Michigan Law Review

Volume 89 | Issue 8

1991

On the Need for a Uniform Choice of Law Code

Larry Kramer
University of Michigan Law School

ON THE NEED FOR A UNIFORM CHOICE OF LAW CODE

*Larry Kramer**

At first blush, the notion of a uniform choice of law code seems almost paradoxical. After all, the primary mission of the National Conference of Commissioners on Uniform State Laws (NCCUSL) is to promote uniformity in the law, while choice of law exists only because laws are not uniform. To be sure, the Constitution of the NCCUSL limits the organization's objective to promoting uniformity "where uniformity is desirable and practicable,"[1] which leaves plenty of room for different laws and hence for choice of law. But even so, one would expect the Commissioners to devote their limited resources to reducing the conflicts that necessitate choice of law rather than to improving the choice of law process itself.

Possibly for this reason, the National Conference has not spent much time on choice of law. It has, over the years, adopted a few measures dealing with particular conflicts problems,[2] but choice of law as a field has largely been ignored. This essay argues that such indifference is a mistake and that the NCCUSL should make a place on its agenda for comprehensive treatment of choice of law. Indeed, a uniform choice of law code promulgated under the auspices of the NCCUSL could be as important and useful in this field as the Commissioners' most notable achievement — the Uniform Commercial Code — was in the field of commercial relations.

I. ON THE RELEVANCE OF CHOICE OF LAW

Before turning to the argument for a uniform law, we should take a moment to consider why choice of law is worth the National Confer-

* Professor of Law, University of Michigan Law School. B.A. 1980, Brown University; J.D. 1984, University of Chicago. — Ed. I am grateful to Alex Aleinikoff, Lea Brilmayer, Herma Hill Kay, Rick Pildes, and Kent Syverud for their helpful comments on an earlier draft.

1. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS NINETY-FIFTH YEAR 463 (1990).

2. *E.g.*, UNIF. CONFLICT OF LAWS — LIMITATIONS ACT, 12 U.L.A. 59 (1991 Supp.); UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 115 (1991); UNIF. DIVORCE RECOGNITION ACT, 9 U.L.A. 355 (1988); UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT, 13 U.L.A. 149 (1991). In addition, the Uniform Commercial Code and the Uniform Probate Code contain provisions dealing with choice of law problems. *See, e.g.*, U.C.C. § 9-103 (1991); UNIF. PROBATE CODE § 2-506 (1991).

ence's (or, for that matter, anyone's) attention. One reason is practical: conflicts problems arise in an enormous number of cases.[3] These include many of today's most vexing litigation problems, such as liability for mass torts, responsibility for environmental cleanup, and (perhaps most important) insurance coverage for these two issues. Yet courts today are plainly confused about how to handle choice of law cases.[4] Thus, simple concern for effective litigation management makes choice of law worth examining.

Choice of law is important for another reason as well. Consider Bill Miller's observation that in saga Iceland "law" referred not only to positive enactments but also to the community that lived by those enactments.[5] This rich meaning of law probably is not apparent to English speakers today, but the point nevertheless remains valid. Not that law is the only thing that establishes a community; many of the social conventions that foster a sense of membership and exclusion operate outside the direct influence of promulgated legal norms. But the positive enactments loosely included in today's conventional understanding of "law" are nonetheless an important part of the way a polity creates and asserts its self-identity.

This, of course, is contrary to current academic fashion, which emphasizes the importance of ethnic identity and private power.[6] But even these concerns inevitably must be addressed within the framework of a positive legal apparatus. Hence, debates about whether and how to preserve ethnic cultures or control private power invariably deal with the content of positive law. If individual empowerment is a goal of participatory democracy, one of the objectives is empowerment to enact laws of a particular type.[7]

In the United States, of course, we cannot talk about "the" positive law, as if there were only one. There are more than fifty positive laws, including federal law and the laws of the states and territories. More-

3. I am not aware of any statistics on the number of conflicts cases, but a LEXIS search for the phrases "choice of law," "conflict of laws," or "conflicts of law" turned up 17,862 state and federal cases. This is not surprising given population centers that span state borders and the ease of interstate travel and communication.

4. *See* Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. (forthcoming 1991); *cf.* Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983) (describing different approaches used in different states); Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041 (1987) (same).

5. Miller, *Of Outlaws, Christians, Horsemeat, and Writing: Uniform Laws and Saga Iceland*, 89 MICH. L. REV. 2081, 2082 (1991).

6. *See, e.g.*, Cover, *The Supreme Court, 1982 Term — Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983); Torres & Milun, *Translating* Yonnondio *by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625; West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990).

