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## Simplifying Choice-of-Law Interest Analysis

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# SIMPLIFYING CHOICE-OF-LAW INTEREST ANALYSIS

LUKE MEIER\*

*Modern choice-of-law doctrine invites judges to consider the interests that states have in applying their law to a dispute. But modern choice-of-law doctrine has never provided judges with a rubric by which to conduct this interest analysis. This trend continues in the proposed draft of the Restatement (Third) of Conflicts of Law.*

*This Article attempts to fill that void by proposing an extremely simple rubric by which judges can determine whether a state has an interest in applying its law to a horizontal choice-of-law dispute. In actuality, the rubric proposed herein reaches the results that most courts have reached without the rubric. The rubric, however, will make it much easier to reach that result.*

## Table of Contents

I. Introduction .....	338
II. A Rubric for Identifying State Interests .....	341
III. Explaining the Rubric .....	344
A. Step One: A Domicile-Based Approach .....	344
1. Protect/Reward Theory (Match).....	345
2. Punish Theory (Mismatch) .....	346
B. Step Two: A Contacts-Based Approach.....	349
1. Which Contact(s) Count? .....	352
2. Does the Contact Create an Interest?.....	355
a) The Third Restatement Categories: An Analytical Critique .....	356
b) The Third Restatement Categories: A Practical Critique .....	358
c) Simplification: Plaintiff-Preferred Laws Are Conduct- Regulating.....	359
C. Cases the Rubric Gets Wrong .....	362
1. A Funky Tort Law Fact Pattern .....	362
2. Property Disputes .....	364

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IV. Consistency with Third Restatement Results and a Word on Tiebreakers.....	365
A. Third Restatement Results.....	365
1. Summary.....	365
2. Third Restatement Methodology.....	367
3. Section 6.07.....	369
4. Sections 6.04 and 6.06.....	370
5. Section 6.08.....	375
B. A Word on Tiebreakers.....	379
V. Conclusion.....	382

### I. Introduction

In the mid-twentieth century, American horizontal choice of law underwent a dramatic transformation.<sup>1</sup> Prior to this transformation, choice-of-law issues were usually resolved according to a relatively simple “territorial” approach.<sup>2</sup> Under this approach, a court applied the law of the state where an important factual event between the parties had occurred.<sup>3</sup> The relevant factual event was usually based upon the points at which the plaintiff’s legal rights became “vested” against the defendant.<sup>4</sup> Thus, for instance, in a torts

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1. See generally Earl M. Maltz, *Do Modern Theories of Conflict of Laws Work? The New Jersey Experience*, 36 RUTGERS L.J. 527, 528–29 (2005) (describing the transformation in choice of law).

2. See LAURA E. LITTLE, CONFLICT OF LAWS: CASES, MATERIALS, AND PROBLEMS 166–67 (2d ed. 2018) (describing the territorial approach and how it had a “stranglehold on United States courts in the nineteenth century and the first half of the twentieth century”).

3. See Perry Dane, *Vested Rights, “Vestedness,” and Choice of Law*, 96 YALE L.J. 1191, 1195 (1987) (explaining that under the traditional approach “the law governing a given legal interaction was almost always the law of the place in which certain discrete, specified events in that interaction took place”).

4. See Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1127 (2010) (equating the vested rights approach with the traditional territorial approach of the First Restatement of Conflict of Laws); Terry S. Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity*, 62 N.Y.U. L. REV. 651, 658 n.32 (1987) (“The vested rights theorists believed instead that, at some specified moment in some specified geographic location (the time and place of the occurrence of some specified event), the rights giving rise to a cause of action are created or ‘vested.’”). Other scholars have noted that the territorial approach can be separated from Professor Joseph Beale’s “vested rights” synthesis of it. See CLYDE SPILLINGER, PRINCIPLES OF CONFLICT OF LAWS 59 (2010) (“It is essential to distinguish the general idea of *lex loci* as simply one practical approach to the choice-of-problem, from Beale’s elaborate systematization of it, based on the concept of ‘vested rights.’”). Notably, Professor Beale drafted the first publication of the Restatement (First) of Conflict of Law.

dispute, the relevant factual event would be the moment in which the plaintiff was injured, because it was only after an injury occurred that the plaintiff had legal recourse against the tortfeasor defendant.<sup>5</sup> To resolve a choice-of-law dispute, then, the court simply applied the law of the state where the injury had occurred. This traditional approach was captured by the original Restatement (First) of Conflict of Laws (“First Restatement”).<sup>6</sup>

This all changed in the middle of the twentieth century. Gradually, courts and commentators came to the view that choice-of-law analysis must include consideration of the interests that states have (or do not have) in applying their law to a horizontal choice-of-law dispute.<sup>7</sup> This view is most closely associated with academic Brainerd Currie.<sup>8</sup> In the famous case of *Babcock v.*

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John F. Coyle, *A Short History of the Choice-of-Law Clause*, 91 U. COLO. L. REV. 1147, 1167 (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3420162](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420162).

5. See Mo Zhang, *Party Autonomy in Non-Contractual Obligations: Rome II and Its Impacts on Choice of Law*, 39 SETON HALL L. REV. 861, 876 (2009) (“[T]he 1934 Restatement enshrined the *lex loci* doctrine, escalating ‘the place of wrong’ to the level of a general rule in determining the applicable law for torts.”); Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 724–25 (2009) (“The First Restatement defines the place of wrong as ‘the state where the last event necessary to make an actor liable for an alleged tort takes place.’ Usually this is the location where the plaintiff was injured, since liability does not arise without injury. Thus, under the First Restatement, if the injury occurs in State A, the judge should apply the law of State A.”).

6. See Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 GEO. L.J. 301, 314–15 (2014) (describing generally the territorial approach of the First Restatement). *But see* Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1374–75 (2004) (explaining that the First Restatement rules did not always produce clear-cut results due to inconsistent application of the territoriality principle).

7. See Gary J. Simson, *An Essay on Illusion and Reality in the Conflict of Laws*, 70 MERCER L. REV. 819, 822 (2019) (“Every one of the many state supreme courts that has joined the revolution in choice-of-law practice that began with *Babcock [v. Jackson]* has included governmental interest analysis as a fundamental ingredient of its choice-of-law approach.”); Symeon C. Symeonides, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1, 21 (2001) (“[M]ost if not all other modern American choice-of-law approaches have adopted two of the basic premises of [Professor Brainerd Currie’s] analysis: (a) the notion that states have an ‘interest’ in the outcome of multistate private-law disputes, and (b) the notion that these ‘interests’ must be taken into account, albeit together with other factors, in resolving these conflicts.”).

8. See Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 953 (1994) (“Beale’s theories came under almost immediate attack from the followers of the emerging legal realist movement, but it was not until Brainerd Currie developed his brand of governmental interest analysis that Beale’s ‘vested rights’ theory had a serious choice of law competitor.”).

*Jackson*,<sup>9</sup> Judge Stanley Fuld signaled judicial acceptance of the state-interest approach.<sup>10</sup>

The Restatement (Second) of Conflict of Laws (“Second Restatement”) embraced the idea that resolving a choice-of-law dispute required consideration of the interests that states do (or do not) have in applying their law to the litigation in which the choice-of-law dispute arose.<sup>11</sup> The Second Restatement, however, offered judges little guidance for identifying whether states have an interest.<sup>12</sup> Consequently, judges have struggled to perform the interest analysis that modern choice-of-law doctrine requires.<sup>13</sup>

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9. 191 N.E.2d 279 (N.Y. 1963); see also Gary J. Simson, *Choice of Law After the Currie Revolution: What Role for the Needs of the Interstate and International Systems?*, 63 MERCER L. REV. 715, 718 (2012) (“Broadly speaking, the history of choice of law in the courts of the United States can be divided into two eras: before *Babcock v. Jackson* and after.”).

10. *Babcock*, 191 N.E.2d at 283 (“Justice, fairness, and ‘the best practical result’ may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation.” (citation omitted)).

11. See William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417, 424 (2000) (“Subsections 6(2)(b) and (c) [of the Second Restatement] clearly contemplate the court’s performing some sort of interest analysis.”).

12. In addition to providing judges very little guidance as to how to determine whether a state had an interest, the Second Restatement was ambiguous with regard to how a state-interest analysis should factor into the ultimate choice of law result. Thus, although a state-interest analysis was clearly contemplated by the Second Restatement, the Second Restatement approach also allowed for other considerations. See Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 BUFF. L. REV. 329, 360–61 (1997) (“[S]ection 6 of the second *Restatement* incorporates interest analysis as part of the *Restatement*’s most significant relationship test. But only as a part. The other principles in section 6 delve into matters that have nothing to do with interest analysis.”). In this regard, the Second Restatement has been criticized as an ambiguous “approach” rather than a restatement of workable “rules.” See Steven Bradford, *Conflict of Laws and the Attorney-Client Privilege: A Territorial Solution*, 52 U. PITT. L. REV. 909, 910–11 (1991) (“The *Second Restatement* fails miserably at reducing the ambiguity and manipulation inherent in the modern, policy-based approaches. Its compromise approach can be used to justify virtually any choice of law.”). The drafters of the Second Restatement were aware of this ambiguity, but they believed that the proper role for a Restatement was to descriptively restate the law as it existed, even if that law was in transition and thus somewhat amorphous. See RESTATEMENT (THIRD) OF CONFLICT OF LAWS, COUNCIL DRAFT NO. 4, Reporter’s Memorandum at xviii (AM. LAW INST. 2020) [hereinafter RESTATEMENT (THIRD)] (on file with author) (“[I]t . . . was not that Willis Reese, [the Second Restatement’s] Reporter, thought that the opaque and labor-intensive process [the Second Restatement] prescribed was an ideal choice-of-law system. It was rather that he did not believe choice of law in torts was ready for restatement in the form of rules.”). The Third

The Third Restatement—which is still in draft form—attempts to simplify modern choice of law.<sup>14</sup> This is definitely a step in the right direction. Unfortunately, however, the Third Restatement does not go far enough in advancing its goals of “identify[ing] convergent practices and captur[ing] them in simple rules.”<sup>15</sup> In the following Part, I identify a simple rubric that explains a high percentage of choice-of-law cases. Going forward, courts would be well-served to apply this simplified approach.<sup>16</sup>

## II. A Rubric for Identifying State Interests

Courts should follow this two-step rubric (“Rubric”) for determining which (if any) states have an interest in applying their law to a choice-of-law dispute:

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Restatement seems devoted to restating American choice of law in a series of rules rather than an approach; the state-interest analysis appears to drive the rules that the Third Restatement identifies. See Joseph William Singer, *Choice of Law Rules*, 50 CUMB. L. REV. 347, 347 (2020) (“The new rules being offered by the Third Restatement are far better than those of the prior Restatements. They are better because they . . . reflect careful use of interest analysis and attention to party rights . . .”).

13. See Paul E. McGreal, *Conflict of Laws*, 47 SMU L. REV. 865, 865 (1994) (“Again, courts struggled to merely identify the proper choice of law rules in the *Second Restatement of Conflict of Laws*.”). The struggle of judges to apply interest analysis comes as academics continue to hotly debate it. See Yunsieg P. Kim, *Conflict of Laws for the Age of Cybertorts: A Game-Theoretic Study of Corporate Profiteering from Choice of Law Loopholes and Interstate Torts*, 46 BYU L. REV. 329, 348 (2021) (“The debate over interest analysis remains especially memorable, both for its longevity and the acrimonious tone taken by some interlocutors, rare even for legal academia.”).

14. See RESTATEMENT (THIRD), *supra* note 12, at 2 (“These rules [in the Third Restatement] capture majority practice while offering certainty and predictability to parties and simplicity and ease of application to courts.”).

15. See *generally id.* at xix.

16. This Article, then, has both a descriptive and normative perspective. The basic rubric proposed in this Article would simplify choice of law for judges, lawyers, and litigants. This simplification would greatly benefit judges and would benefit litigants as a class, as less time and money would be spent litigating choice-of-law issues. The Third Restatement is not as free to advance a normative perspective on what choice of law *should* look like. See, e.g., *id.* at xi (asserting that a principal element of a Restatement is to “ascertain the nature of the majority rule”). Nevertheless, the rules I am normatively arguing for are pretty accurate in describing the results in a large percentage of choice-of-law cases. Thus, the rubric I am proposing will not be a dramatic alteration in caselaw results, but rather a simplified route by which to achieve these results.

1. If a domicile of a state is asking for his home-state law to apply, that state has an interest.
2. Identify the state whose law would apply under the approach outlined in the First Restatement.<sup>17</sup> If that state's law is preferred by the plaintiff<sup>18</sup> in the current litigation, that state has an interest.

This Rubric incorporates the two primary ways in which courts have traditionally identified state interests: a domicile-based approach and a contacts-based approach.<sup>19</sup> Step One considers the litigants' domicile (and the litigants' requested state law). Step Two employs a contacts-based approach. Tracing back to Judge Fuld's first judicial foray into state-interest analysis in *Babcock*, these two inquiries<sup>20</sup> have accounted for most judicial efforts to identify state interests in a choice-of-law dispute.<sup>21</sup>

This Rubric will not necessarily resolve all choice-of-law disputes. Under Step One, one or more states might have an interest, or no state might have an interest. Moreover, under Step Two, an additional state might have an interest (states can have an interest under both Step One and Step Two). Employing the terminology first coined by Professor Currie, the results of applying the Rubric can create either a "true conflict," a "false conflict," or an "unprovided-for" case.<sup>22</sup> In a true conflict, more than one state has an interest. In a false conflict, one (and only one) state has an interest. In an unprovided-for case, no state has an interest.

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17. *See supra* notes 2–6 and accompanying text.

18. By "plaintiff" here, I do not necessarily mean the party who filed suit (although that will usually be the case). Rather, "plaintiff" here means the party who is seeking relief from a court. The party who is content with the status quo is not the "plaintiff," regardless of which party initiates the litigation. Thus, for instance, consider a party who anticipates a civil suit against it but (for strategic reasons) initiates the litigation by filing suit for a declaratory judgment. This party is not a "plaintiff" for purposes of the choice-of-law Rubric. Rather, the party who will be asking the court to award it civil relief (damages or an injunction) is the "plaintiff."

19. *See* SYMEON C. SYMEONIDES, *CHOICE OF LAW* 271–72 (2016) (explaining that both territorial and domicile-based factors are important to modern choice-of-law approaches that require consideration of a state's interest).

20. The Third Restatement uses the terms "territorial connecting factors" and "personal connecting factors." *See* RESTATEMENT (THIRD), *supra* note 12, at xviii–xix ("One way of describing the choice-of-law revolution is as embodying the realization that other connecting factors matter too—other territorial factors, like the place of conduct, but also personal connecting factors like the parties' domicile.").

21. *See id.* at xviii.

22. *See* Anthony J. Colangelo, *Absolute Conflicts of Law*, 91 *IND. L.J.* 719, 728 (2016) (describing Currie's creation of the terminology).

