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Conflict of Laws: Foundations and Future Directions

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CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS. By *Lea Brilmayer*. Boston: Little, Brown & Co. 1991. Pp. xvi, 240. \$12.95.

According to *Ecclesiastes*, there is nothing new under the sun.¹ Nowhere are these words more apt than in the field of conflicts of laws. Each generation of conflicts scholars batters down the work of its predecessors and builds in its place a new theoretical edifice, only to have the next generation go to work mining the walls. When the walls have tumbled down and the ground is plowed with salt, the attackers begin building anew. And the ideas they use to build their new creation bear an uncanny resemblance to those that were demolished by the previous generation. Little changes in this cycle except the pace of destruction and rebuilding, which quickens with each succeeding generation. Progress is measured in original combinations of old ingredients, rather than in the discovery of truly novel ideas.

Conflict-of-law theory nevertheless has great practical importance, especially in the United States, where fifty sovereign states and a handful of territories and districts compete with the federal government to make differing and overlapping laws. The American legal system provides a natural laboratory for conflict-of-law theories and has always forced Americans to take conflicts seriously. Other nations and conglomerations of nations — for example, the European Community and the Commonwealth of Independent States — may soon have similar problems to confront, as they bundle once-unitary legal systems into newly created confederations.

Professor Lea Brilmayer's latest work, *Conflict of Laws: Foundations and Future Directions*,² contains an exposition and a critique of recent conflict-of-law theories. It also advances a new theory, which Brilmayer calls rights-based analysis. This new theory unsurprisingly rejects most of the theoretical underpinnings of the currently fashionable conflicts theory, governmental interest analysis. Even less surprisingly, the new theory brings back some of the elements of the previous generation's conflicts theory, vested rights. This book, which in its early chapters sets out the cyclical nature of conflicts of law, is thus ironically a product of that cycle.

Chapter One describes and attacks the vested rights theory of Joseph Beale, which culminated in the first *Restatement of the Conflict*

1. "The thing that hath been, it is that which shall be; and that which is done is that which shall be done: and there is no new thing under the sun." *Ecclesiastes* 1:9.

2. Lea Brilmayer is Nathan Baker Professor of Law, Yale University. Her previous works include *AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM* (1986) and *JUSTIFYING INTERNATIONAL ACTS* (1989).

of Laws in 1934 (p. 18). Vested rights requires a set of conflicts rules external to the laws of individual states. Judges use these external rules, found in the general common law, to answer choice-of-law questions.³ The courts adjudicate cases using the positive substantive law of a particular state, but they choose that substantive law by reference to general common law — a natural law concept.

Regardless of the similarities between some elements of Brilmayer's rights-based analysis and Beale's vested rights theory,⁴ Brilmayer in no way advocates a return to the days of the first *Restatement*. Conflicts scholars may agree on little else, but they stand united in their antipathy toward vested rights. "We are all positivists now" might be the motto of modern conflicts scholars, including Brilmayer, who universally reject the natural law implications of vested rights.⁵ Brilmayer shows that the intellectual basis of vested rights vanished with the disappearance of the belief in a general common law (pp. 35-36).

Brilmayer's book begins in earnest in Chapter Two, where she describes and provides trenchant criticism of the conflicts theory currently in vogue — governmental interest analysis. Interest analysis, first propounded by Brainerd Currie in the 1950s and 1960s,⁶ has received wide scholarly support because it meets two common criticisms of the vested rights theory. First, interest analysis purports to find its source of authority in the internal, positive law of the state, not in an external, general common law that modern scholars find meaningless.⁷ Second, interest analysis rejects the notion of jurisdiction-selecting rules — that is, choice-of-law rules that select a particular state's substantive rules without reference to the content or underlying policies of those rules (pp. 59-60). To interest analysts, law is a purposive activity, and choice of law makes no sense unless it takes into account the

3. For example, under the first *Restatement*, the law to be used in a dispute over contract validity is the law of the place of contract formation. *RESTATEMENT OF CONFLICT OF LAWS* § 332 (1934). But if the offeree mails the acceptance, the place of formation depends on whether the court applies the mailbox rule, which is not the law in every jurisdiction. How can the court make this initial determination of the place of formation without already knowing which state's contract laws should apply? Beale solved this dilemma by specifying that the court was to use the "general" law of contracts to determine the place of formation, not the law of the forum or any other state's law. Beale instructed the courts to follow the mailbox rule, which he considered to be part of the general common law of contracts. Pp. 36-37.

