

**Surveying Choice of Law: A Foreword
to Twenty Years of Choice-of-Law Surveys
by Symeon C. Symeonides'**

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It is impossible to overstate the value and significance of the *Choice-of-Law Surveys* written by Dean Symeon C. Symeonides over many years. These surveys have not only educated law professors and lawyers about changing dynamics in the field of choice of law, but they have been instrumental in refining the modern method of analyzing and resolving these cases. To understand how important these surveys have been, we need to know something about the history of the field, why choosing the applicable law is so hard, and the importance of patterns and justifications that emerged from the work behind these surveys. This background information will show why these surveys frame the foundational scholarly work that has formed the basis for the emerging Third Restatement of Conflict of Laws. What that means is that the scholarly work Symeonides did to produce these surveys, and the analysis within them, have been crucial to law reform in this area and the development of a better, more defensible approach to choosing the applicable law when more than one jurisdiction has a legitimate claim to govern persons or events.

History of the Field

In the United States, the field began with Justice Joseph Story's treatise, *Commentaries on the Conflict of Laws*.² Story argued that courts always apply their own law but that they sometimes engage in "comity" by showing respect for the laws of other states when those states have a better claim to regulate persons or events. This *comity approach* gave

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² Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic: In regard to contracts, rights, and remedies, and especially in regard to marriages, divorces, wills, successions, and judgments* (1834).

judges discretion to defer to foreign law, but it did not produce any systematic account of when that was appropriate.

Story's comity approach was replaced at the end of the nineteenth century and the beginning of the twentieth by Joseph Beale's *vested rights approach*.³ Unlike Story, Beale believed that only one state has the legitimate power to apply its law to any fact situation. Rather than understanding judges as using discretion to defer to foreign law, Beale argued that certain actions or events create "vested rights" that must be recognized by courts, no matter where those courts are situated. The vested rights theory rested on a formalistic approach that required characterizing a case by subject matter (torts, contracts, property, procedure, status, etc.), identifying the single contact that determines whether or when a right comes into existence (or "vests"), and then applying the law of the state where that contact occurred or is located.

This approach fit the formalistic jurisprudential style of the *Lochner* era by eschewing policy analysis of any kind. It also defined state sovereignty as hermetically sealed such that it was *never* the case that more than one state might have the legitimate power to apply its law to a single controversy. For this system to work, there needed to be consensus about whether a case was a tort or a contracts case when both areas of law were implicated, and judges needed to be content to focus on a single event or contact and give that single factor determinative significance.

For example, in the famous case of *Alabama Great Southern Railroad Co v. Carroll*,⁴ an Alabama employee was injured in Mississippi when a co-worker failed to see a crack in a link between two railroad cars and arrange to fix the problem. The omission occurred both in Alabama when the train was stopped and *en route* inside Mississippi. Alabama had an employers' liability act that imposed vicarious liability on the employer if an employee was injured by the negligence of a fellow employee while on the job. Mississippi had no such law, and immunized the employer from liability under the doctrines of assumption of risk and the fellow servant rule. The Alabama Supreme Court characterized the legal question as a tort issue since it involved liability for negligence and vicarious liability. The employee had

³ Joseph Henry Beale, *A Treatise on the Conflict of Laws: or, Private International Law* (1916). Note that this first draft of his treatise was completed and published in a three-volume edition in 1935, the year after publication of the *First Restatement of Conflict of Laws* in 1934.

⁴ 11 So. 803 (Ala. 1892).

argued that it should be seen as a contract case because the Alabama statute had created a mandatory term in every employment contract. The court rejected the idea that the claim could be based on breach of an implied contractual obligation, opining that such an idea would be “astounding to the profession.”⁵ As a tort case, the only contact that mattered was the place of the injury (Mississippi). Alabama law could not apply regardless of any Alabama public policy to hold its employers responsible for workplace injuries suffered by Alabama employees.