7. *See* Binder, *What's Left?*, 69 TEXAS L. REV. (forthcoming 1991).

over, preserving this multiplicity of overlapping but independent sovereign communities is one of the fundamental and enduring commitments of our constitutional order.[8] And this, in turn, entails a commitment to respect and preserve the separate laws through which each of these communities articulates its values and establishes its social order. Choice of law plays a critical role in this regard: by defining each sovereign's power to regulate vis-à-vis other sovereigns, it establishes the effective boundaries.

To return to tenth-century Iceland, Miller posits that the Icelanders had to become all pagan or all Christian because they lacked a state to mediate disputes about where the old law left off and the new law began.[9] But a decisionmaking body, even one with enforcement authority, also needs to draw lines in a way that adherents of both laws accept as fair and legitimate. This is where principles of choice of law become important.

I do not want to overstate the importance of choice of law, which obviously is not the dominant issue in intergovernmental relations. But for most readers, I suspect the topic suggests only trivial matters: guest statutes, statutes of limitations, and the like. Such problems (which have concededly occupied too much of the time of conflicts scholars) are hardly ones on which a community's identity stands or falls — though we should acknowledge that these are in fact the problems that bring most people to the legal system. In any event, decisions about choice of law are not limited to car accidents and slip-and-fall cases. Choice of law also concerns marriage, divorce, child custody, abortion, criminal law, welfare, education, and innumerable other matters of greater and lesser importance. Choice of law defines the scope of the whole corpus of a state's law, and in this way it defines the scope of the community itself.

II. On the Need for Uniform Choice of Law Rules

It does not follow that because states need a choice of law system, all states need the same system. On the contrary, once we recognize that choice of law defines the limits of a state's law, looking for uniformity seems a bit unrealistic. Surely different states may legitimately have different desires and expectations about how far their laws should extend. That being so, why worry about uniformity?

Once again, there is an easy answer based on practical considera-

8. This is a matter of more than symbolic importance, for while federal power has expanded enormously throughout the twentieth century, the vast majority of the law that affects most citizens remains state and local.

9. Miller, *supra* note 5, at 2094.

tions and a more complicated answer having to do with the nature of choice of law. The easy answer is that uniform treatment of choice of law helps the parties by assuring predictable outcomes. People seldom plan to end up in court, and usually do not know where they will litigate until hostilities commence.[10] Consequently, if states employ different approaches to choice of law, the parties cannot know what law governs their conduct until after they have acted. The resulting uncertainty is unfair, and it discourages desirable interstate activity. Because this is bad for all states, all states should have an interest in devising a choice of law system that provides predictable, uniform treatment of multistate cases.

This argument reflects one side of a longstanding dispute between advocates of choice of law rules and proponents of case-by-case analysis of the policies at issue.[11] Rules advocates emphasize the importance of consistency and uniformity and argue that these values are best achieved with a shared system of rules.[12] Advocates of case-specific analysis counter that judges should be concerned primarily with implementing substantive policies and that this is best done by approaching each case on its own terms.[13]

This dispute, in turn, is merely a particularized example of a larger legal debate about rules versus discretion. It is a debate that cannot be resolved in general terms or on the basis of deductive logic. Rather, the choice between rules and case-specific analysis (or an appropriate mix of the two) turns in any particular context on certain empirical and value judgments: How important is predictability in this area? Does case-by-case analysis identify substantively correct answers better than rules we can realistically formulate? How much better? Can we devise rules that are sufficiently clear and workable to provide real guidance?

Judgments about these questions in choice of law have varied over the years. During the eighteenth and nineteenth centuries, common

10. In some commercial contexts, the parties include choice of law or choice of forum clauses. This alternative is unavailable in nonconsensual transactions, however, and even in contract cases it helps only if courts enforce the clauses — a choice of law question on which states differ.

11. *See* Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 7 n.15 (1989) (citing authorities).

12. *See, e.g.*, Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 212-13 (1981); Reese, *Choice of Law: Rules or Approach?*, 57 CORNELL L. REV. 315 (1972); Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946 (1981).

