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Interstate Federalism*

*Lea Brilmayer***

I. INTRODUCTION

Conflict of laws scholars appear to be about the only ones concerned about what is going on in the evolving modern learning of interstate relations. By interstate relations, I am referring to problems of adjudicative jurisdiction, legislative jurisdiction, and enforcement of judgments. Although such relations are governed largely by state law, they are also affected by federal constitutional provisions such as the due process clause, the full faith and credit clause, and the commerce clause. These relations comprise the arcane field known as "conflict of laws," and constitute "the other" federalism issue; the first such issue being the relationship between the state and federal courts and legislatures.¹

Issues of federal/state relations, naturally, have received plenty of attention. Their political implications are clear, given the role that federal courts have taken in the civil rights struggles.² Nevertheless, most scholars ignore the rights of states with regard to one another, and even the Supreme Court has consistently treated these federalism issues with considerably less seriousness than it has treated the relations between state and federal courts.³

The goal of this article is to convince a larger group of peo-

* This article is based on a speech given at the Federalist Society Symposium titled "Federalism and Constitutional Checks and Balances: A Safeguard of Minority and Individual Rights" held on November 15-16, 1986, at the American Law Center, Northwestern School of Law.

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1. For an analysis of the Supreme Court's different treatment of these two issues, see Brilmayer & Lee, *State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and the Conflict of Laws*, 60 NOTRE DAME L. REV. 833 (1985).

2. See, e.g., *Michigan v. Long*, 463 U.S. 1032 (1983) (dealing with a technical issue of Supreme Court review of ambiguous state court rulings).

3. See Brilmayer & Lee, *supra* note 1.

ple that something important is going on in the conflict of laws arena, and it is something that people ought to be concerned about. Conflict of laws, admittedly, is technical, but so are many doctrinal issues whose implications are nevertheless widely appreciated. Although no more technical than these, conflicts seems nonetheless different because of the jargon, the arcane and amusing schools of thought, and the virulence with which the members of one school attack members of the others. These features make it difficult for those outside the conflicts field to appreciate the wider implications of the modern revolution in conflicts theory, to evaluate their desirability, and to mount a principled opposition.

Underlying these developments are some rather disturbing premises that ought to dismay both the left and right political wings. Moreover, the left/right dichotomy does have something to do with the current lack of appreciation for the extent of the problem. Interstate federalism does not fit neatly into the usual political divisions. To some degree, those who favor the modern conflicts revolution tend to be liberals; those who oppose it, conservatives.⁴ Nevertheless, the arguments that conservatives ought to be making in opposition to the modern learning are not entirely the usual conservative ones. The problem rests with the dichotomy between property rights and political/civil rights. The conservatives would at first seem to find their greatest support

4. At least, there is this general tendency on our current Supreme Court, although I should emphasize that this generalization is a rather rough one. The four conflict of laws decisions that provoked the greatest divisions in the Court were *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Thomas v. Washington GasLight*, 448 U.S. 261 (1980). The voting patterns were as follows:

<i>Justice</i>	<i>WWV</i>	<i>Hague</i>	<i>Thomas</i>	<i>Asahi</i>
Brennan	P	P	PP	D
Marshall	P	P	D	D
Stevens	D	PP	PP	D
Blackmun	P	P	PP	D
White	D	P	P	D
Stewart	D	—	PP	—
Powell	D	D	P	DD
O'Connor	—	—	—	DD
Burger	D	D	P	—
Rehnquist	D	D	D	DD
Scalia	—	—	—	DD

In this chart, "P" indicates a pro-plaintiff position, "D" indicates a holding for the defendant, and PP (or DD) indicates a finding for the plaintiff (or defendant) on more extreme theoretical grounds.

in principles protecting property rights, but I suggest that a better basis could be found in "liberal" arguments about political process values.

This article begins with a description of several cases exemplifying the modern learning. Since most readers will probably have little tolerance for discussions of "territorialism," "neo-territorialism," "functionalism," "comparative impairment," and "apparent true conflicts,"⁵ this article avoids such jargon and focuses instead on the astounding things that courts have actually allowed to happen. The article also discusses some results that might be reached if the modern learning is allowed to extend to its logical conclusions. This is followed by a critical evaluation of the general philosophical perspective which accounts for such results.

This article then turns to a discussion of the nature of the rights with which interstate federalism deals. It suggests that a completely different perspective better accommodates the true goal of choice of law restraints. This perspective, however, cannot be politically pigeonholed. The arguments that we ought to be making about conflict of laws are properly taken from the liberal camp; yet the liberals are not motivated to make them. The conservatives on the other hand have also effectively abandoned interstate federalism rights, perhaps because conflict of laws cannot be squeezed into an appropriate property rights mold. The end result is our current sordid state of affairs, a situation which now will be addressed.

II. SOME ACTUAL CASES AND SOME HYPOTHETICAL EXAMPLES

*Rosenthal v. Warren*⁶ is a good starting point. Rosenthal, a citizen of New York, traveled to Boston, Massachusetts for diagnosis and treatment by Dr. Warren, a world renowned surgeon. After surgery in New England Baptist Hospital, Rosenthal died. His widow filed a medical malpractice claim for \$1.25 million in New York.⁷ Under Massachusetts law, recovery for wrongful

5. For an explanation of these terms and an introduction to the major theories underlying the field, see generally L. BRILMAYER ET. AL., AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM (1986).

6. 475 F.2d 438 (2d Cir.), cert. denied, 414 U.S. 856 (1973).

7. Jurisdiction was obtained over Warren by quasi-in-rem attachment of his insurance policy, a practice no longer allowed after *Rush v. Savchuk*, 444 U.S. 320 (1980). Jurisdiction over the hospital was obtained by serving a hospital officer temporarily present; the constitutionality of this method of service is unclear. See L. BRILMAYER, *supra*

death was severely limited, while New York law allowed unlimited recovery. Malpractice insurance premiums were, correspondingly, much lower in Massachusetts than in New York: \$192 as opposed to \$1,139. The court, however, applied New York law because the decedent was a New York domiciliary and his next-of-kin would be New York charges. The New York court de-emphasized the importance of any party expectations that Massachusetts law might apply because "one does not ordinarily think of wrongful death limitations even when undertaking surgery."⁸ The court also pointed to the nationwide reputation of the hospital.⁹

A similar result was reached in *Lilienthal v. Kaufman*.¹⁰ Kaufman, a resident of Oregon, approached Lilienthal in California, and the two became involved in a joint venture to sell binoculars. Lilienthal was unaware that Kaufman, after having become involved in another binocular deal, had already been adjudged a spendthrift in Oregon. California law would not have recognized the spendthrift adjudication as a defense, but Lilienthal unwisely initiated litigation in Oregon. The Oregon court conceded that all of the relevant events (negotiation, loan, and contemplated repayment) were in California rather than Oregon, but it noted Oregon's extensive interests in the case:

The spendthrift's family which is to be protected by the establishment of the guardianship is presumably an Oregon family. The public authority which may be charged with the expense of supporting the spendthrift or his family, if he is permitted to go unrestrained upon his wasteful way, will probably be an Oregon public authority.¹¹

While conceding California's interest in having its law applied, the court cited its duty to further the policies adopted by the Oregon legislature, and denied recovery.

