
William M. Richman, University of Toledo
Review Essay: A New Breed of Smart Empirically-Derived Conflicts Rules: Better Law than “Better Law” In the Post-Tort-Reform Era


William M. Richman*

The Second Edition of Dean Symeon Symeonides’ book THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE is a superb piece of work; that should not surprise many readers of the conflicts literature. The First Edition, prepared in conjunction with Symeonides’ lectures at the Hague Academy of International Law, received enthusiastic reviews from some of the most prominent authorities in the area. Moreover, veteran conflicts aficionados are accustomed to seeing fine work from Symeonides, including a casebook in collaboration with Professors Perdue and von Mehren, a treatise in collaboration with Professors Scoles and Hay and Dean Borchers, invaluable annual surveys of American choice-of-law decisions appearing in the American Journal of Comparative Law, and innovative work codifying the conflicts law of Louisiana, Puerto Rico, and Oregon.

In this review of the second edition, I want to highlight some of the virtues of the new edition but also to respond to a trenchant critique of the original volume as well as to the doubts of some scholars, who - even before the publication of the first edition - have called into question, whether the author’s project (the formulation and legislative codification of choice-of-law rules) is worthwhile or even possible. In doing so, I shall

* Distinguished University Professor, University of Toledo, College of Law

1 Symeon C. Symeonides, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE (2d ed. 2006) [hereinafter cited as REVOLUTION]
7 E.g. La. Civ. Code, Book 4. Conflict of Laws. Even this list shortchanges his considerable body of work, which comprises nearly twenty books and monographs and over seventy law review articles in four different languages.
have to be careful since all of the players – Symeonides and his critics – are long-time friends and two of his critics are my co-authors.

A Chronicle and an Assessment of the Revolution

Like the original edition, the current volume is organized into ten chapters. After a quick Introduction, Symeonides devotes three concise chapters to a chronicle of the American choice-of-law revolution, first among the scholars and then in the courts, concluding with a snapshot of the status of the revolution today. The first of these chapters briefly describes each of the competing choice-of-law methodologies: Interest Analysis (with special emphasis on Brainerd Currie’s forum-favoritism version of the method), Comparative Impairment, Leflar’s “better law” approach, von Mehren and Trautman’s Functional Analysis, Weintraub’s Consequences-Based Approach, and the Second Restatement. This is familiar ground, but Symeonides treatment is especially clear and compact, occupying less than thirty pages.

The second of the three chapters chronicles the gradual shift in American courts from the lex loci rules of the First Restatement to one or another of the modern methods. Those familiar with the author’s annual surveys will recognize the charts, timelines, graphs and maps designed to give the reader some sense of the chronological pace and geographical range of the revolution’s progress in the courts.

---

8 My skill and tact as a diplomat is well known; tongue firmly planted in his cheek, my current dean and longtime friend and colleague, Doug Ray, has nicknamed me “Silk.” He is not a conflicts scholar, so I assume he is not referring to the unfortunate Susan Silk of Tooker v. Lopez, 249 N.E.2d 394 (N.Y. 1969).


10 REVOLUTION, Chapter I.

11 REVOLUTION, Chapter II.

12 Thus the chapter contains a chronology charting the departures in the state courts from the place of injury rule and the place of making rule, maps of the nation depicting each state and its current contract and tort choice-of-law methodology, and pie charts showing the percentage of states (and the percentage of the nation’s population – about 15 – still subject to the traditional methodology. The reader will have to forgive my fascination with this portion of the book; graphic representations in the field of conflicts have been a minor obsession for nearly 25 years. See William M. Richman and William L. Reynolds,
The third chapter surveys the statutory and decisional law in the several states with the goal of identifying the main methodological camps they represent. Several important themes emerge: First, and perhaps most important, are several caveats based on the lack of recent tort or contract choice-of-law precedent in several states, the eclectic methodologies that some states use, and the limited influence of declared methodology on actual results. Caveats aside, several useful conclusions emerge: (1) the Second Restatement is by far the dominant methodology among American courts; (2) its pale imitation – the contacts-counting approach – unfortunately retains some support; (2) although few states fit squarely in the “interest analysis” column, the influence of Brainerd Currie’s thought is still significant because it is incorporated in other methodologies (including those of three lex fori states); (3) the influence of Leflar’s choice-influencing considerations – particularly its better law component – is waning; (4) rule-oriented approaches, such as New York’s Neumeier Rules and codifications in Louisiana, Puerto Rico, are increasingly important.

