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The Return of the Unprovided-For Case

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THE RETURN OF THE UNPROVIDED-FOR CASE

Michael S. Green*

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I. INTRODUCTION

The cast of characters in the conflict of laws have curious names—renvoi, dépeçage, false conflicts, true conflicts, comparative impairment, choice-influencing considerations. This Article concerns one of the strangest: the unprovided-for case. The unprovided-for case is a puzzle that arises, primarily concerning tort cases, under the dominant choice-of-law approach used in the United States, governmental interest analysis. As its name suggests, in the unprovided-for case the tort law of no jurisdiction appears to apply. There is a gap in the law.

One might think that the solution is simple. When a court faces a gap in the law, it looks to relevant regulatory policies and *creates* a legal rule to fill the gap. But this is not how interest analysts have tried to solve the unprovided-for case. It is a fundamental commitment among conflicts scholars of all stripes that law is *applied* in conflicts cases. It is not *made*.¹ For the unprovided-for case to be solved, preexisting law must be found to fill the gap that the unprovided-for case apparently presents.

The most influential argument along these lines was offered by Larry Kramer, in his 1989 article *The Myth of the “Unprovided-For” Case*.² Kramer’s solution has not only been largely accepted by interest analysts,³ it also appears to have silenced critics.

¹ But see *infra* note 126 (discussing briefly some conflicts scholars who characterize courts as making law in conflicts cases).

² 75 VA. L. REV. 1045.

³ Kermit Roosevelt—the Reporter for the new *Third Restatement of the Conflict of Laws*—is a prominent example of an interest analyst who accepts Kramer’s argument, although he disagrees about the effect that the Privileges and Immunities Clause, U.S. CONST. art. IV, § 2, cl.1, has on (putative) unprovided-for cases. Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2520–25 (1999). See *infra* note 78. For other examples of conflicts scholars who accept Kramer’s argument (although not always his claims about the effect of the Clause), see Mark D. Rosen, *Choice-of-Law as Non-Constitutional Federal Law*, 99 MINN. L. REV. 1017, 1082 (2015) (stating that Kramer’s argument is “irrefutably sound”); Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 BUFF. L. REV. 329, 347–49 (1997) (accepting Kramer’s argument); Herma Hill Kay, *A Defense of Currie’s Governmental Interest Analysis*, in 215 RECUEIL DES COURS 9, 161–64 (1989) (same). But see Louise Weinberg, *A Radically Transformed Restatement for Conflicts*, 2015 U. ILL. L. REV. 1999, 2009–10 n.37 (rejecting Kramer’s argument, although not for the reasons I offer in this Article).

I will argue that Kramer's solution fails. He finds applicable laws in unprovided-for cases only by using an unsustainably broad definition of a *law*, a definition that generates intractable puzzles if consistently employed. What Kramer actually shows is not that law always applies in the unprovided-for case, but that regulatory policies can always be found to recommend law to fill the gap that the unprovided-for case creates. But these policies are *reasons* for laws. They are not themselves laws.

The recognition that law must be made in the unprovided-for case is much more than a solution to a technical problem in the interest analysis approach. It revolutionizes the entire field. Once it is acknowledged that a court makes law in the unprovided-for case by taking into account freestanding regulatory policies, one cannot avoid the conclusion that it must do the same in every conflicts case, for these policies are relevant to them too.⁴ The result is that interest analysis collapses, leaving no clear replacement. Or so I shall argue.

II. SOME BACKGROUND

Two main conflicts approaches are used in the United States. The oldest is vested rights theory.

A. VESTED RIGHTS THEORY

Vested rights theory is best exemplified in the *First Restatement of the Conflict of Laws*, for which the Harvard law professor (and first dean of the University of Chicago Law School) Joseph Henry Beale was the Reporter. Although dominant in the late nineteenth and early twentieth centuries, it is now retained by only around ten states.⁵ Its conceptual foundation is a principle

⁴ See *infra* note 125 for one small exception.

⁵ See Symeon C. Symeonides, *Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Survey*, 63 AM. J. COMP. L. 299, 351 (2015) (noting that Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming still use the *First Restatement* for tort cases).

of exclusive legislative jurisdiction: a sovereign necessarily has sole lawmaking power over events within its borders.⁶

Assume two married Californians are in a car accident in Georgia due to the wife's negligence. The husband sues the wife for compensation. Georgia law bars interspousal negligence suits.⁷ California law allows them.⁸ Which law should the court use?

To the vested rights theorist, only Georgia law applies, because only Georgia lawmakers can legally regulate accidents that occur within the borders of the state.⁹ When the accident occurred in Georgia, it became a fact that a Georgia legal right (protecting the wife from liability) was created.¹⁰ That fact—that a Georgia legal

⁶ See 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 46 (1935) (“[T]he law must extend over the entire territory subject to it and apply to every act done there, but only one law can so apply.”); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19 (1834) (“[E]very nation possesses an exclusive sovereignty and jurisdiction within its own territory.”).

⁷ See O.C.G.A. § 19-3-8 (2016) (stating that spouses enjoy interspousal tort immunity); *Bassett v. Harrington*, 543 S.E.2d 798 (Ga. 2000) (“Under the common law doctrine of interspousal tort immunity (codified at OCGA § 19-3-8), actions between spouses for personal torts committed by one spouse against the other are barred. . .”).

⁸ See *Klein v. Klein*, 376 P.2d 70, 72 (Cal. 1962) (holding that interspousal immunity no longer exists for either intentional torts or torts based on negligence).

⁹ This theory of exclusive legislative jurisdiction was complemented by a theory of exclusive *adjudicative* jurisdiction, famously expressed by Justice Field in *Pennoy v. Neff*, 95 U.S. 714, 722 (1877) (“[E]very state possesses exclusive jurisdiction and sovereignty over persons and property within its territory.”). The courts of only one sovereign have the power to issue a judgment binding upon the person of the defendant (that is, a judgment *in personam*), namely, the sovereign within whose borders the defendant happens to be at the initiation of the suit. By the same token, the courts of only one sovereign have the power to issue a judgment binding upon the property of the defendant (that is, a judgment *in rem* or *quasi in rem*), namely, the jurisdiction within whose borders the property happens to be at the initiation of the suit. A judgment of a court with adjudicative jurisdiction also creates a vested right, which other court systems ought to respect.

¹⁰ What happens, one might ask, when the accident itself crosses borders, for example, when the negligent *act* occurs in Alabama and the resulting *harm* in Mississippi? *E.g.*, *Alabama Great Southern R. Co. v. Carroll*, 11 So. 803, 804 (Ala. 1892) (negligent act committed by one employee in Alabama caused train to uncouple in Mississippi, causing harm to another employee). To Beale, the fact that the *last* event necessary to create the legal right at issue occurred within Mississippi's borders made it self-evident that Mississippi, and it alone, has lawmaking power. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 377–378 (1934) (stating that “[t]he place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place,” and “[t]he law of the place of the wrong determines whether a person has sustained a legal injury”). It is for the same reason that he claimed that the law of the place of acceptance, which is the last event necessary to create a contractual obligation, governed the validity and interpretation of a contract, no matter where the offer was made, the contracting parties reside, or performance was to occur. See

right had *vested*—ought to be respected by every sovereign's courts.¹¹

For the vested rights theorist, a sovereign's lawmaking power is not merely exclusive, it is *compulsory*. A sovereign cannot fail to legally regulate everything within its sphere of lawmaking authority. As Beale put it: "It is unthinkable in a civilized country that any act should fall outside of the domain of law. If law be regarded as a command, then every act done must either be permitted or forbidden."¹² There can be no "hiatus or vacuum in the law."¹³ For example, if an action is subject to Georgia's exclusive legislative jurisdiction and one can find no Georgia law that forbids the action, then necessarily the action is permitted. There is no other alternative.¹⁴ It follows that there are no gaps in conflicts cases.

No one, to my knowledge, accepts this theory of exclusive legislative jurisdiction anymore. Sovereigns, we assume, have *concurrent* regulatory power over transactions that have connections with more than one jurisdiction.¹⁵ Both Georgia and California officials can legally regulate accidents in Georgia

RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 311, 332 (1934) (stating that the law of the place of contracting governs questions of the validity of a contract).

¹¹ See 3 BEALE, *supra* note 6, at 1969 ("The law annexes to the event a certain consequence, namely, the creation of a legal right . . . When a right has been created by law, this right itself becomes a fact . . . [T]he existing right should everywhere be recognized; since to do so is merely to recognize the existence of a fact."). Despite his theory of vested rights, Beale did not think that a foreign court is legally obligated to acknowledge these rights. Assume a California court has adjudicative jurisdiction over the California wife, because she was within the borders of California at the initiation of the suit. If the court were *legally* obligated to use Georgia law to adjudicate the husband's claim against her, the California court's exclusive power over persons and property within its borders would be compromised. Vested rights create legal *reasons* for territorial choice-of-law rules, but they do not legally obligate courts to adopt such rules. For a further discussion, see Michael S. Green, *Legal Monism: An American History*, in VIENNA LECTURES ON LAW AND PHILOSOPHY (Hart Publishing, forthcoming) (describing the vested rights approach); Roosevelt, *supra* note 3, at 2456 (same).

¹² 1 BEALE, *supra* note 6, at 45.

¹³ *Id.*

¹⁴ This extends to all legal questions, such as duties of compensation. If looking to Georgia law does not show that someone suffering a harm in Georgia has a right to compensation, then necessarily he has no such right.

¹⁵ See, e.g., Michael S. Green, *Vertical Power*, 48 U.C. DAVIS L. REV. 73, 81–85 (2014) (discussing the Supreme Court's recognition of concurrent regulatory authority between states and between states and the federal government).

involving Californians.¹⁶ Indeed, concurrent regulatory power is now established constitutional law. The Supreme Court long ago abandoned its quixotic project of using the Full Faith and Credit Clause and the Due Process Clause of the Fourteenth Amendment to divide states' lawmaking powers into exclusive spheres.¹⁷ As the Court now sees it, a number of states may permissibly extend their law to an event, provided that there is "a significant contact or significant aggregation of contacts, creating state interests, such that choice of [the state's] law is neither arbitrary nor fundamentally unfair."¹⁸ Concurrent legislative jurisdiction has also been accepted as a matter of international law.¹⁹

In addition, legal regulation is now seen as a discretionary matter, rather than something metaphysically compelled.²⁰ If two sovereigns have the power to regulate, to insist that they both exercise that power would force them to engage in regulatory warfare. But it is surely possible that one sovereign might choose not to exercise its power because it thinks that the other has. The question is no longer whether a Californian's action in Georgia is legally forbidden or permitted under Georgia law. There is a third option. The action may be neither forbidden nor permitted. Georgia officials may have chosen to leave a legal void to be filled with California law.

¹⁶ See *id.* at 82 (noting that "a state can extend its tort law to a transaction even if the harm occurred outside its borders").

¹⁷ See, e.g., *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357, 376–77 (1918) (reading into Due Process Clause the rule that the law of the state of contracting determines validity and scope of a contract).

¹⁸ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981). Paired with this theory of concurrent legislative jurisdiction is a theory of concurrent adjudicative jurisdiction, as expressed in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). As the Supreme Court now sees it, more than one jurisdiction's courts are empowered under the Due Process Clause to assert jurisdiction *in personam*. Even though the defendant is currently outside its borders, a state court can still subject him to *in personam* jurisdiction, provided that there are minimum contacts with the state such that the exercise of jurisdiction over the defendant does not offend "traditional notions of fair play and substantial justice." *Id.* at 316.

¹⁹ Under international law, a sovereign can have legislative jurisdiction over a transaction outside of its borders, for example, when the transaction involves its nationals. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987) ("[A] state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory.").

²⁰ See *infra* Section II.B.1.