Admittedly, these were lower court cases, one from a federal court and one from a state court, but an even more interesting result is found in one of the most important recent conflicts decisions of the United States Supreme Court, *Allstate Insurance Co. v. Hague*.¹² A Wisconsin domiciliary, Ralph Hague, owned

note 5, at 34.

8. 475 F.2d at 444.

9. *Id.*

10. 239 Or. 1, 395 P.2d 543 (1964).

11. *Id.* at 14, 395 P.2d at 548.

12. 449 U.S. 302 (1981).

three vehicles garaged in Wisconsin. An insurance policy issued in Wisconsin specified uninsured motorists coverage of fifteen thousand dollars per vehicle. Suit was brought on this policy after Ralph was killed in Wisconsin by a fellow Wisconsin driver. Under Wisconsin law, recovery was limited to fifteen thousand dollars, rather than forty-five thousand dollars, because the policy had a clause prohibiting the "stacking" of coverage, and these clauses were valid in Wisconsin.¹³

Nevertheless, Wisconsin law was not applied. After Ralph's death, his widow, Lavinia, moved to Minnesota and filed suit there. The Minnesota court invalidated the anti-stacking provision, because it believed that Minnesota had the "better law."¹⁴ Although without a majority opinion, the United States Supreme Court affirmed. A plurality held that application of Minnesota law was constitutional because of three factors: the widow was now a resident of Minnesota (and her move was not motivated by forum shopping), Allstate did other unrelated business in Minnesota, and Ralph had been employed in Minnesota and commuted there. The last factor gave Minnesota an interest in protecting Ralph even though he was neither commuting nor engaged in employment related travel at the time of the accident.¹⁵

A concurring opinion by Justice Stevens went, perhaps, even further. He expressed doubt about whether due process would ever be violated by a court applying forum law because preference for forum law could not be said to be irrational or arbitrary. He suggested that application of Minnesota law had not been shown to encroach upon Wisconsin sovereignty, and that it was not fundamentally unfair to either of the litigants. Fundamental unfairness might exist, in his view, if the law on its face discriminated against non-residents, if it was a "dramatic departure" from the rule in force in most states, or if it was substantively unfair.¹⁶ One surmises from this that Justice Stevens would have found application of Wisconsin law unconstitutional (even if the case were heard in Wisconsin) because Wisconsin

13. One author disputes this version of the facts, claiming that even under Wisconsin law the larger recovery would be allowed. Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?* 10 *HOFSTRA L. REV.* 17 (1981). Since these are the facts upon which the Court based its opinion, however, I chose to treat them as true.

14. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1978), *aff'd*, 449 U.S. 302 (1981).

15. 449 U.S. at 313-19.

16. *Id.* at 326-27 (Stevens, J., concurring).

had an extreme minority rule! A dissenting opinion took the plurality to task.¹⁷

There are other recent indications that the Supreme Court's attitude may not be quite as laissez-faire as suggested.¹⁸ But what limitations will be recognized is uncertain. One particular problem that is looming is whether a court has the right to apply its law on "procedural" issues simply because it is the forum.¹⁹ The following is a typical scenario. Plaintiff is injured in State A by one of the defendant's products that was purchased in State A. After the statute of limitations runs, the plaintiff decides to sue. Plaintiff then discovers that the defendant does business also in State B, which has the longest limitations period in the country. Jurisdiction is obtained in State B by pointing to the defendant's unrelated business in State B, and State B applies its own rule on the limitations issue because the issue is "procedural."

One might think that the State B court would resent such forum shopping and dismiss the case. But if the defendant requests either a transfer or a forum non conveniens dismissal, it may be conditioned upon agreeing to application of B's statute of limitations in the new forum.²⁰ Indeed, theoretically there could be fora in which the statute of limitations will never run because of a local tolling provision.²¹ For example, the statute of limitations might be tolled as to a defendant not present in the state until the defendant started to do business there at some point many years after the events leading up to the litigation. The Court's attitude toward forum shopping to obtain a favorable statute of limitations is not yet settled, but still apparently quite permissive.²²

17. *Id.* at 332 (Powell, J., dissenting).

18. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (forum may not automatically apply forum law in nationwide class action).

19. *See, e.g., Cowan v. Ford Motor Co.*, 719 F.2d 785 (5th Cir. 1983); *cf. Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979).

20. *See, e.g., Van Dusen v. Barrack*, 376 U.S. 612 (1964) (transferee court must apply transferor court's law); E. SCOLAS & P. HAY, *CONFLICT OF LAWS* 367 (1984) (citing cases where dismissal conditioned on waiving statute of limitations objection in alternative forum).

21. *See, e.g., G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982) (under the equal protection clause a state may toll statute of limitations as to defendant amenable to jurisdiction that had not appointed an agent for service of process).

22. In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), the Court allowed personal jurisdiction on such facts, but did not specifically address the choice of law issue. *But cf. Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953) (allowing forum to

The logical, if extreme, conclusion to which modern choice of law thinking can lead is exemplified by one author's hypothetical problem.

Driving through unfamiliar streets on business, Mr. Jones, the plaintiff, a non-resident, rings a random doorbell to ask directions after making his way up a snowy path. On his way back to the road, he observes a sign warning that the path is slippery. Although he makes every effort to avoid an accident, he slips on the unshoveled, unsanded snow on the path and is seriously injured. Under the law of the situs, there is no duty to remove or sand snow on one's property, so long as one has posted a warning; the law of the plaintiff's home state is to the contrary

Since Ms. Smith, the homeowner defendant, specifically relied on the law of her home state in postponing the task of clearing the walk, and since she had no way of knowing in advance in which state her uninvited visitor resided, it might be thought insupportable to hold her to duties intended to regulate landowners in that visitor's state

Yet imposition of liability would not be inappropriate.²³

This example, and both *Lilienthal* and *Rosenthal*, share common elements. In all three situations, there is a party who never leaves his or her own state, who never even has deliberate communication with anyone outside the state, who never does anything with foreseeable impact outside the state, and yet is nevertheless held to another state's law simply because his or her opponent happens to be from that other state. One suspects that the author's conclusion—the imposition of liability—is highly counter-intuitive to those untrained in the subtleties of modern conflict of laws reasoning. What sort of conflicts approach might generate such a result? The reasons offered for this resolution of the hypothetical problem will be examined in the course of explaining the philosophical perspective underlying the modern conflicts learning.