A false conflict is easily resolved: Apply the law of the only state that has an interest in applying its law to this dispute.<sup>23</sup> True conflicts and unprovided-for cases, however, have proven more difficult to resolve. A few states purport to weigh interests.<sup>24</sup> For example, California purports to weigh the impairment on each state's interest if its law is not applied.<sup>25</sup> Yet, this approach only works for true conflicts; in an unprovided-for case, there is no interest to weigh or impairment to compare. Professor Currie, however, argued that true conflicts and unprovided-for cases would require a tiebreaker.<sup>26</sup> Many jurisdictions have employed such a tiebreaker (either explicitly or implicitly), usually defaulting to either forum law (Currie's preference) or to the law that would be selected under the First Restatement's traditional approach.<sup>27</sup>

Thus, a jurisdiction employing the two-step Rubric will still need to determine what to do when the Rubric indicates that multiple states (or no states) have an interest.<sup>28</sup> Although this question is beyond the general scope of this Article, the conclusion in Part V advocates for a tiebreaker that defaults to the law that would be selected under the traditional territorial-

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23. See Andrew D. Bradt, *Resolving Intrastate Conflicts of Laws: The Example of the Federal Arbitration Act*, 92 WASH. U. L. REV. 603, 615 (2015) ("In the language of interest analysis, that [circumstance] is a 'false conflict,' and represents an easy case.").

24. See LITTLE, *supra* note 2, at 338 ("[O]ther jurisdictions [besides New Jersey] have experimented with a balancing approach for resolving true conflicts . . .").

25. See Patrick J. Borchers, *An Essay on Predictability in Choice-of-Law Doctrine and Implications for a Third Conflicts Restatement*, 49 CREIGHTON L. REV. 495, 496 (2016) ("Instead, California adopted the 'comparative impairment' solution—that is, applying the law of the state whose interests would be most impaired if it were not applied—for true conflicts.").

26. See Louise Weinberg, *A Radically Transformed Restatement for Conflicts*, 2015 U. ILL. L. REV. 1999, 2017 ("As gleaned from Currie's writings (and, as we shall see, from certain Supreme Court cases), the general rule is that the interested forum should apply its own law."); Scott A. Burr, *The Application of U.S. Antitrust Law to Foreign Conduct: Has Harford Fire Extinguished Considerations of Comity?*, 15 U. PA. J. INT'L BUS. L. 221, 232–33 (1994) (explaining Currie's forum-law tiebreaker in true and unprovided-for cases).

27. See Michael S. Green, *The Return of the Unprovided-For Case*, 51 GA. L. REV. 763, 776–77 (2017) (listing Kentucky and Michigan as two states that seem to default to forum law for true conflicts).

28. Also, of course, a court employing the Rubric would have to determine which state's law would be applied under the First Restatement. Usually, this will be a straightforward exercise (the First Restatement is characterized by relatively simple, easy-to-apply rules), but in some instances determining the First Restatement jurisdiction might be more difficult. See, e.g., William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1206 (1997).



based approach. There are a number of reasons favoring a tiebreaker (as opposed to a weighing or balancing approach). Amongst the tie-breaking candidates, using the law selected by the First Restatement makes the most sense.

Once a jurisdiction decides on a tie-breaking method, however, most choice-of-law disputes could be very easily resolved using the Rubric. This simplicity would be extremely valuable. As Dean William Prosser said decades ago, choice-of-law doctrine is a “dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.”<sup>29</sup> The Rubric would have a disentangling effect, making choice of law much less dismal.

Moreover, the Rubric generates outcomes that are largely consistent with how courts decide choice-of-law cases. It just gets to those outcomes with fewer quagmires and less “incomprehensible jargon.”<sup>30</sup> Part IV explores these results below.

### *III. Explaining the Rubric*

Under the Rubric, a state can have an interest pursuant to either a domicile-based approach or a contacts-based approach.

#### *A. Step One: A Domicile-Based Approach*

Under the domicile-based approach, a state might have an interest in applying its law to a choice-of-law dispute if a party to the litigation is from that state. (Thus, for instance, Michigan may have an interest under the domicile-based approach if one of the parties is from Michigan.) In this scenario, the party will either ask for—or argue against—the application of his home state’s law.<sup>31</sup> Under the Rubric, an interest exists when a party asks

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

30. *See id.*

31. An interest analysis (indeed, all choice-of-law analyses) proceeds from the assumption that certain states’ laws are being considered. This process of framing the horizontal choice-of-law dispute is almost always done by the parties: One party will argue that Michigan law applies, while the other will argue for Ohio law. Once the parties have framed the choice-of-law dispute, the judge’s task is to pick either Michigan or Ohio law. When the judge uses an interest analysis to resolve this dispute, the judge’s task is to identify whether Michigan or Ohio have an interest in having their law apply. Notice that the judge does not start with this question: “What are all of the states that are interested in applying their law to this dispute?” Rather, the parties (through argument) will frame the states whose

for her home state's law to apply but not when a party argues against application of her home state's law.

*1. Protect/Reward Theory (Match)*

Under the Rubric, if a party asks for her home state's law to apply, an interest is created. When there is a match between (1) the domicile of a party and (2) the law that party prefers, the state is interested because it wants to apply its law to benefit its domiciliary. This applies to either plaintiffs or defendants. Thus, if a plaintiff from Iowa asks for Iowa law to apply, Iowa has an interest in applying its law to reward or protect the Iowa party. Similarly, if a defendant from Nebraska asks for Nebraska law to apply, Nebraska has an interest in applying its law to protect the Nebraska party. Notice, then, that for each party, a domicile-based interest might be created if there is a match between that party's domicile and the law that party prefers in the choice-of-law dispute.

Determining that a state has an interest under the protect/reward (match) theory is uncontroversial and widely prevalent.<sup>32</sup> There are countless examples of courts using this logic.<sup>33</sup>

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interests must be determined. What this means for an interest analysis under the domicile-based approach, then, is that a court will not start by looking at the domicile of the parties and then determining whether those states have an interest. Instead, a court will start with the states whose law the parties have asked the court to apply and then determine whether there is a domicile from those states. Thus, in the hypothetical above in which the judge must pick between Michigan or Ohio law, the fact that one of the parties is domiciled in Kansas would be inconsequential, because neither party is asking for the application of Kansas law. The critical question is whether either of the parties is domiciled in Michigan or Ohio, because those are the two states whose law the parties are asking for. In other words, the parties' framing of the choice-of-law dispute determines the states whose interests the court will consider in resolving a horizontal choice-of-law dispute. This explains the statement in the text that a "party will either ask for—or argue against—the application of his home state's law." The only parties whose domiciles matter are the litigants from a state whose law is being requested in the choice-of-law dispute.

32. See Jeffrey L. Rensberger, *Who Was Dick? Constitutional Limitations on State Choice of Law*, 1998 UTAH L. REV. 37, 44 ("Under the modern approach to choice of law, interest analysis, nothing is more significant to the question of which state's law should apply than the domicile of the parties.")

33. See, e.g., *Swanson v. Image Bank, Inc.*, 77 P.3d 439 (Ariz. 2003); *Wallis v. Mrs. Smith's Pie Co.*, 550 S.W.2d 453 (Ark. 1977); *Reich v. Purcell*, 432 P.2d 727 (Cal. 1967); *First Nat'l Bank v. Rostek*, 514 P.2d 314 (Colo. 1973); *Travelers Indem. Co. v. Lake*, 594 A.2d 38 (Del. 1991); *State Farm Mut. Auto. Ins. Co. v. Olsen*, 406 So. 2d 1109 (Fla. 1981); *Airgo, Inc. v. Horizon Cargo Transp., Inc.*, 670 P.2d 1277 (Haw. 1983); *Seubert Excavators, Inc. v. Anderson Logging Co.*, 889 P.2d 82 (Idaho 1995); *Nelson v. Hix*, 522 N.E.2d 1214 (Ill. 1988); *Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968); *Jagers v. Royal Indem. Co.*, 276

## 2. Punish Theory (Mismatch)

When a party litigant resists application of his home state's law, this destroys the theoretical basis on which an interest is found pursuant to the protect/reward theory. When a plaintiff from Iowa asks for Iowa law, Iowa's interest is based on the notion that it is interested in Iowans getting the benefit of Iowa law. If the Iowa plaintiff, however, argues against the application of Iowa law, this same rationale does not work.

Nevertheless, courts have occasionally determined that a state has a domicile-based interest in applying its law *against* a home-state litigant. The most famous application of this reasoning was by Judge Fuld in *Neumeier v. Kuehner*.<sup>34</sup> In *Neumeier*, an automobile passenger brought suit in New York against the driver of the automobile for an accident that occurred in Ontario.<sup>35</sup> The plaintiff (guest-passenger) was a domiciliary of Ontario while the defendant-driver was a domiciliary of New York.<sup>36</sup> The defendant-driver claimed the protection of the Ontario guest statute.<sup>37</sup> The plaintiff resisted application of Ontario law, instead asking the court to apply New York law (which did not have a guest statute).<sup>38</sup>

The *Neumeier* case was a "mismatch" fact pattern: The Ontario plaintiff resisted Ontario law, while the New York defendant resisted New York law. Nevertheless, in concluding that Ontario law applied, Judge Fuld explained

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So. 2d 309 (La. 1973); *Collins v. Trius, Inc.*, 663 A.2d 570 (Me. 1995); *Hartford Mut. Ins. Co. v. Bruchey*, 238 A.2d 115 (Md. Ct. App. 1968); *Pevoski v. Pevoski*, 358 N.E.2d 416 (Mass. 1976); *Kopp v. Rehtzigel*, 141 N.W.2d 526 (Minn. 1966); *Smith v. Church Mut. Ins. Co.*, 254 So. 3d 57 (Miss. 2018); *Phillips v. Gen. Motors Corp.*, 2000 MT 55, 298 Mont. 438, 995 P.2d 1002; *Heinze v. Heinze*, 274 N.W.2d 465 (Neb. 2007); *Dictor v. Creative Mgmt. Servs., LLC*, 223 P.3d 332 (Nev. 2010); *Lessard v. Clarke*, 736 A.2d 1226 (N.H. 1999); *Mellk v. Sarahson*, 49 N.J. 226 (N.J. 1967); *Terrazas v. Garland & Loman, Inc.*, 142 P.3d 374 (N.M. Ct. App. 2006); *Shaw v. Carolina Coach*, 918 N.Y.S.2d 120 (N.Y. App. Div. 2011); *Braxton v. Anco Elec., Inc.*, 409 S.E.2d 914 (N.C. 1991); *Mager v. Mager*, 197 N.W.2d 626 (N.D. 1972); *Fox v. Morrison Motor Freight, Inc.*, 267 N.E.2d 405 (Ohio 1971); *Brickner v. Gooden*, 1974 OK 91, 525 P.2d 632; *Casey v. Manson Constr. & Eng'g Co.*, 428 P.2d 898 (Or. 1967); *Kuchinic v. McCrory*, 222 A.2d 897 (Pa. 1966); *Najarian v. Nat'l Amusements, Inc.*, 768 A.2d 1253 (R.I. 2001); *Boone v. Boone*, 546 S.E.2d 191 (S.C. 2001); *Brazones v. Prothe*, 489 N.W.2d 900 (S.D. 1992); *Hataway v. McKinley*, 830 S.W.2d 53 (Tenn. 1992); *Toyota Motor Co. v. Cook*, 581 S.W.3d 278 (Tex. App. 2019); *State ex rel. S.O. v. H.O.*, 2005 UT App 393, 122 P.3d 686; *State Farm Mut. Auto. Ins. Co. v. Gillette*, 2002 WI 31, 251 Wis. 2d 561, 641 N.W.2d 662.

34. 286 N.E.2d 454 (N.Y. 1972).

35. *Id.* at 455.

36. *Id.*

37. *Id.*

38. *See id.* at 455–56.

that Ontario had a domicile-based interest: namely, to apply its pro-defendant guest statute *against* an Ontario plaintiff-passenger so as to punish the “ungrateful guest[.]”<sup>39</sup> Ontario’s interest was not based on applying its rule to help a domiciliary, but rather to punish the domiciliary for his behavior.<sup>40</sup>

In my perspective, Judge Fuld’s use of the punish theory in *Neumeier* was ridiculous. Most courts seem to agree: It is very hard to find cases employing the punish theory against a plaintiff.<sup>41</sup> The punish theory is somewhat more plausible, however, when it is employed against defendants. For instance, in *DeLoach v. Alfred*,<sup>42</sup> the Arizona Supreme Court reasoned that Arizona had an interest in applying Arizona’s shorter statute of limitations against Arizona defendants who had caused an accident in Tennessee.<sup>43</sup> The intermediate appellate court had reasoned that Arizona lacked an interest because the Arizona statute of limitations would work in favor of the California plaintiff and to the detriment of the Arizona defendant.<sup>44</sup> The Arizona Supreme Court, however, employed the punish theory to explain why Arizona was interested in applying its law against the Arizona defendant: “Arizona courts have long recognized that . . . holding tortfeasors accountable . . . advances the important interest in deterring wrongful conduct. . . . Thus the policy of deterrence extends to providing a forum for redress against Arizona defendants for their negligent conduct outside the state.”<sup>45</sup>

Although the punish theory is more plausible when applied against defendants (“don’t engage in this behavior, citizens, regardless of where it happens”), it is still rejected much more frequently than it is used.<sup>46</sup> Thus, when a defendant resists the application of his home state’s law, courts most

39. *Id.* at 455.

40. In *Neumeier*, the plaintiff’s punishment under Ontario’s guest statute was warranted because of the plaintiff’s temerity in attempting to recover for injuries (his death) from a person who, after all, was giving him a free ride. *See id.* at 455–56.

41. There are a few. *See, e.g.*, *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679, 687 (N.Y. 1985) (explaining that New Jersey had an interest in applying its pro-defendant charitable immunity doctrine *against* plaintiffs from New Jersey because it “further[ed] that State’s interest in enforcing the decision of its domiciliaries to accept the burdens as well as the benefits of that State’s [charitable immunity rule]”).

42. 960 P.2d 628 (Ariz. 1998).

43. *Id.* at 629, 632 (“Thus the policy of deterrence extends to providing a forum for redress against Arizona defendants for their negligent conduct outside the state.”).

44. *Id.* at 631.

45. *Id.* at 632.

46. *See, e.g.*, *Erwin v. Thomas*, 506 P.2d 494, 496 (Or. 1973) (“However, it is stretching the imagination more than a trifle to conceive that the Oregon Legislature was concerned about the rights of all the nonresident married women in the nation whose husbands would be injured outside of the state of Oregon.”).

frequently conclude that no interest is created under this “mismatch.” Despite the punish theory’s decreasing application, there are still a small minority of cases that have used the theory to conclude that a state has an interest in applying its law against the home-state defendant.<sup>47</sup>

Considering the punish theory as it applies to both plaintiffs and defendants, then, courts have overwhelmingly rejected this basis for concluding that a state has an interest.<sup>48</sup>

Moreover, in the few instances in which courts have used the punish theory, its application has often been inconsistent and illogical. In *Neumeier*, Judge Fuld reasoned that Ontario had an interest in applying its law to punish an Ontario plaintiff.<sup>49</sup> In the same case, however, the New York defendant also resisted application of his home state’s law.<sup>50</sup> Despite using the punish theory to find an Ontario interest, Judge Fuld did not even consider whether the punish theory could be used to determine that New York had an interest in applying its law against a New York defendant.<sup>51</sup>

Courts infrequently use the domicile-based punish theory for finding an interest.<sup>52</sup> When applied, the rationale underlying the theory is suspect. Moreover, it is difficult to discern why the theory is used in some instances but rejected in others (sometimes even in the same case). For these reasons, I have excluded the punish theory as a route by which a court can find an interest under a domicile-based approach. The goal of the Rubric is to simplify choice-of-law disputes. The small set of cases employing the punish theory are an easy sacrifice to make toward the goal of simplification.

