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CHOICE OF LAW AND TIME

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Choice of law is usually thought of as a problem of law across geography, of how laws apply to persons and events not entirely within a state's boundaries. But time is another dimension to the choice of law problem. In cases wholly domestic to a single state, this temporal issue appears when a court considers whether a change in law has retroactive application. But changes in law occur in interstate cases as well. Moreover, the facts relevant to a choice of law analysis may change between the time of the underlying events and the litigation. Does the court consider facts as they exist at the time of litigation or are the facts to be fixed as of the time of the underlying events? These questions appear in three contexts: First, the state whose law is to apply under a choice of law rule may undergo change, and the sovereign currently in force is not the same one that existed at the time of the events leading to the litigation. Second, the state remains the same, but it has changed its law. Third, the facts relevant to choice of law may change over time. By drawing these three contexts together, one can get a sense of the larger problem of choice of law and time. In general, the question is whether rights and obligations of the parties should be fixed, anchored to a definite point in the past, or allowed to float and change over time. No single overarching solution is available, but the relevant factors are the nature of the underlying issue, the choice of law approach the court has taken, and the extent to which the policy demands of the present are impaired as compared to the impairment

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of the expectations and reliance interests of the parties who acted in the past.

INTRODUCTION

Most choice of law problems deal with geography. The result of a choice of law analysis is that the law of one state or nation or another—a place—applies. But there is another, largely unexplored, dimension to the choice of law problem, that of time. This article explores the temporal dimensions of choice of law.

To be more concrete, a court applying its choice of law rule might be instructed to apply the law of a place where a certain thing exists or event occurred—the tort injury or the contract formation or the domicile of a party, for example. These rules answer a "where" question (which state or nation?) but leave unanswered a "when" question. What if the nation selected by the choice of law rule has changed, the old state having been replaced by a new one? Is the court to apply the law of the new or the old state? Or suppose there has been no change of government but the law of the selected state (a nation or a state of the United States) changes its law. Is the court to apply the current or the old law of the other state? Or suppose the government and the law are unchanged but the facts upon which the choice of law rule operates have changed, such as a party changing his or her domicile. Is the court to apply its choice of law rule to the facts that existed at the time of the underlying events or those that exist at the time of litigation? Each of these discrete questions raise the issue of whether the rights and obligations of the parties should be fixed and anchored in the past or should be changeable, floating along the currents of time.

This article explores these temporal issues in choice of law. In Europe, there has been some study of these "intertemporal" choice of law problems, but little in the United States. The Second Restatement of Conflict of Laws mentions the temporal choice of law problem only to declare it off limits. An introductory section on the covered subject matter lists "Conflicts in time" among the topics excluded.[1] But the issue the Restatement seems to have in mind is a straightforward problem of retroactivity *within* a single state: "whether a prior or subsequent law of a state should be applied, as, for example, when it is argued that a statute should be given a retroactive application."[2] The most recent draft of the Third Restatement of Conflict of Laws

1. RESTATEMENT (SECOND) OF CONFLICT OF L. § 2 cmt. c (AM. L. INST. 1971).

2. *Id.* ("The question occasionally arises whether a prior or subsequent law of a state should be applied, as, for example, when it is argued that a statute should be given a retroactive application.").

carries forward this exclusion.[3] In contrast, the topic considered in this article is the treatment of time when the law of two or more states is potentially applicable, thus involving choice of law problems of both time and space. The modern Restatements thus doubly miss the issue addressed here: They define a related but distinct problem and then choose to exclude it.

But the general neglect of choice of law and time is not due to an absence of actual intertemporal problems. Courts have long wrestled with issues of choice of law and time, but it has been neglected as a distinct field. Courts have seen oaks and maples and birches but did not realize that they were looking at a forest. The American Law Institute is currently developing a Third Restatement of Conflict of Laws.[4] It would be helpful if the new Restatement addressed these issues.

While the three areas identified above—changing states, changing law, and changing facts—all present the general question whether the law governing an event or transaction should be fixed and anchored or allowed to float, the different contexts of the time problem present, not surprisingly, different concerns. No uniform all-encompassing solution is possible. Moreover, the answer to the time problem depends upon both the nature of the substantive legal issue and the choice of law policy one is committed to. Whatever the limitations of the prescriptions that can be made, drawing together the temporal issues in choice of law is useful in order to appreciate the dimensions of the problem.

This article proceeds as follows. Before analyzing the temporal issues in horizontal (i.e., interstate) choice of law, Part I sets the background. It first explains why the traditional vested right approach to choice of law overlooked these issues. Although few states today use that system, its conception that rights and obligations are fixed remains with us as a vestigial subconscious assumption even if it is not formally articulated. Part I then considers related temporal issues, ones not involving horizontal choice of law, that help us understand the time problems in choice of law. Each state has its own law of retroactivity, for example. This too is a problem of how the law is to apply across time. Similarly, in the domestic law of contracts, parties are presumed to incorporate existing law into their contract. Changes in the law in this context also raise a problem of which temporal version of the law to apply. Both of these areas require a

3. *See* RESTATEMENT (THIRD) OF CONFLICT OF L. § 1.02 cmt. d (AM. L. INST., Tentative Draft No. 2, 2021).

4. For a description of the project and its status, see *Restatement of the Law Third, Conflict of Laws*, AM. L. INST., https://www.ali.org/projects/show/conflict-laws (last visited Jan. 29, 2022).

court to choose between two legal rules, the current or the old, without the complication of another state being involved. Finally, temporal choices of law appear in domestic cases within vertical (federal-state) choice of law. These issues arise in cases applying the *Erie* doctrine and in other areas, such a federal common law, where federal law adopts state law as a rule of decision. In these cases, a federal court applies state law, but does it apply older or current state law? Part II then addresses temporal issues in horizontal choice of law, organizing the analysis around the three topics noted above, changing states, changing law, and changing facts. As to each topic, the article suggests an appropriate solution.

I. EXPLORING CHOICE OF LAW AND TIME

The law interacts with time in both interstate and domestic contexts. This section surveys some of the domestic contexts. In these contexts, there is no question of which state's law to apply; the forum is applying its own law or, in the *Erie* context, is bound to apply the law of a particular state. The question instead is whether to apply current law of the state or an earlier version of it. But before addressing those matters, it is helpful to understand the background of choice of law to see why the time question in choice of law has been neglected.