III. THE PREVAILING PHILOSOPHY

These preceding examples do not arise at random; they are the product of a prevailing philosophy of choice of law. Starting

apply its shorter statute of limitations). The author was counsel of record for the defense in *Keeton*.

23. Weinberg, *On Departing From Forum Law*, 35 *MERCER L. REV.* 595, 623-24 (1984).

in the 1930s with academic criticisms of the then-prevailing rules embodied in the First Restatement of Conflicts, a movement gained momentum in the 1950s and 1960s with Brainerd Currie's work which culminated in a revolution in judicial treatment of choice of law issues.²⁴ Generalizing about the new learning is dangerous because so many academicians have added their own variations and permutations,²⁵ and because courts sometimes skip blithely from one method to another on their way to their chosen conclusions.²⁶ With some trepidation, however, I group the distinctive characteristics of the new learning into three categories: sensitivity to the needs of plaintiffs, lack of sensitivity to the concerns of defendants, and pre-occupation with the interest of the forum. I will illustrate each of these and try to describe the philosophical perspective that accounts for them.

A. *Plaintiff Orientation*

Under the old approaches to choice of law, a body of rules was consulted to determine which state's law should be applied. The judge was not supposed to consider the content of the rules in determining which to apply; he or she needed only to examine the facts of the case and determine which jurisdiction was to supply the relevant rule. Only after selection of the jurisdiction was the judge supposed to ask what result the selected rule would entail; the content of the rule was important on the merits, but not at the threshold jurisdictional stage. Furthermore, since there was a fixed body of rules, which all courts were supposed to apply faithfully, plaintiffs supposedly would not be able to engage in forum shopping.

All of this has changed. Selection of the applicable law now is supposed to be decided according to whether any of the involved states have "interests" in having their law applied. To determine whether a state has an interest in applying its law, it is necessary to examine the contending substantive laws and decide whether the underlying policies are implicated by the particular interstate transaction at hand. For example, if State A

24. Many of Currie's articles are collected in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963). The current status of the modern conflicts revolution in the fifty states is set out in Kay, *Theory into Practice: Choice of Law in the Courts*, 34 *MERCER L. REV.* 521 (1983).

25. See L. BRILMAYER, *supra* note 5.

26. Some courts, for example, write opinions articulating no clear rationale at all. Kay, *supra* note 24, at 521-22.

uses strict liability and State *B* insists on proof of negligence, then one policy underlying State *A*'s rule is to provide recovery for plaintiffs. This policy is supposedly implicated in all cases that have a plaintiff from State *A*.²⁷

This method is biased towards plaintiffs in several respects. First, rules favoring plaintiffs tend to have a longer list of supposed underlying policies. For instance, pro-recovery rules typically can be explained either in terms of allowing recovery for injured plaintiffs, or in terms of deterring injurious conduct. Accordingly, there is an interest if either the injured plaintiff is a local or the tortious conduct occurred within the state.²⁸ Pro-defendant rules, however, are not usually seen in terms of penalizing plaintiffs for their actions but only in terms of protecting defendants.²⁹ For example, strict liability arguably deters wrongful manufacture, but negligence law is not designed to deter plaintiffs. Since the forum is supposed to apply its law whenever it has an interest in doing so,³⁰ pro-plaintiff laws are more likely to implicate an interest, and thus be applied.

Second, it is entirely possible that more than one state will have an interest in having its law applied. Such cases are called "true conflicts." It is also possible that neither state will have an interest; these are called "unprovided-for" cases. In such circumstances, the forum is counseled to apply its own law.³¹ Obviously, this means that the result will vary depending on where the suit is filed, which opens room for jurisdictional manipulation. Since the plaintiff is the one who chooses among the constitutionally available fora, this room for manipulation is to the plaintiff's advantage. Traditional approaches to choice of law sought to provide uniform results regardless of where the action

27. The interest analysis approach to choice of law is critically described in Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980).

28. See, e.g., *Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974).

29. See, e.g., Brilmayer, *supra* note 27, at 399.

30. Currie claimed that a court was obliged to apply its law whenever there was an interest, because courts had obligations to further democratically formulated choices. B. CURRIE, *supra* note 24, at 182 (courts should not weigh interests but should further the interests of their own state).

31. Some authors even claim that it is unfair or discriminatory to not apply local law when there is an interest in doing so, simply because some of the relevant events occurred elsewhere. See, e.g., *Allo, Allstate Ins. Co. v. Hague: An Unprovided-for-Case in the Supreme Court*, 32 CASE W. RES. L. REV. 1, 103 (1981) (equal protection requires that forum law be applied in true conflict or unprovided-for situations).

was brought; forum shopping by plaintiffs was supposedly minimized.³²

Finally, there tends to be a bias in the definition of who should be counted as a local party for purposes of determining whether there is a local policy of allowing recovery. A plaintiff can presumably be treated as a local if he, she or it is domiciled, incorporated, has a residence, or has principal place of business in the forum. But, as the previous discussion of the *Hague* case indicates, some members of the Court have been willing to recognize an interest in protecting persons who move into the state after the transaction or persons who had other connections with the state (such as local employment). How far they will take this reasoning is unclear.

In contrast, interests in protecting defendants have not been so readily recognized. Cases do not, for instance, assert that a corporation may be protected by a state even when all of the events occurred elsewhere, simply because the state is one of the many in which the corporation does business.³³ For example, if Allstate Insurance did business in all fifty states, perhaps states other than just Wisconsin have a no-stacking rule. Did these states have interests just because Allstate did unrelated business there, in the same way that Minnesota had interests in local employees? How much of a showing ought to be required for a state to find an interest is unclear. But, presumably, however strong a showing is required for defendants should also be required for plaintiffs. Instead, amorphous contacts seem adequate to support interests in protecting plaintiffs, while defendants must show a more intimate connection to establish interests in protecting them.

The modern choice of law scholars are not overly squeamish about admitting a plaintiff bias in their choice of law analysis. In fact, the plaintiff bias is seen by some authors as an end in itself. In the hypothetical given earlier about the duty to shovel snow on one's property, the author's chief basis for imposing liability was, quite bluntly, that she believed the plaintiff ought to be allowed to recover, and imposition of the injured plaintiff's home state law allowed that recovery.