In Chapter IX, Symeonides assesses the progress made by the American choice-of-law revolution via an ingenious technique. He posits a series of dichotomies (perhaps better

---

13 With a brilliantly selected quote from a Rhode Island decision, Symeonides illustrates how blithely state courts mix and match the choice-of-law methodologies that the scholars are at pains to distinguish:

> In this jurisdiction ... we follow ... the interest-weighing in approach. In so doing, we ... determine the rights and liabilities of the parties 'in accordance with law of the state that bears the most significant relationship to the events and the parties'. That approach has sometimes been referred to as a rule of 'choice influencing considerations.'

> In applying the interest-weighing or choice influencing considerations, we consider ... [Leflar's five choice-influencing considerations and the four factual contacts listed] in the Restatement (Second) CONFLICT OF LAWS §145 (2).

thought of as continua) in choice-of-law ideology and then assesses the traditional and current American systems according to each separate rubric. Thus he opposes unilateralism to multilateralism, territoriality to non-territoriality, forum-neutrality to ethnocentrism, jurisdiction selection to content selection, certainty to flexibility and conflicts justice to material justice. Then in a chart that resembles the set of “slider” controls on a video system (e.g. sound volume, picture brightness, tint (red to green), contrast, etc.) he places one marker on each scale for the status of American choice-of-law regime before the revolution and another marker for its status today. Thus graphically we can see that the revolution has pushed American choice-of-law theory from multilateralism and territorialism halfway toward unilateralism and non-territorialism, from forum-neutrality and jurisdiction selection most of the way toward ethnocentrism and content selection, and from certainty almost all the way toward flexibility. Symeonides has not invented any one of these dichotomies or continua, but his perspicacity in separating out the several closely related threads and his ingenuity in developing a single visual representation for them all have given me a more multi-dimensional and textured perspective on the progress of the choice-of-law revolution than I had been able to develop in 25 years of my own observation.

Toward Success Rather than Mere Victory: A New Breed of Smart Evolutionary Rules

In the book’s final chapter, entitled “The Next Phase in Choice of Law,” Symeonides takes the revolution to task for achieving victory but not success. The victory, of course, is the overthrow of the rigid dysfunctional rules of the First restatement; the as yet unattained success is their replacement with some coherent, non-chaotic choice-of-law methodology. The author summarizes his complaint and the seed of its remedy in four short paragraphs:

Indeed, four decades after the revolution began, it is high time to see how it should end. It is time to develop an exit strategy that consolidates and preserves the gains of the revolution and turns its victory into success.

---

15 Revolution, supra note 1, 364-413.
16 Id. at 420.
17 Symeonides also adds to my understanding of the revolution with periodic comparisons to the choice-of-law-regimes of other legal systems. See, e.g., id at 200, 236, 243, 265-266, 319, 339. In general other legal system’ choice-of-law rules as well as their substantive tort law seems to favor plaintiffs less than our own; it is difficult to draw any moral from the comparison, however, because most nations that have well-developed tort and choice-of-law regimes also have national mandatory health insurance, which, sadly, ours does not.
It is also time to recognize that the revolution has gone too far in embracing flexibility to the exclusion of all certainty, just as the traditional system had gone too far toward certainty to the exclusion of all flexibility.

A correction is needed, and a new equilibrium should be sought between these two perpetually competing needs.

The view of this author is that it is now necessary and possible to articulate a new breed of smart, evolutionary choice-of-law rules that will accomplish both objectives: (1) restore a proper equilibrium between certainty and flexibility; and (2) preserve the substantive and methodological accomplishments of the revolution.¹⁸

In Chapters V through VIII, the book’s intellectual heart, the author attempts systematically and courageously to answer his own call for a successful, rather than merely victorious end to the choice-of-law revolution. His solution and his recommendation for a new post-revolutionary choice-of-law system are apparent from the paragraphs quoted above: the answer is “a new breed of smart evolutionary” rules for choice of law in tort cases.