If the conceptual foundation of vested rights theory has been rejected, why do some states still hang onto it? The main reason is its (apparent) predictability and ease of application.²¹ Under vested rights theory, choosing law turns out to be simple, at least in theory: just identify the sovereign that people in the late nineteenth and early twentieth centuries thought had exclusive lawmaking power over the event being adjudicated. In tort cases, this is the sovereign where the harm occurred.²² In contract cases, it is the sovereign where the contract was entered into.²³

But if lawmaking power is concurrent, vested rights theory—whatever its predictability and ease of application—is irrational. If Georgia and California can both legally regulate an event in Georgia, Georgia may have chosen not to extend its law to the event out of deference to California’s regulatory interests. To nevertheless apply Georgia law on the basis of an outdated theory of exclusive regulatory power frustrates California’s regulatory interests without providing Georgia with any corresponding benefit.

It is not surprising, therefore, that courts that use the vested rights approach rely on numerous “escape devices” that allow them to avoid the recommended choice, in favor of one more in keeping with governmental interests.²⁴ But with these escape devices in place, the predictability and ease of application that were the main virtues of vested rights theory vanish.

²¹ See, e.g., *General Tel. Co. &c. v. Trimm*, 311 S.E.2d 460, 460 (1984) (“Although [interest analysis] is a more recent development in choice of law cases, we are impressed with the findings of other jurisdictions that this approach is neither less confusing nor more certain than our traditional approach.”); *McMillan v. McMillan*, 253 S.E.2d 662, 664 (Va. 1979) (“[W]e do not think that the uniformity, predictability, and ease of application of the Virginia rule should be abandoned.”).

²² See RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 377–379 (1934) (stating that the law of the “place of wrong” determines liability under tort).

²³ *Id.* §§ 311, 332 (stating the law of the “place of contracting” determines the validity of a contract).

²⁴ See LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 226–29 (1986) (describing use of escape devices); KERMIT ROOSEVELT III, CONFLICT OF LAWS 14–28 (2010) (same).

B. GOVERNMENTAL INTEREST ANALYSIS

The remaining forty states, as well as the District of Columbia, have adopted some form of governmental interest analysis, which is based on the recognition that sovereigns can have concurrent regulatory power.²⁵ To find out whether a jurisdiction's officials have chosen to extend their law to the facts of a conflicts case, interest analysts argue, a court should rely on the usual method for interpreting laws' scope.²⁶

1. *False Conflicts*. Consider a Georgia court adjudicating a case that presents no interjurisdictional problems. Two Georgians, who are married but legally separated, are in a car accident in Georgia due to the wife's negligence. The husband sues the wife for compensation under Georgia negligence law. The wife points to a Georgia statute codifying the common law rule of interspousal immunity.²⁷

The court seems to face a conflict of Georgia laws. Each party points to a Georgia law that appears to apply (negligence law and the interspousal immunity statute) and the court must choose

²⁵ As for federal courts, they usually do not use their own choice-of-law approach. When sitting in diversity or supplemental jurisdiction, they use the choice-of-law approach of the state where they are located. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941). But in certain federal question cases—for example, maritime cases whose facts might fall under federal law or the law of a foreign nation—they use what amounts to an interest analysis approach. See *Lauritzen v. Larsen*, 345 U.S. 571, 592 (1953) (looking, in part, to residence of parties to choose Danish law over American law); *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 308 (1970) (looking, in part, to residence of parties to choose Greek law over American law); see generally Symeon Symeonides, *Maritime Conflicts of Law from the Perspective of Modern Choice of Law Methodology*, 7 MAR. LAW. 223 (1982).

²⁶ The idea that a court addressing a conflicts case should approach it the same way that a court adjudicating a case with purely domestic facts does is a pervasive theme among interest analysts. See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 183–84 (1963) (describing the process as “essentially the familiar one of constriction or interpretation” when adjudicating cases); Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1888–89 (2005) (“[T]he idea that conflicts should return from its self-imposed exile and rejoin the body of ordinary legal analysis is a staple of the literature.”); Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 1005 (1991) (stating that the only difference between choice of law and other legal problems is that “some of the facts are connected to different states”).

²⁷ O.C.G.A. § 19-3-8; see *Bassett v. Harrington*, 543 S.E.2d 798, 799 (Ga. 2000) (stating that under Georgia law “actions between spouses for personal torts committed by one spouse against the other are barred”).

between them. One might think that the court should rely on legal principles that deal with such conflicts, for example, that laws enacted later defeat those enacted earlier (*lex posterior derogat legi priori*), that statutes trump common law, that more specific statutes take precedence over more general ones (*lex specialis derogat legi generali*), and so on. Using these principles, the interspousal immunity statute should obviously take priority.

But before the court makes a *choice* of law, shouldn't it first determine whether both laws actually apply to the facts? Perhaps the interspousal immunity statute is inapplicable to separated spouses. In fact, the Supreme Court of Georgia asked this very question in *Harris v. Harris*.²⁸

One could imagine the court resolving the question by looking to the plain text of the statute. The statute says that spouses are not permitted to sue one another for negligence, and separated spouses are still spouses.²⁹ But the court assumed that the term "spouses" was not intended to answer the question. Since no textual resolution of the statute's scope was possible, it looked to the statute's purposes, in order to determine whether they would be vindicated through its application to the facts.

Interspousal immunity, the court concluded, exists to encourage marital harmony and to keep spouses from engaging in insurance fraud by staging accidents.³⁰ The statute should not be read as applying to separated spouses, therefore, because there is no significant marital harmony to disturb and no serious worry about collusion and fraud.³¹ There was no conflict of laws after all. Only Georgia negligence law applied.

The interest analyst argues that the same method should be used when the laws of different jurisdictions appear to conflict. The scope of the laws at issue should first be examined to see if the apparent conflict is real. Consider our case of two married

²⁸ 313 S.E.2d 88, 89 (Ga. 1984).

²⁹ O.C.G.A. § 19-3-8. Technically, the statute says only that "[i]nterspousal tort immunity, as it existed immediately prior to July 1, 1983, shall continue to exist on and after July 1, 1983." But the common law rule referred to speaks of "spouses." *E.g.*, *Robeson v. Int'l Indem. Co.*, 282 S.E.2d 896, 897 (Ga. 1981) (stating that common law rule concerns "personal torts committed by one spouse against the other").

³⁰ *Id.* at 898.

³¹ *Harris*, 313 S.E.2d at 89–90.

Californians who are in a car accident in Georgia.³² Should Georgia's interspousal immunity statute be used, or California law, which allows for interspousal negligence liability? Before relying on some principle for resolving a conflict between two jurisdictions' laws, the court should first determine whether there is a conflict at all.

Textualism cannot answer this question, because laws rarely limit their territorial scope explicitly.³³ If one were to follow their plain meaning, they would apply to everyone, everywhere in the world.³⁴ Georgia's interspousal immunity statute speaks of *spouses*, not Georgia spouses or spouses who get into accidents in Georgia.³⁵ Under a purely textualist reading, the statute applies to Mongolian spouses who get into accidents in Finland. Courts must therefore look to laws' purposes to determine their territorial scope.

The purposes of Georgia's interspousal immunity statute, as we have seen, are encouraging marital harmony and avoiding insurance fraud.³⁶ But these purposes are irrelevant, the interest analyst would argue, concerning a California married couple that gets into an accident in Georgia. Georgia lawmakers aren't interested in the marital harmony of California couples or fraud concerning California insurance contracts. Those are California's concern.

So Georgia law does not apply. By contrast, California law does. The purposes of California law are those of negligence law generally—deterrence and compensation. California lawmakers believe in deterring interspousal negligence and compensating those harmed by such negligence.³⁷ True, they are probably not interested in deterring interspousal negligence in Georgia, even

³² The Californians are not separated, making the exception in *Harris v. Harris* inapplicable.

³³ For a rare counterexample, see WIS. STAT. § 895.03 (2015) (action for wrongful death "caused in this state").

³⁴ Kramer, *supra* note 2, at 1052–53.

³⁵ In fact, the statute refers to the common law rule. O.C.G.A. § 19-3-8. But the language of the common law rule refers to spouses generally, without any territorial limitation. *Robeson*, 282 S.E.2d at 897.

³⁶ *Id.* at 898.

³⁷ See Klein, 376 P.2d at 72–73 (stressing that it is "fundamental in the law of torts that any person proximately injured by the act of another, whether that act be willful or negligent, should . . . be compensated").

when it is a Californian who is negligent. That's Georgia's business. But California's compensatory interest in the case is real. California lawmakers want all Californians harmed due to the negligence of a spouse to be made whole, no matter where the accident occurred.

As the interest analyst would describe it, our case is a *false conflict*, in which no choice of law is necessary.³⁸ Only California law applies. The recommendation of vested rights theory, which is to use the law of the place of the accident (here, Georgia's interspousal immunity statute), frustrates the purposes of the only interested jurisdiction.³⁹

2. *Loss-Allocating and Conduct-Regulating Rules.* The way the interest analyst reads laws' territorial scope (particularly in tort cases) depends upon a distinction between *conduct-regulating* and *loss-allocating* rules. A rule is conduct-regulating if it imposes a duty of compensation as a means of discouraging people from engaging in the conduct that gave rise to the plaintiff's harm. And, if the rule limits or rejects a duty of compensation, it is conduct-regulating if it seeks to give people the freedom to engage in the conduct.⁴⁰ For example, negligence liability is conduct-regulating to the extent that it imposes liability in order to discourage negligent conduct. And barring liability when someone causes harm through non-negligent conduct is conduct-regulating to the extent that it is intended to give people the freedom to engage in such conduct.

If all laws were solely conduct-regulating, there would be few cases in which interest analysis and vested rights theory come out differently, for interest analysts understand the scope of conduct-regulating rules territorially. The jurisdiction that created the

³⁸ The cases in which states have abandoned vested rights theory for interest analysis have almost always been false conflicts. *E.g.*, *Babcock v. Jackson*, 191 N.E.2d 279, 281, 285 (N.Y. 1963); *Jagers v. Royal Indem. Co.*, 276 So. 2d 309, 311 (La. 1973); SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 145 (2006).

³⁹ *E.g.*, *Forsman v. Forsman*, 779 P.2d 218, 219–20 (Utah 1989) (using interest analysis to apply California negligence law rather than Utah's rule of interspousal immunity to suit by California wife against her husband concerning an accident in Utah).

⁴⁰ Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 39–40 (1989) (discussing "liberty interests" in tort law that "grant people freedom to act without regard to the consequences to others").

conduct-regulating rule is interested in its applying to all instances of the conduct in the jurisdiction and all instances of the conduct outside the jurisdiction that cause harm in the jurisdiction.⁴¹ The residence of the parties is irrelevant.

A rule is loss-allocating, by contrast, if it imposes or bars a duty of compensation for different reasons than discouraging or encouraging the conduct that gave rise to the plaintiff's harm.⁴² With respect to some loss-allocating rules, the purpose is vindicating a view about the appropriate *ex post* distribution of the loss between the plaintiff and the defendant. An example is *respondeat superior*, that is, the rule holding an employer vicariously liable for the torts of its employees, even though the employer behaved non-negligently in hiring and supervision. The rule is not conduct-regulating, because holding the employer liable is not intended to change the employer's hiring and supervision: by assumption the employer acted with due care. The rule is instead the expression of a judgment that the loss ought to be put on the employer, particularly when employees are commonly without sufficient assets to provide compensation to the plaintiff themselves.

Some rules perform both conduct-regulating and loss-allocating functions. Negligence liability is an example. Its goals are deterring negligent conduct *and* making those who suffer harm

⁴¹ The only way that interest analysis and vested rights theory would come out differently concerning conduct-regulating rules is when the harm and the conduct at issue occurred in different jurisdictions. See *supra* note 10.