Although the failure to shovel snow may not be actionable at

32. See L. BRILMAYER, *supra* note 5, at 220.

33. See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (the Court did not discuss the interests of the other states in which Allstate did business).

the situs, it is a failure nevertheless; a homeowner must be aware that the failure creates a condition of some risk, whether or not a warning is posted. That the situs cheerfully places the risk on the injured party is all very well when the injured party is one of the situs' own residents. It seems a bit highhanded when the injured party is a non-resident, particularly when the costs of the injury will have to be borne in another state. As between an innocent injured party and an insured or otherwise suable party amenable to jurisdiction whose act or omission caused the injury, *widely shared policies* favoring risk spreading, compensating, and deterrence, coupled with considerations of the foregoing kind suggest that the risk of accident should not fall on the injured party, and that most courts would share that view.³⁴

Basically, the author's reason for choosing the plaintiff-favoring rule is that it favors plaintiffs.

The reliance upon "widely shared policies" allowing recovery is reiterated in other writings by the same author. Elsewhere, she notes that state substantive laws have become increasingly protective of plaintiffs. "Since the turn of the century, the burden of statistically inevitable accident, for example, increasingly has been shifted to defendant enterprises and away from injured workers, consumers, and travelers As American substantive law has moved towards this more plaintiff-favoring position, American conflicts law has followed suit."³⁵ This shift is justified by "the national interest in facilitating litigation for the interstate plaintiff."³⁶ This author is not alone; another author, for example, approvingly cites the Minnesota rule of "choose the more fully compensating tort law."³⁷ In a similar vein is Robert Sedler's reliance on "common policies" of promoting recovery.³⁸

This philosophy seems to be that courts exist because of the necessity to transfer money from defendants to plaintiffs, and therefore, the more often they do this, the more adequately they

34. Weinberg, *supra* note 23, at 624 (emphasis added).

35. Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 466-67 (1982).

36. *Id.* at 469-70.

37. Morrison, *Death of Conflicts*, 29 VILL. L. REV. 313, 337-38 (1984).

38. Sedler, *Choice of Law in Michigan: Judicial Method and the Policy-Centered Conflict of Laws*, 29 WAYNE L. REV. 1193, 1210-11 (1983); Sedler, *The Governmental Interest Approach to Choice of Law, An Analysis and Reformulation*, 25 UCLA L. REV. 181, 235 (1977).

are performing their jobs. Plaintiffs are "innocent injured parties," while defendants "cause injury," even when they act in compliance with local law.

[A]ll states share plaintiff-encouraging policies of compensation, deterrence, enforcement, and validation [of contracts]; one state's occasional idiosyncratic defense need not be deferred to

. . . The litmus test is multi-state policy: a departure from forum law will be justified when there is 'better law' in the non-forum state, law more representative of multi-state policy—that is, law more favorable (in the usual case) to the plaintiff.³⁹

This comparison between the recognition of plaintiffs' needs and defendants' interests brings us to the second point: the modern learning's attitudes toward defendants.

B. *Lack of Concern for Defendants*

If plaintiffs are seen by the modern learning as being presumptively entitled to receive compensation, defendants are envisioned as being presumptively obligated to pay. Who else will foot the bill once it is recognized that the state has an interest in affording recovery in order to prevent the injured person from becoming a public charge? We have already noted the modern learning's reluctance to find that some state has an "interest" in protecting defendants.⁴⁰ But the insensitivity to defendant's needs goes further. To the naive, it might seem arguable that the defendant should be entitled to protection, whether or not some state has some "interest" in having its law applied. Perhaps the defendant has—pardon the expression—a *right* to be protected. But such reasoning is out of place in current thought.

The old learning envisioned things in terms of vested rights.⁴¹ If a contract was entered into in State A, or if an injury occurred there, then rights were said to have "vested" under the laws of State A. The plaintiff could take these rights to any state in the country, for the most part,⁴² and cash them in; but he or she was not supposed to be able to cash in more rights than were

39. Weinberg, *supra* note 23, at 600.

40. See *supra* note 33 and accompanying text.

41. See L. BRILMAYER, *supra* note 5, at 218-20.

42. Even the traditional theory recognized some exceptions, such as "public policy" or "procedural characterization," which allowed the forum to apply its law even though the rights accrued elsewhere. See E. SCOLLES & P. HAY, *supra* note 20, at 58-59, 72-75.

acquired. Plaintiffs and defendants both had these rights. They resembled the sort of rights that most of us would recognize in final judgments.

Modern theorists see things differently. Vested rights went out with formalism; legal realism recognizes that rights do not amount to anything until they are translated into something tangible by an actual court.⁴³ The idea that the result might depend on who is applying the law, or indeed upon what the judge applying the law ate for breakfast, is no longer frightening. In such a philosophical climate, allowing the plaintiff to shop around for the best deal is no more perverse than allowing the plaintiff to shop around for an automobile. The defendant/hostage on the shopping spree has no legitimate complaint because he or she never acquired a cognizable claim to any particular state's law in the first place.

The rationalizations for this lack of sensitivity to the defendant's interests are varied. The first explanation that is usually offered is insurance.⁴⁴ Since defendants are insured, so the argument goes, they have no legitimate complaint against imposition of a pro-recovery law. Defendants are not only insured; they are also supposedly superior risk distributors, an attitude already alluded to in the discussion of why the plaintiff should *not* be required to bear the risk of loss. These generalizations are typically offered without any discussion of whether, in a particular situation, it might be better to require plaintiffs to carry insurance, or even whether in certain situations plaintiffs typically *do* carry insurance.

While these can be powerful sentiments even in domestic cases, they seem to be virtually irresistible in the conflict of laws context. In domestic cases, substantive sentiments are often checked simply because the law has been settled one way by a superior court or legislature; in conflicts cases, there can be more room for expression of such sentiments because deciding to apply the more favored substantive rule of another state is less visible than declaring hostility to one's own disfavored rule. In addition, the defendant and the insurance company may be from

43. The relationship between abandonment of vested rights and the growth of legal realism is discussed in Dane, *Vested Rights, "Vestedness", and Choice of Law*, 96 *YALE L.J.* 1191 (1987).

44. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (defendant can protect itself by procuring insurance); cf. *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 168-69, 583 P.2d 721, 728, 148 Cal. Rptr. 867, 874 (1978).

out of state. In the presumably improbable event that plaintiff-oriented rules might raise insurance premiums, the costs would be borne by or at least shared with out-of-staters.