4. For example, as the names of the two theories imply, both endow litigants with choice-of-law rights, although the nature of these rights differs considerably. Moreover, both theories rely on norms external to the state's positive law. See *infra* notes 17-18 and accompanying text.

5. Brilmayer lists only one modern scholar, Perry Dane, who offers even a partial defense of vested rights theory. P. 194 n.10; see Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 *YALE L.J.* 1191 (1987).

6. P. 43. The reader can find much of Currie's work regarding interest analysis in *BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

7. "The problem [with vested rights theory] was not the particular rules themselves but the 'metaphysical apparatus of the method.'" P. 44 (citation omitted).

policies and purposes behind the applicable state's law.⁸ Interest analysis seeks to select the proper law by examining whether the application of a state's law in a multistate case will further the policies of that law (p. 46).

Brilmayer believes that interest analysis suffers from one of the worst flaws of vested rights theory: the theory, as set out by Currie, turns out in practice to be jurisdiction-selecting, even while its exponents maintain that it is sensitive to the purposes of the laws it selects. Vested rights and interest analysis, she asserts, differ only in the type of contacts they consider relevant to choice of law decisions. Vested rights theory looks at territorial factors (for example, the place of injury in tort actions), while interest analysis looks at the domiciles of the parties (pp. 57-61).

Brilmayer arrives at this conclusion by analyzing a series of hypothetical multistate cases under Currie's theory (pp. 56-60). Currie divides all conflicts cases into one of three categories: false conflicts, true conflicts, and unprovided-for cases (p. 47). Brilmayer points out that Currie's false conflict cases usually occur when the two parties share the same domicile (p. 58). In these cases, the court simply chooses the law of the common domicile. True conflicts occur when the parties have different domiciles and the two states have conflicting laws (p. 58). Currie's solution is to apply the law of the forum. Unprovided-for cases occur when the parties have different domiciles, and neither state has an interest in applying its law (p. 59). Currie's solution is again to apply the law of the forum. Brilmayer points out that the domiciles of the parties alone supply the correct choice of law. The court need not actually look at the policies or interests behind the laws. Thus, Currie's theory is jurisdiction-selecting.⁹

Brilmayer's analysis contains valid criticism of Currie's theory. Thirty years have passed since Currie presented the theory, however, and other scholars have continued to refine it. Her criticisms of Currie do little to weaken the analysis of these later scholars. For example, Professor Larry Kramer asserts that Currie was wrong in hypothesizing the unprovided-for case; Kramer maintains that no such category actually exists.¹⁰ He asserts that most of Currie's supposedly unprovided-for cases are actually either true or false conflicts.¹¹ Under

8. "The courts simply will not remain always oblivious to the true operation of a [vested rights] system that, though speaking the language of metaphysics, strikes down the legitimate application of the policy of a state . . ." CURRIE, *supra* note 6, at 181.

9. Pp. 59-60. Brilmayer offers two qualifications to her charge that Currie's theory is jurisdiction-selecting: territorially triggered interests and the interest in interstate restraint might cause the forum to look at state policies. P. 61. But she considers these considerations "anomalous" to Currie's method.

10. Larry Kramer, *The Myth of the "Unprovided-for" Case*, 75 VA. L. REV. 1045 (1989).

11. According to Kramer, in the rare case where there really is no state that has an interest in applying its laws, the plaintiff simply has no cause of action. Kramer considers this situation

Kramer's analysis, interest analysis is no longer jurisdiction-selecting. To decide whether the cases that Currie thought fell into the unprovided-for category are true or false conflicts, the analyst must examine the policies behind the laws of the two states. Knowledge of the domiciles of the parties is no longer sufficient to choose the correct law.

Brilmayer also criticizes Currie's theory because of its shortsighted view of state interests (p. 71). Currie intended to create a theory allowing a state to pursue its own interests in its choice-of-law policies, just as that state does in applying its substantive law. Thus, Currie's solution to a true conflict — a case in which both the forum and another state have an interest in applying their own laws — is to apply forum law (p. 47). Currie believed that each state furthers its own interests by applying forum law. This solution, however, fails even on its own terms. If Michigan courts ruthlessly apply Michigan law in every multistate case in which its laws conflict with the laws of other states, Michigan can expect no cooperation from Ohio when Ohio litigates a multistate case with important Michigan connections. Brilmayer points out that Michigan may sometimes pursue its long-term interests more effectively by deferring occasionally to the interests of other states. By deferring, Michigan can expect reciprocity from other states in cases litigated in the courts of other states (p. 71). Thus, a state's interest in cooperation is often as substantial as its interest in applying its own laws.