A. Joseph Beale and Vested Rights

The legacy of the First Restatement's commitment to vested rights may be the reason for the underdevelopment in American conflicts law of the temporal issue in choice of law. Joseph Beale, the reporter for the First Restatement, perceived the temporal issue but dismissed it out of hand. His reasoning made perfect sense given his commitment to vested rights. The overarching theory of vested rights under the First Restatement was succinctly stated by Justice Holmes. When a court enforces a liability that arose elsewhere, that "does not mean that the act in any degree is subject to the *lex fori*."[5] Instead, the "theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found."[6] Or

5. Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126 (1904).

6. *Id.* The *obligatio* explanation of choice of law is reminiscent of Poe's line from the movie *Hard Times*, in which he reveals that he carries something of an *obligatio*: "Poe: I have two years of medical school to recommend me. Chaney: Two years doesn't

as Beale put it, at the time of an event having legal consequences—a tort injury or the formation of the contract—the "law annexes to the event a certain consequence, namely, the creation of a legal right" and this right "should everywhere be recognized; since to do so is merely to recognize the existence of a fact."[7] Because rights vest (become "facts") at the time of an occurrence, Cardozo explained, it is simply case that the "plaintiff owns something"—a vested cause of action—"and we [the foreign court] help him to get it."[8] The foreign cause of action thus "may be considered much like personal property of the injured party."[9] Under this view, a court applying the law of another state is enforcing a right that became fixed elsewhere. And it necessarily became inalterably fixed, frozen in time.

While Beale noted the temporal issue,[10] he did not dwell long on it. "Conflict of Laws deals primarily with the application of laws in space," Beale wrote, but the "Application of Laws in Time" (Beale is here quoting the title of a work by Friedrich Savigny) is a "similar topic."[11] Beale contrasted two approaches to conflicts problems, one resting "upon the theory that the applicability of law to the facts of the case may properly be determined as of the moment of litigation," while the other insists that "the applicability of law to the juridical facts must be determined as of the time of their occurrence."[12] The correctness of the latter position was for Beale "*indisputable*" since "[s]ome proper law must have governed the juridical situation at the moment of its occurrence."[13] Because of the commitment to vested rights, the question of time was foreclosed. Rights vest at the moment a contract is created or a tort is completed. Other jurisdictions are simply enforcing the rights that have already vested. Choice of law problems are thus to be spoken of in the past tense.

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make a doctor. Poe: Well, in my third year of studies a small black cloud appeared on campus; I left under it." *See Hard Times, Strother Martin: Poe*, IMDB, https://www.imdb.com/title/tt0073092/characters/nm0001510 (last visited Jan. 29, 2022).

7. 3 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1969 (1935).

8. Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 201 (N.Y. 1918).

9. Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2456 (1999).

10. Others have noted that earlier writers saw the link between spatial and temporal choice of law problems. *See* Perry Dane, *Vested Rights, "Vestedness" and Choice of Law*, 96 YALE L.J. 1191, 1248 n.202 (1987) ("Traditional choice of law literature routinely saw conflicts-over-time and conflicts-over-space as two species of the same genus.") (citing 1 BEALE, *supra* note 7, at 1 n.1; FRIEDRICH KARL VON SAVIGNY, PRIVATE INTERNATIONAL LAW, AND THE RETROSPECTIVE OPERATION OF STATUTES 48 (W. Guthrie trans., 2d ed. rev. 1880) (1869)).

11. 1 BEALE, *supra* note 7, at 1.

12. *Id.* at 2.

13. *Id.*

The caselaw from the era in which Beale wrote is consistent with this approach. When confronted by a change in arguably applicable law, courts without discussion applied the older, time-of-transaction, law. For example, in *Poole v. Perkins*, a Virginia court had before it a promissory note made by a married woman who at the time the note was executed lived in Tennessee.[14] The note was payable in Virginia and was valid under Virginia law.[15] But under Tennessee law "in force at the time of the execution and delivery of the note" married women lacked capacity.[16] The court analyzed the choice of law problem and concluded that Virginia law applied based on the place of performance and presumed intentions of the parties.[17] What the court did not do was take a shorter route and conclude that there was no conflict since the "disability of coverture had been removed by statute in Tennessee."[18] Had the court considered the new statute it might well have rejected its applicability, concluding that it did not retroactively create liability where none had existed. But it did no such analysis. It did not even pause to consider the temporal question of whether the case should be decided by reference to current law or to that in effect at the time of the contract. That result was unimaginable to it. Similarly, in *Milliken v. Pratt*, a Massachusetts married woman contracted to guaranty her husband's purchases from a Maine merchant.[19] The court applied Maine law, under which the contract was valid, by some clever dicing of the facts to conclude that the contract was made and to be performed in Maine.[20] But the court did not use the simpler route: "Since the making of the contract sued on, and before the bringing of this action, the law of this Commonwealth has been changed, so as to enable married women to make such contracts."[21] The court thus took Massachusetts law as it existed at the time of the contract to find a conflict and then solved it without reference to the current law of Massachusetts.[22]

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14. Poole v. Perkins, 101 S.E. 240, 241 (Va. 1919).
15. *Id.* at 245.
16. *Id.* at 241.
17. *See id.* at 244.
18. *Id.*
19. *See* Milliken v. Pratt, 125 Mass. 374, 376 (1878).
20. *See id.* The court concluded that the contract was complete when acted upon in Maine by the Maine merchant when it sold goods to the defendant's husband. *Id.*
21. *Id.* at 377.
22. In fairness to the court, it did consider the current state of Massachusetts law in order to determine whether Maine law was contrary to Massachusetts' public policy. *See id.* at 383. But this was not a part of the choice of law analysis. The court used old Massachusetts law to find a conflict, solved it by applying Maine law, then concluded that Massachusetts public policy was not offended by applying Maine law using the current version of Massachusetts law. *See id.*

Even as choice of law has fundamentally changed since Beale, the assumption that legal relations are fixed has remained, like a genetic memory, embedded in our legal minds. Even Brainerd Currie, who is credited with overthrowing the old Bealian system and creating modern choice of law, succumbed to it.[23] We will see examples of this persistence of the idea of vesting in modern choice of law cases. But first, to appreciate the pervasiveness of the time problem, we will look outside the horizontal choice of law context to temporal issues in related areas.