As might be imagined, these arguments are applied with particular relish to large corporate defendants. It is argued, for instance, that large corporations are particularly capable of ascertaining the different laws of all of the states in which they do business. Thus, if a corporation does *some* business in the state (even business having no relationship to the transaction in question) it has had an opportunity to determine what that state's law is, and so it cannot be surprised should that law be applied.⁴⁵ Of course, this equates ability to know what the law says with ability to anticipate that it will be applied to a particular case. Regardless of the lack of logic, it is similar to an argument sometimes offered in support of extensive personal jurisdiction, namely that large corporations experience little inconvenience if required to litigate in distant fora.⁴⁶

The final rationalization for lack of sensitivity to defendants is that it does not matter whether the defendant is surprised by application of some particular state's law because defendants virtually never rely on the law anyway. Especially in tort cases, it is said that the defendant has not relied on one state's laws because people do not plan unintentional torts.⁴⁷ Expectations are said to be particularly irrelevant where insurance companies are involved because insurance rates are readjusted to reflect loss experience. "To talk of surprising an insurer by applying a rule of law that makes a particular loss greater than it would have been under a different law is talking nonsense."⁴⁸

There is an interesting contrast here between the philosophy of modern conflicts theory and the law and economics perspective. Law and economics emphasizes the role that law plays in creating incentives and thus in influencing conduct. For instance, there is a general assumption that where feasible, persons will transact around unfavorable laws.⁴⁹ Modern conflicts

45. See, for example, the argument in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 317-18 (1981), that Allstate would not be surprised by application of Minnesota law, since it did business there and must be presumed to be familiar with its laws.

46. Weintraub, *Due Process Limitations on The Personal Jurisdiction of State Courts: Time for a Change*, 63 OR. L. REV. 485, 526 (1984).

47. *Id.* at 531; cf. *Allo*, *supra* note 31, at 70 (individual who is deaf to threats cannot be deterred).

48. Weintraub, *supra* note 13, at 27.

49. The classic early statement of this idea is found in Coase, *The Problem of Social*

theory, in contrast, seems to assume the opposite: the purpose of law is simple transfer payments. Both schools of thought probably oversimplify enormously. But in a theory such as modern conflicts learning that de-emphasizes certainty,⁵⁰ it has to be assumed that planning is unimportant. If individuals molded their conduct around some particular law, then it would be unfair to the defendant and it would give the plaintiff an undeserved windfall if the plaintiff was allowed unilaterally to select a different law after the fact. If, however, the plaintiff and defendant have not acted any differently because of the law, then arguably there is no unfairness in changing the law at the last minute. When modern conflicts learning doubts that individuals act differently because of the law, this is another way of saying that the defendant has no vested rights, and no claim to resist the assertion of a state's interests.

C. *Illegal Realism: The Role of the Courts*

The final distinctive perspective of modern conflicts learning is its conception of the judicial function. The modern learning is the realists' creation. Conceived in opposition to the rule-dominated conceptualism of the First Restatement of Conflicts, it was built upon criticisms of the Restatement that had been mounted by legal realists such as Walter Wheeler Cook.⁵¹ However, it is also philosophically linked with another school also known as "realism." In international law, "realism" is the school of thought that emphasizes sovereign states pursuing sovereign interests, without misplaced sensitivity to the needs of other nation states or of the international community. Both types of realism are crucial to the modern conflicts learning, although the influence of domestic legal realism is clearer and has been perceptively noted.⁵²

Consider domestic legal realism first. This type of realism recognizes that judges have substantial discretion to make law. The rules of the First Restatement of Conflicts were suspect because they were supposed to have been deduced by logical methods from first principles about vested rights. The old learning

Cost, 3 J. L. & ECON. 1 (1960).

50. One of the foremost aspirations of the First Restatement was uniformity and predictability. L. BRILMAYER, *supra* note 5, at 220.

51. See generally W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942).

52. Dane, *supra* note 43.

was therefore criticized by the guru of the conflicts revolution, Brainerd Currie, as mechanical, metaphysical, and based upon a desire to impose spurious uniformity upon a world of varying laws.⁵³ Moving to a system without such constraints opens up a great deal of decision-making power for judges. Consequently, the fact that the modern learning requires judges to engage in amorphous, ad hoc assessments is not jurisprudentially troubling.⁵⁴ Evaluation of the underlying policies, it is claimed, is no different in conflicts cases than in domestic cases.⁵⁵ It therefore becomes entirely understandable that the judges respond to their own intuitive assessment of the merits of the dispute. Judges, like any other people, want to reach fair and just resolutions of the problems set before them, and the modern methodology claims to allow them to do so.⁵⁶ What this usually means is application of the law that the judge feels to be substantively just; sometimes this is explained in terms of the forum's interest as a "justice administering state."⁵⁷

From this perspective, it is hard to see how it can be an injustice to apply the substantively "more just" legal rule.⁵⁸ For one thing, cases do not look any different on the merits just because some of the elements occurred in another state. If one has sympathy for the victims of defectively manufactured products, one is not going to have any less sympathy simply because the injury, the sale, or the manufacture occurred in another state.⁵⁹ Furthermore, if the defendant complains about application of the law allowing recovery, a judge may have little sympathy. Local defendants are held to the higher standard of recovery; what is this defendant asking for, better treatment than local defend-

53. L. BRILMAYER, ET. AL. *supra* note 5, at 223-33.

54. B. CURRIE, *supra* note 24, at 627 ("plead[s] guilty without reservation" to the "ad hoc" nature of his analysis).

55. *Id.*

56. Sedler, *Interest Analysis and Forum Preference in the Conflict of Law: A Response to the "New Critics"*, 34 MERCER L. REV. 593, 601, 635-41 (1983) (interest analysis promotes functionally sound and fair results).

57. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 295 (1966).

58. See, for example, Justice Stevens' opinion in *Allstate Ins. Co. v. Hague*, noting that a defendant might show that application of local law was unconstitutional by showing that it was substantively unfair. 449 U.S. 302, 326 (1981) (Stevens, J. concurring).

59. See, e.g., Weinberg, *supra* note 23, at 612 (legislature would not care about the fact that an accident occurred outside the state—they would want same policies to apply).

ants get?⁶⁰ So long as the substantive predilections of the judges are considered relevant, rules requiring application of some other state's laws may be flouted.

Finally, legal realism encourages judges to be frank about their exercises of discretion. Under the First Restatement of Conflicts, judges who wished to respond to what they saw as the real merits of the dispute were obliged to manipulate its convoluted rules to obtain their desired results. Such manipulations were scorned by the new learning as "escape devices".⁶¹ The new methods sought to unveil the "real" processes of decision-making, thereby encouraging judges to be honest about what they were doing.⁶² If they were favoring forum law, or choosing the law that benefited forum residents or plaintiffs, so be it. The methodology should explain the foregoing, rather than try to coerce judges into reaching the results of some supposedly foreordained set of metaphysical rules.