13. *See, e.g.*, B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 170-71, 183-87 (1963); M. HANCOCK, *Three Approaches to the Choice-of-Law Problem: The Classificatory, the Functional and the Result-Selective*, in STUDIES IN MODERN CHOICE-OF-LAW: TORTS, INSURANCE, LAND TITLES 1 (1984).

law courts developed a comprehensive system of rules for resolving conflicts problems. These rules were then attacked vigorously by academics during the first half of the twentieth century. Critics charged that the traditional rules were in fact very bad at identifying substantively correct outcomes and (because they were easily manipulated) not much better at providing uniformity and predictability. But the attack went beyond calling for different and better rules. Instead, reasoning that rules are inherently inferior to case-by-case analysis at finding right answers, the reformers urged judges to worry less about predictability and more about substantive outcomes in particular cases.[14]

Beginning with the 1963 decision in *Babcock v. Jackson,*[15] this critique swept through the courts, and judges in most states abandoned the traditional choice of law rules for a variety of more ad-hoc approaches. Within a remarkably short time, however, minds began changing again, as experience with case-by-case analysis led observers increasingly to appreciate the values of uniformity and predictability. Most commentators today recognize that while the traditional rules were far from perfect, they provided more consistency than their critics realized. There is, simultaneously, a general perception that choices made under case-specific approaches are seldom clear cut, leaving room to question whether the results really are substantively better. As a result, more and more commentators have begun advising courts to return to rules.[16] There is, however, little sentiment in favor of reinvigorating the traditional rules, which practically everyone agrees are overbroad and arbitrary. Instead, the revisionist view is that we should develop new rules to fill this gap.[17]

As I suggested above, there is a second (and in my view better) reason for creating a uniform choice of law code — one having to do with the nature of choice of law. The premise of the first argument is that the benefit of rules in terms of predictability more than offsets

14. For a more detailed recounting of these developments, see L. BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 22-41 (1991).

15. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

16. *See* Kramer, *Rethinking Choice of Law,* 90 COLUM. L. REV. 277, 320-21 (1990); Singer, *supra* note 11, at 27. Singer offers a valuable reminder that the lines drawn in this debate are less sharp than we like to pretend: rule-like patterns develop under ad-hoc analysis, flexible standards are employed in implementing rules, policy analysis is required to choose among rules. *Id.* at 6-23. But if the differences are less distinct than is commonly supposed, there are nevertheless differences. Moreover, experience in choice of law suggests that however narrow these differences ought theoretically to be, they are in fact quite large in practice.

17. A notable exception is Professor Alfred Hill, who maintains that the common law choice of law rules generally do a good job of accommodating state interests with the need for workable rules. Hill, *The Judicial Function in Choice of Law,* 85 COLUM. L. REV. 1585 (1985).

their cost in terms of the occasional substantively incorrect answer. An underlying assumption — one made in virtually all debates about rules and discretion — is that case-specific analysis is superior at finding the right answer in any particular case. Choice of law rules are supposedly justified only because this advantage is outweighed by the unpredictability of case-by-case analysis. I want to suggest, however, that choice of law rules may be essential not only to provide predictability, but also to produce the best substantive outcomes.

To understand why rules are necessary to achieve the best substantive results in choice of law, we must first consider what we mean by a "right" answer in this context. When lawyers argue that one of two legal rules (or two interpretations of the same rule) is "right," they are usually making one of two kinds of claims. On the one hand, an answer may be right for *process* reasons, that is, because one rule (or one interpretation) comes from a more authoritative lawmaker: statutes are superior to common law, decisions of higher courts trump those of lower courts, decisions of later legislators are preferred to those of earlier ones, and so on. Alternatively, an answer may be right for *substance* reasons, that is, because it is better as a matter of social or political justice: thus, one solution may allocate resources more efficiently, move society toward a more equitable distribution of power, avoid morally irrelevant differences, or serve some other desirable goal.

Defining the relationship between these two kinds of claims is not easy. In practice, "process-based" and "substance-based" arguments overlap and inform one another. To take an obvious example, if there is a dispute over how to read an ambiguous statute or judicial opinion, one's views about which reading is substantively better may inform the result without being expressly or even consciously identified as such. Be that as it may, arguments of each type are presented and debated as distinct ways of thinking about law. The still predominant legal process model consists largely of an effort to minimize the role of substantive argument in adjudication — reserving it for cases of genuine ambiguity or conflicting rules of equal authority. The most powerful challenges to that model, in the meantime, involve efforts to upgrade the status of arguments based on substantive justice. But while both approaches may be controversial (depending on whom one asks), both reflect a style of argument that judges and lawyers generally find familiar.

A common feature of both legal process and substantive justice thinking is the assumption that there is a right answer in every case. The answer may not be obvious; it may not be demonstrable to a cer-

tainty through the exercise of logical deduction. The parties may disagree about whether it turns on procedural or substantive justifications, or about which procedural or substantive justifications are even legitimate. But whatever particular premises one accepts, the general assumption is that one of the available options is intrinsically "better" or "more right" in any particular case. Put another way, there is a notion that through the application of some form of proper reasoning we can assign the options objective, relative priorities.