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47. See, e.g., *DeLoach*, 960 P.2d 628 (Ariz. 1998); *Smith v. I-Flow Corp.*, 753 F. Supp. 2d 744 (D.C. Ill. 2010) (noting “there is little precedence on this issue” of applying the law for defendant’s domicile against him).

48. See *supra* notes 41, 46 and accompanying text.

49. *Neumeier v. Kuehner*, 286 N.E.2d 454, 455 (N.Y. 1972).

50. *Id.*

51. This argument would have been the one that the Arizona Supreme Court used in *DeLoach* in finding that Arizona had a deterrence interest in applying its pro-plaintiff rules against a home-state litigant. As discussed in this Article, the *DeLoach* argument seems much more persuasive than the argument that Judge Fuld used in *Neumeier* to determine that Ontario had an interest.

52. See *supra* note 48.

*B. Step Two: A Contacts-Based Approach*

Modern choice of law holds that it is important to ascertain the interests that states have in applying their law to a dispute.<sup>53</sup> But modern choice of law does not completely reject the contacts-based approach of the First Restatement. Instead, modern choice of law recognizes that territorial contacts—*where* events in the dispute happened—can still be important to resolving a choice-of-law dispute.<sup>54</sup> These contacts, however, are not the end of the analysis (as they were under the First Restatement). Instead, these contacts are a means to an end: A territorial contact is important because it might trigger a state interest.<sup>55</sup>

Here again, judicial acceptance of the notion that territorial contacts might create an interest can be traced back to Judge Fuld.<sup>56</sup> In *Babcock v. Jackson*, the tort injury had occurred in Ontario.<sup>57</sup> Judge Fuld, however, concluded that this contact did not create an interest because of the type of Ontario law that was involved in the specific horizontal choice-of-law dispute before the court:

It is hardly necessary to say that Ontario's interest is quite different from what it would have been had the issue related to the manner in which the defendant had been driving his car at the time of the accident. . . . In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place.<sup>58</sup>

Judge Fuld's observation in *Babcock* is intuitive, and it has proven to be extremely influential. A contact may or may not create an interest, depending

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53. See *supra* note 7 and accompanying text.

54. See Graham C. Lilly & Molly Bishop Shadel, *When Privilege Fails: Interstate Litigation and the Erosion of Privilege Law*, 66 ARK. L. REV. 613, 642 (2013) (arguing that a choice-of-law approach must value both territorial and domicile interests in order to survive).

55. See *Babcock v. Jackson*, 191 N.E.2d 279, 283 (N.Y. 1963) ("Justice, fairness, and the 'best practical result' may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact *with the occurrence* or the parties, has the greatest concern with the specific issue raised in the litigation." (emphasis added) (citation omitted)).

56. *Id.* at 280, 283.

57. *Id.* at 280.

58. *Id.* at 284.

on the type of law involved in the choice-of-law dispute. But which type of laws create contact-based interests, and which do not?

In answering this question, courts have frequently distinguished between “conduct-regulating” rules and “loss-allocating” rules.<sup>59</sup> Conduct-regulating rules are thought to create contact-based state interests, whereas loss-allocating rules do not.<sup>60</sup>

The Third Restatement wholly adopts this framework (at least for torts).<sup>61</sup> Moreover, the Third Restatement goes one step further by attempting to provide a list classifying laws as either conduct-regulating or loss-allocating.<sup>62</sup>

I certainly applaud this ambitious attempt at clarifying the law. However, for reasons explained below, I believe the Third Restatement’s attempt to classify laws as either conduct-regulating or loss-allocating is misguided—both analytically and practically.

The Rubric incorporates the basic concept that a contact may or may not create an interest, depending upon the type of law involved. Under the Rubric, however, it is necessary to ask only one question: Does the state where the relevant contact occurred have a law favored by the plaintiff in the current horizontal choice-of-law dispute? If so, an interest is created. (That is, the law is “conduct-regulating.”) If not, no interest is created. (That is, the law is “loss-allocating.”)

Another question remains: Which contact(s) count? Under the First Restatement, *one* relevant contact was identified. For torts, it was the place of

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59. John T. Cross, *The Conduct-Regulating Exception in Modern United States Choice-of-Law*, 36 CREIGHTON L. REV. 425, 425–26 (2003) (“[A] review of cases across the nation reveals that courts across the land treat conduct-regulating rules differently than loss-allocating rules in the choice-of-law process.”); see also Wendy Collins Perdue, *A Reexamination of the Distinction Between “Loss-Allocating” and “Conduct-Regulating Rules,”* 60 LA. L. REV. 1251, 1251 (2000) (“The basic rule is, as to laws that are conduct-regulating, to apply the law of the place of conduct, and, as to laws that are loss-allocating and the parties are from the same state, to apply the law of the common domicile.”).

60. See Cross, *supra* note 59, at 431 (“[The state where the tort occurred] clearly has an ‘interest’ in applying its conduct-regulating rules to all conduct that occurs within its borders.”); see also *id.* at 433 n.28 (noting that, where only one party is from a state, that state will have an interest in applying its loss-allocating rules “*only* if the law benefits its resident, or in the less-common case where the law hurts its resident and the state specifically wants to punish its resident in a case of this sort” (emphasis added)).

61. See RESTATEMENT (THIRD), *supra* note 12, at xix–xxii (explaining the decision to rely heavily on the conduct-regulating/loss-allocating distinction).

62. See *id.* §§ 6.01–.03.

injury.<sup>63</sup> For contracts, it was either the place of contracting or place of performance, depending on the type of dispute before the court.<sup>64</sup>

The Second Restatement thoroughly rejected the notion that a choice-of-law dispute should be resolved considering one—and only one—contact. Instead, the Second Restatement listed a plethora of contacts that might be important for any particular case.<sup>65</sup> For torts, the list included the place of injury, the place of the tortious conduct, and the place where the relationship between the parties was centered.<sup>66</sup> For contracts, the list included the place of contracting, the place of negotiation, the place of performance, and the location of the contract’s subject matter.<sup>67</sup>

The Third Restatement (at least, portions of the Third Restatement for which there is a preliminary draft) is somewhere between the First and Second Restatements. For torts, the Third Restatement considers both the place of wrong and the place of injury.<sup>68</sup> For cases in which those occur in different states (a relatively rare phenomenon, generally speaking, but one that is more likely to trigger a choice-of-law dispute), the Third Restatement has a preference for the law of the state of bad conduct.<sup>69</sup> However, this preference can, in certain circumstances, be negated in favor of the law of the place of injury—if that is the result that the plaintiff prefers.<sup>70</sup>

Under the Rubric that I propose, a court need consider only one contact to resolve a choice-of-law dispute. And, as discussed below, that contact will be

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63. Technically, the First Restatement used the “law of the place of wrong” for torts. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378 (AM. L. INST. 1934) (“The law of the place of wrong determines whether a person has sustained a legal injury.”). The place of wrong was defined as the place “where the last event necessary to make an actor liable for an alleged tort takes place.” *Id.* § 377. Under this definition, the place of “wrong” would almost always be the place where the plaintiff suffered injury. *See id.* § 377 n.1 (“Except in the case of harm from poison, when a person sustains bodily harm, the place of wrong is the place where the harmful force takes effect upon the body.”). In this sense, the “place of wrong” was an unfortunate name for the concept that the First Restatement authors were expressing, because it suggested that the place where the defendant acted—rather than the place where the plaintiff received injury—was controlling. For this reason, I have described the First Restatement rule as the “place of injury” in this Article.

64. *See id.* § 358.

65. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (AM. L. INST. 1971) (listing multiple relevant contacts in a torts dispute).

66. *Id.*

67. *See id.* § 188 (listing relevant contacts in a contracts dispute).

68. The somewhat complicated way that the Third Restatement takes into consideration both the place of injury and wrong will be discussed more fully in Part IV of this Article.

69. *See* RESTATEMENT (THIRD), *supra* note 12, § 6.08(1).

70. *Id.* § 6.08(2).



the contact deemed important by the First Restatement. This mostly comports with what courts have been doing; any infidelity to the caselaw (and it is minor) is worth the gains in simplicity.

*1. Which Contact(s) Count?*

In identifying one territorial contact as the controlling determination for resolving choice of law, the First Restatement placed a premium on clarity and ease of application.<sup>71</sup> The Second Restatement was a reaction to the perceived failings of the First Restatement.<sup>72</sup> At the time, the “inflexible” nature of the First Restatement’s rules was thought to be the problem.<sup>73</sup> As such, the Second Restatement provides an approach to resolving choice of law; this approach is malleable enough that courts are often free to resolve a choice-of-law dispute in a variety of ways under the guise of the Second Restatement.<sup>74</sup>

With the Third Restatement, the pendulum seems to be swinging back towards the First Restatement’s “rules” and away from the Second Restatement’s “approach.”<sup>75</sup> As part of this process, there seems to be a reevaluation of the inflexible “problem” associated with the First Restatement that was in need of fixing. Perhaps the First Restatement problem was not so much the rules-based approach to restating choice of law, but rather that those rules were asking the wrong questions and, thus, getting the wrong answers.

Thus, one way to understand the Third Restatement’s mission is that it attempts to take the learning from modern choice of law—the primary one being that choice of law must analyze whether states have an interest in having their law apply—and to capture these insights in the form of rules.

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71. See Ankur Mandhania, *Second-Order Choice of Law in Bankruptcy*, 89 N.Y.U. L. REV. 739, 763 (2014) (“Additionally, the Restatement (First) is particularly useful because the rules are notoriously clear and direct . . .”).

72. See John R. Leathers, *Choice of Law in Kentucky*, 87 KY. L.J. 583, 586–87 (1999) (describing how the perceived failings of the First Restatement influenced the direction of the Second Restatement).

73. See Symeon C. Symeonides, *The ALI’s Complex Litigation Project: Commencing the National Debate*, 54 LA. L. REV. 843, 856 (1994) (“The rules of the first Restatement were too rigid and mechanical, leaving no room for evolution.”).

74. See Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1183–84 (2000) (describing how the “baseline presumptions” of the Second Restatement sanction “whatever the courts want to do”).

75. See Robert A. Sedler, *Choice of Law in Conflicts Torts Cases: A Third Restatement or Rules of Choice of Law?*, 75 IND. L.J. 615, 615 (2000) (“A major impetus behind the proposal for a third conflicts restatement is the purported uncertainty and lack of predictability in American conflicts law today.”).

That is also the mission of this Article. This mission is best served by limiting a contacts-based analysis to one contact only.

It is important to remember that the contacts considered here are only a means to an end. Under the First Restatement, identifying the state where the relevant contact occurred resolved the choice-of-law dispute.<sup>76</sup> Here, contacts are considered as a means to determine whether the state in which the contact occurred has an interest in having its law apply. But this analysis (Step Two under the Rubric) is only *one* of the ways by which a state interest might be found.

Thus, focusing only on one contact does not bring choice of law back to the “old” days where choice-of-law analysis depended solely on identifying the state where the relevant contact occurred. Here, the contact is important because it might (or might not) create a state interest. But the contacts-based approach is only one of the ways by which a state interest might be determined (the domicile-based approach being the other). Using one contact only will not make choice of law “mechanical” or “formulistic.” It just makes the contact-based approach for identifying a state interest much easier for courts to apply.

Expanding the list of relevant contacts from one to many makes choice of law more difficult. If there are multiple contacts to consider in each case, and if those contacts occur in different states, are those contacts to be weighted? If not weighted, the number of states who might have an interest in the litigation will be expanded. This will create more true-conflicts cases in which more than one state has an interest. True conflicts are the hardest type of case to resolve.<sup>77</sup> Anything that increases the number of true conflicts makes choice of law more difficult.

It is true, of course, that more than one contact might trigger state interests in any particular dispute. For instance, in a product liability suit, the state where the product was designed might have an interest in having its law

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76. See LITTLE, *supra* note 2, at 167.

77. See Michael S. Green, *The Return of the Unprovided-For Case*, 51 GA. L. REV. 763, 776 (2017) (“Although all interest analysis approaches generally come to the same conclusion about false conflicts, they disagree about how true conflicts should be resolved.”).

applied to the dispute.<sup>78</sup> And so might the state where the product was purchased.<sup>79</sup> Similarly for the state of injury.<sup>80</sup>

But 100% accuracy in identifying state interests should not be the goal.<sup>81</sup> With regard to choice of law, perfect is often the enemy of good. Here, the benefits to courts and litigants of focusing on *one* contact are worth the cost of occasionally disregarding a state that might have a contact-based interest that is triggered by a contact other than the one identified under choice-of-law rules.<sup>82</sup>

If only one contact is to be considered, it should be the contact identified by the First Restatement. *First*, the contact identified by the First Restatement has tended to be that contact that is used even outside of the First Restatement.<sup>83</sup> Although the Second Restatement expands the list of relevant contacts, the Second Restatement has numerous provisions that create presumptions in favor of a particular contact.<sup>84</sup> Notably, these contacts are usually the contact identified in the First Restatement.<sup>85</sup>

Similarly, courts tend to gravitate towards the First Restatement contacts whenever a territorial type of analysis is required.<sup>86</sup> An example of this is borrowing statutes. Borrowing statutes frequently require a court to identify *where* a cause arose. This is a territorial analysis. Not surprisingly, courts frequently use the First Restatement contacts when trying to determine where

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78. *See, e.g.*, *Townsend v. Sears, Roebuck & Co.*, 879 N.E.2d 893, 895, 909 (Ill. 2007) (concluding that Illinois, the state where the defective product was designed, had an interest in applying its law to the dispute).

79. *See, e.g.*, *Long v. Sears Roebuck & Co.*, 877 F. Supp. 8, 12 (D.D.C. 1995) (concluding that the District of Columbia, where the defective product was purchased, had an interest in applying its law to the dispute).

80. *See Townsend*, 879 N.E.2d at 896, 909 (concluding that Michigan, where the defective product was purchased, had an interest in applying its law to the dispute).

81. Indeed, the Second Restatement implicitly concedes this point by narrowing the relevant contacts to a list of three or four. Although this list is more expansive, it might also be underinclusive in any particular choice-of-law dispute.

82. Of course, the state whose contact-based interest is ignored might nevertheless have a domicile-based interest. This also serves to temper the concerns associated with limiting the contact-based approach to only one contact.

83. *See Shirley A. Wiegand, Getting Nowhere: Florida's Failed Choice of Law Approach to Torts and a Proposal for Change*, 8 FLA. A&M U. L. REV. 1, 5 (2012).

84. *See id.* (“The Restatement (Second) requires courts to apply the law of the place of injury unless that presumption is overcome.”).

85. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 147–148 (AM. L. INST. 1971).

86. *See, e.g.*, *Duke v. Housen*, 589 P.2d 334, 341, 351 (Wyo. 1979) (using the First Restatement tort rules to determine “where” the cause of action arose under the Wyoming “borrowing statute”).

a cause of action arose.<sup>87</sup> The First Restatement can be rightly criticized for ignoring state interests, but the First Restatement successfully uses territorial contacts analysis.