Despite the recognized importance of legal realism, the other form of realism—international realism—is equally important to the development of the modern conflicts outlook. It reflects another strand of modern conflicts thinking, namely a judge's obligation to further the interests of his or her own state. The modern learning supposedly is the best way to do this. For example, Currie held (and many continue to argue) that if more than one state have an interest, the court should further the interests of its own state and disregard those of the others.⁶³ The reason for this approach was that courts had obligations to fur-

60. For instance, in *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964), the defendant had previously defrauded an Oregon resident and Oregon law prevented recovery. It has been suggested that *Lilienthal* is explicable in terms of a desire not to treat foreign plaintiffs better than local ones or, conversely, to treat local defendants sued by foreign plaintiffs differently from local defendants sued by local plaintiffs. Weinberg, *supra* note 23, at 605.

61. This characterization is picked up by several leading casebooks: see, e.g., R. CRAMPTON, D. CURRIE & C. KAY, *CONFLICT OF LAWS*, (3d ed. 1982); see also L. BRILMAYER, *supra* note 5, at 226.

62. This is particularly true with regard to the "better law" approach. See Leflar, *supra* note 57, at 300; cf. J. FRANK, *LAW AND THE MODERN MIND* 137 (1935) ("All judges exercise discretion . . . Shall the process be concealed or disclosed?").

63. B. CURRIE, *supra* note 24, at 182; Allo, *supra* note 31, at 103. Currie later modified his view somewhat by saying that, where a conflict of interests was found to exist, the forum might wish to reexamine its interests and take a more restrained view. But even if a restrained second look uncovered a state interest, the forum was obliged to further it. See Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1242-43 (1963).

ther the policy interests of their democratically elected legislatures.⁶⁴

It is, similarly, a basic tenet of international realism that sovereign states are entitled to pursue their own interest, without external constraints stemming from principles of international law. Indeed, realists express doubt about whether international law exists in any meaningful sense in virtually the same way that some modern conflicts theorists insist that there are no constitutional limits on choice of law, so long as the forum has an "interest."⁶⁵ An important assumption comes into play at this point. That assumption is in essence the first principle of the international realist perspective, namely that a state has a right to do what is in its interest.

This assumption is far from self-evident. In fact, it seems clearly false. There seems to be something of an agency argument at work. In the conflicts context, the argument is that the court is the agent of the legislature and of the people. It would be a breach of duty if the court failed to serve the interests of those persons that it represents. In the international realist context, the argument is that the government acts on behalf of the state, and must therefore act to further the state's interests. But the agent's duty to act on behalf of the principal does not make it justifiable to take all steps that will further its client's interests. In particular, it is hard to see how that agent could be obligated to further goals that the client would not be entitled to further on its own behalf.⁶⁶ The agent's duty might be overridden by limitations on the principal's freedom of action.

The duty to further the client's interests might also be overridden by limitations on what means may be employed. For example, the managers of a corporation have an obligation to further the interests of the shareholders, and a lawyer has an obligation to further the interests of his or her clients. However, a manager could not justify bribing a judge in a case where the corporation was a defendant, on the grounds of an obligation to further the stockholders' interests. Similarly, a lawyer could not

64. B. CURRIE, *supra* note 24, at 182-83.

65. Generally, the constitutional test for whether a choice of law is permissible is whether an interest exists. For a recent exposition of this view, see Shreve, *Interest Analysis as Constitutional Law*, 48 OHIO ST. L.J., 51, 71-77 (1987). For a discussion of the realist view of international law, see C. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS*, 11-66 (1979).

66. Cohen, *Moral Skepticism and International Relations* in C. BEITZ, M. COHEN, T. SCANLON & A.J. SIMMONS, *INTERNATIONAL ETHICS* 3, 4 (1985).

further a client's interest by destroying evidence or soliciting perjured testimony. The fact that he or she had an obligation to serve the client would not be an excuse. The same is true in the international and conflict of laws contexts. Furthering the interests of one's state is not the only or even the most important consideration. It is an obligation that operates within the limits on what a state may legitimately seek, and within the limits on the means an agent may employ to promote even legitimate ends. Actions are not justifiable merely because they serve state or national interests.

If the international realists have not been overly concerned about such limitations of principle, they at least can somewhat plausibly assert that states are compelled to protect their interests because in this global state of nature there is no one else that can be trusted to do so.⁶⁷ While they might prefer to act on principle and respect other states' interests, they may be disinclined to do so without assurances of reciprocity. The security dilemma in international affairs may mean that the players settle for sub-optimal outcomes because there is no Leviathan to enforce proposed solutions to their prisoners' dilemma. Whether or not this is convincing as a matter of international law,⁶⁸ the same cannot be said within the United States, where the Supreme Court exists in part to prevent states from running roughshod over one another. There is no reason to settle for a sub-optimal anarchy when workable methods of cooperation might be developed. Nevertheless, the modern conflicts emphasis on state interest persists.

The two different realist strands were both present in Currie's original presentation of the modern approach. But they lead in different directions. Judicial discretion, and preference for case-by-case adjudication as opposed to formalized rules, is not the same as pursuit of forum interests. The first leads to increased judicial power to implement "just results"; the second involves single minded pursuit of the interests of the state. A conflict arises where the judge thinks that the other state's law is substantively superior—should he or she then "further justice," or further the interests that his or her institutional superiors have defined? This tension accounts for a growing rift be-

67. C. BEITZ, *supra* note 65 (describing "state of nature" theories of international law).

68. *Id.*

tween those modern scholars who simply favor pro-plaintiff law and those who first and foremost favor forum law. Some emphasize the former,⁶⁹ and some the latter.⁷⁰

Neither of these emerging subgroups of the modern school, however, focus on principled arguments in favor of defendants. Yet, it is the viewpoint of the individual protesting application of forum law—usually the defendant⁷¹—that strikes one as providing the proper principled perspective on choice of law. The needs of the plaintiff and of the forum are of only secondary importance, to be considered once the defendant's legitimate concerns are accounted for. After making this argument, I think it will be easier to see why the rights of interstate federalism have not found champions either in the political left or the political right.