This way of thinking about law has naturally made its way into choice of law. Like scholars in every other field, choice of law scholars assume that their task is to develop a theory of procedural or social justice that will identify the law that provides the best "conflicts justice" in each case.[18] In my view, this whole way of thinking about the problem is misleading. The reason is this: in any true conflict, we have (at least) two competing versions of justice, each associated with a different sovereign. Because these sovereigns are, by definition, coequal — because, that is, each is equally entitled to decide what is right for a particular case — we have no ground from which to judge one state's law better or more just. On the contrary, subordinating one state's law to the other's on such grounds is inconsistent with the premise of sovereign equality.

It does not follow that each state should just go its own way.[19] It follows only that we cannot resolve such cases through conventional appeals to a procedurally more authoritative or substantively better law. We cannot, in other words, say that one state is a superior lawmaker (the way we say that a legislature is superior to a common law court within a single state) or that one state's solution is more just — for both these statements are inconsistent with the premise that

18. There are choice of law approaches fitting both the substance-based and the process-based models. The most well-known substance-based theory is Leflar's "choice-influencing considerations," often called the "better law" approach. *See* Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966). Joe Singer offers a modernized and considerably more sophisticated version of "better law" analysis. Singer, *supra* note 11. The most well-known process-based approach is the *Second Restatement*, which purports to identify the more authoritative lawmaker in any given case (the state with the "most significant relationship") based on a balancing of relevant factors and contacts. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1988). Aaron Twerski's "enlightened territorialism" is another example of a process-based approach. Twerski, *Enlightened Territorialism and Professor Cavers — The Pennsylvania Method*, 9 DUQ. L. REV. 373 (1971).

19. This was Brainerd Currie's solution. B. CURRIE, *supra* note 13, at 117-21 (forum should apply its own law in true conflict because courts are not capable of choosing and so should fulfill their role as agents of the state's lawmakers). Note, however, that while this idea is most closely associated with Currie, it can be found in other places as well. The traditional rejection of the renvoi, for example, assumes that when states disagree about how to resolve a choice of law problem, the forum should follow its own solution. *See* Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. (forthcoming 1991).

each sovereign is equally entitled to make law. Instead, we must think about choice of law more like treaty negotiations, where the "correctness" of a particular solution is simply a matter of what the states agree to do.

To illustrate, imagine a simple multistate choice of law problem (the kind that I suggested above is already discussed too much in choice of law scholarship but that nonetheless is useful for these purposes): *P* and *D* sign a contract in which *D* agrees to leave the bulk of her estate to *P* in exchange for certain services. *P* is from Illinois, which enforces contracts to make a will; *D* is from Michigan, which prohibits such contracts in order to protect the economic well-being of decedent's survivors. After *P* performs the required services, *D* informs him that she will not alter her will. *P* sues, relying on Illinois contract law. *D* counters that Michigan law applies and that the contract is therefore unenforceable (though *P* may recover in quantum meruit).

The first question is whether the case presents a conflict at all. None of this stuff about reconciling the laws of coequal sovereigns matters unless both parties have a plausible argument for relying on the laws they cite. This much of the problem is similar to any wholly domestic case: the court must interpret each law separately and determine whether the party invoking it states a claim or defense on these particular facts.[20] Here, *P* can reasonably argue that Illinois protects contractual expectations when the economic consequences of an agreement are felt in Illinois, while *D* can just as reasonably argue that Michigan prohibits agreements to make a will that could deprive Michigan families of estate assets. Thus, while there are undoubtedly cases in which Illinois or Michigan law does not apply — for instance, where there are no economic consequences in Illinois or where the decedent has no connection to Michigan — this does not seem to be one of them. Both states would apply their laws here because the facts implicate the purposes of both states' laws.

The case thus presents a real conflict, and we must find a way to choose one of the laws. We cannot make this choice by asking about the rights and interests of the parties, because their rights and interests are defined by law and we have two laws that define these rights differ-

20. The idea that deciding whether there is a conflict in multistate cases is similar to deciding whether a party states a claim in ordinary domestic cases is familiar to students of choice of law. Because I have explored this issue elsewhere and want to focus here on cases in which a real conflict exists, I will not discuss it further. Interested readers may see Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, 24 CORNELL INTL. L.J. 245 (1991) [hereinafter Kramer, *More Notes*]; Kramer, *supra* note 16, at 280-311; Kramer, *supra* note 19.

ently. We must find some other way to decide which state has a superior claim to define the parties' rights on these facts.