B. Temporal Issues within Domestic Law

One encounters changing law not only in choice of law cases. The law within a state may change and courts must analyze the effect of the new law in cases with no interstate or international connections. Thus, in wholly domestic cases courts deal with issues such as retroactivity and whether the intentions of the parties were shaped by the legal backdrop against which they acted.

1. Retroactivity

Each state has rules to determine whether new statutory or common law applies to pre-existing events or transactions. These rules operate outside of the interstate context and apply to cases whose facts are entirely domestic to the forum. In that sense they are pure temporal choice of law rules under which a court chooses between competing versions of its own law—the past and the present. In contrast, this article examines *interstate* temporal choice of law, which addresses two choice of law problems, that of space and of time. Although the problem posed is thus distinct, retroactivity is worth a few words both as a background to the related problems under consideration here and because one possible solution to the interstate temporal choice of law problem is to use the law of retroactivity of the state whose law applies.

"Judicial decisions have had retrospective operation for near a thousand years" instructed Justice Holmes.[24] After the Warren Court dallied with more frequent prospective application, the Supreme Court subsequently reverted to a broad rule of retroactive application of judicial decisions.[25]

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23. *See infra* note 331 and accompanying text.

24. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting).

25. For a thorough treatment of the rise and fall of prospective application of judicial decisions, see Samuel Beswick, *Retroactive Adjudication*, 130 YALE L.J. 276,

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.[26]

This returned the general rule to the historical understanding. As Justice Marshall put it in 1801 in *United States v. Schooner Peggy*, "the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."[27] There are exceptions,[28] but the norm is that judicial decisions are applied to the parties before the court and to future and pending cases. At least as to the parties before it, retroactive application is necessary for the court to perform its core adjudicative function of deciding a dispute. For federal courts, retroactivity may be necessary in order to satisfy Article III's requirement that the federal courts

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293–98 (2020); Kermit Roosevelt III, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1103 (1999) (concluding that "retroactive results have reassumed the primacy they enjoyed before the Warren Court's innovations").

26. Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 97 (1993).

27. United States v. Schooner Peggy, 5 U.S. 103, 110 (1801).

28. *See, e.g.*, Frlekin v. Apple, 457 P.3d 526, 538 (Cal. 2020) (citation omitted) ("'[F]airness and public policy sometimes weigh against the general rule that judicial decisions apply retroactively.' For example, prospective application might be warranted when a judicial decision changes an established rule on which the parties below have relied."); Pohutski v. City of Allen Park, 641 N.W.2d 219, 232 (Mich. 2002) ("Although the general rule is that judicial decisions are given full retroactive effect . . . a more flexible approach is warranted where injustice might result from full retroactivity.").

In federal courts, there is a nominally absolute rule of retroactivity. But a litigant's arguments under the new law may be held forfeited for the failure to raise the issue in a timely fashion. *See* Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What It Might*, 95 CAL. L. REV. 1677, 1687 (2007) ("Forfeiture has the potential to be extremely powerful in reducing the number of litigants who can take advantage of new rules. Precisely because the rules are new, litigants are unlikely to have asserted them at trial."); *see also* Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 979 (2006) (explaining that courts apply "forfeiture rules in a manner that ensures a great many defendants who might benefit from [a new case's] holding will still lose. Full retroactivity in form has degenerated into a significant amount of nonretroactivity in fact.").

decide cases and controversies.[29] In addition, federal courts are not (except for the narrow slices of federal common law) creators of law but interpreters of statutes and the constitution. A federal court is always therefore simply making plain what a law (statute or constitutional provision) had *already* meant.[30] State courts differ in that they have the power to create and modify common law rules. In state courts, the default position remains for common law rules to be applied retroactively, but there is a greater flexibility to decide that a given decision might apply prospectively.[31] Thus, for purely domestic cases, a change in a common law rule is normally applied to pending and future cases and therefore necessarily to transactions and events that predate the announcement of the new common law rule.

New statutory law has the opposite treatment. "The principle that statutes operate only prospectively, while judicial decisions operate retrospectively," Justice Rehnquist optimistically stated, "is familiar to every law student."[32] As a statement of a general rule, this is reasonably accurate. More precisely, there is, first, a presumption that legislation applies only prospectively and, second, a body of rules that sometimes require prospectivity. The latter include the Ex Post Facto, Contracts, Takings, and Due Process Clauses, as well as the prohibition against Bills of Attainder.[33] But even if retroactive application of a statute is not forbidden under one of those clauses, the norm of prospective application of statutes operates as a rule of construction.[34]

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29. *See* Roosevelt, *supra* note 25, at 1111. Some state courts share this concern. *See, e.g.*, Molitor v. Kaneland Cmty. Unit Dist. No. 302, 163 N.E.2d 89, 97 (Ill. 1959) ("[I]f we were to merely announce the new rule without applying it here, such announcement would amount to mere dictum.").

30. *See* Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring) (asking whether a decision applies retroactively "presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is").

31. *See* Van Dyke v. Chappell, 818 P.2d 1023, 1025 (Utah 1991) ("[T]he modern view is that the retroactive operation of a change in the common law is not invariable and is not a question of judicial power; rather, whether a decision will operate prospectively should depend solely upon an appraisal of the relevant judicial policies to be advanced."); Ashland Oil, Inc. v. Rose, 350 S.E.2d 531, 534 (W. Va. 1986) ("[J]udicial decisions ordinarily operate retroactively. The courts of this country long have recognized exceptions to the rule of retroactivity, however."). *See generally* S.R. Shapiro, Annotation, *Prospective or Retroactive Operation of Overruling Decision,* 10 A.L.R.3d 1371 (1966).

32. United States v. Sec. Indus. Bank, 459 U.S. 70, 79 (1982).

33. *See* Landgraf v. USI Film Prod., 511 U.S. 244, 266 (1994).