Yet forty years later, in the case of *Bradford Electric Light v. Clapper*,⁶ the United States Supreme Court held that the obligations of employers to employees were established by contract, and that statutory regulations of their relationships were implied contractual obligations fixed at the time of contracting. For that reason, a Vermont employee of a Vermont company who was killed on the job while working in New Hampshire had no right to sue his employer for negligence even though the law of the place of conduct and injury would have allowed the claim. The Court was so sure of this conclusion that it held that it would be unconstitutional to apply the law of the place of injury; instead the law of the place where the contract was made was the only law that could constitutionally be applied.

Carroll and *Clapper* demonstrate why the vested rights approach failed. Even before its adoption by the American Law Institute in 1934, the vested rights approach was under attack by legal realists who undermined the thinking that gave determinative significance to a single contact and that failed to allow courts to consider the policies underlying both torts and contract law in resolving cases that involved injuries by persons who were parties to consensual relationships out of which those injuries arose. Key among those legal realists was Walter Wheeler Cook whose scholarship undermined the conceptual and theoretical bases of the vested rights approach in scholarship

⁵ 11 So. at 807.

⁶ 286 U.S. 145 (1932).

published as early as 1924.⁷ Other early legal realist critics of Beale were Ernest Lorenzen and Hessel Yntema.⁸

Key insights of the legal realists were that more than one state may have legitimate reason to apply its law to a particular controversy, more than one contact matters in choosing the applicable law, states have policy concerns that are relevant to determining when their laws should apply, and parties may have rights to the protection of different state's laws that need to be reconciled. While these scholars undermined the vested rights approach, they did not present an alternative framework or approach to resolve choice of law questions. That alternative was finally invented by Brainerd Currie whose monumental article on married women's contracts revolutionized the field.⁹

Currie argued that what matters is not just territorial contacts but *state interests*. Currie argued that domicile is a relevant territorial contact in torts and contracts cases, that more than one state might have an interest in applying its law to a particular case, and that there were cases where only one state is really interested in applying its law. When one state is interested in applying its law and another is not, Currie argued that the case presented a *false conflict*, and that the only rational thing to do was to apply the law of the only state interested in applying its law. Currie's analysis began a revolution that embraced analysis of state interests and the use of false conflicts analysis.

Yet Currie's approach was not satisfying to many scholars and judges because he argued that forum law should always apply unless a case presented a false conflict and a state other than the forum state was the only one interested in applying its law. That did not sit well with analysts or judges, so when the American Law Institute began work on the Second Restatement, under the leadership of Willis Reese, it both embraced and rejected Currie's approach. It embraced it in Section 6 of the Second Restatement when it required courts to determine which state had the most significant relationship to the case by reference to factors which included (a) "relevant policies of the

⁷ Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 Yale L.J. 457 (1924). See Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws* (Harv. Univ. Press 1949).

⁸ Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 Yale L.J. 736 (1924); Hessel Yntema, *The Hornbook Method and the Conflict of Laws*, 37 Yale L.J. 468 (1928).

⁹ Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. Chi. L. Rev. 227 (1958).

forum” and “the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue.”¹⁰ It rejected Currie’s approach by adopting presumptive rules that were identical to those in the First Restatement, thus choosing a place of injury rule rather than a forum law approach for true conflicts.

After publication of the Second Restatement in 1971, we experienced a long fifty-year experiment in applying interest analysis, along with consideration of the “justified expectations” of the parties,¹¹ and consideration the “needs of the interstate...system[].”¹² In this period, courts wrestled with the factors listed in section 6 of the Second Restatement and the injunction to determine the state that had the “most significant relationship to the occurrence and to the parties.”¹³ They paid attention to multiple contacts, unlike the single contact that resolved cases in the vested rights era. They focused on state policies and tried to determine the relative strength of state interests in the particular fact situation before the court. And they took into account the rights and justified expectations of the parties. In this era of wrestling with the field, the presumptions adopted by the Second Restatement played little role. After all, the Second Restatement required ignoring those presumptive rules if a different state had a more significant relationship with the case.