Symeonides’ proffered rules differ profoundly from the traditional First Restatement rules. First they are vastly more detailed: they cover particular narrow areas of tort law (product-liability, punitive damages, e.g.) rather than whole of the area, and they canvass multiple contact/law patterns rather than imposing a single-contact, one-size-fits-all rule. Second, they are content sensitive, taking into account whether the particular rule is conduct-regulating or loss-distributing¹⁹ or pro-recovery or pro-defendant. They are also

¹⁸ Id. at 425.
¹⁹ The distinction is designed to help the court determine the purpose behind the competing tort rules. Conduct regulating rules attempt to control (foster or deter) the conduct of primary actors in the system. Good examples are punitive-damages rules, rules of the road, work-place safety standards, building codes and premises liability rules. See REVOLUTION at 136. The purpose of loss distribution rules, by contrast, is not to influence conduct but rather to determine the party who must bear the loss caused by a tort. Examples are immunity rules, damage ceilings, no-fault automobile accident regimes, and rules providing for indemnification or contribution among joint tortfeasors. Symeonides uses the distinction to help solve one of the oldest disputes in choice of law: whether the reach of a rule should depend on territorial variables, such as the place of injury or personal variables such as the domiciles of the parties. Id. at 140.

The distinction is controversial; embraced by Symeonides and the New York Court of Appeals in Schultz v. Boy Scouts of America, Inc., 480 N.E.2d 679 (1985), it has been criticized by other scholars as unworkable and useless. See e.g., Wendy C. Perdue, A Reexamination of the Distinction between “Loss-Allocating” and “Conduct-Regulating” Rules, 60 LA. L. REV. 1251 (2000), where the author points out that nearly all tort rule have both deterrence and compensating purposes and effects. In the words of Justice
purpose-motivated; Symeonides rules do not presume to choose between two states rules without first taking account of the reasons for those rules' existence. Finally, and perhaps most importantly, Symeonides' rules are formulated *a posteriori* rather than *a priori*; they are descriptive rather than prescriptive. In the words of Professor Weinberg, they are derived rather than devised.²⁰

His method for deriving them of course is empirical and painstaking, requiring the charting of every possible combination of contacts, law, policy, and outcome in each case pattern.²¹ If the results permit and if the policy outcome is rational, he derives a summary rule.²² The method is exactly that preferred by the American Legal realists,²³ who

Keen in the Case of the Speluncean Explorers, “not one statute in a hundred has any ... single purpose.” Lon L. Fuller, The Problems of Jurisprudence 17 (temp. ed. 1949). To me Perdue seems to have the better of the argument; interest analysis requires divining the purpose behind each state’s competing rule, but I am not persuaded that dividing the innumerable possible purposes of tort rules into two groups adds much to the inquiry. Ultimately, Symeonides seems to realize as much, citing Judge Weinstein’s observation that the conduct-regulation/loss allocation distinction is “far from a rigid one,” but rather is “‘no more than a proxy for the ultimate question of which state has the greater interest in having its law applied to the litigation in hand.’” Id. at 138, quoting from Hamilton v. Accu-tek, 47 F. Supp. 330,337 (E.D.N.Y. 1999). Ultimately Symeonides concludes that the distinction’s explanatory power is worth its difficulties at the margins: “Surely, in hard cases or cases in which the distinction is unworkable, the lines may be adjusted or even stepped-over, but this does not mean that it is better to debate without lines.” Id.

²⁰ WEINBERG, *supra* note 3, at 1648.
²¹ In addition to permitting the formulation of empirically-based rules, the author’s painstaking method permits some significant observations – especially in the products liability cases. Not surprisingly, he finds that although most cases speak the language of interest analysis, there decisions seem to be more influenced by contact counting. REVOLUTION, *supra* note 1, 320. Forum shopping is not nearly as common nor as profitable as many commentators have supposed; thus the forum applied its pro-plaintiff law in only 53% of the surveyed cases. *Id.*, 330. Nor do the cases reveal a bias in favor of plaintiffs, who prevailed in about half of the cases. *Id.*, 332, or a dramatic preference for forum law, applying it only 56% of the time. *Id.*, 334 These results suggest that the “tort reform” movement has enjoyed some lobbying successes, and that product liability litigation, at least in choice of law cases, is not currently the plaintiff’s lawyers’ bonanza that manufacturers claimed it once was.