Chapters Four and Five provide Brilmayer's response to her criticisms of interest analysis. In Chapter Four, she offers her thoughts on improving interest analysis. She discusses various game theory models of cooperation that would induce a state to defer to foreign law (pp. 155-60). In the end, Brilmayer comes to the unhappy conclusion that the enlightened self-interest of the state courts is unlikely to generate sufficient cooperation to further each state's interests optimally (p. 163). She believes that an outside group will have to create a structure of cooperation that each state can adopt (pp. 181-84). Her favored choice is a uniform act adopted by all states, preferably a new restatement from the American Law Institute (pp. 185-89).

Brilmayer seems less than optimistic that her solutions will solve the problems of interest analysis.¹² Chapter Five, in which she sets out a new theory of rights-based analysis, shows why. Brilmayer's heart simply isn't in improving interest analysis. Even if scholars correct the shortcomings of interest analysis discussed above — the shortsighted view of state interests and the jurisdiction-selecting nature of the anal-

to be equivalent to a purely domestic case in which the plaintiff fails to establish a cause of action. He sees no reason to invent an exotic name for this unsurprising occurrence. *Id.* at 1063-64.

12. For example, she only discusses her proposed improvements to interest analysis after suspending some of her strongest reservations about the theory. P. 145.

ysis — Brilmayer believes interest analysis is incapable of taking into account considerations necessary to a just choice of law system.

The facts of *Allstate Insurance Co. v. Hague*¹³ illustrate the flaws Brilmayer sees in interest analysis. *Hague* was a wrongful death suit brought in a Minnesota court by the widow of a man who was killed in a motorcycle accident. The accident occurred in Wisconsin, and both the plaintiff's decedent and the defendant were residents of Wisconsin. The Minnesota trial court applied pro-plaintiff Minnesota law, rather than the more restrictive Wisconsin law, even though the plaintiff could point to only one relevant connection with Minnesota: she had moved to Minnesota after the accident.¹⁴

Under interest analysis, the court's choice of Minnesota law was perfectly proper. The plaintiff was a resident of Minnesota, and Minnesota tort law sought to protect Minnesota plaintiffs. Thus, Minnesota had an interest in applying its law. That the plaintiff became a Minnesota resident only after the accident is irrelevant to the analysis.¹⁵

The reader who is something other than an interest analyst will probably find something intuitively wrong with this result. Why should Minnesota be able to impose its law on a defendant with such a tenuous connection to the state? Interest analysts may respond that the court was indeed wrong; if the court had a clearer idea of Minnesota's true interests, it would defer to Wisconsin, so that Wisconsin would reciprocate in cases that implicated important Minnesota interests. But Brilmayer would claim that this response does not meet our real objection. The court was not wrong because it misunderstood Minnesota's true interests; it was wrong because subjecting the defendant to Minnesota law was *unfair* (p. 198).

This intuition is the basis of Brilmayer's fundamental criticism of interest analysis. The theory is inadequate because unfairness is simply not in its vocabulary. According to Brilmayer, interest analysis is consequentialist: if applying a law would further its values, the state has an interest in its application.¹⁶ As Brilmayer points out, "the problem with consequentialist reasoning is that it is indifferent to what the parties deserve" (p. 202).

The deficiencies of interest analysis lead Brilmayer to rights-based

13. 449 U.S. 302 (1981). Brilmayer sets out a hypothetical with facts similar to *Hague* on page 197.

14. 449 U.S. at 305-06.

15. Currie himself rejected applying local law in cases of after-acquired domicile. See p. 197. He therefore would have disagreed with the result in *Hague*. Brilmayer correctly points out, however, that Currie was unable to justify his rejection in terms of interest analysis; he found the need to explain his rejection in terms of vested rights. P. 197 n.23.