A debate ensued between those who favored neutral rules (David Cavers), those who favored consideration of the “better law” (Robert Leflar), those who favored case-by-case interest analysis (Robert Sedler & Herma Hill Kay) or comparative impairment (William Baxter), and those who favored a forum law approach (Louise Weinberg). The rules advocates thought that interest analysis or the most significant relationship test were hard to apply, led to inconsistent results, and provided little guidance either to citizens or judges. The proponents of case-by-case analysis argued that conflicts cases are hard, that multiple contacts matter, that competing interests and rights need to be considered to avoid the arbitrary and irrational results seen under the vested rights approach. There seemed to be a fight between those who valued predictability and those who valued multistate justice. A second fight also existed between those who thought that choice of

¹⁰ Restatement (Second), Conflict of Laws §6(b) & (c) (1971).

¹¹ *Id.* at §6(d).

¹² *Id.* at §6(a).

¹³ *Id.* at §145(1); *see also id.*, §188(1) (using the “most significant relationship test” to resolve contracts conflicts).

law rules should be neutral and those who thought that substantive justice was relevant to choice of law problems such that a court might favor the law that promoted “the basic policies underlying the particular field of law” (as the Second Restatement put it) or the “better law” (as Robert Leflar put it).

Into that debate stepped David Cavers and Judge Fuld on the Court of Appeals in New York. Cavers proposed new rules to replace the outdated rules in the First and Second Restatements.¹⁴ The Court of Appeals of New York adopted a subset of those rules in the case of *Neumeier v. Kuehner*.¹⁵ Those proposed rules were defended and criticized by other scholars and judges. Those rules either celebrated because they grew out of careful analysis of state interests and party rights or excoriated because they proposed to resolve complex cases by a simplistic and arbitrary formula.

In this morass stepped Symeon Symeonides. His choice-of-law surveys provided both the raw material and the analytical rigor needed to help scholars and judges figure out whether it might be possible to craft new rules that would achieve the goals sought both by rules advocates and interest analysts. To understand the importance of his contribution, we must first understand why the practice of choice of law is such a contested terrain.

Why Choice of Law is Hard

Choice of law cases are *hard*. They usually present intractable conflicts that are not easily resolved. That is because any approach or set of rules one can offer to solve conflicts of law inevitably privileges the interests of some states over those of other states and the rights of one party over those of the other. It is true that there are a few easy cases. In modern parlance, those are the false conflicts where one state has legitimate reasons to want its law to be applied while the other state has no interest (or no legitimate interest) in applying its law. What types of cases are easy?

One easy case is the “lonely domicile” case where all contacts are in one state except for the domicile of one of the parties. A prime example is *Hurtado v. Superior Court*.¹⁶ In that case, a Mexican resident

¹⁴ David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173 (1933). See also David F. Cavers, *The Choice of Law Process* (1965).

¹⁵ 286 N.E.2d 454 (N.Y. 1972).

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traveled to California and was killed in an auto accident there; the driver of the other car was a California resident. Mexico, but not California, limited damages for wrongful death. The victim's family sued the tortfeasors in California courts. In this situation, Mexico has no interest in limiting the liability of a California resident driving at home; Mexico's only interest is in limiting the liability of Mexican residents or visitors driving in Mexico. California, on the other hand has deterrent interests in liability for wrongful death and unlimited liability may increase deterrence. But even if California's interest is only loss-allocating rather than conduct-regulating, it has no interest in withholding a remedy from a non-resident when the tortfeasor is a forum resident who committed a wrong while acting inside the forum. There is no relationship centered in another state to protect, as was the case for example in *Schultz v. Boy Scouts of America*¹⁷ or *Foster v. Leggett*,¹⁸ and Mexico had no interest in depriving its residents of the full benefits of the law of another state that is willing to confer those benefits.