²² The outcomes of the reported cases do not always permit a summary rule. For example, the decisions reveal no clear choice pattern in cross-border, loss-distribution conflicts that fit the “unprovided-for pattern in Currie’s lexicon, i.e., they involve an act in defendant’s domicile – whose law favors the plaintiff – and an injury in plaintiff’s domicile – whose law favors the defendant. Symeonides considers several possible solutions, including Currie’s *lex fori* fall-back and a re-characterization of the issue as conduct regulating rather than loss distributing, but ultimately concludes:
advised lawyers to ignore the horn-book rules and abstract theories that courts articulate in their decisions and concentrate instead on the fact patterns that they faced and the results that they chose.24

Symeonides’ method puts me in mind of a former-colleague’s solution to a landscaping problem. When the university replaced an unsightly parking lot with a new landscaped quadrangle, my colleague and I speculated about where the paved walkways should and would be located. Our guess was that there would be a committee that would choose the layout based upon the various buildings around the quadrangle, the students’ and faculty’s likely paths given the relationship among the subject matters taught in the various buildings, the scheduling of classes for day and evening students, uses of the quadrangle and its surrounding buildings for extracurricular purposes and finally, of course, aesthetics. My colleague suggested a different method - seeding the entire mall area with grass, leaving no paved pedestrian paths. He predicted that after a full academic year, the ideal layout of pedestrian walks would be revealed by the paths in the grass worn away by the travelers on their daily rounds.

Not only superior to the rules of the First restatement, Symeonides rule are also preferable to the Second Restatement’s. First, his rules’ coherence contrasts sharply with the Restatement’s amalgam of black-letter rules,25 tentative territorial presumptions,26 party-autonomy provisions,27 substantivist solutions,28 grouping-of-contacts

On balance, a better option is to concede that pattern 8 cases are not susceptible to a priori solutions. A court that has the opportunity to consider the totality of the circumstances of the particular case, including factors such as the parties relationship, if any, is likely to reach a better result than a result preformulated ex ante.

REVOLUTION, supra note1, 202. Symeonides willingness to settle for experientially-earned agnosticism in such intractable patterns tend to make the reader all the more confident in the rules he formulates for patterns where the case law is less equivocal

23 For another attempt to use the realists’ empirical method to derive conflicts rule in tort cases, see Robert A. Sedler, A Third Restatement or Rules of Choice of Law, 75 IND. L. J. 615 (2000).
24 See, e.g.,
25 Restatement (Second) of Conflict of Laws § 223 (1971) (applying the law of the situs to all questions involving the validity and effect of conveyances of situs land).
26 E.g., id., § 146 (choosing the law of the state of injury unless some other state has a more significant relationship to the parties and the occurrence).
27 E.g., id., § 187 (permitting contracting parties in most cases to choose the law that will govern their agreement).
28 E.g., id., § 203 (applying an alternative reference rule to validate most contracts against a usury defense).
enumerations, and § 6 Choice of Law Principles. Second, their simplicity and clarity highlight the unwieldiness of the Restatement’s black letter-rule-plus-comments-plus-examples approach.

*Nationwide Mutual Insurance Co. v. Black* is an excellent vehicle for contrasting Symeonides’ method with the Second Restatement’s. An Ohio driver and her two Ohio passengers drove to Ontario, where their car collided with one driven by a resident of Ontario. The passengers presented their injury claims to the Ohio driver’s insurer, which denied them. They then presented the same claims to their own first-party insurer, which paid them and then sued the driver and her insurer for indemnification. The passengers’ insurer was an Ohio citizen, but the driver’s insurer was not. Nevertheless, both insurers did business in Ohio, and both policies were written there. The choice was between Ohio’s traditional tort rule, which would have permitted the indemnification claim and Ontario’s no-fault regime, which would not.

The court began its analysis with § 146, which provides for a presumptive reference to the place of injury – Ontario – and a “more significant relationship” escape valve incorporating the contacts of § 145 and the principles of § 6. Completely misreading § 6, the court failed to conduct an interest analysis; instead it “weighed” the policy interests involved, concluding that, “Ontario could ... advance as many policy reasons for its no-fault ... law as Ohio could for its fault-based system.” Because the competing policies of Ohio and Ontario “offset each other,” the court concentrated on the contacts of § 145. The coincidence of the tortious conduct and the injury in Ontario counted heavily, and was not counter-balanced by the common domicile of the insureds because one of the insurers was not incorporated in Ohio!