⁴² See Joseph William Singer, *Facing Real Conflicts*, 24 CORNELL INT'L L.J. 197, 207 (1991) ("Loss-allocating rules are intended to place the losses occasioned by social activity on the appropriate party even if those rules will leave unaffected the intensity, frequency, or manner of the harmful activity."). For more on the distinction, see generally SYMEONIDES, *supra* note 38, at 123–40; Robert A. Sedler, *Professor Juenger's Challenge to the Interest Analysis Approach to Choice of Law: An Appreciation and a Response*, 23 U.C. DAVIS L. REV. 865, 883–84 (1990). In New York, the distinction is explicitly relied on in its choice-of-law rules for torts. See *Neumeier v. Kuehner*, 286 N.E.2d 454, 455–58 (N.Y. 1972) (using the distinction). The distinction is also used in Oregon and Louisiana's choice-of-law statutes. OR. REV. STAT. § 15.440 (2016); LA. CIV. CODE ANN. arts. 3542–48 (2016). For criticism of the distinction, see Wendy Collins Perdue, *A Reexamination of the Distinction between "Loss-Allocating" and "Conduct-Regulating Rules"*, 60 LA. L. REV. 1251, 1253 (2000) (using the examples of strict liability and limits on damages); Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 405 (1980) ("[M]any of the statutes that interest analysts call protective or compensatory alter incentives in a way that suggests that the legislature was aware of, and probably approved of, their regulatory effects.").

from such conduct whole. But some rules, such as *respondeat superior*, are commonly understood as solely loss-allocating.

Although I will use the term “loss-allocating” myself, I should note that it is misleading, for some “loss-allocating” rules have as their purpose the encouragement or discouragement of conduct. The relevant conduct, however, is something other than the conduct that created the plaintiff’s harm. Interspousal immunity is an example. The rule is not described as conduct-regulating, because it does not have as its purpose making spouses feel free to behave negligently toward one another. But at least one of its purposes is discouraging a certain form of conduct, namely staging accidents in order to defraud insurance companies.⁴³

It is concerning loss-allocating rules that interest analysis and vested rights theory come out very differently. The vested rights theorist treats loss-allocating and conduct-regulating tort rules the same—the law of the place of the harm applies. For the interest analyst, by contrast, the scope of a loss-allocating rule is generally tied to the residence of one or both of the parties. Georgia’s interspousal immunity statute, for example, applies only to Georgia couples, including Georgia couples who get into accidents in other states. It does not apply to Californians who get into accidents in Georgia.

3. *True Conflicts*. To repeat, in the false conflict context, no choice of law is necessary, because only one jurisdiction’s law applies. Only if the case is a *true conflict*, in which at least one purpose of each jurisdiction’s law would be furthered by the law’s application to the facts, is a genuine choice of law required. An example of a true conflict is a Georgia married couple’s accident in California. California is interested in its negligence law (in its conduct-regulating function) being used, as a means of deterring interspousal negligence in the state, and Georgia is interested in

⁴³ An example of a “loss-allocating” rule that has as one of its purposes encouraging activity is charitable immunity, in which a charity is not liable for harm resulting from its negligent hiring or supervision of workers. The rule is not conduct-regulating, for negligent hiring and supervision are admittedly wrongful. The rule is not meant to make charities feel free to negligently hire and supervise. See generally SYMEON SYMEONIDES, *AMERICAN PRIVATE INTERNATIONAL LAW* 135 (2008); see also *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679, 684–88 (N.Y. 1985). But the rule arguably does seek to encourage a certain type of conduct, namely charitable activity, by lowering its cost. SYMEONIDES, *supra*, at 200.

its interspousal immunity statute being used, as a means of encouraging the marital harmony of Georgia couples and preventing fraud concerning Georgia insurance contracts.

Although all interest analysis approaches generally come to the same conclusion about false conflicts,⁴⁴ they disagree about how true conflicts should be resolved.⁴⁵ Brainerd Currie, the father of interest analysis, argued that a court is institutionally obligated to favor the interests of its own jurisdiction, even if these interests are weaker.⁴⁶ Kentucky and Michigan are two states that

⁴⁴ I include the Second Restatement here. Under the Second Restatement, a court chooses “the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). In determining which jurisdiction has the most significant relationship, a court looks, at least in part (and often solely), to the interests of the forum and the other relevant jurisdictions. Thus, the Second Restatement also recommends that interspousal immunity be governed by the law of the place of the marital domicile, *id.* § 169, and many courts in Second Restatement jurisdictions would describe our example of a California married couple’s accident in Georgia as a “false conflict.” See William A. Reppy, Jr., *Codifying Interest Analysis in the Torts Chapter of a New Conflicts Restatement*, 75 IND. L.J. 591, 591–93 (2000) (describing how numerous jurisdictions engraft the concept of a false conflict onto the Second Restatement).

⁴⁵ Part of the problem is that a proper resolution would appear to require a court to compare the strengths of the jurisdictions’ competing purposes. And interjurisdictional utility comparisons, like interpersonal utility comparisons, are impossible. See generally Daniel M. Hausman, *The Impossibility of Interpersonal Utility Comparisons*, 104 MIND 473, 473–90 (1995). For a discussion of this problem, see ROOSEVELT, *supra* note 24, at 66–67. Hence the attraction of the false conflict, in which no weighing of one jurisdiction’s interest against another’s is necessary, because there is only one jurisdiction with an interest in its law applying. The false conflict is the jurisprudential version of a Pareto superior change in distribution; that is, a change in which at least one party is made better off and no one is made worse off. Welfare maximizers like the Pareto superior change because they can know that it increases aggregate utility without having to engage in interpersonal utility comparisons. See generally Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 85 (1992).

⁴⁶ CURRIE, *supra* note 26, at 119 (describing this obligation as the “sensible and clearly constitutional thing for any court to do”); ROOSEVELT, *supra* note 24, at 44–45 (Currie “[a]ssume[s] a quite selfish state, concerned only with promoting its own interests; a state, if you please, blind to consequences, and interested only in short-run ‘gains’”). It is true that the result will be that the law used will depend upon where the action is brought, but Currie thought that the resolution of that problem should be left to Congress, using its power under the Full Faith and Credit Clause, to resolve. Brainerd Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1243 (1963). The only exception to this preference for forum law is when the existence of a true conflict gives the forum’s sovereign a reason to relinquish its interest. Currie described this as the “moderate and restrained interpretation” of forum interest. Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963). But he appeared to limit it to cases where the forum yields out of concern for the reasonable

arguably have adopted this strong preference for forum law in true conflicts.⁴⁷ But most states allow forum interests to yield, at times, to the interests of another jurisdiction.⁴⁸

C. UNPROVIDED-FOR CASES

Although true conflicts are problematic, they are not theoretically puzzling. It is expected that jurisdictions' regulatory interests will sometimes conflict and that some method of resolving these conflicts is needed. But what happens if an examination of laws' purposes leads the court to conclude that *neither* jurisdiction's law applies? Interest analysts call these *unprovided-for cases*.

expectations of the parties. This is suggested by his use of *Bernkrant v. Fowler*, 360 P.2d 906 (Cal. 1961), as an example of the moderate and restrained interpretation in action. Currie, *supra*, at 757–58.

⁴⁷ Symeonides, *supra* note 5, at 351.

⁴⁸ For example, some states use Leflar's "choice-influencing considerations" approach. Under this approach, a court may prefer one jurisdiction's law over another in a true conflict—including foreign over forum law—on the ground that the chosen law is "better." The five states that use Leflar's approach for tort cases are Arkansas, Minnesota, New Hampshire, Rhode Island, and Wisconsin. *Id.* See, e.g., *Wallis v. Mrs. Smith's Pie Co.*, 550 S.W.2d 453, 456–59 (Ark. 1977); *Milkovich v. Saari*, 203 N.W.2d 408, 413 (Minn. 1973); *Clark v. Clark*, 222 A.2d 205, 210 (N.H. 1966); *Woodward v. Stewart*, 243 A.2d 917, 923 (R.I. 1968); *Heath v. Zellmer*, 151 N.W.2d 664, 672 (Wis. 1967). Deciding on the basis of the better law is only one consideration out of five that might be used to resolve true conflicts under Leflar's approach. Other considerations include predictability of results, maintenance of interstate and international order, simplification of the judicial task, and advancement of the forum's governmental interests. Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1586–88 (1966).

Other interest analysis approaches avoid normatively assessing the laws at issue. California, for example, uses William Baxter's comparative impairment approach, in which a court facing a true conflict chooses the law whose underlying purposes would be most impaired if it were not used. William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 8–9 (1963); see generally Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577 (1980). For an argument that California has recently retreated from the comparative impairment approach, see Michael H. Hoffheimer, *California's Territorial Turn in Choice of Law*, 67 RUTGERS U. L. REV. 167 (2015).

Of the remaining states that have moved away from vested rights theory, the vast majority have adopted the Second Restatement. Just how true conflicts are to be resolved under the Second Restatement is hard to discern, because the identification of false conflicts and the various means for resolving true ones are all lumped together haphazardly in a master rule used to determine which state has the "most significant relationship." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

1. *Neumeier v. Kuehner*. For an example of an unprovided-for case, consider *Neumeier v. Kuehner* (with its facts somewhat simplified in a manner that doesn't affect the analysis).⁴⁹ A New Yorker driving with an Ontario guest gets into an accident in Ontario. The Ontario guest sues the New York host for negligence in New York state court.⁵⁰ Ontario has a guest statute, which bars guests in cars from suing their hosts for negligence. Under New York law, hosts can be liable to guests for negligence. Which law should the court use?

As we've seen, under interest analysis a court should first determine the purposes of each law involved and then decide whether these purposes would be vindicated by the law's application to the facts of the conflicts case. The New York Court of Appeals had earlier concluded that the purpose of Ontario's guest statute is discouraging the guest and host from staging an accident so that they can collect from the host's insurance company.⁵¹ The guest statute is therefore a loss-allocating rule, which applies only when the host is from Ontario. If the host is from another jurisdiction, the consequences of the possible fraud (say, rising insurance rates) would be felt there. Ontario is therefore not interested in its law applying in *Neumeier*, since the host is from New York.⁵² Avoiding fraud concerning New York insurance contracts is New York's business.

What about New York negligence law then? The purposes standing behind that law are deterring negligence by hosts and compensating guests they harm.⁵³ The deterrence purpose is conduct-regulating and so implicated only when the accident is in New York. New York lawmakers are not interested in deterring negligence by hosts, even New York hosts, *wherever* it might occur. Detering negligence by hosts in Ontario is Ontario's business.

That leaves New York negligence law in its loss-allocating function. Here too New York is not interested. New York

⁴⁹ 286 N.E.2d 454 (1972).

⁵⁰ In the actual *Neumeier* case, the Ontario host and guest died in the accident. The action was brought by the Ontarian's administratrix against the New Yorker's estate. *Id.* at 455.

⁵¹ *Babcock v. Jackson*, 191 N.E.2d 279, 284–85 (N.Y. 1963).

⁵² Currie, in his discussion of *Babcock*, agreed. CURRIE, *supra* note 26, at 724–25.

⁵³ See *Babcock*, 191 N.E.2d at 284 (“New York’s policy of requiring a tort-feasor to compensate his guest for injuries caused by his negligence cannot be doubted.”).

lawmakers do not want to ensure that any guest harmed by a negligent host is compensated. They are interested only in ensuring the New York guests are compensated.⁵⁴ Compensating Ontario guests is Ontario's business.

In *Neumeier*, each jurisdiction lacks an interest in extending its law to the facts of the case, creating what appears to be a gap in the law. The apparent solution would be for the court to create a legal rule to fill the gap, by considering relevant Ontario and New York regulatory policies. But that is not the approach that Currie, who first identified the unprovided-for case, recommended. Currie thought it was beyond the judicial competence to exercise lawmaking power in conflicts cases, even though he must have been aware that courts create legal rules to fill in gaps in other areas of law.⁵⁵

As Currie saw it, the only governmental interests that can exist are those generated when the purposes of *preexisting* laws are vindicated through their application.⁵⁶ If the purposes of no preexisting law would be vindicated, there are simply no governmental interests to take into account. No jurisdiction "cares what happens."⁵⁷ Freestanding governmental policies that might recommend creating a new legal rule don't count.