*Second*, using the First Restatement contact as the basis for determining whether there is a contacts-based state interest takes advantage of all the accumulated thinking and experience with the First Restatement contacts. Normally, identifying the state where an injury occurs will be relatively straightforward, but difficult cases occasionally arise. This will be true of any contact. Picking a contact whose edges have already been clarified in existing cases prevents courts from having to repeat the same process with a “new” contact. Choice of law needs simplification. Picking the First Restatement contact is, by far, the simplest contact to consider going forward.

## 2. Does the Contact Create an Interest?

The existence of a contact within a state does not necessarily create an interest. Instead, the content of that state’s law must be examined to determine whether the policy supporting the law is triggered by the contact in that state.

As explained above, courts have employed the distinction between “conduct-regulating” laws and “loss-allocating” laws to ascertain whether a territorial contact creates an interest in the state in which it occurred.<sup>88</sup> Conduct-regulating laws do; loss-allocating laws do not.<sup>89</sup>

The Third Restatement attempts to categorize laws as either conduct-regulating or loss-allocating. Guest statutes and charitable immunity rules are loss-allocating;<sup>90</sup> “requirements for liability” and “scope of liability” are conduct-regulating.<sup>91</sup> In total, there are nine categories of conduct-regulating rules and ten categories of loss-allocating rules.<sup>92</sup>

For two reasons, the Third Restatement’s effort to create a list of conduct-regulating and loss-allocating rules is misguided. First, from an analytical standpoint, the Third Restatement list seems to forget that horizontal choice of law occurs when parties ask for two (or more) states’ laws to apply. Thus, in any choice-of-law dispute, the parties will advocate for two different laws to apply (or at least two versions of the “same” law). A choice-of-law dispute

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87. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 147–148 (AM. L. INST. 1971).

88. See *supra* note 61.

89. See *supra* note 62.

90. See RESTATEMENT (THIRD), *supra* note 12, § 6.03.

91. See *id.* § 6.02.

92. See *id.* §§ 6.02–03.

does not involve “one” law. Thus, any attempt to create categorical lists, based on *the* law involved in a choice-of-law dispute, is analytically misguided.

Second, even if it were possible to identify *the* law involved in a choice-of-law dispute, requiring a law to be categorized as either conduct-regulating or loss-allocating will ultimately involve courts in exceedingly difficult line drawing. The Third Restatement authors concede that the process of assembling the list of conduct-regulating and loss-allocating rules was difficult and tedious; the authors also admit that their list is not exhaustive.<sup>93</sup> Under the Third Restatement, then, courts will be forced to draw the line between what is conduct-regulating and loss-allocating. This trends toward “quaking quagmires” and “dismal swamp[s].”<sup>94</sup>

*a) The Third Restatement Categories: An Analytical Critique*

Courts perform a choice-of-law analysis only when they are asked to do so by the parties. If the parties agree on the applicable law, a judge need not perform a choice-of-law analysis.<sup>95</sup> Thus, when a court is asked to resolve a choice-of-law dispute, it is necessarily picking between law from distinct jurisdictions. Moreover, these laws are different enough that it is worth the attorneys’ fees to fight over the choice-of-law issue.

Given the adversarial context in which horizontal choice of law occurs, a fundamental problem arises with the Third Restatement’s attempt to identify certain rules as being either conduct-regulating or loss-allocating: Whose rule counts?

Consider the infamous case of *Schultz v. Boy Scouts of America, Inc.*<sup>96</sup> In *Schultz*, a New Jersey plaintiff brought suit in New York against a New Jersey defendant for sexual abuse that had occurred in New York.<sup>97</sup> Consistent with the later-drafted Third Restatement, New York had no interest in applying its pro-recovery rules to the case because New Jersey had

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93. *See id.* § 6.01 cmt. a (describing the Restatement lists in sections 6.02 and 6.03 as “nonexclusive”).

94. *See* Prosser, *supra* note 29, at 971.

95. Choice of law is not jurisdictional in the sense that it implicates a court’s power. As such, courts do not affirmatively reach out to identify choice-of-law disputes, and a party can waive the issue by failing to raise a choice-of-law argument. *See* LITTLE, *supra* note 2, at 192 (“The failure to raise a choice of law problem at an early time can result in a finding of waiver for the purposes of appeal.”).

96. 480 N.E.2d 679 (N.Y. 1985).

97. *Id.* at 681.

a charitable immunity doctrine that protected the defendant from liability.<sup>98</sup> Using the same terminology as the Third Restatement, the New York court held that “the” law involved in the case was loss-allocating because New Jersey’s charitable immunity rules were best described as pursuing loss-allocating goals rather than conduct-regulating goals.<sup>99</sup> But this analysis completely ignores the goals of New York law, which *was* conduct-regulating.<sup>100</sup>

Suppose that, after the *Schultz* case, the exact same fact pattern repeats itself one year later. Also suppose that during that year New Jersey abolishes its charitable immunity doctrine. According to the Third Restatement, New York’s interest as the place where the injury occurred *is now controlling*.<sup>101</sup> In reality, of course, New York’s interest in applying its pro-recovery rules to the case is the same under either fact pattern. The only change is New Jersey’s views on how such cases can be handled. But New Jersey’s views cannot determine whether New York has an interest in a case. Yet, under the Third Restatement’s list approach, the content of New Jersey law determines whether New York has an interest in regulating the conduct that occurred within New York.<sup>102</sup>

Another problem with the Third Restatement’s list approach—in which laws are labelled as being either loss-allocating or conduct-regulating<sup>103</sup>—is that it is oblivious to *where* the contacts in a particular case occurred. Recall that, under a modern choice-of-law analysis, contacts are thought to be relevant simply as means to an end: A contact within a state may or may not trigger that state’s interest in having its law applied to the dispute.<sup>104</sup> But under the Third Restatement list approach, the conclusion as to whether states have a contact-based interest ignores *where the relevant contact occurred*. If a guest statute is involved, the dispute is loss-allocating (and, presumably, no contacts-based interest is triggered) regardless of where the accident occurred. It is defensible for New Jersey’s loss-allocating rules to be

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98. *See id.* at 683; RESTATEMENT (THIRD), *supra* note 12, § 6.03 (defining charitable immunity as a loss-allocating issue).

99. *See Schultz*, 480 N.E.2d at 686 (“[T]he rule in conflict is loss-allocating rather than conduct-regulating.”); RESTATEMENT (THIRD), *supra* note 12, §6.03 (defining charitable immunity rules as loss-allocating).

100. The *Schultz* court failed to appreciate that New York has a clear interest in preventing assaults within New York. For further discussion of this analytical deficiency, see *infra*, p. 38.

101. *See* RESTATEMENT (THIRD), *supra* note 12, §6.04.

102. *See generally id.* §6.03.

103. *Id.* §§ 6.02–03.

104. *See* discussion *supra* Section III.B.1.

determinative when an injury occurs within New Jersey, but it is bewildering for the content of New Jersey law to be controlling for an injury that occurs in New York. Yet, under the Third Restatement approach, the mere existence of New Jersey's charitable immunity doctrine makes the case a loss-allocating case, regardless of the content of New York law and *regardless of where the accident actually occurred*.

The Restatement's classification of laws as being conduct-regulating or loss-allocating is an attempt to make choice of law easier; I certainly applaud these efforts. But I believe that the Third Restatement is missing the forest for the trees: courts introduced the loss-allocating and conduct-regulating concepts as part of an effort to determine which contacts create state interests. The Third Restatement formalizes this process in such a way that it is difficult to even remember why we are asking the conduct-regulating/loss-allocating question. The contact itself—that is, where the contact occurred in a particular dispute—is lost in the shuffle.

*b) The Third Restatement Categories: A Practical Critique*

Even if the Third Restatement's conduct-regulating/loss-allocating lists were analytically sound, there is a more practical problem: these lists are not exhaustive. Thus, when litigants are confronted with a case that the lists cannot resolve, they will have to litigate whether *a* rule is conduct-regulating or loss-allocating.<sup>105</sup>

This might not be overly problematic if this classification task were easily performed. But this is not an easy line to draw—a fact that the Third Restatement concedes.<sup>106</sup>

Most laws have both conduct-regulating and loss-allocating aspirations. Thus, characterizing such laws as one or the other requires determining the “predominant purpose of a rule.”<sup>107</sup> This is a complicated task that choice of law could do without.

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105. In actual litigation, the parties will probably appreciate the analytical point made above, which is that a horizontal choice-of-law dispute involves two rules. This complicates any attempt to apply the conduct-regulating/loss-allocating distinction because there are probably different values being served by the two different rules in the choice-of-law dispute.

106. See RESTATEMENT (THIRD), *supra* note 12, § 6.02 cmt. a (conceding “difficult cases” in drawing the conduct-regulating/loss-allocating distinction); see also Patrick J. Borchers, *How “International” Should a Third Conflicts Restatement Be in Tort and Contract?*, 27 DUKE J. COMPAR. & INT’L. LAW 461, 480–81 (2017) (discussing the difficulties of categorically listing laws as being either conduct-regulating or loss-allocating).

107. See RESTATEMENT (THIRD), *supra* note 12, § 6.02 cmt. a.

*c) Simplification: Plaintiff-Preferred Laws Are Conduct-Regulating*

The Rubric incorporates the fundamental concept that drives the conduct-regulating/loss-allocating distinction: namely, that not every contact creates an interest and that the content of state laws should be considered when determining whether a contact creates an interest.

The Rubric greatly simplifies this analysis, however, by reducing the analysis to a simple question: Does the First Restatement contact occur in a jurisdiction with law preferred by the plaintiff in the choice-of-law dispute? If so, that state has an interest in the litigation. If, however, the contact occurs in a jurisdiction whose law is preferred by the defendant in the choice-of-law dispute, no contact-based state interest exists.

One way to view the Rubric is that it equates conduct-regulating rules as being plaintiff-preferred and loss-allocating rules as being defendant-preferred. This closely aligns with the Third Restatement's lists. Most of the laws listed as loss-allocating rules are defendant friendly, while most of the laws described as conduct-regulating rules are liability-creating, plaintiff-friendly rules.<sup>108</sup>

In a large number of cases that have found a territorial contact created a state interest, the state where the contact occurred had law favored by the plaintiff in the choice-of-law dispute.<sup>109</sup> It is an obvious and intuitive argument as to why a state has an interest in applying its pro-plaintiff law to an event that occurred in that state: By allowing for the recovery desired by the plaintiff, the state is regulating the defendant's conduct and deterring others from engaging in this injury-causing type of behavior. Thus, for instance, a state might have an interest in allowing recovery for the victim of a sexual assault that occurred in that state, even though a different jurisdiction's law might shield the defendant under a doctrine such as charitable immunity. The argument is obvious as to why the contact creates a state interest: "Don't commit sexual assault in our state!" This explains why

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108. A major difference between the Rubric and the Third Restatement lists, though, is that the Rubric is cognizant of the context in which courts must resolve choice-of-law disputes. Under the Rubric, for every choice-of-law dispute, there will be a conduct-regulating rule (the law preferred by the plaintiff) and a loss-allocating rule (the law preferred by the defendant). Under the Third Restatement approach, the label "conduct-regulating" or "loss-allocating" will be applied to a dispute, even though the dispute involves two states with two different laws motivated by different policy objectives.

109. *See, e.g.,* *Hurtado v. Super. Ct.*, 114 Cal. Rptr. 106, 112–13 (Cal. 1974) (holding that California, as the place of injury, had an interest in applying its plaintiff-friendly law regarding damages).



courts have accepted the state-interest argument when the contact occurs in a state with a plaintiff-preferred law.

Admittedly, there are some cases in which courts have found a contacts-based interest to exist, even when the state in which the relevant contact occurred had a law favored by the defendant.<sup>110</sup> In most of these cases, the courts concluded that a jurisdiction's defendant-preferred rule was conduct-regulating because the law was trying to encourage the general type of behavior engaged in by the defendant. The courts did not believe that the state was trying to encourage the specific injury-causing behavior of the defendant, but rather the more general class of behavior in which the defendant was engaged. The California Supreme Court's opinion in *McCann v. Foster Wheeler, LLC*<sup>111</sup> is a good example of this logic.

In *McCann*, the California Supreme Court considered whether to apply the California statute of limitations or an Oklahoma statute of repose to a suit brought by a California domiciliary based on asbestos exposure that had occurred in Oklahoma.<sup>112</sup> The intermediate California appellate court had determined that Oklahoma had no interest in applying its law to the case because the defendant seeking the benefit of the Oklahoma law was not an Oklahoma domiciliary.<sup>113</sup> The California Supreme Court concluded, however, that Oklahoma (where the exposure had occurred) had a contacts-based interest, even though the defendant preferred the Oklahoma law in that case.<sup>114</sup> Oklahoma did not, of course, want to encourage the *specific* behavior that had caused the injury in *McCann*—exposure to asbestos. According to the *McCann* court, however, Oklahoma had an interest in providing liability protection for the *general* class of behavior in which the defendant was engaged:

When a state adopts a rule of law limiting liability for commercial activity conducted within the state in order to provide what the state perceives is fair treatment to, and an appropriate incentive

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110. See, e.g., *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 844–45 (7th Cir. 1999) (concluding that Mexico, as the place of injury, had an interest in applying its pro-defendant contributory negligence defense).

111. 225 P.3d 516 (Cal. 2010).

112. *Id.* at 518. California has a borrowing statute, but the *McCann* court conceded that the borrowing statute might not have been applicable in the case. See *id.* at 524–27. The *McCann* court then proceeded to explain why the Oklahoma statute of repose had to be applied in that case (pursuant to California's normal choice-of-law analysis) even if the borrowing statute did not require that result. *Id.* at 526–38.

113. *Id.* at 522–24.

114. *Id.* at 530–31.

for, business enterprises, we believe that the state ordinarily has an interest in having that policy of limited liability applied to out-of-state companies that conduct business in the state, as well as to businesses incorporated or headquartered within the state. A state has a legitimate interest in attracting out-of-state companies to do business within the state, both to obtain tax and other revenue that such businesses may generate for the state, and to advance the opportunity of state residents to obtain employment and the products and services offered by out-of-state companies. . . . [A]s a practical and realistic matter the state[] [does have an] interest in having that law applied to the activities of out-of-state companies within the jurisdiction . . . .<sup>115</sup>

There are other cases using similar logic to find a contact-based interest in a jurisdiction having defendant-preferred law.<sup>116</sup> However, the number of cases rejecting a contact-based interest for a state having a defendant-preferred law greatly dwarfs the few cases in which an interest has been found.

In the interests of clarity and simplicity, the Rubric excludes a contact-based state interest in a jurisdiction that had a defendant-friendly law. The reasoning here parallels the argument that a state has a domicile-based interest in applying its law to the detriment of a litigant (the “punish theory”). In each instance, a logical explanation can be offered in support of this state interest argument. Additionally, although there is almost no support for this theory in the caselaw,<sup>117</sup> there are some cases recognizing a contact-based interest for a state having a defendant-friendly law and a domicile-based interest for a state in applying its law against its domiciliary.<sup>118</sup> That said, the

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115. *Id.* at 530.