If these two fundamental mis-readings of the Restatement were not sufficient, the court then referred to an unfortunate example in comment d. As an example of a situation where the place of injury will count for little in the choice-of-law calculus, the comment hypothesizes a plaintiff airline passenger domiciled in X who purchases a ticket from an X-based airline to fly from one location in X to another. While flying briefly over the airspace of Y, the pilot commits an act of negligence, which causes severe fright and

---

29 *Id.*, §§ 145,188 (grouping of contacts section for torts and contracts cases).
31 656 N.E. 2d 1352,1353.
32 656 N.E. 2d 1352, 1354.
33 656 N.E. 2d 1352, 1355.
34 656 N.E. 2d 1352, 1357.
35 The court also misread *Kurent v. Farmers Ins. of Columbus, Inc.* 62 Ohio St. 3d 242, 247, 581 N.E.2d 533. (1991). The defendant in *Kurent* was domiciled in Michigan, so the case presented a true conflict, which the Supreme Court of Ohio settled with a territorial reference to Michigan, the place of injury. Unable to appreciate the Restatement’s incorporation of interest analytic principles, the *Black* court mistakenly read *Kurent* to control the case before it, which unlike *Kurent* was a garden variety false conflict. 656 N.E. 2d 1352, 1357.
shock to the plaintiff but does not prevent the plane from proceeding safely to its destination, again in X. Easily distinguishing the strange hypothetical, the court went on to conclude that there was no reason to displace the place-of-injury presumption in the decidedly routine case it faced.36

Black shows how easy it is for a court to miss-read the Restatement; it is, after all a complicated document, incorporating multiple choice-of-law methodologies as well as several different drafting devices (black letter, comments and examples). Symeonides’ rules do a much better job with the routine false conflict pattern in Black. First, the case fits neatly into the loss-distributing category; however problematic the loss-distribution/conduct-regulation dichotomy might be, Black is a clear case. His RULE 1 provides: “When the ... victim and ... the tortfeasor are domiciled in the same state, the law of that state governs whether it favors the victim ... or the tortfeasor....” Very likely even the Black court would have little difficulty applying such a clear and succinct rule to produce the correct result.38

Rules, Justice, Neutrality and Flexibility

So Symeonides’ rules are better than those of either of the two restatements and arguably, represent the state of the art in modern choice-of-law legislation, but that still leaves the question whether rules – even excellent rules – are the way to go. A rival school of thought holds that rules are ill-suited for the choice-of-law enterprise and that only a flexible approach can provide a satisfactory answer.39 This is the kind of debate that seems to progress but never end.40 So to say that Symeonides has not solved the issue is hardly a critique; he has surely raised the level of discourse.

36 656 N.E. 2d 1352, 1357.
37 REVOLUTION, supra note1, 156.
38 Even in the event it was distracted by the non-Ohio residence of one of the insurers, Symeonides system would still guide the court correctly. It provides a rule for “cases analogous to common-domicile cases:” “persons domiciled in states whose law ... is substantially identical shall be treated as if domiciled in the same state.” The non-Ohio insurer was a citizen of a state with a fault-based tort system. REVOLUTION, supra note1, 162.

39 See, e.g., William L. Reynolds, The Silver Anniversary of the Second Conflicts Restatement: Legal Process and Choice of Law, 56 MD. L. REV. 1371 (1997) [hereinafter cited as REYNOLDS]; Friedrich K. Juenger, A Third Conflicts Restatement, 75 IND. L. J. 403 (1997); WEINBERG, supra note 3. The disagreement between these writers and Symeonides is one of the most fundamental that faces choice of law as a discipline. In the words of Professor Reese, “[t]he principal question in choice of law today is whether we should have rules or an approach.” Willis Reese, Choice of law: Rules or Approach, 57 COLUM. L. REV. 459, 460 (1972). The date in the preceding citation and the persistence (and virulence) of the debate some 35 years later does not augur well for a conclusive resolution any time soon.
40 Debates between Platonists and nominalists and between utilitarians and deontologists have the same character.
One critique of rules for choice-of-law focuses on the unworkability of rules in an area where the variables are so many and complex. Here Symeonides has made some progress. First he points to the history of codification efforts in Louisiana, Puerto Rico and Oregon. Perhaps their success is open to dispute but the only available empirical evidence – an affirmance-rate comparison study by Dean Borchers – suggests that codification does produce gains in predictability.  

Second, he focuses attention on the silent revolution that has occurred in state legislatures, which for the last 50 years have been “routinely ... enacting unilateral choice-of-law rules interspersed with substantive rules in areas such as insurance contracts, franchises, dealerships, consumer protection, construction contracts, workers’ compensation, public contracts, and other densely regulated areas.” Multilateralist statutory solutions, he notes, also have proliferated in the Uniform Commercial Code among other areas.

