/"deontological" debate. When Brilmayer says that an individual has a "right" not to have the law of state X chosen, this is a complicated way of saying that a rational choice-of-law system would not choose the law of state X. One need not hold any particular moral philosophy to agree with the unremarkable proposition that choice-of-law systems should choose between competing rules of decision. Despite the mesmerizing quality of the term "right" (just as Currie mesmerized his audience with the term "interest"), nothing, except for confusion, is gained by using it.

Brilmayer realizes that new terminology does not give content to her discourse. In Brilmayer's terminology, she must decide under what circumstances a party has a "right" to be free from certain choices of law. In more conventional terms, she must set forth the rules of choice or at least the connecting factors she considers appropriate. At this point it seems the discussion of moral and political philosophy, so prominent at the beginning of the chapter, might reclaim the forefront to guide the choice of an appropriate set of connecting factors. But here Brilmayer falls back on intuitions:

> The first task of a political rights model is to identify the circumstances under which the state has, or lacks, an adequate justification for coercion. Political choice of law rights derive from the limited nature of such justifications. . . .
>
> The two most intuitively acceptable bases are probably express consent and the domicile of the party burdened by the applicable law.[141]

Besides her intuition she offers no more than her observation that "most political philosophers investigating the problem . . . have as-

140. *Id.* at 209. In tone and approach this passage resembles the Supreme Court's holdings in Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) and Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 806-07 (1985) that a state may apply forum law only if the parties and events have enough contact with the forum to create a state "interest" in applying its law.

141. CONFLICT OF LAWS, *supra* note 3, at 210.

sumed that citizenship or domicile is one of the strongest possible justifications for state authority . . . ."[142] Thus, Brilmayer's choice of the domiciliary nexus is just as dogmatic and arbitrary as Beale's choice of the territorial nexus and Currie's choice of the benefiting domiciliary nexus. It is odd that, after criticizing Currie's arbitrary choice of the domiciliary nexus, Professor Brilmayer would choose to invoke the same nexus in a similarly doctrinaire manner.

It should come as no surprise that the use of the domiciliary nexus causes the same problems for Brilmayer that it did for Currie. For large classes of persons their domicile does not entail any real sense of belonging and may be difficult to discern. White collar workers such as law professors, bankers, and doctors may have a clear domicile, but what about the homeless, migrant workers, international refugees and jet setters?[143] Are they to be denied the protection of law because their domicile is difficult to locate? Should they be burdened by the rules of decision of a political system that they may be trying to escape?

Even more ironic is that, notwithstanding Brilmayer's professed aversion to Currie's teachings, the "political rights" model appears, at this point, to be an inverted version of interest analysis. Whereas Currie assumed that states have an "interest" in *benefiting* their domiciliaries, Brilmayer insists that her vision of political rights requires states to burden them. But, as Brilmayer notes, in practice this is likely to generate the same general class of problems as interest analysis.[144]

Brilmayer considers a hypothetical two-state problem in which the laws of New York and Connecticut differ, each to one party's benefit and the other's detriment.[145] If both parties hail from the same state, Brilmayer joins Currie in recommending application of the law of the common domicile.[146] Unlike Currie, however, she recommends this course not because it will benefit one of the domiciliaries, but because it will burden the other.[147] If the parties hail from different states, Brilmayer meets her equivalent of true conflicts and unprovided-for cases. If both parties will benefit from the application of their home state's law, Currie called this a true conflict, and recommended application of forum law.[148] For Brilmayer, however, this is the equivalent

142. *Id.* at 211. Brilmayer also contends that the ability to vote justifies the domiciling nexus, *see id.* at 211, but this argument is difficult to fathom given that many domiciliaries, such as children and felons, may not vote, and that many non-domiciliaries, such as college students, may vote.

143. Juenger, *A Critique*, *supra* note 8, at 39; *see also* Weintraub, *An Inquiry Into the Utility of "Domicile" as a Concept in Conflicts Analysis*, 63 MICH. L. REV. 961 (1965).

144. CONFLICT OF LAWS, *supra* note 3, at 214.

145. *Id.*

146. *Id.*

147. *Id.*

148. Currie, *supra* note 17, CONFLICT OF LAWS, at 1242-43.

of an unprovided-for case, because neither state has a chance to burden one of its domiciliaries.[149] Conversely, if neither party will benefit from the application of his or her home state's law, Currie called this an unprovided-for case, and recommended application of forum law.[150] For Brilmayer this configuration is the equivalent of a true conflict, because both states have a chance to burden one of their own.[151]

Brilmayer's innovation, therefore, is to interchange the "true conflict" and "unprovided-for" case categories. To Currie, however, putting a case into one category or the other would not have made the slightest difference, because he recommended application of forum law in either situation.[152] While Brilmayer refers to this similarity between her model and interest analysis as being "virtually by coincidence"[153] and "almost by inadvertence,"[154] there is nothing coincidental or inadvertent about it. Any scheme that involves two parties and uses a domiciliary nexus can produce only four possibilities. Thus every solution to the problem must resemble every other, especially if one begins from the premise that the law of any common domicile controls.