116. *See* *Rowe v. Hoffmann-La Roche, Inc.*, 917 A.2d 767, 775–76 (N.J. 2007) (finding that Michigan, as the place of purchase and injury in a products liability suit, had an interest in applying its defendant-preferred law so as to make prescription drugs more generally available to Michigan residents, and at a cheaper price); *Offshore Rental Co. v. Cont’l Oil Co.*, 583 P.2d 721, 725 (Cal. 1978) (finding that Louisiana, as the place of injury, had an interest in applying its defendant-preferred law so as to avoid “extended financial hardship” to the negligence defendant acting within Louisiana). Professor Singer has cleverly deemed this style of argument to be “conduct liberating” rather than “conduct-regulating.” *See* Joseph William Singer, *Multistate Justice: Better Law, Comity, and Fairness in the Conflict of Laws*, 2015 U. ILL. L. REV. 1923, 1933 (“The defendant-protecting policy of Colorado in *Bryant*, however, was *not* a loss-allocating rule. It was a conduct-liberating rule; by decreasing potential damages, it was intended to promote business activity in Colorado.”).

117. *See generally supra* note 116.

118. *See supra* note 41.

benefits involved with simplifying choice of law far exceed the costs of occasionally “missing” the contact-based interest a state has in applying its defendant-preferred law.<sup>119</sup>

### C. Cases the Rubric Gets Wrong

The Rubric accounts for most of the ways in which courts have determined that a state has an interest in applying its law to a choice-of-law dispute. When considering the different ways that jurisdictions might choose to resolve either a true-conflict case (a case in which more than one state has an interest) or an unprovided-for case (a case in which no state has an interest), the Rubric can be reconciled with a very large percentage of the holdings in horizontal choice-of-law disputes.

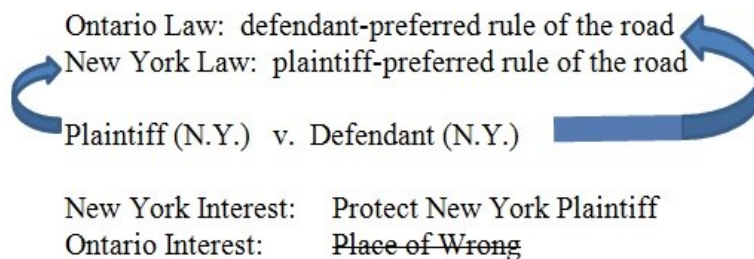
That said, the Rubric is not perfect. There is one tort law fact pattern where the Rubric clearly gives the wrong answer. Moreover, I do not suggest applying the Rubric to property cases.

#### 1. A Funky Tort Law Fact Pattern

The Rubric produces the wrong result in a particular type of torts case. Fortunately, this fact pattern involves a choice-of-law dispute so preposterous that it is doubtful to occur frequently in actual litigation.

The fact pattern that the Rubric gets wrong is a (1) joint domicile case involving (2) an accident in a different jurisdiction (3) with a defendant-preferred rule that (4) is an obviously conduct-regulating “rule of the road,” such as a speed limit or a traffic rule regarding engine braking.

Such a case could be depicted as such:



Under the Rubric, this is a false-conflicts case. New York has a domicile-based interest in applying its plaintiff-preferred law on behalf of

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119. Here again, it is worth noting that the normative perspective of this Article is not a freedom that the Restatement—whose job is to descriptively restate that law—enjoys.

the plaintiff from New York. Ontario has no domicile-based interest, as there is no Ontario domiciliary. Ontario is the place of the injury, but because Ontario's law is defendant friendly, Ontario's interest is not triggered under the Rubric.

But this cannot be the correct result. As Judge Fuld recognized as early as *Babcock*, it would be almost "unthinkable" to apply another jurisdiction's "rule of the road": "It is hardly necessary to say that Ontario's interest is quite different from what it would have been had the issue related to the manner in which the defendant had been driving his car at the time of the accident."<sup>120</sup>

The reason that the Rubric reaches the wrong answer in this fact pattern is the Rubric's assumption that a contact-based state interest cannot be created when a jurisdiction has a defendant-preferred rule. Here, the defendant prefers Ontario law, but if this dispute involves a "rule of the road," then Ontario has a conduct-regulating interest in applying its law to the accident that occurred on its road, even though Ontario's law is defendant-preferred.

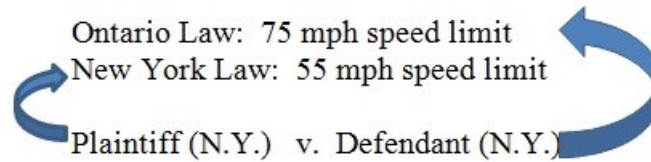
So, the assumption that defendant-preferred laws do not give rise to a contacts-based interest is not perfect. This means that the Rubric is not perfect.

Not all is lost, however. Despite the Rubric's clear mistake in this choice-of-law dispute, the notion that anything other than the accident state's "rule of the road" should apply is so ridiculous that this conclusion can be easily reached without a difficult choice-of-law analysis. This becomes apparent when we plug actual laws into our fact pattern.

Suppose that the choice-of-law dispute concerns whether the defendant was speeding and thus negligent per se. Under New York law, the speed limit is fifty-five miles per hour. The plaintiff wants New York law to apply because the defendant was driving sixty-five miles per hour at the time of the accident. The defendant, however, wants Ontario law to apply; Ontario's speed limit is seventy-five miles per hour. Here again we can depict the fact pattern, substituting the actual law requested by each party:

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120. *Babcock v. Jackson*, 191 N.E.2d 279, 284 (N.Y. 1963).



New York Interest: Protect New York Plaintiff  
 Ontario Interest: ~~Place of Wrong~~

The Rubric suggests that this is a false-conflicts case: New York has a domicile-based interest. Ontario does not have a potential contacts-based interest because Ontario's law is preferred by the defendant.

But the plaintiff's argument is too outlandish for any litigant to even contemplate asserting in actual litigation: What the plaintiff is asserting here is that the defendant "breached per se" because he violated the New York fifty-five miles-per-hour speed limit when he was driving sixty-five miles per hour *on an Ontario road*. For this "rule of the road," the conduct-regulating nature of Ontario's law is blatantly evident; thus, Ontario law should apply.

In the event a litigant does make this type of far-fetched argument, a court should obviously deviate from the Rubric to reach the correct result. (The use of the term "Rubric," rather than "rule," was intentional.)

The types of choice-of-law disputes that courts deal with in real life, however, are not usually cases where a party is claiming that a New York speed limit applies on an Ontario highway.<sup>121</sup> In actual choice-of-law disputes, the existence of a contact-based state interest will not be obvious. In these instances, I believe the Rubric is very helpful to courts. But courts should (of course) bypass the Rubric when its application would lead to an obviously incorrect result.

## 2. Property Disputes

Property cases have long been controlled by the "situs" rule,<sup>122</sup> even after modern choice of law required courts to engage in a state-interest

121. Professor Symeonides documents a few cases where a plaintiff attempted to argue that a defendant's conduct should not be measured by the "rules of the road" where the defendant's conduct occurred. *See* SYMEONIDES, *supra* note 19, at 232–36. Predictably, courts in those cases had no trouble concluding that the defendant's conduct must be measured by the law of the state where the conduct occurred. *See id.*

122. Under the situs rule, "the existence or non-existence of title of the chattel is determined by the law of the place where it was physically located at the point the title is

analysis.<sup>123</sup> As courts have not tended to use a state-interest analysis in resolving property choice-of-law disputes,<sup>124</sup> I do not advocate applying the Rubric to property cases. The territorial situs rule works very well, and it should be left alone.

#### *IV. Consistency with Third Restatement Results and a Word on Tiebreakers*

In this Part, I address how the Rubric compares to the results under the Third Restatement and also offer my thoughts on the best way to resolve true conflicts and unprovided-for cases.

##### *A. Third Restatement Results*

###### *1. Summary*

The Third Restatement is in various stages of completion, but the portion addressing choice of law for torts has proceeded to draft form. As such, it is possible to compare the results that the Rubric reaches with the results under the current draft of the Third Restatement.

The process of comparing the results under the Rubric with the results under the Third Restatement gets somewhat tricky and technical for a variety of reasons. For readers disinclined to get into the weeds, I offer this quick summary over the following few paragraphs.

The simple Rubric I have proposed reaches the same results as the Third Restatement in a supermajority of fact patterns.<sup>125</sup> In over 71% of tort law fact patterns, the Rubric and the Third Restatement reach the exact same result.

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alleged to have been created.” See Monique Lee, *A Choice of Law Dilemma: The Conflict and Reconciliation of Laws Governing Cross-Border Transfers of Stolen Art*, 7 CARDOZO PUB. L., POL’Y & ETHICS J. 719, 722–23 (2009).

123. *Id.* (discussing ubiquity of the rule).

124. See Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 671 (2013) (“Even today, for instance, American lawyers think it natural for various issues relating to real property to be adjudicated according to the law of the place where the property is located . . .”).

125. As explained previously, the Rubric requires a process for resolving true conflict and unprovided-for cases. See *supra* text accompanying notes 22–30. As explained later in this Part, I propose using a tiebreaker that defaults to the First Restatement rule. See *infra* Section IV.B. Thus, in this section, in describing the results reached by the Rubric in tort cases, I will be resolving true conflicts and unprovided-for cases by applying the law of the place of injury (the First Restatement rule). Obviously, should a jurisdiction choose to resolve true conflicts and unprovided-for cases differently, this would change the data as to the consistency of results between the Rubric and the Third Restatement.

What about the 29% of fact patterns decided differently? Half of these fact patterns are a byproduct of the unusual Third Restatement provisions that permit a plaintiff to pick either the law of the place of injury or the law of the place of the defendant's bad conduct. As explained below, it is ill-advised for black-letter, choice-of-law rules to explicitly state that the plaintiff gets to pick the law that she prefers. If these "plaintiff-gets-to-pick" rules are replaced by the traditional law of the place-of-injury torts rule, then the consistency between the Rubric and the modified Third Restatement jumps to over 85%.

The remaining 15% of fact patterns in which there are inconsistent results between the Rubric and the Third Restatement occur for a variety of reasons. For these fact patterns, there is usually caselaw support for both the Rubric result and the Third Restatement result. As explained above, in one particular type of fact pattern, the Rubric reaches the wrong result.<sup>126</sup> I believe there are also fact patterns that the Third Restatement simply gets wrong. In short, the results are pretty much the same. When the results differ, there is usually caselaw support for the position reached by the Rubric and the Third Restatement.

But the Rubric is much easier to apply. The Third Restatement depends on the ability of courts to label "the" law in a torts choice-of-law dispute as being either conduct-regulating or loss-allocating. As explained above, this analysis is misguided (both analytically and practically).

Moreover, the Rubric is preferable because it can be used outside the context of tort law. The Rubric identifies state interests through a generic process that changes very little from one subject matter to the next.<sup>127</sup> The current draft of Third Restatement rules, however, are specific to tort law.<sup>128</sup> The Third Restatement will soon publish a new set of proposed rules that deal with contracts.<sup>129</sup> These rules, presumably, will not incorporate the conduct-regulating/loss-allocating distinction that the Third Restatement rules use for tort cases. The Rubric, then, will permit judges and lawyers to avoid not only the somewhat complicated Third Restatement torts rules but

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126. *See supra* Section III.C.1.

127. The Rubric depends on identifying the important contact under the First Restatement, and the First Restatement contacts depend on characterizing the dispute as involving torts, contracts, etc. Other than this minor characterization adjustment, the Rubric does not change from one subject matter to the next.

128. *See* RESTATEMENT (THIRD), *supra* note 12, xvii.

129. *See generally id.* at xvii, xxxvii–xxxviii (presenting a projected Table of Contents, which includes "Chapter 8: CONTRACTS").

also whatever complex rules that the Third Restatement develops for other subject matters such as contracts.

## 2. Third Restatement Methodology

For torts, the Third Restatement identifies three important issues: (1) Whether the case involves a loss-allocating rule<sup>130</sup> or a conduct-regulating rule;<sup>131</sup> (2) whether the defendant's conduct and the plaintiff's injury occur in different states or the same state;<sup>132</sup> and (3) whether the parties are from the same state or different states.<sup>133</sup>

With the three variables being considered (and with each variable being binary), there are eight possible combinations. Here are the eight options, including how the Third Restatement proposes to resolve each case:

<u>Loss-Allocating/ Conduct-Regulating</u>	<u>Same State/ Different State</u>	<u>Joint Domicile/ Split Domicile</u>	<u>Result</u>
1. Loss-Allocating	Different State	Joint Domicile	Law of Joint Domicile (§ 6.06)
2. Loss-Allocating	Same State	Joint Domicile	Law of Joint Domicile (§ 6.06)
3. Loss-Allocating	Different State	Split Domicile	Plaintiff Picks Law of Bad Conduct or Injury (§6.08) <sup>134</sup>

130. Recall the criticism in Part III of the Third Restatement's presumption that one label can be applied to the two different rules involved in a horizontal choice-of-law dispute. *See supra* Section III.B.2.b.

131. *See* RESTATEMENT (THIRD), *supra* note 12, §§ 6.01–.03.

132. *See id.* §§ 6.04, 6.07–.08.

133. *See id.* §§ 6.06–.07.

134. The Third Restatement section 6.08 is actually more complicated than just “the plaintiff gets to pick.” Here is the complete text of section 6.08:

### § 6.08. Cross-Border Torts

(1) Except as otherwise provided in §§ 6.04, 6.06, and 6.07, when conduct in one state causes injury in another, the law of the state of conduct governs issues of conduct regulation and loss allocation.

(2) However, the law of the state of injury, rather than the state of conduct governs all issues subject to this Section if:

(a) the occurrence of the injury in that state was objectively foreseeable;  
and

(b) the injured person formally and timely requests the application of that state's law.

(3) Whether the defendant was under a duty to act is always determined with reference to the law of the state of conduct, regardless of whether the



<u>Loss-Allocating/ Conduct-Regulating</u>	<u>Same State/ Different State</u>	<u>Joint Domicile/ Split Domicile</u>	<u>Result</u>
4. Loss-Allocating	Same State	Split Domicile	Law of Bad Conduct (\$6.07)
5. Conduct-Regulating	Different State	Joint Domicile	Plaintiff Picks Law of Bad Conduct or Injury (\$6.08)
6. Conduct-Regulating	Same State	Joint Domicile	Law of Bad Conduct (\$6.04)
7. Conduct-Regulating	Different State	Split Domicile	Plaintiff Picks Law of Bad Conduct or Injury (\$6.08)
8. Conduct-Regulating	Same State	Split Domicile	Law of Bad Conduct (\$6.04)

Another way to restate the results reached under the Third Restatement is as follows: Apply the law of the place of the bad conduct unless (1) it is a joint-domicile case and “the” rule is loss-allocating; or (2) it is not a case covered by the first exception, the state of injury and the state of bad conduct are different, and the plaintiff prefers the law of the state of injury.<sup>135</sup>

Under the Rubric, there are only two questions to consider: (1) where are the parties from and for whose law are they arguing?; and (2) did the injury occur in a state with pro-plaintiff laws?