Symeonides’ highlighting of these statutory provisions suggests a new way to shed light on the workability portion of the rule-versus-approach debate. Perhaps it would be productive to consider legal areas – other than choice of law - that are dominated by rules on one hand or more flexible guidelines on the other. Guidelines and flexible standards tend to cluster in areas of the law where one or more of the following conditions prevail: the total number of disputes is relatively small (either as an absolute number or as a fraction of the total number of transactions); individual factual variation among cases is great; dispute resolution involves professional intervention (litigation or some form of alternative dispute resolution); repeat players do not predominate; and no industry or governmental function depends on the certain, routine, predictable resolution of legal issues. The legality of mergers and acquisitions, the permissibility of governmental speech regulations, the standards for personal jurisdiction and forum non-conveniens, and the discretionary exclusion of logically relevant evidence are examples that come to mind.

In other areas, hard and fast rules predominate. Consider Articles 3, 4 and 9 of the Uniform Commercial Code. Transactions number in the billions; most fall into certain routine stereotypical patterns by virtue of their very number; their multitude means that few can result in a professional adjudication (the vast majority of decision making must be performed by the legally-untrained primary actors in the system). These areas require

---

42 REVOLUTION, supra note 1, 432.
43 Symeonides points to bilateral statutory rules on matters such as choice-of-law and forum selection clauses, statutes of limitations (borrowing statutes), interstate arbitration, decedents estates, marital property, premarital agreements, and notice and proof of foreign law among others. Id.
certain, predictable, clear and relatively inflexible rules to guide conduct. Imagine if the routine dealings among the secured creditor, the borrower, and the borrower's unsecured creditors, or those among the drawer, the drawee and the payee of checks were subject to the variations of theory, methodology, and manipulation that attend the many routine conflicts-of-laws cases. Retail financing in the one case, and the payments system, in the other, would break down overnight.

Symeonides' enumerations of successful statutory choice-of-law provisions invite comparison with the types of legal areas where rules or approaches predominate in order to mine some useful criteria with which to determine whether a particular choice-of-law problem is a good candidate for legislative resolution or not. Such an endeavor may or may not produce a wealth of non-controversial results, but the fact that Symeonides' work suggests it as a possible new strategy counts as a major step forward in an otherwise intractable debate.

Two additional critiques of the use of rules in choice of law are worth some attention. Professor Reynolds, drawing on the legal process school of jurisprudence, focuses on the futility of rule as predictors of judicial decisions. While rules seem to promise predictability, the promise is an empty one, because judges, when faced with a rule-mandated result that is inconsistent with justice and common sense, will simply find ways to avoid the application of the rule. The extensive system of escape devices used to import flexibility into the rigid rules of the First Restatement is the classic example. Thus he argues that rules cannot really reduce or cabin judicial discretion; rather, they merely drive it underground. The judges reach the results they want by bending and manipulating the rules, but the real reasons why the result is desirable remain hidden. The consequence is that the reasons in the opinion do not reveal the genuine reasons for the decision, and predictability, the purported goal of rule making to begin with, suffers catastrophically.

It seems to me that Symeonides version of rule making can marshal at least a partial response to Reynolds' critique. First the empirical, a posteriori nature of Symeonides' rules suggests that judges will seldom feel the need for evasion. The rules, after all, are not devised as an academic exercise but rather derived by abstraction from the actual decision-making conduct of the judges. Harking back to the example of the pedestrian paths on the University mall, if the architects place the paths where experience (in the form of dead grass) indicates pedestrians actually walk, there should be few instances of straying unless patterns of use change radically. If they do, it's time for a new paved path, or in the case of straying judicial decision, a new choice-of-law rule.

---

44 REYNOLDS, supra note 37, 1400.
45 Id.
46 See William M. Richman and William L. Reynolds, UNDERSTANDING CONFLICT OF LAWS 182-204 (3d ed. 2002);
47 Id.
48 See text at note ___, supra.
Second, while the rule that Symeonides derives in the book have no escape valves, he advises aspiring codifiers to add such clauses to his rules before including them in a codification. Thus a judge, cramped by an ill-fitting choice-of-law rule, has only to use the escape clause and record honestly her reasons for the need for deviation. Thus Symeonides’ rules, no less than Reynolds’ legal process solution, can allow the exercise of discretion, and more importantly, bring it out of the shadows and into the sunlight, thus making accurate prediction more feasible.