Can we find an answer in the Constitution? Certainly not under present law. Constitutional restrictions on choice of law leave room for more than one law in a great many situations, including this one.[21] Basically, the Court has held that any state with a material domestic interest in the disposition of a case may apply its law.[22] The reasons for this minimalist approach are easy to understand. It is one thing to draw a line between interested and disinterested states and say that a disinterested state has no legislative jurisdiction. Quite apart from choice of law considerations, there is no reason to extend a state's sovereignty to persons or disputes with which the state has no connection. Choosing among legitimately interested states, however, is another matter altogether. Uncertain about how to make such choices, and aware that the states themselves are hopelessly divided on the question, the Court has hesitated to constitutionally mandate any particular choice of law system.

Moreover, restraint makes sense for reasons other than reluctance to impose a particular choice of law scheme during a time of flux. How would the Court make such choices? As I noted above, the conventional legal response is to appeal either to the superior authority of one of the lawmakers or to the substantive justice of one of the laws. Clearly the Court cannot choose on the ground that one state is a more authoritative lawmaker. The federal government is superior to the states, but the states are all equally authoritative. Interstate travel and communication may create overlaps in states' regulatory and other policies, but one state does not become less authoritative in legislating just because another state is also interested. Real conflicts simply present a choice between two equally authoritative, but inconsistent legal rules.

When faced with such conflicts in wholly domestic cases, courts generally turn to substantive considerations and choose the law that

---

21. *See* E. SCOLES & P. HAY, CONFLICT OF LAWS § 3.20-3.30 (1984).

22. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981). *But see* Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (holding that forum may always apply its own statute of limitations, even where a claim is governed by the substantive law of a different state). The Constitution also imposes substantive constraints on state lawmakers. Thus, the hypothetical case in the text would be easy if one of the laws violated one of these provisions of the Constitution. Alternatively, the due process clause makes it unconstitutional to apply even a substantively constitutional law under certain circumstances, such as where the disadvantaged party had no reason to expect this result. *See, e.g.*, Home Ins. Co. v. Dick, 281 U.S. 397 (1930). For purposes of this discussion, I assume that such arguments are unavailable and that the case falls within the relatively large sphere of discretion the Constitution leaves to states.

reflects the better policy. That move is unavailable in the multistate context, however. Consider my hypothetical case: Illinois has determined that contracts to make a will are permissible and gives parties a right to protect their contractual expectations. Michigan apparently disagrees: its lawmakers have determined that it is "better" to protect survivors, even if this means upsetting an otherwise innocent party's expectations. Both states have a legitimate interest in the disposition of the case and are therefore equally entitled to assert legislative jurisdiction. Which state's law is "better"? Most commentators probably prefer Illinois' decision to enforce, though it is certainly something about which reasonable persons could disagree. But the point is that once Michigan's lawmakers disagree, the question of a better law becomes meaningless: we *begin* the choice of law analysis from the premise that states are coequal sovereigns, entitled to make different judgments. True conflicts present competing but equally legitimate versions of what is just in a particular case, and each state — by definition — has an equal claim to have its law applied, its policy implemented, and its version of the just result vindicated.

Perhaps there is an intermediate position. Conceptually, at least, it seems plausible to say that one state's contacts with a case can give that state a stronger claim to apply its law — that while the other state's contacts may be sufficient to create an interest, they are more tangential. On this view, the state with the stronger contacts is the more authoritative lawmaker *in this case.* Such an approach probably coincides with the intuitions of many readers and may explain the popularity of the *Second Restatement.* But it still assumes an objective measure of the relative strength of each state's claim to apply its law, and there simply is no such measure — or rather there are fifty such measures, each equally valid for these purposes. So if Illinois considers the domicile of the party seeking enforcement critical, while Michigan says to apply the law of the place where the contract was made, we have no external point of reference from which to judge one state right and the other wrong. The states have simply made different determinations about when they want to exercise legislative jurisdiction.