A second easy case is the "common domicile" case of *Babcock v. Jackson*.¹⁹ In *Babcock*, two New Yorkers went to Ontario and were involved in an accident there. The passenger sued the driver for negligence in New York courts. Ontario, but not New York, had a guest statute that immunized drivers from such suits. Ontario's defendant-protecting rule was designed to regulate local relationships or Ontario drivers when driving at home; its loss-allocating goal was to protect drivers from liability to those they helped by driving them around. Ontario's rule also had a conduct-regulating purpose of protecting insurance companies from fraudulent, collusive claims. But the case did not involve an Ontario driver or an Ontario insurance company, and New York was perfectly happy to entertain the lawsuit. In that scenario, New York has an interest in loss-allocation and civil justice between its residents while Ontario has neither a loss-allocating nor a conduct-regulating policy that would be served by application of Ontario law. Ontario's law was not, for example, a damage limitation law designed to promote business investment in Ontario. If it were, then the case would present a true, rather than a false, conflict and would be hard to resolve. As is, it presents a classic false conflict that

¹⁷ 480 N.E.2d 679 (N.Y. 1985).

¹⁸ 484 S.W.2d 827 (Ky. 1972).

¹⁹ 191 N.E.2d 279 (N.Y. 1963).

modern courts resolve by application of the law of the common domicile.

A third example of a clear false conflict is the “fortuitous injury” case that involves conduct by a defendant in a plaintiff-protecting state that happens to cause harm to a plaintiff in a defendant-protecting state. In *Ling v. Jan’s Liquors*,²⁰ a Missouri liquor store sold liquor to a minor in violation of Missouri criminal and civil regulatory laws. The minor drove over the border to Kansas and struck a Kansas resident as she stood by her disabled car. Missouri, but not Kansas, imposed liability on liquor stores for selling liquor to minors who go on to get drunk and cause an accident. Missouri has a strong regulatory interest in deterring such sales and in holding its residents responsible for their wrongdoing. The Kansas immunity rule is designed to limit the liability of Kansas stores and bars either to decrease the costs of doing business or because Kansas does not view them as the proximate cause of the harm. Either way, Kansas has no interest in immunizing a store that is located and acts in a state that both prohibits its conduct and imposes liability on it for that conduct. Moreover, Kansas has no interest in depriving its resident of a remedy that a sister state is willing to provide.

These cases are “easy” in the sense that most courts and commentators would agree that they are false conflicts and that the law of the only interested state is the one that should apply. But beyond these few fact patterns, most multistate cases that involve a conflict between the laws of two jurisdictions are, *by definition*, hard cases. They are hard because both states have sufficient relevant contacts with the case as to give them a legitimate interest in applying their laws to govern the parties’ relationship. When that is the case, it is also true that each of the parties has a claim to the protection of the law of one of the states. That means that each party claims a right to the recourse that their state’s law provides them; that, in turn, means that we have a clash of competing rights. When the states each seek to exercise their sovereign powers and the parties each claim legitimate and competing rights, there is no way to resolve the case without trampling on the sovereignty of one of the states and the rights of one of the parties. Sure, we may be able to come up with rules that seem sensible and that could be adopted by all states if they thought about it carefully. But those rules, whatever they are, will inevitably come

²⁰ 703 P.2d 731 (Kan. 1985).

under pressure because they will require one state and one party to give up legitimate claims, policies, and entitlements.

If we take for granted that most choice of law cases present hard questions, we must then figure how what to do. One possibility is to adopt a “neutral” rule like applying the law of the place of the injury. Another is to resort to forum law. A third is to ask courts to do the right thing, all things considered. The problem we face is that none of these approaches has proved to be satisfactory. What we really need is to work on creating *new rules* that are defensible and justifiable and that courts are willing to live with. Doing that requires nuanced rules (not clumsy, absolute ones like the place of injury rule). It also requires careful attention to competing norms in different fact/law settings. To generate an acceptable set of practices in this field, we need careful consideration of both facts and policies.