Instead of allowing a court to make a new legal rule, Currie tried to solve the puzzle of the unprovided-for case by arguing that every court entertaining a case begins with a presumption in favor of the application of its own law.⁵⁸ Only if there is a reason to depart from the law of the forum should a court apply the law of another jurisdiction. In an unprovided-for case no reason can be found, so forum law applies. The presumption of forum law ensures that there are no gaps in conflicts cases. Forum law fills in anything that might be left unregulated.

⁵⁴ See John Hart Ely, *Choice of Law and the State's Interest in Protecting its Own*, 23 WM. & MARY L. REV. 173, 201-05 (1981); Robert Allen Sedler, *Interstate Accidents and the Unprovided for Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125, 125-26 (1973).

⁵⁵ CURRIE, *supra* note 26, at 153-54.

⁵⁶ Kramer, *supra* note 2, at 1050 ("Currie believed that only interests expressed in a state's lawfully enacted rules are relevant to choice of law.").

⁵⁷ CURRIE, *supra* note 26, at 152.

⁵⁸ *Id.* at 183-84.

But that means that Currie's approach is as arbitrary as the vested rights theory he criticized.⁵⁹ The fundamental problem with the vested rights approach was its assumption that a jurisdiction's law applies within its borders whether or not the law's purposes would be vindicated. But Currie makes the same mistake, except that now it is *forum* law that is applied mindlessly, without regard to purposes.

2. *The Pro-Resident Bias.* Given the inadequacy of Currie's response, the unprovided-for case has been a focus of critics of interest analysis. A common observation is that it arises because interest analysts read loss-allocating rules as applying only if a resident will *benefit*. This pro-resident bias improperly narrows laws' scope, with the result that some cases fall under no jurisdiction's law.

The critics argue that interest analysts adopt the pro-resident bias tendentiously, in an attempt to generate the hoped-for false conflict.⁶⁰ Once the scope of loss-allocating rules is understood

⁵⁹ See Kermit Roosevelt III, *Brainerd Currie's Contribution to Choice of Law: Looking Back, Looking Forward*, 65 MERCER L. REV. 501, 512 (2014) (arguing that the presumption "makes no sense if you think about [choice of law] (as Currie thought we should) as an issue about the scope of state laws"). In addition, we have no answer to how a court of a third jurisdiction with adjudicative power but without any regulatory interest should deal with the case. In this circumstance, Currie could not decide between using forum law and the "bolder technique" of a court placing itself "in the position of Congress, and [reaching] the decision [it thinks] Congress would reach if it were to consider the matter." A court following the latter approach would act as a "guardian of the national interest," and attempt to identify the "more enlightened and humane" rule. Currie, *The Disinterested Third State*, *supra* note 46, at 778–80.

⁶⁰ Often this criticism of the bias is constitutional in nature: The emphasis on benefiting residents violates the Privileges and Immunities Clause of Article IV. Ely, *supra* note 54, at 191 (concluding that "an interest analyst approach to choice-of-law problems . . . is unconstitutional"); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 336 (1992) ("Choice-of-law methods that prefer local litigants, local law, or better law are unconstitutional."). According to these arguments, states are constitutionally obligated to extend the benefits of their laws without discrimination on the basis of residence. This means adopting a territorial approach similar to the First Restatement. Notice that such critics would agree with Currie and Beale that the unprovided-for case does not create a gap in the law. The force of the Constitution means that the law of the place of the accident applies.

Larry Kramer, following Currie, has criticized this argument, I believe effectively, by noting that when a jurisdiction refuses to extend a loss-allocating rule to benefit a non-resident, it can do so as a means of permitting the law of the non-resident's jurisdiction to be used. For example, when a court refuses to extend Georgia's interspousal immunity statute to a California married couple that gets into an accident in Georgia, it does so as a

more broadly, such that they can burden as well as benefit residents, the result is not merely that the unprovided-for case disappears. True conflicts proliferate.

For an example of how the pro-resident bias puts a thumb on the scales in favor of false conflicts, consider *Hurtado v. Superior Court*.⁶¹ A family from the Mexican state of Zacatecas sued a Californian in California state court for wrongful death concerning a California accident in which a Zacatecan was killed.⁶² Zacatecan law had a limitation on the amount of damages for wrongful death; California law allowed unlimited damages.⁶³

The California Supreme Court concluded that the case was a false conflict.⁶⁴ The Zacatecan limitation was a loss-allocating rule intended by Zacatecan lawmakers to protect against “exaggerated claims.”⁶⁵ It followed from the pro-resident bias that the limitation applied only to Zacatecan defendants, because only then would it benefit Zacatecans. The limitation therefore did not apply in *Hurtado*, because the defendant was from California.⁶⁶ On the other hand, California law did apply. Of course, California’s unlimited damages rule did not apply in its loss-allocating function. As a means of ensuring adequate compensation to plaintiffs, it applied only when the plaintiff was a Californian. In *Hurtado* the plaintiff was from Zacatecas. But the court concluded that the rule was also conduct-regulating.⁶⁷ It was intended, in

means of allowing California law to apply. It is true that the California defendant is denied a benefit that would be given to a Georgia defendant. But this is to allow California to vindicate its regulatory purposes concerning California couples. That is miles away from the usual form of invidious discrimination against non-residents that the Privileges and Immunities Clause was intended to prohibit. Reading the Clause as requiring Georgia to extend its interspousal immunity law to the California defendant (and thus to frustrate California regulatory purposes) would be perverse, for it would create the very sort of interstate friction that the Clause was meant to prevent. Kramer, *supra* note 2, at 1065–72. This helps explain why courts have not discussed, much less accepted, the critics’ argument. See, e.g., *Skahill v. Capital Airlines*, 234 F. Supp. 906 (S.D.N.Y. 1964). For further discussion of Kramer’s position, see *infra* note 78.

⁶¹ 522 P.2d 666 (Cal. 1974).

⁶² *Id.* at 668.

⁶³ *Id.*

⁶⁴ *Id.* at 674.

⁶⁵ *Id.* at 670.

⁶⁶ *Id.*

⁶⁷ *Id.* at 672.

part, to maximize the deterrence of tortious conduct.⁶⁸ California was therefore interested in the law applying, because the tortious conduct at issue occurred in California.

Once interest analysis loses its pro-resident bias, *Hurtado* becomes a true conflict. If Zacatecan lawmakers enacted their limitation not just to protect Zacatecan defendants from being subject to exaggerated claims, but also to prevent Zacatecan plaintiffs from making such claims, the limitation would apply.⁶⁹ Furthermore, if California's unlimited damages rule in its loss-allocating function ensures that California defendants adequately compensate those harmed by their negligence, in addition to ensuring that California plaintiffs are adequately compensated, it too would apply.⁷⁰

The unprovided-for case is useful for criticizing the pro-resident bias, because in the unprovided-for case the loss-allocating rule of the plaintiff's residence benefits the defendant, by barring or limiting liability, and the loss-allocating rule of the defendant's residence benefits the plaintiff, by being pro-recovery. The bias forces a court to conclude that neither rule applies. In addition, in an unprovided-for case no jurisdiction has a conduct-regulating interest. To avoid the conclusion that no jurisdiction's law applies, the critics argue, one must read loss-allocating rules as both benefiting and burdening residents,⁷¹ with a resulting increase in the number of true conflicts.⁷²

⁶⁸ *Id.*

⁶⁹ *Cf. Erny v. Estate of Merola*, 792 A.2d 1208, 1211 (N.J. 2002) (attributing to New York a loss-allocating policy of requiring negligent New Yorkers to compensate those they harm, even when the accident occurs outside the state and the plaintiff is not a New Yorker); *Kaiser-Georgetown Cmty. Health Plan, Inc. v. Stutsman*, 491 A.2d 502, 509–10 (D.C. 1985) (finding that D.C. has an interest in holding D.C. corporations responsible for compensating those harmed by their negligence, even when wrongdoing was in Virginia and plaintiff was a Virginian).

⁷⁰ Conduct-regulating rules can also be read more broadly. New York negligence law might be understood as intended to deter not merely negligent conduct within the state, but also negligent conduct by New Yorkers in other states. *Erny*, 792 A.2d at 1220 (New York is interested in its negligence law being used for New Yorkers driving in other states as a means of encouraging them to drive safely there).

⁷¹ Indeed, some argue, why limit the scope of a loss-allocating rule on the basis of residence at all? Why not extend it to loss-causing conduct in the jurisdiction, whatever the residence of the parties? See Joseph William Singer, *Justice and the Conflict of Laws*, 48 MERCER L. REV. 831, 832 (1997) (stating that the “place of the injury has the legitimate

But is the pro-resident bias really as important to interest analysis as these critics make it out to be? With respect to many loss-allocating rules, the issue is not whether the rule will *benefit* a resident, but some other consideration that suggests that the rule applies only to residents. For example, the reason that Ontario's guest statute applied only to Ontario hosts and not to Ontario guests in *Neumeier* was not because that is when Ontarians would benefit from the statute. The purpose of the statute was to prevent the guest and host from bringing a collusive suit in order to defraud the host's insurance company.⁷³ The statute applied only to Ontario hosts because that is when the consequences of a collusive suit—such as increased insurance rates—would most likely be felt in the province. Indeed, the statute arguably *disadvantaged* the Ontario hosts to whom it applied. If the suits really were collusive, the guests would presumably have shared the proceeds with the hosts had the suits been allowed to continue.

In addition, even when the scope of a loss-allocating rule is genuinely limited only to cases in which it *benefits* residents, it is not clear that this is the result of impermissible *bias*. Such a limitation on scope can be understood as a form of deference to the

power and obligation to ensure that there is a remedy for the infringement of the plaintiff's right to bodily security" regardless of residence); Donald T. Trautman, *Two Views on Kell v. Henderson: A Comment*, 67 COLUM. L. REV. 465, 467 (1967) (place of injury can have a compensatory interest concerning non-residents); Singer, *supra* note 40, at 37–39, 97 (place of injury has moral interest in compensation to non-residents); Aaron D. Twerski, *Enlightened Territorialism and Professor Cavers: The Pennsylvania Method*, 9 DUQ. L. REV. 373, 382–85 (1971) (because tort laws embody "moral judgments" a court should not assume that legislators intended to confine their benefits to residents).

⁷² The conclusions drawn from the proliferation of true conflicts are varied. Joseph William Singer has recommended, for example, that courts embrace a normative approach, in which choice of the better law plays a more substantial role. Joseph William Singer, *Multistate Justice: Better Law, Comity, and Fairness in the Conflict of Laws*, 2015 U. ILL. L. REV. 1923; Singer, *supra* note 40, at 6. Others recommend that courts give up answering conflicts cases on the basis of governmental interests entirely and return to a more territorial approach like the First Restatement. Twerski, *supra* note 71, at 373, 382. This recommendation arguably has been followed by the minority of jurisdictions that have retained vested rights theory, for they have done so, in part, because they find that if governmental interest are read broadly, irreconcilable true conflicts abound. See, e.g., *McMillan v. McMillan*, 253 S.E.2d 662, 664–65 (Va. 1979) (criticizing "uncertainty and confusion" of interest analysis approaches).