It does not follow that any solution is necessarily arbitrary. But we need to change the way we think about the problem and recognize that "right" answer in this context means something different, something subjective. Because states are equally authoritative in making rules for multistate cases, the only "right" answer is one the interested states agree mutually to adopt. Just as each state is free to decide whether to permit or prohibit contracts to make a will in the first place, each is free to decide what contacts with the state trigger that

law's applicability. Accordingly, if the states agree to apply a particular law in particular situations, their agreement makes that the "right" answer for those cases.[23]

Developing such agreement may be difficult. Why should either state agree to apply the other state's law instead of its own? Applying another state's law means sacrificing the substantive policy of your own. If Michigan law is applied, Michigan policy is implemented — and Illinois policy is not. Why should Illinois agree to this instead of holding out for the application of Illinois law? Put another way, since the choice in any true conflict appears to be zero-sum, how are states to decide whose law should yield?[24]

The flaw in this reasoning is the assumption that choice of law is zero sum. To be sure, in any particular case, applying one state's law necessarily means not applying the other's. But the policies at stake may not be equally important to both states. Each state presumably cares more about some true conflicts than others, because some true conflicts affect more important purposes of the state's laws or affect these purposes in more important ways. Moreover, because the states' substantive policies are different, it is unlikely that their preferences in this regard are identical. Choice of law is thus a variable-sum game in which some solutions may leave states better off than others by calling for the application of their laws in more of the cases they care about.

This understanding, in turn, suggests a way to think about securing agreement on multistate choice of law problems. It is impossible for all states to implement their policies in true conflict cases: one state's law will not be applied in each case, frustrating that state's policy at least to that extent. We can, however, look for solutions that

23. Alternatively a choice of law solution could be imposed on the states by a superior authority — in this case Congress, which is expressly empowered to enact such a law by the full faith and credit clause. U.S. CONST. art. IV, § 1, cl. 2. Michael Gottesman recently made a powerful argument for such a solution, which has a number of obvious advantages (not the least of which is that it could be implemented across the nation immediately). Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (forthcoming October, 1991). Nonetheless, a solution that originates in the states seems preferable for several reasons. First, getting choice of law onto the national agenda in Congress is unrealistic. Second, a choice of law scheme that originates in and is agreed to by the states is likely to be better because the problem itself concerns the scope of state laws. In this regard, it is worth remembering that one of the aims of the NCCUSL was to minimize federal intrusion into state law matters by providing states a collective voice on questions requiring coordination. Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 LAW & CONTEMP. PROBS. 233, 237 (1965).

24. *Cf.* B. CURRIE, *supra* note 13, at 169:

> There remains the stubborn fact that under any conceivable conflict-of-laws method the interests of one state will be sacrificed to those of another whenever there is a conflict. The only virtue of the method proposed here [to apply forum law] is that it at least makes the choice of interests on a rational and objective basis: the forum consistently applies its own law in case of conflict, and thus at least advances its domestic policy.

enhance the likelihood that each state's law is applied in the cases it cares about most. That way, even if no state fully realizes its objectives, all states can at least maximize the extent to which they implement their policies.

The success of such an approach requires states to cooperate with one another. To maximize state policies, we must determine which cases states care about and arrange tradeoffs to secure the application of each state's law in as many of these as possible. Because true conflict cases are litigated in different courts, however, all states must enforce the tradeoffs so defined, directing their courts to apply foreign law in appropriate cases. Only by thus making choice of law turn on actual policy preferences rather than where suit is brought can we successfully maximize state policies.

With this analysis, we are at last in a position to understand why rules are necessary to produce the best substantive results in choice of law. First, while it seems theoretically possible to run such an approach case-by-case — requiring the court to apply the law of the state with the stronger policy commitment in the particular case[25] — in practice such determinations are so subjective and complex as virtually to guarantee arbitrariness.[26] Maximizing the interests of different states can be done only on a more wholesale basis: by identifying generally shared policies or policy preferences and constructing rules that systematically advance these.[27]

Second, and more important, to cooperate successfully states must be able to coordinate the handling of cases in their own courts and to monitor compliance by courts in other states. As noted above, deferring to foreign law in appropriate cases makes sense only if other states follow suit, for only then is a state's forbearance from applying its own law repaid by the reciprocal forbearance of others. This, in turn, requires both internal coordination and external monitoring to ensure consistent treatment by judicial bureaucracies in each state, and that can be done effectively only with a system of rules.[28]

The argument is thus that rules provide the most effective mechanism for implementing a system of tradeoffs that will maximize the interests of all states. Such a system, in turn, can provide a framework

25. This essentially is Baxter's proposal for resolving true conflicts by "comparative impairment" analysis. Baxter, *Choice of Law and the Federal System,* 16 STAN. L. REV. 1 (1963).

26. This is borne out by the experience of courts attempting to apply comparative impairment analysis. *See* Kramer, *supra* note 16, at 315-18 & n.135.

27. For a more detailed analysis of how such rules work, including illustrations, see *id.* at 319-38; Kramer, *More Notes, supra* note 20.