34. *See* 2 NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 41:4, at 400–01 (7th ed. 2009) (explaining that the "principal function" of the rule against retroactivity "has been to impose rules of strict construction upon retrospective legislation. . . . [A] law is not construed as retroactive

Under this rule of construction, statutes "will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction."[35] This presumption "is deeply rooted in our jurisprudence" and is based on "considerations of fairness [which] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."[36]

But there are of course exceptions. "Curative legislation" is meant to "repair the consequences of legal accident or mistake" that caused the earlier legislation to "not reflect the desires of either the legislature or the parties."[37] Such legislation reaches backwards in time to validate a prior transaction. The legislature may, for example, retroactively adjust a rate of interest upwards to make lawful a bond which at the time it was issued had an impermissibly high rate.[38] More broadly, a statute will be construed to have retroactive effect when the "fulfillment of the parties' reasonable expectations may require the statute's retroactive application."[39]

The retroactivity doctrines require a court to consider the time element of the law to be applied. The approach is informed by concerns of fairness to parties but is also driven by institutional characteristics. The legislature's role is to make law, but common law courts have a dual function, to decide cases and also to make law. Because a court must decide the case before it (which involves a past transaction), its pronouncements must necessarily have at least some retroactivity. But the inherent need for this retroactivity is absent with legislation, and so the concerns of fair notice rise to the surface for statutes, and they usually apply only prospectively. Another reason for the general retroactivity of judicial decisions is that courts are often viewed not as creating law but instead as applying law that in some sense exists exterior to the court itself. Federal courts thus do not create constitutional or statutory rights. They instead identify them within their true sources, the Constitution or acts of Congress. Likewise, at

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unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application.").

35. *Id.*

36. *Landgraf*, 511 U.S. at 265; *see also* 2 SINGER & SINGER, *supra* note 34, § 41:2, at 386 ("A fundamental principle of jurisprudence holds that retroactive application of new laws is usually unfair.").

37. 2 SINGER & SINGER, *supra* note 34, § 41:1, at 386.

38. *See* Bates v. Bd. of Educ., Allendale Cmty. Consol. Sch. Dist. No. 17, 555 N.E.2d 1, 4 (1990) ("[T]he legislature may by a curative act validate any proceeding which it might have authorized in advance, provided the power be so exercised as not to infringe on or divest property rights and vested interests of the parties involved"); *see also* 2 SINGER & SINGER, *supra* note 35, § 41:11, at 503–08.

39. 2 SINGER & SINGER, *supra* note 35, § 41:4, at 423.

least during the time of the development of the rule of judicial retroactivity, common law courts did not think they were making law. Instead of legislating they were simply *finding* the rule of law in the corpus of the common law, a body law that exists outside of the court itself.[40]

2. Presumed Incorporation of Domestic Law

An old legal saw has it that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms [and] . . . are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement."[41] This rule operates in conjunction with the rule against legislative retroactivity. The presumption of incorporation applies to laws subsisting "at the time" of the contract but not to statutes "enacted or modified after contract formation . . . because parties are not required to foresee changes in legislation."[42] This rule is thus a temporal choice of law rule for contract cases, declaring that generally the law of the time of the contract, not later law, applies.

Although the general rule restricts the law presumed to have been incorporated to that existing at the time of the contract, this doctrine is flexible. While setting expectations based on the state of the law at the time of the contract is the norm, "[n]othing prevents the parties to a contract from agreeing to be bound with reference to future laws."[43] For example, in *In re Estate of Peterson*, the court dealt with an antenuptial agreement that renounced the husband's rights in his wife's estate.[44] At the time the agreement was signed, state law validated such agreements as to interests in "lands" but made no mention of rights in personalty and the husband argued he had a right to an elective share of the personal estate.[45] By the time of the spouse's death, however, a new version of the statute validated antenuptials

40. How one views the role of a common law court and whether a court makes or finds law is taken up in more detail below. *See infra* notes 165–73 and accompanying text.

41. Von Hoffman v. City of Quincy, 71 U.S. 535, 550 (1 Wall.).

42. Steven W. Feldman, *Statutes and Rules of Law as Implied Contract Terms: The Divergent Approaches and A Proposed Solution*, 19 U. PA. J. BUS. L. 809, 815 (2017).

43. Bd. of Trs. of Cmty Dist. No. 513 v. Krizek, 446 N.E.2d 941, 944 (Ill. App. Ct. 1983) (finding that the "contract specifically incorporates present and future laws of the State of Illinois and makes those laws binding on the parties.").

44. *See* In re Estate of Peterson, 381 N.W.2d 109 (Neb. 1986).

45. *See id.* at 114.

as to both real and personal property.[46] The court concluded that the new statute applied because the parties had contemplated the applicability of future laws: The contract provided that the husband was waiving any rights he "may acquire by reason of the marriage in the other party's property or estate under the present *or future* laws."[47] Similarly, in *Expansion Pointe Properties Ltd. Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP*, a client sued its law firm for malpractice in failing to recover punitive damages.[48] After the parties entered the retainer agreement but before the malpractice litigation, the California Supreme Court ruled that a client cannot recover lost punitive damages in a malpractice action.[49] The court rejected the client's argument that the new case should not apply retroactively because the client had relied on the prior version of California law when it signed the retainer.[50] The new case should apply retroactively, the court concluded, because the record did not support any actual reliance on prior law and because the new rule was based on public policy and failing to apply it would violate current public policy.[51]

As to the latter point, the rule that parties are presumed to have contracted with an eye toward existing law is tempered by the corollary that "the reservation of essential attributes of sovereign power is also read into contracts," at least those touching upon a public interest.[52] Thus, parties are assumed to intend to incorporate both existing law and some future changes to it.[53] While existing laws are "read into contracts in order to fix obligations as between the parties," it is also assumed that the parties anticipated the exercise of the "essential attributes of sovereign power" to change the law.[54] One sees here a theme that will return: the tug between the settled expectations of the past and the policy demands of the current. Every "contract or transaction is deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy."[55]

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46. *Id.*

47. *Id.* at 116 (emphasis added).

48. Expansion Pointe Props. Ltd. P'ship v. Procopio, Cory, Hargreaves & Savitch, 61 Cal. Rptr. 3d 166, 170 (Cal. Ct. App. 2007).

49. *See id.* at 169.

50. *See id.* at 174–175.

51. *See id.* at 177.

52. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435 (1934).

53. *See In re* Marriage of Walton, 104 Cal. Rptr. 472, 476 (Cal. Ct. App. 1972).