Things get complicated, however, when one overlays the factors important to the Third Restatement analysis with the factors important to the Rubric. Combining the Third Restatement factors with the Rubric factors creates sixty-four different fact patterns.<sup>136</sup> These are set out in

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injured person selects a different law. The effect of such a duty is determined by the law selected under this Section.

*Id.* § 6.08.

Assuming that (1) the occurrence of the injury to the plaintiff in the injury state was objectively foreseeable and that (2) a plaintiff will usually make a “formal[] and timely request[]” for the injury state’s law, the only time where the plaintiff does not truly get to pick is when the issue is whether a “defendant was under a duty to act.” *Id.* For simplicity, I have glossed over this complexity in the text.

135. As with the table, in this “restatement” of the Third Restatement provisions the more nuanced provisions of section 6.08 have been reduced to the notion that “plaintiff gets to pick.”

136. For purposes of this analysis, I have assumed that all of the relevant action takes place in only two states. Things get infinitely more complicated if three (or more) states are

Appendix A, using the states of Kansas and Nebraska for demonstrative purposes.<sup>137</sup>

Of these sixty-four different factual scenarios, eight do not involve a choice-of-law issue.<sup>138</sup> The remaining fifty-six factual scenarios will be discussed below, organized around the Third Restatement provisions under which they are addressed.

### 3. Section 6.07

The fact patterns resolved by section 6.07 of the Third Restatement are the easiest to discuss because the Third Restatement and the Rubric reach the exact same results in these cases.

Overall, section 6.07 covers eight of the sixty-four fact patterns.<sup>139</sup> These are fact patterns in which the parties are domiciled in different states, the injury and the bad conduct occur in the same state, and “the” law is loss-allocating. Under section 6.07, a court is to apply the law of the state where the injury and bad conduct occurred.<sup>140</sup> This is the exact result reached by the Rubric.

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involved. Even adding just a third state with contacts to the dispute enlarges the range of different factual scenarios to around one thousand. Moreover, once more than two states are considered, some fact pattern will fall outside the scope of the rules covered in sections 6.04, 6.06, 6.07, and 6.08 of the Third Restatement. These fact patterns would then be resolved according to the residual rule in section 6.09, which instructs courts to apply the law of the state with the “dominant” interest in the issue. The standard of section 6.09 (unlike the rules contained in sections 6.04, 6.06, 6.07, and 6.08) does not definitely point to any state’s law; thus, it is impossible to compare the results reached under section 6.09 with the results under the Rubric. For these reasons, the discussion in this section will assume that all of the contacts take place wholly within two states.

137. Here are the questions that produce the sixty-four different fact patterns:

1. Is Kansas law plaintiff friendly? (binary—yes or no)
2. Where are the parties from? (four options—KS/KS; KS/NE; NE/KS; NE/NE)
3. Is Kansas the state of injury? (binary—yes or no)
4. Is Kansas the state of bad conduct? (binary—yes or no)
5. Is the law conduct-regulating? (binary—yes or no)

*See infra* app. A.

138. For these eight factual scenarios, all the relevant contacts are in either Kansas or Nebraska. In Appendix A, these are fact patterns 1, 2, 31–34, 63, and 64. *See infra* app. A.

139. In Appendix A, these facts patterns are numbered 9, 15, 17, 23, 41, 47, 49, and 55. *See infra* app. A.

140. *See* RESTATEMENT (THIRD), *supra* note 12, § 6.07.

#### 4. Sections 6.04 and 6.06

Sections 6.04 and 6.06 both involve slight deviations from the Rubric. These deviations raise the same issues and will thus be discussed as a pair.

First, section 6.04 applies to fact patterns in which (1) the injury and bad conduct occur in the same state and (2) “the” law is conduct-regulating.<sup>141</sup> (This section applies to both split-domicile and joint-domicile cases.) Section 6.04 instructs courts to apply the law of the state where the injury and bad conduct occurred.<sup>142</sup>

Section 6.04 applies to eleven different factual scenarios.<sup>143</sup> In nine of these fact patterns, the Rubric reaches the same conclusion.<sup>144</sup>

In two fact patterns,<sup>145</sup> however, a difference emerges between section 6.04 and the Rubric. These two fact patterns involve instances where both the plaintiff and the defendant are from the same state—joint-domicile cases. The two fact patterns in which section 6.04 and the Rubric deviate are as follows:

<p>#26 Kansas Law: Plaintiff Preferred Nebraska Law: Defendant Preferred</p> <p>P (KS) v. D (KS) Place of Injury: NE Place of Bad Conduct: NE Character of Law: Conduct-Regulating</p> <p>Rubric: Kansas Law Third Restatement: Nebraska Law</p>	<p>#40 Kansas Law: Defendant Preferred Nebraska: Plaintiff Preferred</p> <p>P (NE) v. D (NE) Place of Injury: KS Place of Bad Conduct: KS Character of Law: Conduct-Regulating</p> <p>Rubric: Nebraska Law Third Restatement: Kansas Law</p>
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These two fact patterns are the mirror image of each other. In each, residents from one state are involved in an accident in another state (which is also where the bad conduct occurs). The place where the injury occurs has law preferred by the defendant. Under the Third Restatement, “the” law involved is conduct-regulating.<sup>146</sup> Under the Rubric, the law of the joint

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141. *See id.* § 6.04.

142. *See id.*

143. In Appendix A, these are 8, 10, 16, 18, 26, 40, 42, 48, 50, 56 and 58. *See infra* app. A.

144. In Appendix A, these are 8, 10, 16, 18, 42, 48, 50, 56 and 58. *See infra* app. A.

145. In Appendix A, these are 26 and 40. *See infra* app. A.

146. *See generally* RESTATEMENT (THIRD), *supra* note 12, § 6.02.

domicile applies. Under the Third Restatement, however, the law of the state of injury applies.<sup>147</sup>

Second, section 6.06 applies to twelve different fact patterns.<sup>148</sup> In eight of these, the Rubric and the Restatement reach the same conclusion.<sup>149</sup> In four, however, a deviation emerges.<sup>150</sup> Here are the four patterns in which a deviation exists:

<p>#7 Kansas Law: Plaintiff Preferred Nebraska Law: Defendant Preferred</p> <p>P (NE) v. D (NE) Place of Injury: KS Place of Bad Conduct: KS Character of Law: Loss-Allocating</p> <p>Rubric: Kansas Law Third Restatement: Nebraska Law</p>	<p>#57 Kansas Law: Defendant Preferred Nebraska: Plaintiff Preferred</p> <p>P (KS) v. D (KS) Place of Injury: NE Place of Bad Conduct: NE Character of Law: Loss-Allocating</p> <p>Rubric: Nebraska Law Third Restatement: Kansas Law</p>
<p>#5 Kansas Law: Plaintiff Preferred Nebraska Law: Defendant Preferred</p> <p>P (NE) v. D (NE) Place of Injury: KS Place of Bad Conduct: NE Character of Law: Loss-Allocating</p> <p>Rubric: Kansas Law Third Restatement: Nebraska Law</p>	<p>#59 Kansas Law: Defendant Preferred Nebraska: Plaintiff Preferred</p> <p>P (KS) v. D (KS) Place of Injury: NE Place of Bad Conduct: KS Character of Law: Loss-Allocating</p> <p>Rubric: Nebraska Law Third Restatement: Kansas Law</p>

Fact patterns 7 and 57 are the mirror image of each other: Both are joint-domicile cases involving loss-allocating rules in which the injury and bad conduct occur in a different state whose law is favored by the plaintiff. Under the Rubric, the law of the state of injury controls, while the Third Restatement holds that the law of the joint domicile controls.

Fact patterns 5 and 59 are also the mirror image of each other. In fact, 5 and 59 replicate 7 and 57, with the only difference being that in 5 and 59 the bad conduct occurs in the joint-domicile state rather than the injury

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147. *Id.* § 6.04.

148. In Appendix A, these numbers are 3, 5, 7, 25, 27, 29, 35, 37, 39, 57, 59, and 61. *See infra* app. A.

149. In Appendix A, these numbers are 3, 25, 27, 29, 35, 37, 39, and 61. *See infra* app. A.

150. In Appendix A, these numbers are 5, 7, 57, and 59. *See infra* app. A.

state. Here again, the Rubric holds that the law of the state of injury applies, while the Third Restatement says that the law of the joint domicile applies.

Considering sections 6.04 and 6.06 as a pair, the six different types of fact patterns in which the Rubric and the Third Restatement diverge share core characteristics: they are joint-domicile cases in which the injury occurs in a different state.

The joint-domicile/injury-in-another-state fact pattern has always been a challenging one for choice of law. This type of fact pattern has been frequently involved in the cases in which state courts moved away from the law of the place of injury.<sup>151</sup> For those courts, the First Restatement resolution—that the law of the place of wrong should *always* apply—was not correct.<sup>152</sup>

But experience has proven that this type of fact pattern cannot *always* be resolved in favor of the law of the joint domicile, either. To this author's knowledge, no one has ever suggested that courts should always apply the law of the joint domicile in every case in which the parties are from the same state. All seem to agree that *sometimes* the law of the joint domicile should apply, and *sometimes* the law of the place of injury must apply. Alas, a line must be drawn. But what line?

The Third Restatement answers this challenge through the conduct-regulating/loss-allocating distinction. If “the” law involved is loss-allocating, the joint-domicile law applies.<sup>153</sup> If “the” law is conduct-regulating, the law of the place of injury applies.<sup>154</sup> Under the Rubric, the line is drawn by asking whether the injury state has a law preferred by the plaintiff. If so, the law of the place of injury applies.<sup>155</sup> If not, the law of the joint domicile applies.

Which is better?

Each, in my view, gets certain types of cases “wrong.” As discussed above, the Rubric errs in the following case: When the choice-of-law dispute involves a “rule of the road,” the injury state's rule must be applied

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151. See Lea Brilmayer, *What I Like Most About the Restatement (Second) of Conflicts, and Why It Should Not Be Thrown Out with the Bathwater*, 110 AJIL UNBOUND 144, 146 (2016) (describing the “universal pattern” found in cases in which state courts rejected the First Restatement).

152. See *id.*

153. See RESTATEMENT (THIRD), *supra* note 12, § 6.06.

154. *Id.* § 6.04. Or, in instances in which the injury and bad conduct occur in different states, the Restatement would allow the plaintiff to pick the law that applies. See *id.* § 6.08. This outcome will be discussed in Section IV.B.

155. This conclusion assumes that a jurisdiction is using the law of the place of injury as a tiebreaker for true conflicts and unprovided-for cases.

even if the injury state has a defendant-preferred rule.<sup>156</sup> (In other words, the injury state has an interest in enforcing its conduct-regulating “rule of the road,” even if the Rubric is not identifying the defendant-preferred rule as conduct-regulating.) But, as explained above, the notion that any other state’s law would apply is so far-fetched that it probably will not be necessary for courts adopting the Rubric to even use this exception: No litigant would even think that a Nebraska speed limit applies to a Kansas crash.

But the Restatement also gets a certain type of case wrong. The infamous case of *Schultz v. Boy Scouts of America, Inc.* is a prime example.<sup>157</sup> If *Schultz* were considered under section 6.03, the case involved “a” loss-allocating rule because the defendant was claiming New Jersey’s charitable immunity.<sup>158</sup> As such, New York had no interest in applying its plaintiff-preferred tort law to an injury that occurred within New York. Under section 6.06, New Jersey law would apply. This is the result that the New York court reached in *Schultz*.<sup>159</sup>

I believe this is the wrong result. To say that New York has no interest in applying its pro-recovery rule to this fact pattern is to assume that New York has no interest in preventing assaults within New York unless the dispute involves a New York domiciliary. This seems both callous and inaccurate. (Indeed, The Third Restatement seems almost apologetic in stating that section 6.06 suggests that the *Schultz* decision “was correct.”<sup>160</sup>) The *Schultz* decision in favor of the Boy Scouts nicely demonstrates the analytical deficiency with the Third Restatement’s category approach: Labelling the dispute as “a” loss-allocating case (because *New Jersey* has charitable immunity doctrine) ignores that the injury occurred *in New York* and that *New York’s* rejection of charitable immunity is clearly based on conduct-regulating (rather than loss-allocating) objectives.

What about consistency with case results? Specifically, between the Third Restatement and the Rubric, which approach best aligns with the actual results reached by courts?

In considering this question, it is first important to appreciate that both the Rubric and the Third Restatement tend to agree on results much more frequently than they disagree. Sections 6.04 and 6.06 of the Third Restatement address twenty-four joint-domicile fact patterns: In eighteen of

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156. See *supra* Section III.C.1.

157. 480 N.E.2d 679 (N.Y. 1985); see *supra* text accompanying notes 96–100.

158. *Id.* at 683.

159. *Id.* at 681.

160. See RESTATEMENT (THIRD), *supra* note 12, Reporters’ Notes at § 6.06, cmt. a.

them, the Rubric and the Third Restatement reach the same results. Thus, a discussion of which approach most closely aligns with existing caselaw must start with the fact that, in a supermajority of cases, the Rubric and the Third Restatement reach the same exact result.

For the portion of cases in which the Rubric and the Third Restatement reach contrary results, there is caselaw authority for each position. For cases in which the injury state has plaintiff-preferred law, the courts will sometimes apply the law of the injury state (the conclusion under the Rubric) but sometimes apply the law of the joint domicile (these are the cases that the Third Restatement tends to label as “loss-allocating” cases).<sup>161</sup> Similarly, for cases in which the injury state has defendant-preferred law, the courts will sometimes apply the joint-domicile law (the result under the Rubric) and sometimes apply the injury-state law (these are the cases that the Third Restatement tends to label as “conduct-regulating”).<sup>162</sup> But I believe these “mixed” results are somewhat misleading. In my view, the Third Restatement is synthesizing the caselaw with a line that either does not exist or that is too fine to be useful going forward.

Looking backwards, conflicting results in cases can always be explained by imagining a retroactive rule that governs the decisions. For the fact pattern we are considering (joint domicile with injury in a different state), suppose that we are going to divide these cases based on results. On the left side of our page, we will put all of the cases in which courts have applied the law of the joint domicile. On the right side of the page, we will put all of the cases in which courts have applied the law of the state of injury.

Having thus separated the cases, it is possible to apply a made-up label. For the cases on the left side of the page (cases where the joint domicile was applied), we can apply the label “wobble.” On the right side of the page (cases where the state of injury was applied), we can apply the label “bobble.” This process can create the impression that, for future cases involving joint domiciles in different states, all that is necessary is to determine whether the case is a wobble or a bobble. But, of course, unless the wobble/bobble label represents a true analytical distinction, it is not at all helpful for resolving future cases. The labels must mean something, and the distinction must be relatively easy to draw.

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161. *See id.* § 6.06.

162. *See id.* § 6.04.

In my view, the Third Restatement's conduct-regulating/loss-allocating distinction is somewhat like the wobble/bobble distinction.<sup>163</sup> Retroactively speaking, the conduct-regulating/loss-allocating distinction is fairly accurate in describing the cases in which courts have applied the joint domicile law or the law of the place of injury. But this appearance of accuracy is an illusion. Unless the categories mean something and can be applied going forward,<sup>164</sup> we might as well be talking about wobbles and bobbles.<sup>165</sup>

In summary, the Rubric and the Third Restatement mostly reach the same result in fact patterns covered by sections 6.04 and 6.06. For fact patterns resolved differently, both the Rubric and the Third Restatement reach some results that seem intuitively wrong and will occasionally require a court to make an exception. There is some caselaw support for the results reached by the Rubric and the Third Restatement. But the Rubric is much easier to apply, and it will avoid courts having to discern whether a case involves a wobble (conduct regulation) or bobble (loss allocation).