⁷³ See *supra* note 51 and accompanying text.

regulatory interests of other jurisdictions.⁷⁴ For example, the reason Zacatecan lawmakers do not protect Californian defendants sued by Zacatecan plaintiffs from excessive demands for compensation might be because they think that the appropriate protection of such California defendants should be left to California lawmakers. So understood, reading the scope of loss-allocating rules to benefit residents is a comity-enabling presumption, not a bias.⁷⁵

III. KRAMER'S "MYTH" OF THE UNPROVIDED-FOR CASE

But even if the pro-resident bias is reinterpreted as a comity-enabling presumption, the critics still seem right that it should be abandoned in the unprovided-for case. The facts in *Neumeier* appear to fall under neither Ontario nor New York law only because the pro-resident presumption leads us to conclude that each jurisdiction is deferring to what it assumes are the greater regulatory interests of the other. Since neither Ontario nor New York has such a greater regulatory interest, the presumption should be abandoned. New York should be understood as extending its negligence law to New York hosts, as a means of compelling them to make whole all the guests they harm. And Ontario should be understood as extending its guest statute to Ontario guests, to discourage them from participating in a possibly collusive lawsuit. The result would be that the case is an evenly-balanced true conflict—both Ontario and New York law apply. Courts would come to similar conclusions in other unprovided-for cases. They would end up as true conflicts.

But Larry Kramer offers a different solution to the unprovided-for case. As he sees it, there is no reason to abandon the pro-resident presumption. The reason is that one jurisdiction always has a neglected law that supports governmental interests to which the other jurisdiction should defer. The unprovided-for case is really a false conflict.

⁷⁴ See *supra* note 60.

⁷⁵ Larry Kramer largely retains the pro-resident presumption on these grounds. Kramer, *supra* note 2, at 1067. But see part IV.B, *infra*, for a discussion of an area where Kramer inconsistently departs from the presumption.

A. AFFIRMATIVE-DEFENSE CASES

As the critics see it, Ontario's only interest in *Neumeier* is the relative weak one that results from a broader reading of its guest statute's scope. Its only interest is in ensuring that Ontario guests do not participate in a possibly collusive suit, even though such a suit will have most of its negative effects in New York. But is that really Ontario's sole interest? *Neumeier* involved a negligent host in Ontario causing an accident in which an Ontario guest was harmed. Wouldn't Ontario lawmakers want compensation to the Ontario guest and deterrence of negligence by hosts in Ontario? It is true that Ontario legislators concluded that compensation and deterrence are not as important as worries about insurance fraud. That's why they enacted the guest statute. But they were thinking about cases where the host is from Ontario, such that the consequences of the fraud would be felt there. When the host is a New Yorker, wouldn't the importance of compensation and deterrence rise to the fore?

One might argue that the problem with such a solution is that Ontario has no *law* supporting these interests in compensation and deterrence in guest-host cases. And the only relevant governmental interests that interest analysts recognize are those that stand behind preexisting laws. There appears to be no Ontario law allowing guests to sue hosts for negligence because, as interest analysts like Currie see it, the Ontario guest statute removed *all* possibilities of a guest suing a host for negligence under Ontario law. But Kramer argues that this is a mistake. The extent to which the guest statute displaced Ontario negligence law in guest-host suits, he argues, *must be read in the light of the guest statute's purpose*. Since it follows from its purpose that it extends only to cases in which the host is from Ontario, the statute displaces Ontario negligence law only in such cases.⁷⁶ Ontario negligence law still applies to guest-host suits in which the host is not from Ontario.⁷⁷ It follows, therefore, that a court facing the

⁷⁶ Kramer, *supra* note 2, at 1059–60.

⁷⁷ Or rather, Ontario negligence law applies to such suits provided that the compensatory or deterrent purposes of Ontario negligence law would be advanced, namely when the guest is an Ontarian or the accident happened in Ontario. Both of these are the case in *Neumeier*.

facts in *Neumeier* should allow the Ontario guest to recover under this preexisting Ontario negligence law.⁷⁸ Kramer is able to turn *Neumeier* into a false conflict while satisfying the demand that only preexisting laws can be used in conflicts cases.

There is an undeniable logic to Kramer's argument. If, as Currie would insist, the scope of the guest statute should be read in the light of its purpose, why shouldn't the manner in which the guest statute displaces Ontario negligence law be read in the light of the guest statute's purpose?

Kramer employs the same solution to a hypothetical unprovided-for case, originally discussed by Currie. (This hypothetical is a variation on an actual case, *Grant v. McAuliffe*.⁷⁹) In the hypothetical, a Californian negligently causes an accident in Arizona in which an Arizonan is injured.⁸⁰ The Californian subsequently dies of his injuries. The Arizonan then sues the Californian's estate for negligence. Arizona has retained the common law rule that a negligence action abates upon the death of

⁷⁸ This is Kramer's solution to the unprovided-for case if one does not take into account the effect of the Privileges and Immunities Clause. The Clause has been interpreted as putting on states a "norm of comity" that prohibits them from discriminating against non-residents simply because they are from outside the state. *Austin v. New Hampshire*, 420 U.S. 656, 660–61 (1975). Kramer argues persuasively that it does not violate the Clause for Georgia to decline to extend its loss-allocating interspousal immunity rule to a California couple who get into an accident in Georgia, even if the result is that the California defendant-wife is disadvantaged. *See supra* note 60. In such a false conflict, Georgia is yielding to California interests, thereby reducing the friction that the Clause was intended to prevent. But (assuming that Ontario is subject to the Clause), he argues that it would violate the Clause for an Ontario court to use only its negligence law in *Neumeier*, without the affirmative defense, thereby disadvantaging the New York defendant. In that case, it cannot be understood as yielding to New York interests, because New York has no interest in its law applying to the case. Kramer, *supra* note 2, at 1072–74. The Clause therefore compels Ontario to extend its guest statute to the facts in *Neumeier*. For a criticism of Kramer's position on the effect of the Clause, see Roosevelt, *supra* note 3, at 2520–25. For my part, I think worries about the Clause must be fundamentally reformulated once we recognize that New York has an interest in a rule barring liability being used. *See Conclusion, infra*. I hope to pursue these matters in another article.

⁷⁹ 264 P.2d 944 (Cal. 1953).

⁸⁰ In the original *Grant* case, the parties were both Californians and the accident was in Arizona. Currie described this case as a false conflict. Only California has an interest. The California Supreme Court, in a sense, agreed, for it used California law. But rather than relying on interest analysis it argued disingenuously that the abatement rule was procedural. *Grant*, 264 P.2d at 948; Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 468 (1985); CURRIE, *supra* note 26, at 152; Kramer, *supra* note 2, at 1054–55.

the tortfeasor. California has abrogated its abatement rule by statute.⁸¹

The purpose behind Arizona's abatement rule is the unfairness of compromising the property interests of the beneficiaries of an estate due to the wrongdoing of the deceased. The beneficiaries, after all, did no wrong themselves.⁸² Arizona is not interested, however, in this rule applying, because the estate to be protected is Californian.⁸³

The purpose behind California law, in which an estate can be sued for the negligence of the decedent, is compensation to the plaintiff.⁸⁴ California isn't interested in its law applying, because the plaintiff to be compensated is from Arizona.⁸⁵ Since neither jurisdiction's law applies, Currie argued that a court should use forum law.⁸⁶

Under Kramer's analysis, the *Grant* variation is a false conflict. Arizona negligence law without the abatement rule applies.⁸⁷ The abatement rule is an affirmative defense to an otherwise available negligence action. Because the abatement rule is intended to protect Arizona estates, it displaces Arizona negligence law only in suits against such estates. Since the estate is Californian in the *Grant* variation, the plaintiff is free to sue under Arizona negligence law.

B. NO-CAUSE-OF-ACTION CASES

So far, Kramer has addressed two unprovided-for cases. In each, an affirmative defense that would otherwise bar the plaintiff's action is inapplicable on conflicts grounds. But what happens when

⁸¹ CAL. CIV. CODE § 956 (repealed 1961). The rule is now in California's code of civil procedure. CAL. CIV. PROC. CODE § 377.20.

⁸² CURRIE, *supra* note 26, at 144; Kramer, *supra* note 2, at 1048–49. Kramer questions whether this account is accurate, *id.* at 1048–49 n.21, but that need not concern us here.

⁸³ Arizona might still be interested if the beneficiaries of the California estate were Arizona residents. But in the *Grant* variation, they are Californians.

⁸⁴ Kramer, *supra* note 2, at 1049. It arguably also exists to deter negligent conduct, but any added deterrent effect due to one's beneficiaries' not receiving their inheritance after one's death is probably minimal.

⁸⁵ CURRIE, *supra* note 26, at 144–45.

⁸⁶ *Id.* at 156, 168.

⁸⁷ Again, this solution ignores the effect of the Privileges and Immunities Clause. See *supra* note 78.

the plaintiff's action is barred, not through an affirmative defense, but by the absence of a cause of action for relief?

Kramer's example of an unprovided-for case of this no-cause-of-action variety is *Erwin v. Thomas*.⁸⁸ Erwin, a Washington resident, was harmed in Washington by Thomas, an Oregon resident. Erwin's wife sued Thomas in Oregon state court for loss of consortium. Washington had retained the common law (and now unconstitutional) rule that only husbands can sue for loss of consortium. Oregon had abrogated the rule by statute.

The Oregon Supreme Court treated the case as unprovided-for. As the court saw it, Washington law protects Washington defendants against loss of consortium actions by married women. It is therefore inapplicable in cases in which the defendant is from Oregon.⁸⁹ But, the court concluded, Oregon law also is inapplicable.⁹⁰ Because Oregon law exists to ensure adequate compensation to Oregon married women (and, perhaps, to maximize deterrence of negligence in Oregon), it does not apply when the plaintiff is from Washington and the accident occurred there.⁹¹ Following Currie's recommendation, the court used forum (that is, Oregon) law and allowed the Washington wife to recover.⁹²

The Oregon Supreme Court appeared to treat the Washington bar on loss of consortium actions by wives as if it were a defendant-protective affirmative defense to a general rule of liability. So understood, Kramer's response would be the same as in *Neumeier* and the *Grant* variation. Because the defense does not apply, the Washington plaintiff should be free to sue under Washington negligence law. But Kramer argues that the plaintiff's action in *Erwin* should instead be dismissed under Washington law for failure to state a claim. The reason Washington law does not provide married women with a cause of action for loss of consortium is because Washington lawmakers do not consider compensation to be appropriate at all:

⁸⁸ 506 P.2d 494 (Or. 1973).

⁸⁹ *Id.* at 496–97.

⁹⁰ *Id.* at 497.

⁹¹ *Id.* at 496–97.

⁹² Kramer, *supra* note 2, at 1063.

A husband could recover for loss of consortium at common law, because the defendant's negligence deprived him of services his wife owed him by law. A wife could not make a similar claim when her husband was injured, because her husband did not owe her similar services. Thus, a wife's claim for loss of consortium does not fail because her interest in being compensated is subordinated to some interest of the defendant. It fails because she is not deemed to have suffered any injury.⁹³

Because Washington lawmakers do not consider a wife's loss of consortium to be a compensable injury, they would want the Washington wife in *Erwin* to be denied relief. She fails to state a claim under Washington law.

To sum up, there are two types of unprovided-for case. Under cases of the first type, the law of the plaintiff's residence has an affirmative defense barring an otherwise applicable cause of action for recovery. The solution is that the inapplicability of the affirmative defense on conflicts grounds leaves the plaintiff free to recover. There is no gap in the law. The plaintiff has a cause of action under the law of her residence.

Under cases of the second type, the law of the plaintiff's residence bars her action because it has no cause of action for recovery at all. The solution here is that the plaintiff fails to state a claim under her law. Again, there is no gap. The unprovided-for case is a "myth."