54. Castleman v. Scudder, 185 P.2d 35, 37 (Cal. Ct. App. 1947) (citations omitted).

55. *In re Marriage of Walton*, 104 Cal. Rptr. at 476.

The exact basis of the presumed incorporation doctrine is unclear.[56] It can be used to establish either a contractual duty or defense.[57] It is sometimes viewed as a gap-filling rule, to implement the presumed intentions of the parties. Under this view, the doctrine does not impose contractual duties but merely implements what the parties (silently) agreed to: "Statutes then existing are read into the contract. They enter by implication into its terms. They do not change the obligation. They make it what it is."[58] Alternatively, the rule is often viewed as a legal fiction—actually a dual fiction—that everyone knows the law and that they intended for it to govern their transaction.[59] But all legal fictions serve some purpose of their authors. What end does this fiction serve? It is often said by courts that the presumption is conclusive and irrebuttable.[60] Some go so far as to suggest that parties cannot avoid the rule even by express provisions that contradict the statute impliedly incorporated, although most courts do allow parties to avoid the rule by expressly providing otherwise.[61] To the extent the rule of presumed incorporation is mandatory, it functions to make the state law in question—the background rule—a mandatory contract term. Making certain provisions of exiting law mandatory contract terms is one possible end served by the fiction, although as is all too often the case the fiction serves to obfuscate rather than reveal the true basis of the decision. To the extent it is permissive and can be avoided, it is perhaps justified as a more efficient way to construct a bargain than to require every contract to spell out every possible legal outcome.[62]

The state may flex its public policy muscles when so desired. When public policy demands it, the incorporation of existing law is mandatory. For new law, public policy concerns are reflected in the exception that allows new law to apply when it is an exercise of the essential attribute of sovereign power" to alter the law. But in the absence of a strong public policy behind the new law, another policy, that of upholding expectations, applies. In this light, the presumed

56. For a thorough recent analysis of the doctrine see Feldman, *supra* note 43, at 809–69.

57. *Id.* at 814 (noting that the presumed incorporation doctrine can be used as "a sword or a shield").

58. New York v. Nixon, 128 N.E. 245, 247 (N.Y. 1920).

59. *See* Feldman, *supra* note 42, at 846.

60. *See id.* at 825.

61. *See id.* at 848.

62. *See* Selcke v. New England Ins. Co., 995 F.2d 688, 690 (7th Cir. 1993) (noting that as an alternative to the cumbersome process of spelling out every right and duty, the law creates, "standard, 'off the rack' terms that parties can vary if they want but that govern otherwise, eliminating the need for parties to negotiate them expressly in every contract").

incorporation doctrine is similar to the general rules on retroactivity (although having a unique role in contract cases). In the general law of retroactivity, statutes are usually applied only prospectively, which mirrors the implied incorporation doctrine's reference to law existing as of the contract. The exception in the implied incorporation doctrine that applies new laws when the state is acting to enforce a matter of public policy also echoes the exception to legislative prospectivity—statutes apply retroactively when the legislature makes it clear that its determination of public policy demands retroactive application.[63]

3. Time and Vertical Choice of Law

Temporal issues also arise in interactions between federal and state law. Federal courts are called upon to apply state law in a variety of contexts. The *Erie* doctrine is the most familiar, but others exist in contexts where federal courts borrow state law. But what version of state law applies when state law has changed?

Under the federal enclave doctrine, lands the federal government acquires from a state for facilities such as military bases and parks become subject to exclusive federal legislative jurisdiction pursuant to the Enclave Clause.[64] But what law applies if Congress fails to legislate for the acquired lands? Rules of state law in force at the time of cessation continue to apply, not of their own, state-sanctioned, force, but as federal law adopting the state law until such time as Congress does legislate.[65] The Enclave Clause permits "the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred."[66] This avoids creating a legal lacuna—an area "left without a developed legal system for private rights."[67] But the state law that is thus federalized does not include later additions or amendments of state law. "Since a State may not legislate with

63. *See* 2 SINGER & SINGER, *supra* note 34, and accompanying text.

64. *See* U.S. CONST. art. I, § 8, cl. 17. The Enclave Clause empowers Congress to "exercise exclusive Legislation" in the District of Columbia and other "[p]laces purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." *Id.* This power is exclusive of the states in the sense that federal law preempts state law even without federal legislation. *See* Paul v. United States, 371 U.S. 245, 263 (1963) ("[T]he grant of 'exclusive' legislative power to Congress over enclaves . . . bars state regulation without specific congressional action.").

65. *See* Stokes v. Adair, 265 F.2d 662, 665 (4th Cir. 1959) (noting that state laws "lose their character as laws of the state and become laws of the Union").

66. James Stewart & Co. v. Sadrakula, 309 U.S. 94, 99–100 (1940).

67. *Id.*

respect to a federal enclave . . . only state law *existing at the time of the acquisition* remains enforceable, not subsequent laws."[68]

The effect in cases where Congress has not legislated is to create a legal time capsule, freezing the law as it existed at the time of cessation. These enclaves have been colorfully described as "jurisprudential Jurassic Parks."[69] The enclave doctrine is another temporal choice of law rule, in this case choosing the law applied to be that existing at the moment of cessation. The situation presents a domestic choice of law problem (as opposed to interstate one) because there is but one sovereign, the United States, involved, and the enclave doctrine chooses not between jurisdictions but between different time periods. And it is a choice.[70] Federal law could choose to use contemporaneous surrounding state law or independently-created federal common law.[71] Indeed, for many issues Congress has passed "assimilative" laws, adopting as rules of decision *current* surrounding state law. The Assimilative Crimes Act, for example, provides that anyone within an enclave who commits an act "which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, by the laws thereof in *force at the time of such act or omission*, shall be guilty of a like offense."[72] The federal choice of law rule for enclaves may be thus summarized: if Congress has substantively legislated, apply the federal substantive law. If Congress has not substantively legislated but has enacted assimilative legislation, apply current state law. If there is neither

68. *Paul*, 371 U.S. at 268 (emphasis added). The exclusion of subsequently created state law applies to both state statutory and common law. *See* Allison v. Boeing Laser Tech. Servs., 689 F.3d 1234, 1240 (10th Cir. 2012).