IV. THE PROPER PERSPECTIVE ON CONFLICT OF LAWS

Before a state court may reach the merits of any controversy, it must first determine whether the defendant has a right not to be subjected to state coercion. This issue is a threshold question which must be addressed before it is legitimate to consider the state's interest in subjecting an individual to its laws and the plaintiff's interest in receiving the benefits provided by those laws. The jurisdictional question, in other words, must be addressed before either the state interests or the plaintiff's interests are relevant. The reason for this is that the latter exist only because there is some positive state law which creates them, while the former is not necessarily a creation of state positive law. It therefore begs the question to say that state interest or plaintiffs' needs create a right to apply state law; rather, it is the right to apply state law which makes the state interests or plaintiffs' needs relevant.

Consider first the claim that the needs of the plaintiff, the proponent of local law, must be taken into account. Why must the plaintiff's needs be considered? Obviously, because the plaintiff has suffered an injury for which he or she seeks compensation. Private law is designed, after all, to compensate in-

69. Weinberg, *supra* note 23.

70. Allo, *supra* note 31.

71. This is because the plaintiff selects the forum, which usually will have a law to his or her advantage. One exception which comes to mind is *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964), but such occurrences are relatively rare.

jured plaintiffs. While this response is true, it overlooks one important thing: Not all injuries are compensated. If you contact and die of influenza, you have suffered an injury, but this injury is probably not compensable (even if it seems clear that you must have contracted the disease from *someone*, and even if you can prove who that person is).

There is nothing logically or morally necessary about leaving the influenza victim without a private defendant to sue. The lack of remedy occurs simply because the present state legal systems have typically chosen not to provide recovery in such circumstances. But that is precisely the point. Plaintiffs obtain their rights to recovery from positive law. Until a plaintiff shows that there is some positive law which bestows such a right, the plaintiff has no legitimate interest that must be taken into account. The burden of persuasion, in other words, should be on the plaintiff to show that some applicable legal norm grants such an interest, and it is putting the cart before the horse to use the plaintiff's need for compensation to show that some particular positive law is applicable.

Take another look now at the snow shoveling example that was discussed earlier. In support of the proposition that compensation should be allowed, the author argued that "although the failure to shovel snow may not be actionable at the situs, it is a failure nevertheless; a homeowner must be aware that the failure creates a condition of some risk, whether or not a warning is posted."⁷² In what sense is it "a failure nevertheless?" Certainly it is a failure in the literal sense of being an omission; to fail to shovel snow is, by definition, a "failure." But something more normative must be intended. The injured party also "failed" to walk carefully enough to avoid an accident. But, according to this author, this failure should not cause the plaintiff to bear the risk of loss. The defendant should instead bear the loss because she should have known that someone might get hurt.

Whence comes this assumption? It must arise either out of some "natural law" of torts or out of some positive law assigning responsibility. Perhaps I am influenced by my view of natural law, but substantive natural law of torts seems an implausible basis for a choice of law theory. If there is a natural law of torts, which overrides positive laws denying recovery, why does it op-

72. Weinberg, *supra* note 23, at 624.

erate only in choice of law cases? Why does its vitality depend upon its being part of a general modern trend towards recovery? In any event, one suspects that such natural law arguments are rather problematic since "general common law" was abolished in *Erie Railroad v. Tompkins*.⁷³ But positive law is even a more suspect source. As already argued, to find a source of plaintiff's rights in positive law is to get the analysis backwards. We are engaged, after all, in determining whether the pro-recovery law applies to this case.

Can the same not be said of the defendant's rights—is this argument not symmetrical? In one respect it is. Many defenses that a defendant might raise (statute of limitations, assumption of risk, etc.) are based on positive law. And with regard to such defenses, the defendant is obligated to show that it is fair to subject the plaintiff to them. This requires showing that a particular positive law applies. But a conflict of laws defense seems to be of a different sort. It asserts a right to be free of particular positive authority, whether adjudicative or legislative. It is different from an argument that the other party might fairly be subjected to the legislative or adjudicative authority of the alternative state, an issue I have called "reciprocal contracts."⁷⁴ Of course, the fact that there are few contacts with the forum means that there will be some other state with connections adequate to support jurisdiction. But the right to be left alone is not based upon the positive law of some alternative forum.

Even if the defendant needed a source for the right to be left alone, moreover, there is one positive law source for such a defense, namely the federal Constitution. This is a source that is not usually subject to the same objection as raised against the plaintiff's right of recovery, because there are no choice of law issues with regard to application of a uniform federal law. In this respect, the defendant's argument can safely be founded on a sort of "natural" law, namely the Constitution.

The only circumstance in which relying on the Constitution as a positive source for the defense may present difficulties is in an international controversy. What if the plaintiff wants New York law applied to a foreign defendant with no American contacts? While there is a sense in which it makes perfect sense to

73. 304 U.S. 64 (1938).

74. Brillmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 110.

evaluate this under the United States Constitution, from another perspective it seems that the foreigner should not be required to rely in this way on American law. The gist of the complaint, after all, is that the defendant is not subject to American law; that he or she has a right to be left alone. This would exclude even the Constitution. To make the same point a different way, what would happen if the Constitution was amended to omit any limitations on legislative or adjudicative jurisdiction? Could the defendant then be properly subjected to New York law?

The point, which I make with some trepidation, is that no law can simply bootstrap itself into applicability in this way. The right to be free from some body of law, or some adjudicatory authority, does not necessarily stem from a particular positive law source. An alternative source perhaps exists in natural law, or, perhaps better, in political philosophy. The argument is that assertions of authority must be justified as a matter of political theory, and that in this sense the burden of proof is on the proponent of authority. Normally the political authority is not open to serious practical question—although it is always of intense philosophical interest—but interstate problems by their nature raise these questions as a practical matter. The question in such jurisdictional disputes is always the proper sphere of state or national authority.

I will return to this point. First, I wish to show that it is for the same reason that the issue of the needs of the forum is also secondary. As previously stated, one of the threads in modern conflicts learning is the forum preference for its own law because of the supposed duty of a forum court to further the interests of its elected superiors. Once conflicts is re-interpreted as an issue of political philosophy, it becomes clear how inadequate such arguments are. The needs or policies of the forum, like those of the plaintiff, are simply beside the point. They are relevant only once the right of the forum to impose its will has been established. What the state wants is irrelevant to whether it has a right to be interested. This, once again, raises an issue of philosophical justification. From this perspective, the thought that forum law should be the norm (applied except in unusual circumstances) is clearly wrong.⁷⁵ The burden runs the other way; it is

75. Cf. B. CURRIE, *supra* note 24, at 3-76 (the law of the forum).

the exercise of coercive authority which must be justified, not the resistance to it.