28. *See* Kramer, *supra* note 16, at 339-44; Kramer, *supra* note 19.

for building a consensus about handling choice of law. Hence, the best way to "solve" the choice of law problem is to develop a system of rules that states will agree to follow.

III. On the Need for Action by the NCCUSL

Not any system of rules will do, of course. We need rules that actually maximize state interests in true conflicts, something that most definitely will be difficult to achieve. We must articulate and reduce to workable formulations a great many complex tradeoffs. Moreover, the true conflict "pie" can be divided along any number of axes: by shared substantive preferences, by the relative emergence or obsolescence of particular policies, by how policies fit within or across state systems, by the states' ordering of policies in wholly domestic cases, and probably in numerous other ways as well. The question, then, is how best to work out the specific terms of acceptable choice of law rules.

One possibility is to leave the courts to develop rules through common law adjudication. This has the advantage of allowing for trial and error. Courts can experiment with rules — developing and testing alternatives for different situations, writing opinions that explain why a particular rule seems beneficial, responding to perceived defects in other courts' rules. Given the newness of this approach to choice of law, and the difficulty of making the required determinations, this process could be extremely beneficial. Eventually, a consensus will emerge, gathering momentum as more states begin using the same rules.

There are, however, significant obstacles to developing a complete system of rules through common law adjudication.[29] It is always difficult to coordinate decisionmaking in a large, decentralized system. If trial and error leads different courts to strike out in different directions, getting them to settle on a uniform practice is likely to prove difficult. This problem is exacerbated by the fact that optimal tradeoffs may require linking issues across categories. Because issue linkage vastly increases the number of potential rules, there is likely to be considerable disagreement and confusion about which formulations are best. Finally, maximizing state interests and building cooperation requires rules that cover a wide spectrum of conflicts disputes. Adopting a particular rule or subset of rules may not be in a state's interests unless rules in some other area provide offsetting benefits. Yet courts develop solutions on a piecemeal basis — case by case, problem by

29. *See* L. Brilmayer, *supra* note 14, at 182-83.

problem. As a result, getting the system going may be terribly difficult.

While these obstacles are indeed formidable, I have explained elsewhere why it is nonetheless plausible to believe that over time judges could develop workable choice of law rules that resemble a sort of constructive multistate compact.[30] The long tenure of the traditional rules evidences this possibility, as does the uniformity of common and customary law in many areas of domestic and international law.[31] At best, however, developing a comprehensive system of choice of law rules through adjudication will be extremely slow, and a lot of time and resources will be wasted in the meantime.

For this reason, it makes more sense to promulgate a choice of law code outside the context of decisional law. While this limits the opportunity to experiment with different proposals, such a code avoids the problems discussed above. A centralized decisionmaking body can consider a wide array of problems simultaneously, make necessary or appropriate issue linkages, and produce a complete system of rules. States may then sign onto this system, diminishing the time it would otherwise take to reach a consensus and greatly increasing the chances of success. To further facilitate this process, each state's use of such a code could be made contingent on reciprocity from other states. States adopting the code would follow it only in conflicts with other states that do the same; otherwise, the state would simply apply its own law. This would prevent free riding and heighten the pressure to cooperate.[32]

The only remaining problem is to find an institution with the necessary authority and resources. I have already indicated why I think a federal solution is unlikely and may be less desirable than a solution that originates in the states.[33] Most choice of law scholars assume that the ideal body to resolve choice of law problems is the American Law Institute, which has provided the twentieth century's most widely used approaches to choice of law. As Lea Brilmayer recently explained in discussing the possibility of developing a *Restatement (Third) of Conflict of Laws:*

> The Restatements enjoy numerous advantages in setting out cooperative conflict of law solutions. First, because the Restatements are comprehensive documents, they can cover a broad enough range of topics to link issues on which some states stand to benefit with issues on which the

30. *See* Kramer, *supra* note 16, at 343-44; Kramer, *supra* note 19.

31. *See* Kramer, *supra* note 19.

32. *See id.*

33. *See supra* note 23.