69. Chad DeVeaux, *Trapped in the Amber: State Common Law, Employee Rights, and Federal Enclaves*, 77 BROOK. L. REV. 499, 503 (2012).

70. Courts understand the enclave doctrine as a choice of law rule. *See Allison*, 689 F.3d at 1235 ("Federal enclave doctrine operates as a choice of law doctrine that dictates which law applies to causes of action arising on these lands."). Likewise, analogous statutes, such as the Outer Continental Shelf Land Act, have been described as choice of law provisions. *See* Union Tex. Petroleum Corp. v. PLT Eng'g, 895 F.2d 1043, 1050 (5th Cir. 1990) ("OCSLA is itself a Congressionally mandated choice of law provision. . . ."). That Act provides that "the civil and criminal laws of each adjacent State, *now in effect or hereafter adopted*, amended, or repealed are declared to be the law of the United States for" the subsoil and seabed extending to the outer continental shelf. 43 U.S.C. § 1333(a)(2)(A) (2018) (emphasis added).

71. *See* DeVeaux, *supra* note 69, at 538–41 (arguing that enclaves should be governed by federal common law.)

72. 18 U.S.C. § 13 (2018) (emphasis added). Other assimilative acts are listed in DeVeaux, *supra* note 69, at 502–03.

substantive nor assimilative legislation, apply state law as it existed on the date of cessation.[73]

To illustrate the complexities introduced by the enclave doctrine, consider *JAAAT Technical Services, LLC v. Tetra Tech Tesoro, Inc.*[74] The plaintiff, a general contractor for construction work done on federal military bases in Georgia and North Carolina, sued a subcontractor.[75] The contract contained a choice of law clause designating Virginia law.[76] The issue was one of subject matter jurisdiction. If federalized North Carolina and Georgia law applied under the enclave doctrine, the case would arise under federal law although the rules of decision for the case would be supplied by the law of those states as it existed in 1917 and 1919.[77] But if the Virginia choice of law clause was enforceable, the case would not raise any federal issue and there would be no jurisdiction.[78] So jurisdiction hinged on the validity of the choice of law clause. But by what law should one assess its validity? Validity of the choice of law clause could be a matter of federal common law. Or, borrowing from *Klaxon Co. v. Stentor Electric Manufacturing Co.*, the court could apply the law of the state in which the federal court sat, Virginia.[79] Finally, given the enclave doctrine, perhaps the court should assess whether a choice of law clause entered into in the twenty-first century would have been valid under the laws of North Carolina and Georgia as they existed in the early decades of the twentieth century.[80] The court avoided deciding which law applied to determine validity by concluding that the choice of law clause was enforceable under any of these three standards. But to get to this exit ramp, the court had to analyze a choice of law clause under otherwise obsolete 1917 state law.

Beyond the enclave doctrine, the time question also arises when federal common law applies but borrowed law of a state supplies the

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73. To be precise, an exception exists under the enclave doctrine if at cessation the state was granted or reserved the right to legislate. *See Allison*, 689 F.3d at 1237–38. In such a case, current state law would apply.

74. No. 3:15CV235, 2017 WL 4003026 (E.D. Va. Sept. 11, 2017).

75. *Id.* at *1.

76. *See id.*

77. *See* Durham v. Lockheed Martin Corp., 445 F.3d 1247, 1250 (9th Cir. 2006) ("Federal courts have federal question jurisdiction over tort claims that arise on 'federal enclaves.'"); Mater v. Holley, 200 F.2d 123, 124 (5th Cir. 1952) (arising under federal law because "any law existing in territory over which the United States has 'exclusive' sovereignty must derive its authority and force from the United States and is for that reason federal law").

78. *See JAAAT*, 2017 WL 4003026 at *5 n.9 ("[A] case applying only Virginia law would not be one in which federal law created the cause of action, nor one in which the right to relief necessarily depends on the resolution of a substantial federal question.").

79. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

80. *See JAAAT*, 2017 WL 4003026 at *6–7.

rule of decision. When Congress creates a federal cause of action but fails to provide a statute of limitations, for example, the federal courts will sometimes borrow state statutes of limitation as federal common law.[81] What if state law has changed from the time of the accrual of the cause of action to the date of decision? Does the revised statute of limitations apply retroactively? One can find cases holding that the question of retroactivity of borrowed state law in federal court is governed by state law. [82] But the leading cases conclude that the federal, not state, law of retroactivity applies.[83] Under that law retroactive application of revised state law may or may not be appropriate regardless of whether state law would allow or forbid retroactive application.[84] The reasoning of these cases is that state law is used only to fill the gaps in federal law and while there is a statute of limitations gap, there is no absence of federal law on the question of retroactivity.[85]

The time problem also appears in actions under the Federal Tort Claims Act.[86] Under the F.T.C.A., the federal government is liable in tort if a "private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[87] State law is thus incorporated into federal law. What if state law changes? Here, in contrast to the approach to borrowed statutes of limitation, courts have applied the retroactivity law of the state, rejecting an independent federal retroactivity analysis. In *Pesantes v. United States*, the plaintiff sued the United States for negligent medical

81. For a general discussion of this practice, see Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 377–80 (2004).

82. For cases relying on state law to conclude that an amendment of borrowed state law does not apply retroactively, see Koulouris v. Chalmers, No. 89 C 0735, 1989 WL 50887, at *3–4 (N.D. Ill. May 4, 1989); Walker v. Aetna Life Ins. Co., No. 87 C 868, 1988 WL 46635, at *9 (N.D. Ill. May 3, 1988); Renovitch v. Stewardship Concepts, Inc., 654 F. Supp. 353, 358 (N.D. Ill. 1987).

83. *See* TwoRivers v. Lewis, 174 F.3d 987, 993, 995 (9th Cir. 1999) (finding that "we apply federal law, not state law, in deciding whether to apply the amended [state law] retroactively" because retroactive application would be "manifestly unjust"); Hemmings v. Barian, 822 F.2d 688, 691 (7th Cir. 1987) ("[T]he six-year statute of limitations is applicable to this case despite Wisconsin's law [denying] retroactive application.").