Professor Weinberg’s attack on choice-of-law rules is based not on their craft deficiencies but rather on their moral consequences. Symeonides’ rules - like any set of rules, that are not purely substantivist (e.g., plaintiff wins) – value “conflicts justice” (neutrality) as well as “material justice” (the “right” result in the case at bar); and occasionally the two will come into conflict. Symeonides’ rules’ built in escape valves will often allow material justice to prevail, but ineluctably in some cases, material justice will lose out to conflicts justice.

This inevitable feature of any set of neutrality-valuing rules is what divides Weinberg and Symeonides. In her words:

But always the problem for every choice-of-law proposal, however well intentioned, however closely worked, is the question whether we are willing to give up on justice – whether we are willing to be satisfied with “conflicts justice.” …. We arrive then, with Symeonides, at the heart of the matter. Must “conflicts justice” be attainable only at the expense of “material justice?” If so, in the face of these conflicting demands, must we be content merely with “conflicts justice?”

Conceding that justice must be blind, she asks:

But what must Justice be blind to? Presumably Justice must be blind to the relative celebrity, wealth, political power, or influence of the parties. But it is hard to believe that Justice must be blind to injustice. Justice cannot be that blind.

Ultimately, she “cannot help setting a much higher value than Symeonides does on ‘material justice,’” and, in its name, objects to any sacrifice in order to achieve conflicts

---

49 See REVOLUTION, supra note 1, 208
50 Symeonides experience as a comparativist allows him to draw our attention to Article 15 of the Swiss PIL Act, which allows a judge to ignore a presumptive reference “if, from the totality of the circumstances, it is manifest that the particular case has only a slight connection to ... [the rule-mandated] law and a much closer relationship to another law.” Id., 417.
51 See note ___, supra.
52 Weinberg, 1663
53 Id 1666.
 justice. “But why should reason, and shared norms, and justice, have to be ‘balanced’ against any ideal, even neutrality?”

Weinberg’s elevation of justice over neutrality is sympathetic, especially in the face of the truly egregious foreign law, but in more prosaic cases, it is vulnerable to the same charge of subjectivism that has always dogged the “better law” theorists. The difficulty is that “better law” and “material justice” may be in the not-so-blind eye of the beholder.

For more than half a century, the advocates of better law and material justice have had a relatively convincing answer to the subjectivist critique. Better law is more progressive law, law that spreads the risk of the enterprise on all who enjoy its benefits (industry and consumers) rather than leaving it on the victim it has haphazardly befallen. Better law and material justice are found in the general shared policies behind the tort law – compensation and deterrence – rather than isolated and “local” defenses. Not to put to fine a point on it, the consensus has been that better law and material justice are plaintiff-favoring.

Personally, I agree with the conclusion, but I am forced to concede that it is no longer the consensus. For the last decade at least, manufacturers, their lobbyists, and the politicians they have captured have enjoyed extraordinary success in changing the terms of the substantive tort law debate. Excoriating greedy trial lawyers and activist courts, they have convinced legislatures, courts and parts of the electorate that there are “litigation hell-holes,” a “malpractice crisis,” a “liability crisis,” and a “litigation explosion.” Further, they have argued with some success that the liability climate in much of our

54 Id 1664.
55 See, e.g., Louise Weinberg, Methodological Interventions and the Slavery Cases, or, Night Thoughts of a legal Realist, 56 Md. L. REV. 1316 (1997).
60 SCOLES et. al., supra note 5, at 788.
country is unfair to business (large and small) and damaging to the economy. Their efforts have paid dividends in substantive changes in the legislative and common law of torts; medical malpractice liability caps, punitive damages limitations, statutes of repose and the Class Action Fairness Act all spring from their efforts. The same interests that have sold the legislatures on the evils of courts-gone-wild are gaining influence in the appointment of the judges and spending fortunes convincing the electorates to put anti-plaintiff legislators, attorneys general and judges in office.