That is *precisely* what Symeonides’ choice-of-law surveys provide us. They catalogued many, many fact situations and presented the reasons offered by courts for their solutions, along with comments by Symeonides that helped the reader determine whether the result was defensible, and how it met or deviated from standard or historical practices. Doing this meant that Symeonides was able to identify and analyze both patterns of cases and core justifications for choosing one state’s policy and one party’s rights over those of the other state and party.

Patterns, Justification, & the Third Restatement

Symeonides’ choice-of-law surveys were based on his review of every choice of law case decided during the previous year. Out of that vast set of raw materials, he carefully chose cases to discuss that showed both how the law was changing and why the facts in particular cases caused judges to deviate from historical practices. That, in turn, allowed him to categorize the cases in an entirely new way. Rather than merely treating some cases as torts cases and others as contracts or property cases, Symeonides generated a series of patterns within each of those categories. He first generated eight basic patterns in torts and then multiplied those patterns to distinguish cases involving loss-allocating rules from those involving conduct-regulating rules.²¹

²¹ Compare Symeon C. Symeonides, *The American Choice-of-Law: Past, Present and Future* (2006) with Symeon C. Symeonides, *Choice of Law* (2016).

The basic patterns have two components: facts and laws. The fact portion identifies the relevant contacts with the two states. The law portion distinguishes between plaintiff-protecting and defendant-protecting policies. Together those patterns identify the basic structure of modern choice of law doctrine. They do this because Symeonides discovered and identified a series of patterns from the raw material of the cases he read and which he distilled in the choice-of-law surveys. Without his work in these surveys, these patterns would not have seen the light of day. Moreover, Symeonides was able to identify majority and minority approaches to handling the patterns while finding an overwhelming consensus on how to handle a few of the patterns of cases. Symeonides then explained in his scholarly work why the cases were being resolved in these ways and what the values, policies, norms, and practices were at stake in each type of case. Doing that required presenting *justifications* for the outcomes that Symeonides was observing in the courts. Those justifications provided arguments about why and when states should defer to the law of other states and when it is fair to privilege one party's entitlement over the other.

This combination of *patterns* and *justifications* allowed Symeonides to describe a new set of presumptive rules for choice of law cases. And that set of presumptive rules is forming the basis for the emerging Third Restatement of Conflict of Laws. Here are the basic patterns and rules:²²

Common domicile rule: When the parties have a common domicile in one state, or they have a relationship centered there, and they are involved in an accident in another state, apply the law of their common domicile (or the place where their relationship is centered) unless the legal rule at the place of conduct and injury is a conduct-regulating rule.

Split domicile rule. When conduct and injury are in the same state as the domicile of one of the parties, apply the law of that state, whether its rule is loss-allocating or conduct-regulating.

²² I have restated the patterns Symeonides found to simplify their presentation and make his findings easily digestible in summary fashion. For an elaboration of the justifications behind these patterns, and some criticisms of the results they lead to, see Joseph William Singer, *Choice of Law Rules*, — Cumberland L. Rev. — (forthcoming, 2020).

Cross-border tort rule. When conduct and injury are in two different states, choose the law that favors the plaintiff unless the defendant could not foresee the injury occurring there. This rule applies whether the rules in question are conduct-regulating or loss-allocating.

These rules require interpretation; they cannot be applied mechanically. There are also reasons why these rules might not lead to the best outcomes in certain fact situations, and some courts and scholars may not like the outcomes they reach and will rebel against them or distinguish or narrow them. Even if all that is true, this approach to resolving choice of law issues is far superior to that in the First or Second Restatements. The choice-of-law surveys done by Symeon Symeonides form the basis of these emerging rules. He is, in all the ways that count, the father of choice of law in the twenty-first century, and his surveys both “show his work” and enable us to join him in the search for multistate justice. He deserves our gratitude and respect and our recognition of his pivotal place in the choice of law field.