84. *TwoRivers* applied the three-part test for the retroactive application of federal statutory law from *Landgraf v. USI Film Prod.*, 511 U.S. 244, 280 (1994). *See TwoRivers*, 174 F.3d at 993. *Hemmings* concluded that there was no reasonable reliance on the former statute of limitations because the cases were divided on what statute applied to the federal cause of action in question. *See Hemmings*, 822 F.2d at 691.

85. *See TwoRivers*, 174 F.3d at 992 (quoting West v. Conrail, 481 U.S. 35, 39–40 (1987)) (noting that federal courts should "borrow no more [state law] than necessary").

86. *See* 28 U.S.C. § 2674 (2018).

87. *Id.* § 1346(b).

treatment at a government hospital in Louisiana.[88] Under Louisiana law at the time of the trial, the standard of care was that of a physician in the same locality or community; this rule thus required an expert witness who practiced in the locality in question.[89] But while the case was pending on appeal the Louisiana Supreme Court overruled the case that had established that rule and also held that the new rule would apply retroactively.[90] The Fifth Circuit held that the retroactivity decision of the Louisiana Supreme Court was "controlling" and that the new Louisiana rule must be applied.[91] But *Pesantes* should not be read as establishing that state law applies retroactively in F.T.C.A. cases. Rather, it establishes that whether state law applies retroactively is determined by state, not federal law. Thus, in *Jackson v. United States*,[92] the court declined to apply a new damage cap retroactively, but that was because the state supreme court had held that the cap was not retroactive.[93]

In the *Erie* doctrine one again encounters temporal issues. In *Vandenbark v. Owens-Illinois Glass Co.*, an early (1941) *Erie* case, the federal district court dismissed plaintiff's complaint in accordance with then-existing state law under which plaintiff had no cause of action.[94] But while the case was pending on appeal, the state supreme court overruled a prior case and recognized the cause of action.[95] Under *Erie*, federal courts are to apply state law, but which state law, that existing at the time of the underlying events, or at the time of the lower court final judgment, or later law that is first established while the case is on appeal? The Supreme Court chose the last option, the state law current while the case was on appeal. Some pre-*Erie* cases had held that "a different interpretation of state law by state courts after a decision in a federal trial court does not require the federal reviewing court to reverse the trial court" even though interpretation of state statutes was supposed to be a "local" law matter not subject

88. *See* Pesantes v. United States, 621 F.2d 175, 176 (5th Cir. 1980).

89. *See id.* at 177.

90. *See id.* at 178.

91. *Id.* at 179. An earlier Fifth Circuit case had similarly held that the new Louisiana standard must also be applied in diversity cases. *See* Samuels v. Doctors Hosp., 588 F.2d 485, 489 (5th Cir. 1979).

92. Jackson v. United States, No. 1:18 CV 9 ACL, 2019 WL 7343442 (E.D. Mo. Dec. 30, 2019).

93. *See id.* at *15. To similar effect is *Moore v. United States*, 318 F. Supp. 3d 188, 192 (D.D.C. 2018) (declining to apply a new provision retroactively because the "statute at issue here is . . . governed by [a prior] holding" of the District of Columbia Court of Appeals that new statutes do not apply retroactively unless there is clear legislative intent).

94. *See* Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 538–39 (1941).

95. *See id.* at 540.

to the general law powers of a federal court under *Swift v. Tyson*.[96] But the Court in *Vandenbark* found the deciding principle in *The Schooner Peggy*: "if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed."[97] Thus, in a diversity case "until such time as a case is no longer sub judice, the duty rests upon federal courts to apply state law . . . in accordance with the then controlling decision of the highest state court."[98]

But the obligation to follow existing state law has a curious qualification. A federal court is to take a predictive approach to the question of the content of state law, to apply the law that the state's highest court would apply to the case today regardless of what it has said in the past.[99] Thus, the Supreme Court referred to the decisions of the Florida Supreme Court in a diversity case as "controlling here *unless* it can be said with some assurance that the Florida Supreme Court will not follow them in the future."[100] This leaves room for a federal court to say that the law of a state is other than what the most recent decision of the state's highest court has said it is. A number of cases have in fact so found, applying as the law of the state a rule of decision that had not been adopted and in some cases had been expressly rejected in the state's caselaw.[101] This approach raises an

96. *Id.* at 540–41.

97. *Id.* at 541 (quoting United States v. Schooner Peggy, 5 U.S. 103, 110 (1801)).

98. *Id.* at 543. *See generally* 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4507 at 200 n.105 (3d ed. 1999) (collecting cases). A different rule obtains if the change in state law occurs after the case has become final and no appeal remains pending. In *DeWeerth v. Baldinger*, 38 F.3d 1266 (2d Cir. 1994) the Second Circuit had incorrectly predicted the content of state law. That judgment became final. After a later state court case made clear that the result was wrong under state law, the district court granted a motion to set aside the judgment. *Id.* The Second Circuit reversed; the "federal courts must follow state law when deciding a diversity case does not mean that a subsequent change in the law of the state will provide grounds for relief under Rule 60(b)(6)." *Id.* at 1272–73.

99. *See* 19 WRIGHT ET AL., *supra* note 98, § 4507, at 124 ("[A] federal court must determine issues of state law as it believes the highest court of the state would presently determine them"); Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1495 (1997) ("[M]ost federal courts today employ a predictive approach—that is, they attempt to forecast how the state's highest court would decide the question were the case before it.").

100. Meredith v. City of Winter Haven, 320 U.S. 228, 234 (1943) (emphasis added).

101. *See, e.g.*, McKenna v. Ortho Pharm. Corp., 622 F.2d 657, 664–67 (3d Cir. 1980) (concluding Ohio would adopt a rule expressly rejected in the last Ohio Supreme Court case to consider it); Mason v. Am. Emery Wheel Works, 241 F.2d 906, 910 (1st Cir. 1957) (predicting that the state Supreme Court would "reconsider and revise the rule [in question] whenever it may have before it a case that squarely presents the

interesting temporal choice of law question. What the federal court is doing in these cases may be thought of as applying the *future* law of the state. Employing a rule of decision that has yet to be adopted by the state's highest court is difficult to characterize as using the current law of the state unless one is willing to take a rather old-fashioned natural law perspective and endow the state's law with a preincarnate existence predating its declaration by the state's highest court. Under the more modern positivist view, the law "consists exclusively of sovereign commands."[102] But if one thinks that such an undeclared law exists before the command from the state's highest court, it can do so only as "a transcendental body of law outside of any particular State but obligatory" on the federal court.[103] If one rejects that view of the law and opts instead for a positivist view, then the federal court "predicting" state law is not applying the law as it exists but is applying the law that it believes *will exist* in the future when the state supreme court gets around to declaring it. As an additional coil in this analytic snare, remember that the federal court is *assuming* that this future law will be held to apply retroactively by the future state Supreme Court decision adopting it.[104]

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issue"). For a thorough discussion of the predictive approach, see generally Clark, *supra* note 99; 19 WRIGHT ET AL., *supra* note 98.