> others do. Also because they are comprehensive, they can be drafted to cover a wide enough range of contingencies to give clear guidance. Courts should not have to guess too often about how cases ought to be decided because the goal is cooperative behavior, and coordination is not possible if the instructions are too vague. Third, the membership of the American Law Institute is drawn from all over the country and does not owe allegiance to a particular state or region. As a less political body than a typical state legislature, its solutions should reflect the interests of the multistate system as a whole and be perceived as relatively neutral.[34]

These same advantages apply to uniform laws adopted under the auspices of the NCCUSL. Moreover, uniform laws are superior to the Restatements in a number of important respects. First, the membership of the National Conference consists of official appointees from all fifty states and is thus ideally suited to negotiate the concessions states must make to one another.[35] Second, because uniform laws are positively enacted by state legislatures, they may acquire greater authority and prove more durable than a Restatement.[36]

The most important advantage of a uniform law over a Restatement, however, derives from a limitation inherent in the whole Restatement project. The function of a Restatement is just that: to *restate* the law, to identify "as nearly as may be the rules which our courts will apply today."[37] To be sure, the ALI has a well-deserved reputation for stretching the precedents to reform and improve the law.[38] But the drafters of a Restatement are nonetheless bound to a considerable degree by existing decisions.[39]

---

34. L. BRILMAYER, *supra* note 14, at 185 (footnote omitted). Brilmayer herself does not appear to favor a Restatement to the exclusion of other forms of choice of law codes; she is concerned that some such solution be developed.

35. This distinguishes work produced by the NCCUSL from the ALI's "model laws," which are otherwise similar to uniform laws.

36. *Cf.* L. BRILMAYER, *supra* note 14, at 182 (legislative solutions are likely to be more stable than judicial solutions). It is, of course, possible to codify a Restatement, but this is contrary to the purpose of the Restatement project. In the words of the ALI's first director, "there never has been any desire to give [the Restatements] statutory authority," for they are "designed to help preserve not to change the common system of expressing law and adapting it to changing conditions in a changing world." Lewis, *History of the American Law Institute and the First Restatement of the Law: "How We Did It,"* in RESTATEMENT IN THE COURTS 19 (permanent ed. 1945).

37. Lewis, *supra* note 36, at 19; *see also* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 582 (1973); Corbin, *The Restatement of the Common Law by the American Law Institute,* 15 IOWA L. REV. 19, 21-22 (1929); Goodrich, *The Story of the American Law Institute,* 1951 WASH. U. L.Q. 283, 286.

38. *See* Wechsler, *The Course of the Restatements,* 55 A.B.A. J. 147, 149-51 (1969).

39. As Wechsler points out, the ALI has in recent years been much more open about using Restatements to reform the law. *Id.* Nevertheless, the limits imposed by existing precedent remain severe. For example, Wechsler cites the *Restatement (Second) of Conflict of Laws* to illustrate the new reformist approach to restating the law. In my second year of teaching, I attended an annual meeting of the Association of American Law Schools held in Miami. The conflicts section met in tribute to Willis Reese, reporter for the *Restatement (Second).* The occasion notwithstanding, a number of participants could not resist criticizing Reese for having retained

This is a real disadvantage in drafting a choice of law code. Existing decisions on choice of law are products of a long tradition of confused and misguided thinking, and results in many areas are plainly colored by the conceptual abstrusities that have befuddled (and continue to befuddle) analysis in this field. Some of these solutions may ultimately prove useful, but clearly it is better if the drafters of a code can freely abandon authority and strike out in new directions where appropriate. This is a freedom enjoyed by the drafters of a uniform law but not a Restatement.

CONCLUSION

Choice of law is an important practical as well as theoretical problem. We need a sensible, workable conflicts doctrine to facilitate interstate and international dealings. More generally, we need acceptable solutions to choice of law problems to minimize conflict at the edges, where competing legal systems collide.

I have tried to explain why the best approach to choice of law will take the form of a comprehensive system of rules. On the one hand, the conventional argument for rules — that they facilitate uniform, predictable results — remains persuasive and powerful in this context, particularly in light of recent experience with case-by-case choice of law analysis. On the other hand, I have tried to show that the very nature of choice of law is such that a system of reciprocally applied rules is most likely to ensure the best substantive outcomes.

All we need are the rules. Here, the NCCUSL can play an important role by investing its resources and its reputation into developing and promoting a comprehensive choice of law code. If drafted well, such a code should prove quite popular, because no one is happy with the current state of affairs. As with the Uniform Commercial Code, getting the new law adopted in a few important states — New York, California, Florida, Texas — may create enough momentum to persuade other states to go along. In any event, the first step is to develop the code, and that will require effort enough for the moment.

---

so many rules from the *First Restatement*. Reese responded that he wanted to abandon these but that there were limits to what one could do in a Restatement because one had to work within the existing decisions.

For what it is worth, the new Restatements may involve less a departure from prior practice than simply a willingness to be open about it. *See* Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55 (1990) (suggesting that the early rhetoric about "telling judges what the law is" was a deliberate cover for a self-consciously reformist program).