Not surprising, the same arguments should be pertinent to refute both the needs of the plaintiff and the interests of the forum rationales. After all, the plaintiff has selected the forum because it will apply its law or exercise adjudicatory authority to the plaintiff's advantage. Their interests are, for this reason, aligned; if they were not, the plaintiff would have chosen a different forum. And so the question in both cases is whether this forum, which perceives its own interests in a way that coincides with what the plaintiff wants, has a justification for asserting coercive power over the defendant.

I realize that this way of phrasing the issue leads inevitably into a natural law thicket. The relevant natural law precept is simply that no government is entitled to exercise coercive authority over an individual without adequate political justification. I do not intend to inquire here into what might count as an adequate justification.⁷⁶ The point is merely to insist that the question must be phrased in those terms. Furthermore, phrasing things in these terms leads necessarily to focus on the defendant, for it is the defendant typically who is experiencing the state's coercive power.

While I have suggested that such principles must exist regardless of whether the Constitution creates or recognizes them, in fact the Constitution does reflect the sort of focus that I am describing. In particular, it incorporates the point of view of the party opposing the imposition of forum authority, asymmetrically subordinating the interests of the party seeking state intervention. The best manifestation of this perspective is the phrasing of the due process clause, which protects against state deprivations of property. This provision asymmetrically protects those who already have a life, liberty, or property interest, as opposed to those who would like to obtain one. The needs of those who seek compensation, and of the state that seeks to compensate, are necessarily dependent upon the right to extract compensation from the particular defendant before the court. Persons cannot simply be chosen at random and required to compensate injured individuals—unless there is adequate reason to extract the judgment from a particular defendant, shifting the

76. That issue, unfortunately, must be left to future articles.

loss onto that defendant is arbitrary, capricious and unconstitutional.

Posing this as an issue of political theory has several consequences. First, it renders inconsequential whether the imposition is de minimis or substantial. As a matter of principle, jurisdiction becomes a due process question like any other; even minor impositions (speaking in financial terms) can count as major violations.⁷⁷ Furthermore, the fact that the defendant has been led to *expect* a violation is no excuse. Such expectations are no more relevant than the expectations created by telling a welfare recipient in advance, "your benefits are going to be cut off without a hearing." Unsurprising violations of rights are still violations. Still another consequence brings us back to the starting point of this article. In my view, it is the fact that interstate federalism involves questions of political theory that accounts for the peculiar lack of appreciation of the problem that general scholarship has shown.

V. THE POLITICAL ORPHAN

Are such questions of political theory the appropriate province of the left or the right? The reasons why the left might not take on this social cause are easy enough to see. Typically, the holders of "interstate federalism rights" are deep pockets—corporations, private defendants represented by insurance companies, and so forth. This is because the only persons worth suing in the interstate context are those with the money to pay a judgment large enough to make expensive interstate litigation profitable. A possible exception arises in family law disputes, where even persons of modest means can get drawn into expensive litigation.⁷⁸ Still another occasional exception may be criminal law—but both of these areas are conflict of laws backwaters at present.⁷⁹ In the usual case the injured party is likely to be someone for whom the social reformers have little sympathy, especially in comparison to injured tort victims, to whom the legal system is supposed to be engaged in redistributing wealth.

Then why is it that interstate federalism issues have not

77. Procedural due process issues often, of course, involve small amounts of money. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972), which involved goods worth \$500, far less than the stake in many litigated choice of law disputes.

78. See, e.g., *Kulko v. Superior Court*, 436 U.S. 84 (1978).

79. L. BRILMAYER, *supra* note 5.

been picked up by the right? The answer to that one, I think, is more complicated. First consider the unclear relevance of the concept of "state rights," a current conservative password. Conservatives might be disinclined to interfere with state choice of law rules if they take a restrained position on judicial review of state law. For every forum with which a plaintiff has aligned himself, however, there is some alternative forum that the defendant has selected as the best protector of her rights. Laissez-faire doesn't maximize state interests because keeping the federal government off the back of one state, in this context, means leaving that state free to prey upon the others.

The largest problem in appreciating these interstate federalism rights probably is a different one, however, namely that violations of these rights resemble property rights but are actually political rights. In the context of a particular case, the violation of such rights may mean that the defendant has to hand over money. But that does not mean that these rights are property rights in the traditional sense. If a criminal defendant's procedural rights were violated, the result might be that he or she was unfairly convicted and required to pay a criminal fine, but the fact that the injury was monetary does not mean that it was a property right that was violated. I am not addressing the issue of whether "property rights" are also civil rights, or whether they are worthy of constitutional protection. On the issue of whether they have equal status with (say) first amendment rights, I express no opinion. It is just that fitting interstate federalism rights into a property rights mold makes them very difficult to explain convincingly.

One proponent of the modern learning, for example, attacks constitutional limits on choice of law by characterizing them as "substantive due process." Early decisions of the Supreme Court recognizing limits on choice of law were, he argues, the product of a "Lochner" mentality.⁸⁰ Issued at about the same time, and written by the same Court, these opinions spoke the language of protecting vested property rights and preventing impairments of contract.⁸¹ If that is all that constitutional limits on choice of law amount to, then it is not surprising that they find little cur-

80. Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59 (1981).

81. *Id.* at 62-66 (describing cases).

rent favor, especially with liberals. They represent judicial activism with a bias in favor of vested property interests.

But vested property rights are not the only way to explain these limitations. Indeed, property rights are not a very convincing way to explain interstate federalism because they do not explain why a state can impinge on the property interests of its own citizens, or those acting within its own territory, in ways that it cannot impinge on the property rights of outsiders. If Illinois seeks to compel an out-of-state defendant to litigate in Illinois, then it may not be imposing any hardship on the defendant that would not be imposed on any local defendant. However, it is not the imposition itself that is unreasonable, but the act of imposing it upon an individual whom the government has no right to impose upon. The defense can only be cogently mounted from a posture of protecting political and civil liberties, where even a *de minimus* offense is a matter of principle.

If this perspective does not neatly fall into either the left or right wing pigeonholes, then neither does it exactly fall outside. Because of its civil libertarian overtones, and because it involves protection of property interests from unwarranted government interference, interstate federalism ought to be a bipartisan issue. And, it ought also to be a subject of some concern; right now, it seems to be neither.

VI. CONCLUSION

An important first step is for lawyers and scholars outside the closed circle of conflicts learning to become informed about what is going on. Choice of law may seem like an arcane specialty, but it is as much an element of the current legal scene as hot political topics such as tort reform. Having been left to the conflicts scholars, modern academic conflicts learning has become out of touch with reality. Interstate federalism should be put back onto our intellectual and political agendas; its constitutional protections simply could not be more timely.