IV. THE MYTH OF THE MYTH

Kramer's solution to the unprovided-for case is ingenious but flawed. My focus will be on his solution to affirmative-defense unprovided-for cases, where the problem is his unsustainably

⁹³ *Id.* at 1062; see also Roosevelt, *supra* note 59, at 512 (accepting Kramer's argument); Roosevelt, *supra* note 3, at 2522 (same). Once again, this is the solution without taking into account the effect of the Privileges and Immunities Clause. See Kramer, *supra* note 2, at 1073, for a discussion of the effect of the Privileges & Immunities Clause on no-cause-of-action unprovided-for cases. For a discussion of the effect of the Clause on affirmative-defense unprovided-for cases, see note 78 *supra*. I ignore this aspect of his argument here.

broad conception of a *law*. This conception generates intractable puzzles if applied consistently. I will then briefly discuss his solution to no-cause-of-action unprovided-for cases.

A. AFFIRMATIVE-DEFENSE CASES

As we have seen, Kramer argues that in *Neumeier* and the *Grant* variation, the affirmative defense that would normally displace the plaintiff's cause of action does not apply.⁹⁴ That frees the plaintiff to recover. The point is not that regulatory policies recommend *creating* a law allowing the plaintiff to recover. There already *is* such a law.

1. *New True Conflicts*. Let us take Kramer at his word. There is preexisting Ontario law allowing negligence actions against non-Ontario hosts. And there is preexisting Arizona law allowing negligence actions against non-Arizona estates.

If these laws already exist, they exist *whatever the content of the competing jurisdiction's law*. If a jurisdiction has a law on the books, it is on the books. It doesn't appear or disappear based on what the law of another jurisdiction says. Consider, therefore, the *Grant* variation with one change. There still is an Arizona plaintiff, a California estate, and an Arizona accident. Arizona still has the common law abatement rule. But the twist is that California has the abatement rule too. *Both* Arizona and California have retained the common law rule that a plaintiff's action for negligence abates upon the death of the tortfeasor.

Kramer must characterize this case as a true conflict. As in the *Grant* variation, Arizona's negligence law (minus its abatement rule) applies. But now California also has an interest in the case—its abatement rule applies, because there is a California estate to protect. So we have Arizona law giving the plaintiff a right of recovery and California law barring the plaintiff's action.

But no court facing such a case would treat it as a true conflict. It would dismiss the plaintiff's action on the ground that both jurisdictions have law that bars the plaintiff's action. If the plaintiff started talking about Arizona negligence law providing him with a right of compensation against non-Arizona estates, he

⁹⁴ See *supra* Part III.A.

would be laughed out of court,⁹⁵ or at best interpreted as asking the court to recognize a *new* and highly problematic Arizona cause of action, one that could never have been anticipated in advance of the conflicts case.

To his credit, Kramer recognizes this problem and offers a response (albeit briefly and in a footnote):

[T]he justification for Arizona to limit its abatement rule to Arizona estates is to leave other states free to regulate their estates as they see fit. But it would hardly be reasonable for Arizona to withhold the benefit of its abatement rule in deference to the law of the defendant's home state and then to ignore that state's law. Failure to recognize either Arizona's or California's abatement rule would thus be inconsistent with the premise for limiting the application of Arizona law in the first place.⁹⁶

One problem with this argument is that it fails to capture why an appeal to Arizona negligence law would be considered inappropriate. If the plaintiff said Arizona negligence law allowed him to sue non-Arizona estates, the court would say that no such law exists. It would not say that the law exists but is barred by California's abatement rule.

But, more fundamentally, it is hard to see how Kramer's argument is responsive to the problem at all. It is indeed true that Arizona limits its abatement rule to Arizona estates to leave other states to regulate their estates as they see fit.⁹⁷ In the *Grant* variation, it gives the matter over to California. And California has chosen to act, by creating an abatement rule. But that simply means there is a true conflict. Deference to California's interests gives Arizona a reason not to extend *its abatement rule* to the facts. It does not give Arizona a reason not to extend its *negligence*

⁹⁵ One reason that the court would reject such a law is that it violates the Privileges and Immunities Clause. The law discriminates on the basis of the residence of the parties. But even in the absence of the Clause, no court would recognize the law's existence, because no one could have anticipated it in advance of the conflicts case.

⁹⁶ Kramer, *supra* note 2, at 1054–55 n.34.

⁹⁷ See *id.* at 1054.

law to the facts. As Kramer himself argues, Arizona is interested in its negligence law applying because there is an Arizona plaintiff who deserves compensation.⁹⁸ How can the fact that Arizona has left the regulation of California estates to California mean that it has to prefer California's regulation of those estates to its own regulation of Arizona plaintiffs? The idea behind Kramer's argument appears to be that if both Arizona's negligence law and California's abatement rule apply, the case is not a true conflict, but rather a case in which a cause of action (Arizona's) has been defeated by an affirmative defense (California's). But that simply means Kramer has assumed—without argument—that California interests defeat Arizona interests.⁹⁹

I think the conclusion is inescapable: If Arizona really has a *law* allowing negligence actions against non-Arizona estates, then it has that law no matter the content of another jurisdiction's law. That means recognizing "laws" that no one would ever say exist—in part because they would frustrate the expectations of the parties.

We can now appreciate the attractions of Currie's approach, under which Arizona's abatement rule completely displaces negligence actions against estates.¹⁰⁰ For Currie, there simply is no Arizona negligence action against a California estate. Thus, we do not have to worry about an Arizona plaintiff asserting such a

⁹⁸ See *id.* (stating that "Arizona gives a right to recover to plaintiffs injured by negligent defendants" when the plaintiff is "from Arizona").

⁹⁹ There is another problem with Kramer's argument. If he has solved the puzzle of a case in which both Arizona and California have abatement rules, he has done so only at the cost of making the original *Grant* variation an unprovided-for case again. In connection with that case, Kramer said that Arizona's negligence law gives the plaintiff relief. Arizona negligence law applies because the plaintiff is an Arizonan, and its abatement rule does not apply because the decedent is a Californian. That was the end of the story. Now things are more complicated. We cannot yet say whether the plaintiff can recover, because Arizona gives over to California law the question of whether an abatement rule is available. The problem is that California has no interest in its answer to that question being used in the *Grant* variation. California does not have an abatement rule because it prefers the compensatory interest of the plaintiff. But in the *Grant* variation, California has no compensatory interest because the plaintiff is not from California. So we are back to an unprovided-for case. Previously, the unprovided-for case was put this way: Arizona was not interested in its abatement rule applying, and California was not interested in its negligence law applying. Now, the problem should be put this way: Arizona is not interested in its abatement rule applying, and California is not interested in its reason not to have an abatement rule applying.

¹⁰⁰ See Part III.A *supra*.

cause of action when both Arizona and California have abatement rules. But, as we have seen, Currie's approach violates the core thesis of interest analysis—that the scope of a law should be read in the light of its purposes. The scope of Arizona's abatement rule is read formalistically, not purposively. The rule displaces negligence liability against an estate even in cases in which Arizona has no interest in its doing so.

Interest analysts therefore appear to face a dilemma. On the one hand, they can stick to the core thesis of interest analysis and understand the conflicts scope of an affirmative defense in the light of its purposes, with the uncomfortable result that laws exist whose application would upset the reasonable expectations of the parties. This is the path Kramer takes. On the other hand, they can abandon the core thesis of interest analysis and protect the reasonable expectations of the parties. This is Currie's approach.

Interest analysts face this dilemma because they are committed to the view that laws have a scope in conflicts cases—that they can actually *apply* to the facts. This forces them to take a stand on how the conflicts scope of an affirmative defense should be read—formalistically, as Currie argues, or purposively, as Kramer argues. But why think that Arizona negligence law and the Arizona abatement rule have *any* scope in a conflicts case? When Arizona lawmakers came up with these laws, they were thinking of an all-Arizona case. In such a case, protecting the blameless beneficiaries of an Arizona estate was considered more important than compensation to an Arizona plaintiff. Arizona law effectuating this balancing of interests is inapplicable to the facts of the *Grant* variation, for there are no beneficiaries of an Arizona estate to protect. One must figure out what law Arizona lawmakers would want to be *created* for the case.

Once one understands law as made rather than applied in the *Grant* variation, a court is free to consider both regulatory policies *and* concerns about the expectations of the parties. True, Arizona's interest in compensation to an Arizona plaintiff recommends a negligence rule. But would the beneficiaries of the California estate be unfairly surprised by such a rule? In the *Grant* variation, the answer is no, because they would be similarly

exposed in an all-California case. So an Arizona negligence rule can be created for the case.¹⁰¹ But party expectations are a problem if California also has an abatement rule. For that reason, it might be advisable (or even constitutionally obligatory on due process grounds) to create an abatement rule for the case, Arizona regulatory interests notwithstanding.¹⁰²

Kramer, by contrast, cannot take party expectations into account in this way, because he thinks an Arizona law allowing negligence actions against California estates already exists. If it already exists, party expectations should conform to it, rather than the other way around.

2. *Rump Laws*. One can describe the laws that Kramer argues apply in *Neumeier* and the *Grant* variation as *rump* laws. Instead of Ontario's guest statute's completely displacing negligence actions in guest-host cases, the guest statute displaces such actions only when the host is from Ontario. A rump Ontario negligence action in guest-host cases remains to be applied in *Neumeier*. A similar Arizona rump law applies in the *Grant* variation.

Kramer finds rump laws useful in *Neumeier* and the *Grant* variation. But his approach produces other rump laws that he would find less congenial. If reading affirmative defenses in the light of their purposes generates rump laws, rump laws should also be generated when a law is repealed.

Consider California's abrogation of its common law abatement rule in 1949. When California had an abatement rule, it

¹⁰¹ I am not taking into account here the effect of any constitutional restrictions. It is likely that the creation of an Arizona negligence law for the *Grant* variation is prohibited under the Privileges and Immunities Clause, because Arizona law discriminates on the basis of the residence of the parties. The proper rule to create, given the Clause, would arguably be one that takes into account all relevant state interests. This would include California's interest in protecting the blameless beneficiaries of a California estate. See Conclusion, *infra* (describing such an approach).

¹⁰² There is nothing unusual about party expectations trumping regulatory policies when creating new common law rules. This occurs, for example, when federal courts create federal common law. Sometimes the content of the federal rule is borrowed from state law, because party expectations have coalesced around the state law standard. This can happen even if federal regulatory policies, narrowly construed, recommend a different rule. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98–99 (1991); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 958–59 (1986) (offering *DeSylva v. Ballentine*, 351 U.S. 570 (1956), as an example).

presumably served the same purpose as Arizona's: protecting the property interests of the blameless beneficiaries of an estate. It applied, therefore, only in cases where the decedent was a Californian. When California lawmakers abrogated the rule, their purpose, we can assume, was vindicating the compensatory interests of plaintiffs. By Kramer's reasoning, therefore, the abatement rule was abrogated only for cases where the plaintiff is a Californian. A rump abatement rule still exists for cases (like the *Grant* variation) with a California estate and a foreign plaintiff. Such cases are within the scope of the original abatement rule and yet not within the scope of the abrogating statute. In short, Kramer should have characterized the *Grant* variation as a true conflict. Arizona's rump negligence law applies, and California's rump abatement rule applies.

The fact that interest analysis, if applied consistently to repeals, would generate rump laws has been observed by Lea Brilmayer—although she does not notice that rump laws would also arise when laws are limited through affirmative defenses.¹⁰³ As she puts it, the notion that a repeal of a law leaves a rump law in place is “absurd.”¹⁰⁴ Interest analysts “would agree that the territorial reach of the repeal must be identical to the territorial reach of the original statute.”¹⁰⁵ To avoid the problem of rump laws, she argues, the conflicts scope of a repeal must be read formalistically. But if that's so, she asks, why not read the conflicts scope of the law that is repealed formalistically too?¹⁰⁶ If

¹⁰³ Brilmayer, *supra* note 42, at 417–20.