#### 5. Section 6.08

Section 6.08 of the Third Restatement covers “cross-border” torts—that is, torts in which the defendant’s “bad conduct” occurs in one state and the plaintiff’s injury occurs in a different state.<sup>166</sup> All cross-border torts are addressed by section 6.08, unless the cross-border tort is a joint-domicile case involving a loss-allocating rule, in which case section 6.06 provides the operative rule.<sup>167</sup> Under section 6.08, the plaintiff gets to pick the rule that he prefers.<sup>168</sup>

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163. I definitely do not mean to suggest that the Third Restatement has intentionally created imaginary categories. Quite the opposite: I think the authors of the Third Restatement are trying very hard to reconcile the joint-domicile cases. I just do not think the categories created by the Third Restatement work in practice; or, at least, the distinctions represented by the categories created by the Third Restatement are simply too much to expect of judges having to resolve actual choice-of-law disputes.

164. As conceded by leading scholar Symeon Symeonides, the distinction is arguably “not worth the candle.” See SYMEONIDES, *supra* note 19, at 249.

165. Or, for Lewis Carroll fans, “ravens” and “writing-desks.” See LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND 57 (Lothrop Publ’g Co., 1898) (1865).

166. See RESTATEMENT (THIRD), *supra* note 12, § 6.08.

167. *Id.* § 6.06.

168. *Id.* § 6.08. As previously explained, section 6.08 does provide that in a few, particular instances the plaintiff will not be able to pick the governing law. For simplicity and clarity, these nuances will be ignored in the analysis contained in the text.



The fact patterns covered by section 6.08 involve the most dramatic divergence between the Rubric and the Third Restatement. Overall, section 6.08 addresses twenty-five fact patterns.<sup>169</sup> In fifteen of these, the Rubric and the Third Restatement reach the same result. In ten, however, the Rubric and the Third Restatement reach conflicting results. This divergence is due to two reasons: (1) the unique Third Restatement provisions allowing plaintiffs to select the law they prefer; and (2) the decision of the Third Restatement to expand the relevant territorial contacts to include the place of bad conduct.

In my view, section 6.08 of the Third Restatement is ill-advised. My objection to section 6.08 is not descriptive. Section 6.08 of the Third Restatement can be traced to the work of conflicts giant Symeon Symeonides.<sup>170</sup> Symeonides's research unquestionably shows that courts tend to resolve cross-border torts cases by applying the law that favors the plaintiff.<sup>171</sup> Symeonides's thoroughness and integrity are beyond reproach. I concede that courts tend to do exactly what the Third Restatement sanctions in section 6.08. My objection to section 6.08, however, is normative; there is something unseemly about black-letter law explicitly favoring one party over another. It is even worse when the applicable law is left to a litigant's choice.

The plaintiff-choice provisions of section 6.08 call to mind the work of torts scholar Robert Leflar. Leflar is most closely associated with the "better-rule" approach, under which a court resolves a choice-of-law dispute by simply selecting the "better rule."<sup>172</sup> Descriptively speaking, Leflar's "better-rule" approach is somewhat useful in understanding the results in actual cases: Judges tended to disfavor guest statutes and would resist their application in horizontal choice-of-law disputes.<sup>173</sup> As a realist, descriptive assertion, recognizing what courts are actually doing (despite the obscuring fluff contained in the opinion) is helpful to lawyers and litigants who must make decisions based on a prediction of how courts will rule. It is also helpful to academics who are trying to ascertain the underlying governing dynamics. As a descriptive assertion, Leflar's "better rule" observation is helpful.

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169. *See infra* app. A.

170. *See* SYMEONIDES, *supra* note 19, at 247–49.

171. *See id.* at 218–24.

172. Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1587–88 (1966).

173. *See generally id.*

But as a normative assertion of what judges should be doing,<sup>174</sup> Leflar’s “better-rule” approach is misguided. Inviting judges to resolve choice of law by simply applying the law the judge prefers undermines confidence in the rule of law. It discredits the authority of judges. It undercuts the repose that occurs when litigants feel they have had their fair day in court. Leflar’s “better-rule” approach is fine as a descriptive observation, but it fails as a normative assertion. Just because judges *are* doing it does not mean that they *should* be doing it.

Section 6.08 of the Third Restatement is similarly misguided. It is one thing for Professor Symeonides to notice a plaintiff-friendly trend in cross-border cases. It is quite another for the Third Restatement to sanction this bias as an official part of the black-letter law.

In some respects, the provisions of section 6.08 are even more problematic than Leflar’s better-rule approach. Leflar’s better-rule approach invites judges to inject their biases, prejudices, and values into cases. Section 6.08 cuts out the middle person and just leaves it to the whim of the plaintiff. The notion that human bias will sometimes influence the way a judge handles a case is something that most citizens can probably anticipate and accept. The idea that the black-letter law itself is explicitly biased in favor of plaintiffs—such that plaintiffs get to resolve choice of law according to their preference—is much more damaging to the system. Judges are human; the law should strive to be neutral.

Of course, every rule (at base) rests on policy considerations and has winners and losers. But rarely will a court justify a rule simply on the notion that it helps a particular party.<sup>175</sup> A common law rule might help plaintiffs (or defendants), but this is usually a means to an end: “The rule allows for recovery here because [insert policy].” Section 6.08 of Third Restatement is missing the “because”: “The rule allows for recovery, and thus it is a good one.”

This difference between a rule that helps a plaintiff “because [policy]” and a rule that exists simply because it helps the plaintiff distinguishes the explicit bias of section 6.08’s “plaintiff-picks” rule from the Rubric’s

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174. It is not clear that Professor Leflar ever proposed that his better rule approach should be used; instead, most view Leflar’s work as descriptive in nature. See Mark Thomson, *Method or Madness?: The Leflar Approach to Choice of Law as Practiced in Five State*, 66 RUTGERS L. REV. 81, 82 (2013) (“Leflar’s goal was not to pioneer some novel choice-of-law theory, but, rather, to refocus scholarly and judicial attention on choice of law as it actually worked in the real world.”).

175. See generally CODE OF CONDUCT FOR U.S. JUDGES Canon 3 (Jud. Conf. U.S. 2019) (“The judge . . . should not engage in behavior that is . . . biased . . .”).

conclusion that a state interest exists when a territorial contact occurs in a state with a plaintiff-preferred law. Under the Rubric, the interest created when a territorial contact occurs in a jurisdiction with a plaintiff-friendly law is based on the notion that the convergence of a remedy and an event in the same state creates an interest under a choice-of-law analysis. This is different than saying, “Whatever helps the plaintiff, that is the rule.”

I hope that the current draft of section 6.08 is ultimately rejected. People, and even institutions, can be biased. The law should not explicitly be.

The other concern with section 6.08 is that it expands the relevant territorial contacts. For the history of American choice of law, the relevant territorial contact for torts has been the place of injury.<sup>176</sup> This was the bright-line rule adopted by the First Restatement.<sup>177</sup> This was the default contact for numerous Second Restatement provisions.<sup>178</sup> Under section 6.08, however, the place of the defendant’s bad conduct is now included as a relevant territorial contact.<sup>179</sup>

I understand the analytical reasons for including the place of bad conduct as a relevant territorial contact, and there is caselaw support for this change.<sup>180</sup> But it is not worth the trouble. What American choice of law needs is simplification, not complication. Indeed, that is the stated goal of the drafters of the Third Restatement.<sup>181</sup> But expanding the relevant territorial contacts from one to two is pulling in the opposite direction, away from simplicity and clarity.

The Rubric is simple and clear. If section 6.08 were replaced with the law of the place of wrong rather than the current “plaintiff-picks” provisions, the convergence between the Rubric and the Third Restatement would jump from 15/25 to 23/25. At this point, the Rubric and the Third Restatement would converge in forty-eight of fifty-six fact patterns. If courts do not like the “plaintiff-picks” provisions of the Third Restatement, they might as well use the Rubric. In 85% of cases, the Rubric and the Third Restatement would then reach this same conclusion, but the Rubric would get there in an easier, more straightforward fashion.

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176. See Joseph William Singer, *Choice of Law Rules*, 50 CUMBERLAND L. REV. 347, 350 (2020) (“The traditional approach under with the First or Second Restatement would be to apply the law of the place of the injury.”).

177. *Id.*

178. *Id.*

179. See RESTATEMENT (THIRD), *supra* note 12, § 6.08.

180. See *id.* at § 6.08 cmt. d (discussing courts’ application of the law of the state of bad conduct).

181. See *supra* note 14 and accompanying text.

### B. A Word on Tiebreakers

The Rubric is a tool for determining whether state interests exist. In instances in which only one state has an interest (a “false conflict”), the choice-of-law issue is resolved: Apply the law of the only state that has an interest in applying its law to the dispute. When more than one state has an interest (a “true conflict”) or no state has an interest, the choice-of-law analysis must proceed.

A variety of approaches have been used to resolve true conflicts and unprovided-for cases. In one camp are the approaches that invite courts to engage in a balancing or weighing process.<sup>182</sup> For instance, at one time New Jersey resolved true conflicts cases by applying the law of the state “with the greatest interest in governing the particular issue.”<sup>183</sup> Along the same lines, California employs the “comparative-impairment” approach, under which the court applies the law of the state whose interest would be more impaired if it were not applied.<sup>184</sup>

These balancing-type approaches suffer from two shortcomings. First, the process of balancing interests or impairments is tedious. But choice-of-law analysis needs to be simplified, and weighing and balancing is a step in the wrong direction. Weighing interests or impairments in a choice-of-law case is akin to balancing feathers on a teeter-totter: The instrument being used is not sensitive enough for the task. Moreover, the case-specific nature of balancing tests limits their usefulness in resolving future cases. Thus, the blood, sweat, and tears involved in balancing interests or impairments is unlikely to be useful to a court handling a subsequent choice-of-law dispute, meaning that the tedious process must be repeated.

Second, balancing-type approaches are only useful for resolving true-conflicts cases. In an unprovided-for case, there are no interests or impairments to weigh or compare. A jurisdiction that wants to balance, then, will need a different approach for resolving unprovided-for cases. A solution that works to resolve both true conflicts and unprovided-for cases is preferable.

Rather than weighing or balancing, the simplicity of a tiebreaker is preferable. Here again, many different tiebreakers have been proposed and used. Professor Leflar wrote that a court would simply pick the jurisdiction

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182. See *supra* notes 24–25 and accompanying text.

183. See, e.g., *D’Agostino v. Johnson & Johnson, Inc.*, 628 A.2d 305, 309 (N.J. 1993).

184. See Albert C. Lin, *Dodging Public Nuisance*, 11 U.C. IRVINE L. REV. 489, 517, 517 n.199 (2020) (noting California’s use of comparative impairment).

that has the “better rule.”<sup>185</sup> In the Third Restatement, for certain types of torts cases, the court is instructed to apply the law that is preferred by the plaintiff in the litigation.<sup>186</sup> In my opinion, both of these tiebreakers are misguided.

What is needed is an (1) easy-to-apply tiebreaker (2) that resolves both true conflicts and unprovided-for cases and (3) is neutral with regard to the parties and the content of the laws involved in the choice-of-law dispute. In this camp, there are two candidates: (1) the law of the forum and (2) the law selected under the First Restatement.

Using the law of the forum was the tiebreaker preferred by Professor Currie,<sup>187</sup> who in many ways is the intellectual forefather of modern interest analysis.<sup>188</sup> It is a fine option. Many jurisdictions have used this tiebreaker, either explicitly<sup>189</sup> or implicitly.<sup>190</sup> And there is something intuitive about the notion that a forum should apply its own rules.<sup>191</sup>

I have a slight preference, however, for a different tiebreaker: the law identified under the First Restatement approach. First, notice that for a court applying the Rubric, no additional work will be necessary in applying this tiebreaker; the relevant contact under the First Restatement would already have been identified under the Rubric. Second, using the law selected under the First Restatement is probably truer to the motivations that initially pushed courts away from the First Restatement approach.

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185. See *supra* text accompanying note 172.

186. See *supra* text accompanying notes 134, 168.

187. See *supra* note 26.

188. See Rodney Patton, *Sisyphus, the Boulder, and the Choice-of-Law Hill: The Analytical Framework for Resolving the Unusual and Complex Choice-of-Law Issues That Can Arise When the United States is a Party in an Aviation Case*, 71 J. AIR L. & COM. 471, 475 (2006) (identifying Currie as the father of the “government interest” analysis).

189. See, e.g., *Lilienthal v. Kaufman*, 395 P.2d 543, 549 (Or. 1964) (holding that forum law should be used in resolving a true conflicts).

190. See, e.g., *Sutherland v. Kennington Truck Serv., Ltd.*, 562 N.W.2d 466, 471–73 (Mich. 1997) (holding that Michigan law applies unless a rational reason to displace Michigan law exists, and then explaining that in a false-conflicts case in which Michigan does not have an interest, a rational reason to depart from forum law would exist); see also Katherine Florey, *Big Conflicts Little Conflicts*, 47 ARIZ. STATE L.J. 683, 686 (2015) (citation omitted) (noting the tendency of state courts to “fall back on forum law in a pinch”).

191. Indeed, some jurisdictions have either adopted, purported to adopt, or flirted with a *lex fori* rule, in which all choice-of-law disputes (not just true conflicts and unprovided-for cases) are resolved by using forum law. See LITTLE, *supra* note 2, at 514 (“[A]t least three states in contemporary times have been formally associated with a *lex fori* approach, at least for tort cases . . .”).

For all the criticisms of the First Restatement, there are many instances in which modern choice of law has not deviated much from the law selected by the First Restatement.<sup>192</sup> The Second Restatement is replete with specific default rules that tend to point back to the law the First Restatement would select.<sup>193</sup> But perhaps the best example of modern choice of law's tendency to gravitate back to the First Restatement is New York choice of law.

New York, and in particular Judge Fuld, was a leader in rejecting the “discredited”<sup>194</sup> territorial approach of the First Restatement. Judge Fuld concluded that choice of law must include analysis of the interests that states have in having their law apply to a choice-of-law dispute.<sup>195</sup> Judge Fuld initiated the choice-of-law revolution.

Then, as a judge on the New York Court of Appeals in *Nuemeier v. Kuehner*,<sup>196</sup> Judge Fuld attempted to synthesize the previous results that New York courts had reached in guest-statute cases, and to provide a blueprint for how those cases should be decided going forward.<sup>197</sup> What Judge Fuld came up with was this: apply the law of the state where the accident occurred, unless it is a joint-domicile case.<sup>198</sup> When you consider Judge Fuld's earlier observation from *Babcock* that Ontario law would apply if the purpose of Ontario's law was conduct-regulating,<sup>199</sup> then Judge Fuld's restatement of New York law in *Nuemeier* was even less of a deviation from the “old” law: apply the law of the state where the accident occurred, unless (1) it is a joint-domicile case and (2) the place where the accident occurred does not have a conduct-regulating law.