Thus, Brilmayer is left with a version of the same problem that has been haunting the analysts: how to resolve the true conflicts and unprovided-for cases.[155] For Currie the problem was easy—he applied forum law. But he attracted few followers in this regard, and, to this day, the analysts do not agree on how to cut (or possibly untie) the Gordian knots the domiciliary nexus creates.[156]

Brilmayer is somewhat at a loss here. Picking up on a suggestion made at the beginning of the chapter that her "political rights" model might not point to any single rule of decision, she returns to a discussion of the validity of territorial contacts. She notes that at least one political philosopher (apparently not among the group of "most political philosophers"[157] whom she used to bolster the choice of the domiciliary nexus), John Locke, thought that territorial contacts were important.[158] Brilmayer admits to some squeamishness about territorial contacts, but decides to take the plunge anyway. Reminiscent of her "intuitive" choice of the domiciliary nexus,[159] she asserts that "to a certain extent, territoriality must be taken as axiomatic for choice of law purposes."[160]

149. CONFLICT OF LAWS, *supra* note 3, at 214.
150. Currie, *supra* note 17, at 1243.
151. CONFLICT OF LAWS, *supra* note 3, at 214.
152. Currie, *supra* note 17, at 1242-43.
153. CONFLICT OF LAWS, *supra* note 3, at 227.
154. *Id.* at 230.
155. *Id.* at 215.
156. Kay, *A Defense*, *supra* note 17, at 63-64.
157. CONFLICT OF LAWS, *supra* note 3, at 211.
158. *Id.* at 216-17.
159. *Id.* at 210.
160. *Id.* at 218.

Brilmayer then concludes that *either* a territorial *or* a domiciliary contact is sufficient to satisfy her "rights-based" approach to choice of law.[161] At this point we can all relax, because all of the choice-of-law approaches, and nearly all of the cases, rely on one contact or the other. Even Joseph Beale, who is hardly given credit these days for knowing which way was up, recognized that choice-of-law systems historically have relied on one of these contacts or the other.[162] If either one will do as far as Professor Brilmayer is concerned, it appears heads of state can sleep the sleep of the blessed, safe in the knowledge that they have not trampled on anyone's "rights." Surely Brilmayer is not exaggerating when she says that her approach "leaves open a wide range of permissible options. It would seem to be a rare case in which analysis of rights would narrow the range of possibilities to a single fair application of one state's law."[163]

At this point, however, Brilmayer seems to suffer pangs of conscience. She feels impelled to make recommendations for a choice-of-law system that will give a modicum of predictability. She decides to see whether "assessing the fairness of the overall pattern of results" might yield some more specific guidance.[164] She also notes that it is "understandabl[e]" that a "state might hesitate to adopt a choice of law . . . principle . . . [that] systematically works to a disadvantage of local persons."[165] In order to promote the "actuarial fair[ness]" of her inverted interest analysis, Brilmayer proposes to use territorial contacts as "tie breakers" in true conflicts and unprovided-for cases.[166] This, she concludes, will evenly distribute the benefits between the locals and the out-of-staters.[167]

But even this approach, however, has its roots in interest analysis. Currie proposed to continue to assign some relevance to territorial contacts. Currie, for instance, thought a local situs for an accident might give a state an "interest" in protecting locally-domiciled medical creditors.[168] Indeed, Brilmayer's proposal bears a striking resemblance to Fuld's rules promulgated in *Neumeier v. Kuehner*,[169] although Brilmayer does not explicitly acknowledge this connection.

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161. *Id.* at 221.

162. J. BEALE, A TREATISE ON THE CONFLICT OF THE LAWS 7-8 (1935).

163. CONFLICT OF LAWS, *supra* note 3, at 221.

164. *Id.* at 222.

165. *Id.* at 225.

166. *Id.* at 229.

167. *Id.*

168. D. CAVERS, *supra* note 41, at 52-53 (for Currie's view); B. CURRIE, *supra* note 30, at 366, 369-70.

169. 31 N.Y.2d 121, 126-30, 335 N.Y.S.2d 64, 68-71, 286 N.E.2d 454, 456-54 (1972). Other commentators have proposed territorial factors "when it comes to breaking a tie in tort choice of law." T. DE BOER, *supra* note 17, at 4-302. Notable among them is David Cavers. *Id.*; *see also id.* at 4-309 (similarity between Cavers' approach and *Neumeier*).

In the end, therefore, Brilmayer's system is strikingly eclectic, cast in the mold of interest analysis. Her approach is Currie-like, with a Bealean tie breaker; worse yet, it combines the arbitrary choices and dubious assumptions of both. Because of these problems, the unappealing flavor of states having to single out their own for worse treatment, and the strange and unfamiliar language in which it is shrouded, I believe Professor Brilmayer's "rights-based" approach is unlikely to attract much support, academic or judicial.

Conclusion

I hope that this essay does not give interest analysis bashing a bad name. I agree wholeheartedly with Professor Brilmayer's criticisms of the tenets Currie and his followers hold dear. But Brilmayer fails to see that her own system is vulnerable not only to the same criticisms, but to new and different ones as well. The important point here is that her criticisms of interest analysis are not in any way interdependent with the affirmative views she sets forth. In fact, to a large extent, her criticisms of interest analysis are inconsistent with her "reciprocity" and "political rights" theories. If Brilmayer succeeds in convincing courts and commentators to adopt her novel terminology, it will represent a monumental setback to a discipline already shrouded in mystery by vague terms and concepts with only pretensions of substance.