The result of these political changes is that it is no longer accurate to claim that the basic common policies behind the tort law include only compensation and deterrence. Another set of basic common policies seems to have emerged: industry protection, discouragement of “frivolous” litigation and suppression of greedy trial lawyers and activist courts. If “better law” theorists can no longer appeal to a steady plaintiff-favoring trend over time, and if the “basic policies” have changed, what can they appeal


62 See Mary Ellen Klas, Medical Liability Adversaries Up Ante in Florida's Top Race, PALM BEACH POST (FLORIDA) October 16, 2002 (citing massive campaign contributions to Governor Jeb Bush of Florida by medical groups, nursing homes, insurance companies and other health care interests as well as Bush’s support for tort reform initiatives and pro-defendant judicial appointments). A Florida reporter quoted Bush as blaming the Academy of Florida Trial Lawyers for resisting the tort reform measures and reported that he said: “We need to whack the trial lawyers.” Id; Michael Greve, Can business groups beat lawyers? They did in 2004. They could in 2005, THE AMERICAN ENTERPRISE, April 1, 2005 (noting that in the 2004 elections business interests in targeted 13 judicial races, especially in West Virginia, Mississippi, and Ohio, and prevailed in 12, and that those same groups won all the attorney general races they targeted.) In those same elections voters approved measures limiting lawyer’s fees (Florida and Nevada), requiring mandatory mediation before litigation against health care providers (Wyoming) limiting private lawsuits under the state's Business and Professions Code (California)). Id. The author concludes that:

[the 2004 results strongly suggest that America's seemingly inexorable tide of lawsuits can be stemmed after all. These results build on earlier successes: Once-notorious Alabama fixed its tort system and courts some years ago, as did Texas. More recently, tort meccas like Mississippi, Florida, and Ohio managed to enact meaningful reforms.

These reforms often took hold after businesses announced that ruinous liability laws would prevent the location of new enterprises within the state.
to, besides subjective preference, to argue that compensating and deterring law is “better”?\(^{63}\)

Furthermore in these times, it is worthwhile to reconsider (purely as a matter of strategy) whether maximum flexibility in choice of law is the preferred solution. Given the increasing body of defendant-favoring substantive law and the increasing corps of Lochnerian judges, those choice-of-law theorists who believe that compensation and deterrence should remain the principal goals of the tort law (I include myself), might be wise to reconsider the virtues of rule-centered choice-of-law systems. The virtues and vices of judicial flexibility in choice of law may balance very differently in the new political environment. During the past fifty years, when defendant-favoring law could be characterized fairly as outmoded, substandard and a drag on the coattails of civilization and when liability-favoring courts were the norm, maximum judicial flexibility was attractive. In today’s substantive tort law climate, defendant-protecting law is ever more common as are reactionary judges. Should choice-of-law theorists really be working to increase judicial license in this climate or have the virtues of neutrality have become more attractive? A reactionary judge, restrained however meagerly by a rule-based choice-of-law system, will be better than one liberated by a better-law regime. Put differently, the relative virtues of flexible versus rule-based choice-of-law systems seem to change depending upon whether one is playing offense or defense in the substantive tort law game.

From a more detached point of view, the changing fashions in substantive tort law show that the “better law” choice-of-law theory has a wave amplifying effect. Compensation and deterrence waxed for more than fifty years, but now seem to be waning. Perhaps the

\(^{63}\) In times past, when there was a steady trend toward law favoring recovery for injured tort victims, a judge who leaned in that direction could confidently proclaim defendant-favoring provisions to be “a drag on the coattails of civilization.” See Clark v. Clark, 222 A. 2d 205 (N.H. 1966) (opinion of Kennison, C.J., referring to automobile guest statues). Today, by contrast, the current successes of the tort reform movement, might justify labeling the new generation of defendant-protecting provisions “the wave of the future.” Some scholars, unfazed by the tort reform movement, continue to maintain that there is an objective basis for treating plaintiff-favoring law as “better law”. See, e.g., AGAINST COMITY, supra note ___ at 67:

The argument that these proliferated disparate defenses represent better law because they represent a consensus that liabilities are too heavy is not quite a non sequitur. But at most tort reform is a shared legislative determination to find decently acceptable ways of subordinating generally favored remedial policies to a perceived current exigency. Tort reform demonstrates widely shared fear of a litigation explosion or an insurance crisis or both. But this does not negate the basic commands of tort law. Whatever constraints on litigation seem necessary to local legislatures, the basic policies underlying tort law are “thou shalt nots.” Moses did not come down from Mount Sinai with The Ten Defenses.
cycle is all part of a sinusoidal wave curve. By allowing appeal to politically sensitive trends and not-so-constant “basic policies,” the “better law” theory works to increase the height of the crests and the depth of the troughs. A rule-based system by contrast should have a wave leveling effect, which today (from my partisan point of view) seems quite attractive.