16. P. 200. For example, one of the values of state tort law is compensation of state residents who are victims of torts. The Minnesota court could thus properly find an interest applying Minnesota law to the plaintiff in *Hague* by virtue of her Minnesota residence alone.

analysis. Brilmayer wishes to endow litigants with choice-of-law rights that "arise out of the fact that the state's legitimate authority is finite . . ." (p. 206). These are negative rights; they grant a party the right to be let alone (p. 195). Her theory is not consequentialist; she looks not to the consequences of her theory on the furtherance of state policies, but to the fairness of a state's applying its law to an individual. Brilmayer's rights-based analysis thus reverses the concerns of interest analysis: rights-based analysis focuses on the party who suffers the burdens of the law, not on the party who enjoys its benefits (p. 213).

Brilmayer uses these principles to derive several bases for legitimate state coercion of a party who is disadvantaged by the application of local law. The most important of these is consent. A state should not apply a law unless the party burdened has consented to its application (p. 210). This consent, however, need not be express; Brilmayer would accept domicile or voluntary engagement in local conduct as a sufficient expression of consent to allow a court to apply local law (p. 230). Another basis of legitimate state coercion is mutuality. By this, Brilmayer means that a state should not hold a party to the burdens of a rule "except in situations where it would help him or her if the tables were turned" (p. 223). Brilmayer's example of a choice-of-law rule that fails the mutuality test is one that requires the court to apply the law of the state that is more advantageous to in-staters and disadvantageous to out-of-staters (p. 223).

Rights-based analysis has several limitations, only some of which Brilmayer acknowledges. First, as in interest analysis, rights-based analysis will often point to more than one state whose law a court may legitimately apply (p. 194). The problem of rights-based true conflicts will thus arise. Brilmayer suggests that courts apply her rights-based theory in conjunction with interest analysis. She would apparently have the courts apply rights-based analysis as an initial screening device to eliminate inappropriate states' laws, and then apply interest analysis to eliminate other states (p. 194). But even this method will not eliminate all ambiguities in choice of law: the application of the laws of more than one state may satisfy both theories.

Second, rights-based theory, like vested rights, is external and objective.¹⁷ That is, the rights granted by the theory, such as "the right to be let alone," do not come from an internal lawmaking body of the state, such as the state legislature. The legislature would probably like to see its law applied to the greatest extent possible. The theory thus faces the same objection as vested rights theory: Where do these external norms come from, if not from positive law?

Brilmayer, of course, claims to be a positivist. She does not advo-

17. "[R]ights are *supposed* to be objective. The forum is entitled not merely to disagree with other states on their concepts of rights but to conclude that other states are *wrong*." P. 205 n.39.

cate a judge's ruling contrary to the positive law of the state. She wants the judge to use her rights-based analysis only as a guide to fill gaps in positive law, which are legion in conflicts cases (p. 205). Unlike interest analysis, however, her theory does not purport to guide a judge in ascertaining legislative intent.¹⁸ Rights-based analysis provides a separate normative guide to lawmaking. The theory thus sounds something like the natural rights theories for which Beale was roundly criticized. Brilmayer claims to adhere to positivism, but, as she points out in Chapter One, so did Beale (pp. 18-19).

Regardless of these shortcomings, Brilmayer's rights-based theory offers insights lacking in current theories. It provides a framework for discussing fairness to the burdened party, which is excluded from interest analysis. By excluding such considerations, interest analysis may suffer the fate of vested rights under the First Restatement: it may end up riddled with exceptions and escape devices that allow judges to reach what they consider the just result in spite of the theory.

If Brilmayer does no more than enlarge the vocabulary of judges, she may perform a valuable service. A judge who talks about fairness to a burdened party is likely to be more restrained in his application of local law than one who can speak only of state interests and policies. This might indirectly create a climate of interstate cooperation, leading to greater reciprocity between states and a furthering of state interests. Rights-based analysis may in this way further the consequentialist goals of interest analysis, even though the theory was devised for a different purpose.

In the end, Brilmayer finds traditional interest analysis fundamentally flawed because it lacks a notion of fairness to balance its preoccupation with state interests and policies. Her perceptive criticisms of the theory shed light on its limitations. Perhaps she believes she has mortally wounded the theory. If such was her goal, she did not succeed; the beast has more life in it than she supposes. Her rights-based analysis, however, is an important break with current theories and deserves the careful attention of conflicts scholars and judges. That alone is a high achievement.

—*Craig Y. Allison*

18. P. 47. Brilmayer would argue that interest analysts are being disingenuous when they claim they are trying to ascertain legislative intent. P. 94. She believes that they, too, are imposing objective, external standards on judges. P. 99.