¹⁰⁴ *Id.* at 418. She does not say why, but the reason is probably the frustration of the expectations of the parties if the existence of such a law were taken seriously.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 420. To my knowledge, the only writer to have responded to Brilmayer's challenge is Herma Hill Kay. (The example Kay discusses is a jurisdiction's repeal of a guest statute.) Kay argues that the repeal would not leave a rump guest statute in place, because the repeal was the repudiation of worries about fraud entirely: “If a state changes the content of its domestic tort law respecting the recovery of guests against hosts, no remnant of an earlier protectionist policy for hosts survives to be resurrected in a conflicts suit by a nonresident passenger against a local driver.” Herma Hill Kay, *Testing the Modern Critics against Moffatt Hancock's Choice of Law Theories*, 73 CAL. L. REV. 525, 539–40 (1985).

Kay is quite right that if the repeal is understood as disclaiming any worry about fraud in guest-host suits, we have no reason to think that a rump guest statute remains. But the question remains *why* we should read the repeal in the manner she suggests. Ontario repealed its guest statute in 1977. Ont. Stat. ch. 54, § 16 (1977). Why read this as the

the conflicts scope of the repeal of the abatement rule is not read in the light of its purposes, why read the conflicts scope of the abatement rule itself in the light of its purposes?

Brilmayer confronts interest analysts with the same dilemma I discussed earlier: (1) read the conflicts scope of law *B*, which limits law *A*, in the light of law *B*'s purposes and accept that a rump of law *A* remains, or (2) read the conflicts scope of law *B* formalistically and violate the core thesis of interest analysis. But, to repeat, there is a third option. The dilemma does not arise if *A* and *B* do not apply in conflicts cases at all. If California's abatement rule has no conflicts scope, we don't have to speculate about the conflicts scope of its repeal.

Once we stop thinking of rump laws as *laws*, we can appreciate them for what they really are: freestanding regulatory policies that recommend the creation of a new law for conflicts cases. So understood, rump laws are no longer absurd, but reveal very important truths. When Arizona's abatement rule was created, Arizona kept the policy of compensating harmed Arizonans. This policy did not disappear simply because it was overridden by concerns about fairness to the beneficiaries of Arizona estates. Because it did not disappear, it can recommend the creation of a rule of negligence liability in the *Grant* variation, where concerns about fairness to the beneficiaries of Arizona estates are irrelevant. By the same token, when California abrogated its abatement rule, its worries about fairness to the beneficiaries of California estates remained. This policy did not disappear simply because it was overridden by the desire to compensate harmed Californians. Because it did not disappear, it can recommend an abatement rule for the facts of the *Grant* variation, where concerns about compensating harmed Californians are irrelevant.

3. *Formalism.* There is yet another problem with Kramer's solution to affirmative-defense unprovided-for cases. Too much

repudiation of concerns about fraud in guest-host suits? Kay herself would admit that Ontario lawmakers are still concerned about collusive suits. There are other Ontario laws that sanction or discourage it. Insurance Act, R.S.O., 1990 c. I.8 (Ont.). Are we really to believe that Ontario lawmakers, despite expressing a concern about insurance fraud in other areas of Ontario law, and thinking in the past that preventing such fraud was *more* important than compensation and deterrence in guest-host cases, now have absolutely *no* concern about fraud in such cases? I cannot see how that can possibly be true.

rests on legal form. As Kramer describes it, if there is an *affirmative defense* blocking the plaintiff's recovery, the defense is inapplicable on conflicts grounds and the plaintiff's action can proceed.¹⁰⁷ If the plaintiff's recovery is blocked by the *absence of a cause of action* for relief, by contrast, the plaintiff fails to state a claim and his action is dismissed.

This will not do. Imagine that Ontario legislators still think that worries about insurance fraud are more important than compensation and deterrence in guest-host cases. But instead of making the presence of a guest-host relationship an affirmative defense to a negligence suit, they decide to make the absence of a guest-host relationship an element of a cause of action for negligence. Kramer's formalism would apparently force him to say that an Ontario guest in a case like *Neumeier* (with a New York host and Ontario accident) now cannot recover. The case would have to be treated like *Erwin*. The plaintiff's action would be dismissed for failure to state a claim under Ontario law.

But it should not matter to the analysis what form Ontario legislators chose to block guest-host suits, provided that they think that compensation to guests and deterrence of negligence by hosts are worthy goals, albeit goals that are less important than avoiding insurance fraud in an all-Ontario case. When Ontario lawmakers were choosing between redefining a negligence action and creating an affirmative defense, they were not thinking of the consequences of their choice for conflicts cases. They were focused on an all-Ontario case, where the distinction made a difference only to pleading and proof.

To avoid such arbitrary results, Kramer would have to amend his argument to make the choice of legal form irrelevant. What is important is whether Ontario lawmakers, if asked, would say that Ontario has deterrence and compensatory policies that recommend liability of negligent hosts to guests. If they would say this, the plaintiff should be allowed to recover in *Neumeier*.

But that means that it does not really matter in *Neumeier* whether one can point to a preexisting Ontario law allowing negligence actions against hosts. If no such law can be found, an

¹⁰⁷ See *supra* Part III.A.

appropriate Ontario negligence law must be created.¹⁰⁸ And with that he has abandoned the view that only interests supported by preexisting laws count. The consequences for interest analysis if this position is abandoned are, as we shall later see, catastrophic.¹⁰⁹

B. NO-CAUSE-OF-ACTION CASES

Let us now briefly turn to Kramer's argument concerning no-cause-of-action unprovided-for cases. To repeat, Kramer argues that in these cases the plaintiff's action should be dismissed for failure to state a claim under the law of the plaintiff's residence.¹¹⁰ The wife in *Erwin* fails to state a claim under Washington law. The case is a false conflict.

One problem with this solution is formalism again: Kramer relies too much on the fact that the plaintiff's action is blocked through the definition of a cause of action, rather than an affirmative defense. Assume that Ontario legislators see no purpose to compensation and deterrence in guest-host suits, not even a purpose that is trumped by worries about fraud. The special circumstances of guest-host suits make compensation and deterrence entirely inappropriate. Perhaps the guest, by demanding compensation, is

¹⁰⁸ As Kramer has put it to me privately, even if there is no Ontario law allowing guests to sue hosts for negligence, the policies of Ontario lawmakers can show whether there is a *legal right* to compensation in guest-host negligence cases. Thus, Kramer would argue that this hypothetical Ontario negligence cause of action (which includes the absence of a guest-host relationship as an element) really consists of two legal rights: a right of plaintiffs to compensation from all negligent defendants (even hosts), and an immunity right barring negligence actions if the defendant is a host. The immunity right trumps the compensatory right in an all-Ontario case. When the plaintiff-guest is an Ontarian and the defendant-host a New Yorker, however, the compensatory right extends to the facts, and the immunity right does not.

I would begin by noting that, in his article, Kramer speaks of there being no legal right without enacted law establishing it. Kramer, *supra* note 2, at 1064. In any event, I see no work that is being performed by the term "legal right" here. What Kramer is really doing is pointing to freestanding regulatory policies that recommend creating a *new* law for the facts in *Neumeier*. Kramer can speak of an Ontario "legal right" of an Ontario guest to compensation if he wants, but only if he also acknowledges a New York "legal right" of a New York host to have actions against him barred due to worries about fraud. See Conclusion, *infra*. *Neumeier* involves a true conflict between these two "legal rights." In both cases, the source of the putative legal right is the same—policies that are not supported by applicable law but that recommend the creation of a law for the facts of a conflicts case.

¹⁰⁹ See Conclusion, *infra*.

¹¹⁰ See *supra* Part III.B.

biting the hand that feeds him and simple self-interest (and worries about liability to third parties) will provide all the deterrence of negligence that the host needs.¹¹¹ Their response might be to redefine a negligence action, such that guest-host suits are not allowed. But they might instead pass a guest statute. Which approach they choose should not make a difference to Kramer's conclusion that the plaintiff's action should be dismissed for failure to state a claim in a case, like *Neumeier*, with an Ontario plaintiff, a New York defendant, and a New York accident.

But there is an even more significant problem with Kramer's solution to the no-cause-of-action unprovided-for case. It assumes that the loss-allocating rule of the plaintiff's residence burdens the plaintiff. It is for this reason that the Washington wife fails to state a claim under Washington law in *Erwin*. This is contrary to the pro-resident presumption, which Kramer employs elsewhere.¹¹²

I think that part of the problem is that in *Erwin*, there is a particular reason why Washington would want its loss-allocating rule to burden Washington wife-plaintiffs. The justification for Washington's rule is that a wife has no right to the sexual services of her husband. When her husband has been rendered unable to provide those services, the wife has not lost anything to which she was legally entitled. She therefore deserves no compensation. Given this justification, Washington lawmakers would want the rule to apply to Washington wife-plaintiffs, because Washington, being the location of the marital domicile, has regulatory power over who in the relationship has a legal right to sexual services from whom.

Furthermore, Washington lawmakers would not want the rule to protect Washington defendants. If an Oregon wife sued a Washingtonian for loss of consortium due to an accident in Oregon, the case would be a false conflict, not a true one. Washington lawmakers would not want their rule to apply, because they leave to Oregon lawmakers the determination of whether an Oregon wife has lost something compensable. This is very different from most loss-allocating rules blocking or limiting liability, like the

¹¹¹ These are not implausible positions. See, e.g., Perdue, *supra* note 42, at 1256 (concluding that liability is not necessary to deter negligence of hosts to guests in car).

¹¹² Kramer, *supra* note 2, at 1054–55.

damages limitation in *Hurtado*, where there is no special reason to think that the rule is intended solely to burden resident plaintiffs. It should either be read as benefiting resident defendants, in keeping with the pro-resident presumption, or as burdening resident plaintiffs and benefiting resident defendants equally, as the critics of interest analysis argue.

To adequately assess Kramer's solution to no-cause-of-action unprovided-for cases, therefore, we need to consider a case without the special reason in *Erwin* to extend the loss-allocating rule of the plaintiff's residence only to resident plaintiffs. An example would be an unprovided-for version of *Hurtado*.¹¹³ To repeat, in the original *Hurtado* case, a family from Zacatecas sued a Californian for wrongful death due to an accident in California in which a Zacatecan was killed. Zacatecan law had a limit on the amount of damages for wrongful death (which was apparently part of the cause of action, not an affirmative defense); California law had no such limit. To make the case unprovided-for, we need to keep the residence of the parties the same but move the location of the accident to Zacatecas.

Normally an interest analyst, using the pro-resident presumption, would argue that both jurisdictions lack an interest in the question of compensation above the Zacatecan limit. California lawmakers are not interested in ensuring that Zacatecans are fully compensated. And Zacatecan lawmakers are not interested in protecting Californians against "exaggerated claims."¹¹⁴

If Kramer were to follow his argument in *Erwin*, he would say that the Zacatecan limit applies. Because the Zacatecan plaintiffs failed to state a claim for damages beyond the limit, Zacatecan law denies them relief. Zacatecan lawmakers are not just interested in protecting Zacatecans against paying excessive compensation—they are also interested in making sure that Zacatecans do not demand excessive compensation. Again, there is no unprovided-for case. The case is a false conflict in which Zacatecan law applies.

So understood, Kramer's solution to no-cause-of-action unprovided-for cases is puzzling. His argument is similar to the

¹¹³ 522 P.2d 666 (Cal. 1974).

¹¹⁴ *Id.* at 670.

critics' solution to unprovided-for cases, in which loss-allocating rules are read as burdening as well as benefiting residents. But Kramer's abandonment of the pro-resident presumption is strangely limited. Zacatecas is interested in burdening Zacatecan plaintiffs with its law. But California is apparently not interested in burdening California defendants with its law. Why not? If the fact that a cause of action *does not* recognize damages can disadvantage a resident plaintiff, why wouldn't the fact that a cause of action *does* recognize damages disadvantage a resident defendant? To be consistent, Kramer would have to characterize the *Hurtado* variation as a true conflict: California's unlimited damages rule and Zacatecas's damages limitation both apply.