Under Judge Fuld's restatement in *Nuemeier*, there had been no horizontal choice-of-law revolution. In terms of the results in actual guest-statute cases, hardly anything had changed. The current fervor in choice of law seems consistent with the New York experience. Perhaps choice of law was never in need of a revolution, but instead a rather minor adjustment. In

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192. See Michael H. Hoffheimer, *California's Territorial Turn in Choice of Law*, 67 RUTGERS UNIV. L. REV. 167, 170–71 (2015) (arguing that California decisions evince a preference for a territorial resolution to choice-of-law disputes); Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49, 55 (1989) (discussing the persistence of the traditional territorial approach to choice of law).

193. See Hoffheimer, *supra* note 192, at 220–21.

194. See *Babcock v. Jackson*, 191 N.E.2d 279, 281 (N.Y. 1963).

195. *Id.* at 283–84.

196. 286 N.E.2d 454, 455 (N.Y. 1972).

197. See *id.* at 457–58 (articulating the “*Nuemeier* rules”).

198. See *id.* Judge Fuld's expression of this rule was much more verbose, but the core idea is the one expressed in the text.

199. *Babcock*, 191 N.E.2d at 284–85.

this spirit, I prefer a tiebreaker that defaults to the law selected by the First Restatement.

#### *V. Conclusion*

Since the introduction of state-interest analysis, horizontal choice of law has been an exceedingly difficult body of law for judges and lawyers. But this complexity is unnecessary. A state-interest analysis can be reduced to the type of simple rules that dominated choice of law before state interest became popular. The Rubric proposed herein achieves this simplicity. The Rubric also produces results that are largely consistent with the results that (1) courts have tended to reach and (2) are achieved under the proposed Third Restatement. With the exception perhaps of law professors, adoption of the Rubric would represent a win for all affected parties.

## Appendix A

		Domicile	Injury/Bad Conduct	LA/CR?	Rubric	Third Restatement	Third Restatement With Injury Instead of Bad Conduct
1.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (NE) v. D (NE)	NE/NE	LA	No Choice of Law Dispute		
	Kansas State Interest: Nebraska State Interest: <del>Place of Injury</del> Protect Nebraska Defendant						
2.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (NE) v. D (NE)	NE/NE	CR	No Choice of Law Dispute		
	Kansas State Interest: Nebraska State Interest: <del>Place of Injury</del> Protect Nebraska Defendant						
3.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (NE) v. D (NE)	NE/KS	LA	False: NE	NE (6.06)	NE
	Kansas State Interest: Nebraska State Interest: <del>Place of Injury</del> Protect Nebraska Defendant						
4.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (NE) v. D (NE)	NE/KS	CR	False: NE	KS (6.08)	NE
	Kansas State Interest: Nebraska State Interest: <del>Place of Injury</del> Protect Nebraska Defendant						
5.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (NE) v. D (NE)	KS/NE	LA	True: KS	NE(6.06)	NE
	Kansas State Interest: Place of Injury Nebraska State Interest: Protect Nebraska Defendant						
6.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (NE) v. D (NE)	KS/NE	CR	True: KS	KS (6.08)	KS
	Kansas State Interest: Place of Injury Nebraska State Interest: Protect Nebraska Defendant						
7.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (NE) v. D (NE)	KS/KS	LA	True: KS	NE (6.06)	NE
	Kansas State Interest: Place of Injury Nebraska State Interest: Protect Nebraska Defendant						



8.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (NE) v. D (NE)	KS/KS	CR	True: KS KS (6.04)	KS
	Kansas State Interest: Place of Injury Nebraska State Interest: Protect Nebraska Defendant					
9.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (NE) v. D (KS)	NE/NE	LA	Unprovided: NE NE (6.07)	NE
	Kansas State Interest: Nebraska State Interest: <del>Place of Injury</del>					
10.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (NE) v. D (KS)	NE/NE	CR	Unprovided: NE NE (6.04)	NE
	Kansas State Interest: Nebraska State Interest: <del>Place of Injury</del>					
11.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (NE) v. D (KS)	NE/KS	LA	Unprovided: NE KS (6.08)	NE
	Kansas State Interest: Nebraska State Interest: <del>Place of Injury</del>					
12.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (NE) v. D (KS)	NE/KS	CR	Unprovided: NE KS (6.08)	NE
	Kansas State Interest: Nebraska State Interest: <del>Place of Injury</del>					
13.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (NE) v. D (KS)	KS/NE	LA	False: KS KS (6.08)	KS
	Kansas State Interest: Place of Injury Nebraska State Interest:					
14.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (NE) v. D (KS)	KS/NE	CR	False: KS KS (6.08)	KS
	Kansas State Interest: Place of Injury Nebraska State Interest:					
15.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (NE) v. D (KS)	KS/KS	LA	False: KS KS (6.07)	KS
	Kansas State Interest: Place of Injury Nebraska State Interest:					

16.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (NE) v. D (KS)	KS/KS	CR	False: KS	KS (6.04)	KS
	Kansas State Interest: Place of Injury Nebraska State Interest:						
17.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (KS) v. D (NE)	NE/NE	LA	True: NE	NE (6.07)	NE
	Kansas State Interest: Protect Kansas Plaintiff Nebraska State Interest: <del>Place of Injury</del> Protect Nebraska Defendant						
18.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (KS) v. D (NE)	NE/NE	CR	True: NE	NE (6.04)	NE
	Kansas State Interest: Protect Kansas Plaintiff Nebraska State Interest: <del>Place of Injury</del> Protect Nebraska Defendant						
19.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (KS) v. D (NE)	NE/KS	LA	True: NE	KS (6.08)	NE
	Kansas State Interest: Protect Kansas Plaintiff Nebraska State Interest: <del>Place of Injury</del> Protect Nebraska Defendant						
20.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (KS) v. D (NE)	NE/KS	CR	True: NE	KS (6.08)	NE
	Kansas State Interest: Protect Kansas Plaintiff Nebraska State Interest: <del>Place of Injury</del> Protect Nebraska Defendant						
21.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (KS) v. D (NE)	KS/NE	LA	True: KS	KS (6.08)	KS
	Kansas State Interest: Place of Injury Protect Kansas Plaintiff Nebraska State Interest: Protect Nebraska Defendant						
22.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (KS) v. D (NE)	KS/NE	CR	True: KS	KS (6.08)	KS
	Kansas State Interest: Place of Injury Protect Kansas Plaintiff Nebraska State Interest: Protect Nebraska Defendant						
23.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (KS) v. D (NE)	KS/KS	LA	True: KS	KS (6.07)	KS
	Kansas State Interest: Place of Injury Protect Kansas Plaintiff Nebraska State Interest: Protect Nebraska Defendant						

24.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (KS) v. D (NE)	KS/KS	CR	True: KS	KS (6.08)	KS
	Kansas State Interest: Place of Injury Protect Kansas Plaintiff Nebraska State Interest: Protect Nebraska Defendant						
25.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (KS) v. D (KS)	NE/NE	LA	False: KS	KS (6.06)	KS
	Kansas State Interest: Protect Kansas Plaintiff Nebraska State Interest: <del>Place of Injury</del>						
26.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (KS) v. D (KS)	NE/NE	CR	False: KS	NE (6.04)	NE
	Kansas State Interest: Protect Kansas Plaintiff Nebraska State Interest: <del>Place of Injury</del>						
27.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (KS) v. D (KS)	NE/KS	LA	False: KS	KS (6.06)	KS
	Kansas State Interest: Protect Kansas Plaintiff Nebraska State Interest: <del>Place of Injury</del>						
28.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (KS) v. D (KS)	NE/KS	CR	False: KS	KS (6.08)	NE
	Kansas State Interest: Protect Kansas Plaintiff Nebraska State Interest: <del>Place of Injury</del>						
29.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (KS) v. D (KS)	KS/NE	LA	False: KS	KS (6.06)	KS
	Kansas State Interest: Place of Injury Protect Kansas Plaintiff Nebraska State Interest:						
30.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (KS) v. D (KS)	KS/NE	CR	False: KS	KS (6.08)	KS
	Kansas State Interest: Place of Injury Protect Kansas Plaintiff Nebraska State Interest:						
31.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (KS) v. D (KS)	KS/KS	LA	No Choice of Law Dispute		
	Kansas State Interest: Place of Injury Protect Kansas Plaintiff Nebraska State Interest:						

32.	Kansas—Plaintiff Preferred Nebraska—Defendant Preferred	P (KS) v. D (KS)	KS/KS	CR	No Choice of Law Dispute	
	Kansas State Interest: Place of Injury Protect Kansas Plaintiff Nebraska State Interest:					
33.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (NE) v. D (NE)	NE/NE	LA	No Choice of Law Dispute	
	Kansas State Interest: Nebraska State Interest: Place of Injury Protect Nebraska Plaintiff					
34.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (NE) v. D (NE)	NE/NE	CR	No Choice of Law Dispute	
	Kansas State Interest: Nebraska State Interest: Place of Injury Protect Nebraska Plaintiff					
35.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (NE) v. D (NE)	NE/KS	LA	False: NE NE (6.06)	NE
	Kansas State Interest: Nebraska State Interest: Place of Injury Protect Nebraska Plaintiff					
36.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (NE) v. D (NE)	NE/KS	CR	False: NE NE (6.08)	NE
	Kansas State Interest: Nebraska State Interest: Place of Injury Protect Nebraska Plaintiff					
37.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (NE) v. D (NE)	KS/NE	LA	False: NE NE (6.06)	NE
	Kansas State Interest: <del>Place of Injury</del> Nebraska State Interest: Protect Nebraska Plaintiff					
38.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (NE) v. D (NE)	KS/NE	CR	False: NE NE (6.08)	KS
	Kansas State Interest: <del>Place of Injury</del> Nebraska State Interest: Protect Nebraska Plaintiff					
39.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (NE) v. D (NE)	KS/KS	LA	False: NE NE (6.06)	NE
	Kansas State Interest: <del>Place of Injury</del> Nebraska State Interest: Protect Nebraska Plaintiff					

40.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (NE) v. D (NE)	KS/KS	CR	False: NE	KS (6.04)	KS
	Kansas State Interest: <del>Place of Injury</del> Nebraska State Interest: Protect Nebraska Plaintiff						
41.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (NE) v. D (KS)	NE/NE	LA	True: NE	NE (6.07)	NE
	Kansas State Interest: Protect Kansas Defendant Nebraska State Interest: Place of Injury Protect Nebraska Plaintiff						
42.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (NE) v. D (KS)	NE/NE	CR	True: NE	NE (6.04)	NE
	Kansas State Interest: Protect Kansas Defendant Nebraska State Interest: Place of Injury Protect Nebraska Plaintiff						
43.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (NE) v. D (KS)	NE/KS	LA	True: NE	NE (6.08)	NE
	Kansas State Interest: Protect Kansas Defendant Nebraska State Interest: Place of Injury Protect Nebraska Plaintiff						
44.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (NE) v. D (KS)	NE/KS	CR	True: NE	NE (6.08)	NE
	Kansas State Interest: Protect Kansas Defendant Nebraska State Interest: Place of Injury Protect Nebraska Plaintiff						
45.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (NE) v. D (KS)	KS/NE	LA	True: KS	NE (6.08)	KS
	Kansas State Interest: <del>Place of Injury</del> Protect Kansas Defendant Nebraska State Interest: Protect Nebraska Plaintiff						
46.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (NE) v. D (KS)	KS/NE	CR	True: KS	NE (6.08)	KS
	Kansas State Interest: <del>Place of Injury</del> Protect Kansas Defendant Nebraska State Interest: Protect Nebraska Plaintiff						
47.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (NE) v. D (KS)	KS/KS	LA	True: KS	KS (6.07)	KS
	Kansas State Interest: <del>Place of Injury</del> Protect Kansas Defendant Nebraska State Interest: Protect Nebraska Plaintiff						

48.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (NE) v. D (KS)	KS/KS	CR	True: KS	KS (6.04)	KS
	Kansas State Interest: <del>Place of Injury</del> Protect Kansas Defendant Nebraska State Interest: Protect Nebraska Plaintiff						
49.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (KS) v. D (NE)	NE/NE	LA	False: NE	NE (6.07)	NE
	Kansas State Interest: Nebraska State Interest: Place of Injury						
50.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (KS) v. D (NE)	NE/NE	CR	False: NE	NE (6.04)	NE
	Kansas State Interest: Nebraska State Interest: Place of Injury						
51.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (KS) v. D (NE)	NE/KS	LA	False: NE	NE (6.08)	NE
	Kansas State Interest: Nebraska State Interest: Place of Injury						
52.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (KS) v. D (NE)	NE/KS	CR	False: NE	NE (6.08)	NE
	Kansas State Interest: Nebraska State Interest: Place of Injury						
53.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (KS) v. D (NE)	KS/NE	LA	Unprovided: KS	NE (6.08)	KS
	Kansas State Interest: <del>Place of Injury</del> Nebraska State Interest:						
54.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (KS) v. D (NE)	KS/NE	CR	Unprovided: KS	NE (6.08)	KS
	Kansas State Interest: <del>Place of Injury</del> Nebraska State Interest:						
55.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (KS) v. D (NE)	KS/KS	LA	Unprovided: KS	KS (6.07)	KS
	Kansas State Interest: <del>Place of Injury</del> Nebraska State Interest:						

56.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (KS) v. D (NE)	KS/KS	CR	Unprovided: KS	KS (6.04)	KS
	Kansas State Interest: <del>Place of Injury</del> Nebraska State Interest:						
57.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (KS) v. D (KS)	NE/NE	LA	True: NE	KS (6.06)	KS
	Kansas State Interest:-Protect Kansas Defendant Nebraska State Interest: Place of Injury						
58.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (KS) v. D (KS)	NE/NE	CR	True: NE	NE (6.04)	NE
	Kansas State Interest: Protect Kansas Defendant Nebraska State Interest: Place of Injury						
59.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (KS) v. D (KS)	NE/KS	LA	True: NE	KS (6.06)	KS
	Kansas State Interest:-Protect Kansas Defendant Nebraska State Interest: Place of Injury						
60.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (KS) v. D (KS)	NE/KS	CR	True: NE	NE (6.08)	NE
	Kansas State Interest:-Protect Kansas Defendant Nebraska State Interest: Place of Injury						
61.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (KS) v. D (KS)	KS/NE	LA	False: KS	KS (6.06)	KS
	Kansas State Interest: <del>Place of Injury</del> Protect Kansas Defendant Nebraska State Interest:						
62.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (KS) v. D (KS)	KS/NE	CR	False: KS	NE (6.08)	KS
	Kansas State Interest: <del>Place of Injury</del> Protect Kansas Defendant Nebraska State Interest:						
63.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (KS) v. D (KS)	KS/KS	LA	No Choice of Law Dispute		
	Kansas State Interest: <del>Place of Injury</del> -Protect Kansas Defendant Nebraska State Interest:						
64.	Kansas—Defendant Preferred Nebraska—Plaintiff Preferred	P (KS) v. D (KS)	KS/KS	CR	No Choice of Law Dispute		
	Kansas State Interest: <del>Place of Injury</del> -Protect Kansas Defendant Nebraska State Interest:						