What's more, if one starts reading loss-allocating causes of action as burdening as well as benefiting residents, why not do the same thing to loss-allocating affirmative defenses? Arizona, for example, believes that it is inappropriate for a plaintiff to demand compensation from the blameless beneficiaries of an estate.¹¹⁵ That's why it has an abatement rule. Why wouldn't it want this defense to burden an Arizona plaintiff who makes demands on the blameless beneficiaries of a California estate? The *Grant* variation would turn out to be a true conflict: Arizona's abatement rule would burden the Arizona plaintiff, and California's negligence rule would burden the California defendant.

Kramer appears to be in a bind. To provide an answer to the *Hurtado* variation, he must abandon the pro-resident presumption. But if he does so consistently, not only does the number of true conflicts balloon, his solution to affirmative-defense unprovided-for cases is threatened.

V. CONCLUSION

Let us set aside Kramer's solution to no-cause-of-action unprovided-for cases, and return to affirmative-defense unprovided-for cases.¹¹⁶ I think it is clear that Kramer's attempt

¹¹⁵ See *supra* notes 81–83 and accompanying text.

¹¹⁶ I hope to discuss no-cause-of-action unprovided-for cases—and more generally, how failure to state a claim should be treated in the conflict of laws—more fully in a separate article.

to find preexisting law that applies in such cases is unsuccessful. Nevertheless, he has identified important regulatory policies that recommend creating a new legal rule to fill the gap that the unprovided-for case creates. Kramer is right that Ontario lawmakers would want a rule of negligence liability for the facts in *Neumeier*. Such a rule would compensate Ontario guests and deter negligence by hosts in Ontario. Granted, Ontario lawmakers concluded that these policies are not as important as avoiding insurance fraud. But they were thinking about cases where the host is from Ontario, such that the consequences of the fraud would be felt there. When the host is not an Ontarian, the importance of compensation and deterrence should indeed rise to the fore, even though there is no actual Ontario law allowing guest-host negligence suits that supports these policies.¹¹⁷

Does that mean that a court faced with the facts of *Neumeier* should allow the plaintiff's action to proceed? The problem is that if one is allowed to look beyond preexisting laws to identify relevant regulatory policies, there is no reason to stop with Ontario's interests in compensation and deterrence.

For example, New York has an interest in avoiding insurance fraud.¹¹⁸ Granted, it does not have a guest statute. But, as we have seen, Ontario does not have a law allowing negligence liability in guest-host suits either. We have abandoned the dogma

¹¹⁷ Something like this argument has been offered by Robert Sedler. See Sedler, *supra* note 54, at 144; Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 235–36 (1977); see also Hans W. Baade, *The Case of the Disinterested Two States: Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 150, 167 (1973) (offering an argument similar to Sedler's). As Sedler would put it, in *Neumeier*, Ontario and New York have shared policies of deterring negligent driving and compensating those harmed by such driving. Ontario, however, has a law—the guest statute—that deviates from the shared policies. Sedler argues that a court should decide the case in accordance with the shared policies, because Ontario has no interest in applying the law that deviates from them. The Ontario plaintiff should be allowed to recover.

Kramer has criticized Sedler's argument, which is similar to his own in other respects, for talking about "state interests in the abstract," without identifying *the law* under which the Ontario plaintiff recovers. Kramer, *supra* note 2, at 1056. As Kramer sees it, the Ontario plaintiff recovers under Ontario negligence law. Sedler, by contrast, appears to be suggesting that law be created to vindicate shared policies. But it is precisely in speaking of the Ontario plaintiff suing under preexisting Ontario law that Kramer went wrong.

¹¹⁸ New York has laws that sanction such fraud and keep those who engage in it from retaining the proceeds. N.Y. INS. LAW §§ 401–410 (McKinney 2011).

that only the purposes of preexisting laws count. We should therefore conclude that New York's policy of preventing insurance fraud recommends a rule that bars liability against New York hosts for the facts in *Neumeier*.

It is true, of course, that New York lawmakers think that compensation to guests and deterrence of negligence by hosts are more important than worries about insurance fraud. Otherwise, they would have enacted a guest statute. But in refusing to enact a guest statute, they were thinking about cases where the compensation was to New York guests and the deterrence was of negligence in New York. When the compensation would be to Ontario guests and the deterrence would be of negligence in Ontario, worries about fraud by New York hosts should rise to the fore.

In short, what's good for the Ontario goose is good for the New York gander. If a court facing the facts in *Neumeier* is free to apply a novel Ontario law allowing guest-host negligence suits, it must also be free to apply a novel New York law that bars liability against hosts—a virtual New York guest statute.

So far, I have spoken of two new laws that might be applied in *Neumeier*. One is a rule of negligence liability that serves Ontario's interests. Another is a rule barring liability that serves New York's interests. But there is a third option. A court might choose a rule that best serves the aggregate weighted interests of Ontario and New York in the case. It would do so by balancing Ontario's interests in compensation to Ontario guests and deterrence of negligence by hosts in Ontario (both of which argue for a liability rule) against New York's interest in discouraging fraud concerning New York insurance contracts (which argues for a rule barring liability).¹¹⁹

Of course, we have no idea what the result of that balancing is likely to be. We cannot assume that the result would be Kramer's recommendation of negligence liability. Assume that the Ontario legislature assigned the following weights to the competing policies, using utiles (an arbitrary measure of relative strength of

¹¹⁹ One benefit of this approach is that it would avoid constitutional objections that the court is jiggering the content of the law to benefit its residents in violation of the Privileges and Immunities Clause.

preference).¹²⁰ It gave compensation to Ontario guests a value of 3 utiles, deterrence of negligent hosts in Ontario a value of 1, and discouraging fraud by Ontario hosts a value of 5. As a result, it concluded that a guest statute was appropriate: $\text{Comp.Ont} (3) + \text{Deter.Ont} (1) < \text{FraudOnt} (5)$. The New York legislature, for its part, gave compensation to New York guests a value of 2 utiles, deterrence of negligent hosts in New York a value of 4, and discouraging fraud by New York hosts a value of 5. As a result, it chose not to enact a guest statute: $\text{Comp.NY} (2) + \text{Deter.NY} (4) > \text{FraudNY} (5)$.¹²¹ The proper rule for *Neumeier* would be a rule barring liability, contrary to Kramer's recommendation: $\text{Comp.Ont} (3) + \text{Deter.Ont} (1) < \text{FraudNY} (5)$.¹²²

We can now see why Currie and Kramer insist that governmental interests be limited to those supported by preexisting laws. Once the door is opened to freestanding regulatory policies, there is no way to answer the unprovided-for case at all.

But it gets worse. These freestanding regulatory policies are relevant not just in unprovided-for cases, but in all conflicts cases. Consider *Babcock v. Jackson*,¹²³ in which the New York Court of Appeals first abandoned vested rights theory for interest analysis. *Babcock* involved a New York guest, a New York host, and an accident in Ontario. The court read the case as a false conflict. Ontario was not interested in its guest statute applying, because the host was not from Ontario. New York, by contrast, was interested in its negligence law (in its loss-allocating function) applying, because that would ensure adequate compensation for a New York guest.¹²⁴

But this ignores the freestanding Ontario and New York regulatory policies that our analysis of *Neumeier* has revealed. If these policies are relevant in *Neumeier*, they should be relevant in

¹²⁰ ROBIN WEST, NORMATIVE JURISPRUDENCE: AN INTRODUCTION 98–100 (2011).

¹²¹ This assumes that we have solved the problem of interjurisdictional utility comparisons. See *supra* note 45 and accompanying text.

¹²² To make matters worse, there is no reason to think that the only relevant New York policy in favor of a rule barring liability is a worry about insurance fraud.

¹²³ 191 N.E.2d 279 (N.Y. 1963).

¹²⁴ See *id.* at 284 (“Comparison of the relative ‘contacts’ and ‘interests’ of New York and Ontario in this litigation . . . makes it clear that the concern of New York is unquestionably the greater and more direct and that the interest of Ontario is at best minimal.”).

Babcock. Put in the mix, Ontario is interested after all. Ontario lawmakers would want a guest-host negligence rule as a means of deterring negligence by hosts within the province. As for New York lawmakers, we don't really know what rule they would want. True, they have a reason to want a guest-host negligence rule as a means of compensating a New York guest. But there is also the worry about fraud by the New York host. This worry was insufficient to recommend a guest statute when it was up against compensation *and* deterrence. But we do not know what New York lawmakers would say when the worry about fraud is up against compensation alone. We cannot conclude they would choose a rule of negligence liability. Using the assignment of weights to policies described above, they would want a virtual guest statute: $\text{Comp}_{\text{NY}}(2) < \text{Fraud}_{\text{NY}}(5)$.

We also do not know what rule best serves the aggregate weighted interests of Ontario and New York, which would require comparing the strength of Ontario's deterrence interest plus New York's compensatory interest (both of which argue for negligence liability) against the strength of New York's interest in discouraging insurance fraud (which argues for a virtual guest statute). We cannot assume that the balancing would recommend a rule of negligence liability. Using the assignment of weights to policies described above, the proper rule would be a virtual guest statute: $\text{Comp}_{\text{NY}}(2) + \text{Deter}_{\text{Ont}}(1) < \text{Fraud}_{\text{NY}}(5)$.

The analysis is complex, but the upshot is simple. As interest analysts recognize, laws are enacted without considering conflicts cases. But interest analysts still insist that these laws apply in conflicts cases. They are mistaken. The decisions that lawmakers made about the relative weights of policies in non-conflicts cases cannot tell us what rule those lawmakers would want for conflicts cases. The problem is clearest in the unprovided-for case, because only policies that stood *against* currently existing laws are relevant. But these sacrificed policies are relevant in other conflicts cases too.¹²⁵ Because the balance of regulatory policies in

¹²⁵ The only exception would be a true conflict in which all of the reasons for each jurisdiction's law are implicated. An example would be a case with a New York guest, an Ontario host, and a New York accident. New York is interested because there is a New York guest to compensate and negligence by a host in New York to deter. Ontario is interested

a conflicts case is fundamentally different from the balance in a non-conflicts case, existing law is inapplicable. Courts must make law. And if they are to make law on the basis of relevant regulatory policies, they must consider all policies—not just those standing behind enacted laws.¹²⁶ That is the lesson of the unprovided-for case.

But how can a court possibly figure out what law serves governmental policies, when doing so requires considering not merely the policies standing behind existing laws, but also the policies standing *against* those laws—policies that are unlikely to have been mentioned by the relevant lawmakers? I think the answer is that it cannot, and that interest analysis must be abandoned. The considerations are so complex that trying to identify the proper balance of governmental interests probably does not get us sufficiently close to the correct solution to be worth it.¹²⁷ Under the pressure of the unprovided-for case, interest analysis collapses, leaving no clear choice-of-law approach in its place.

because there is an Ontario host whose possibly collusive suit would have negative financial consequences for the province. In such a case, a court would not need to consider the policies that New York and Ontario lawmakers sacrificed when enacting their laws.

¹²⁶ I am not the first conflicts scholar to have characterized courts as making law in conflicts cases. From the American legal realists to Friedrich Juenger to Lea Brilmayer, this has been a minority (and somewhat disreputable) position in the field. *E.g.*, WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 20–21 (1942) (“[T]he forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected. . . .”); FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* 163–69 (1993); Lea Brilmayer, *The Problem of Provenance: The Proper Place of Ethical Reasoning in Selection of Applicable Law*, in *THE ROLE OF ETHICS IN INTERNATIONAL LAW* 101 (Donald Earl Childress III ed., 2012) (discussing what she calls the “common-law method” in choice of law). But I arrive at this position, I believe, for novel reasons.

¹²⁷ This is particularly true if the goal is coming up with the rule that best serves the aggregate weighted interests of all relevant jurisdictions—a goal that I think would be necessary to avoid any Privileges and Immunities argument that the court is creating law that discriminates on the basis of residence.