102. Clark, *supra* note 99, at 1479.

103. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

104. There are two approaches in *Erie* cases on whether retroactivity of new state law is itself controlled by the law of the state. Under one view, the federal court should apply new state law only if the state court would. *See* Moorhead v. Mitsubishi Aircraft Int'l, Inc., 828 F.2d 278, 289 (5th Cir. 1987) (remanding under new state law on appeal in diversity "may run afoul of *Erie* when the intervening change in state law would not have been applied retroactively by the state courts themselves"); Litton Sys., Inc. v. Am. Tel. & Tel. Co., 746 F.2d 168, 172 n.6 (2d Cir. 1984) ("*Erie* probably required application only of state appellate decisions that the state court itself said were applicable to judgments previously entered but pending on direct review."); Miro Martinez v. Compania Trasatlantica Espanola, S.A., 643 F.2d 897, 898 (1st Cir. 1981) (per curiam) ("[P]rospective application of a Commonwealth decision is itself a matter of Commonwealth law."); Samuels v. Doctors Hosp., Inc., 588 F.2d 485, 489 (5th Cir. 1979); Carver v. Bank of New York Mellon, No. CV 13-10005-MLW, 2016 WL 7838902, at *6 (D. Mass. Sept. 8, 2016); Estate of Colon *ex rel.* Berganzo v. Ambush, No. CIV. 10-01044 GAG, 2011 WL 4543431, at *1 (D.P.R. Sept. 29, 2011) ("[T]he court predicts the [state] Supreme Court would not apply [the new rule] retroactively.").

The Ninth Circuit requires a diversity court to apply new state law retroactively independent of whether the state courts would do so. *See* Nelson v. Brunswick Corp., 503 F.2d 376, 382 n. 12 (9th Cir. 1974) ("In a state which engages in prospective overruling, the federal appellate court's application of the new rule will lead to a different result than would have resulted in a case pending in the state appellate courts if the new rule were not applied retroactively ... [but] we apply *Vandenbark* as a 'hard-and-fast' rule."). That court later noted some criticism of *Nelson* and questioned

These vertical temporal choice of law issues are characterized by a mix of a desire for private law to be fixed and stable and in other contexts to have the law applied in federal court hew closely to that applicable in state court. The Enclave Clause transfers exclusive legislative jurisdiction to the federal government,[105] and the early cases that established the enclave doctrine relied upon the need for a stable body of law at the moment of transfer. In *Chicago, Rock Island & Pacific Railway Co. v. McGlinn*, the Court stressed the continuity of "laws which are intended for the protection of private rights" in order that "private property remains as before."[106] It relied on an earlier case involving the cessation of territory from Spain which had stressed that although the political rights of the inhabitants of the territory changed, the "relations of the inhabitants with each other" were unchanged, at least until "altered by the newly created power of the state."[107] The enclave doctrine is a federal (common law) rule, but implicitly the position of the federal courts is that it is up to Congress to change it by legislation. But outside of the enclave doctrine, courts applying federal common law using borrowed state law feel free to use or reject later changes to state law under generally applicable federal principles of retroactivity. In contrast, cases under the *Erie* doctrine and the F.T.C.A. are characterized by a desire to apply the same law in federal court that a state court would and so to apply the new law (at least assuming the state courts would apply it retroactively). In the *Erie* context, the dominant concern is that federal courts in diversity reach results that mirror those obtained in state courts in order to avoid undermining state authority and to prevent the instability created by forum shopping.[108] The impulse is thus to get the same result in federal and in state court, which requires one to apply as near to contemporaneous law as is possible. Likewise, under the F.T.C.A., the statutory directive is to mirror the result under state law.[109] In these two contexts there is also a desire to have a fixed and

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whether it attained the *Erie* policy of uniformity, but the court continues to cite *Nelson* with approval. *See* Albano v. Shea Homes Ltd. P'ship, 662 F.3d 1120, 1123 n. 3 (9th Cir. 2011); FBW Enterprises v. Victorio Co., 821 F.2d 1393, 1395 (9th Cir. 1987); *see also, e.g.*, Hinojos v. Kohl's Corp., 718 F.3d 1098, 1103 (9th Cir. 2013). *See generally* Hegger v. Green, 646 F.2d 22, 26 n.6 (2d Cir. 1981) (noting the divided authority).

105. *See supra* notes 64–68 and accompanying text.

106. Chicago, Rock Island & Pac. Ry. Co. v. McGlinn, 114 U.S. 542, 546 (1885).

107. Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 542 (1828).

108. *See* Van Dusen v. Barrack, 376 U.S. 612, 638 (1964) (noting that *Erie* seeks "an identity or uniformity between federal and state courts").

109. *See* 28 U.S.C. § 1346(b) (2018) (providing that the federal government is liable in tort if a "private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred").

stable law, but the anchor is tied to the opposite end of the rope of time—to the present and indeed the future.

II. TEMPORAL ISSUES WITHIN HORIZONTAL CHOICE OF LAW

The preceding section introduced temporal choice of law outside of the interstate choice of law context. The traditional ambit of choice of law deals with the potential applicability of the law of two or more sovereigns. The article now turns to temporal issues that occur within choice of law as traditionally conceived. The problem is best organized around the three things that change over time: the sovereign state, the law of a state, and the facts upon which a choice of law analysis depends.

Traditional choice of law theory relied on rights and obligations vesting at the time and place of a liability-creating event. Modern choice of law regards such talk as unhelpful and focuses instead upon the interest of the states involved and private party concerns such as upholding expectations.[110] But the ghosts of vested thinking haunt us, showing up where time and choice of law intersect. Indeed, our law has "never succeeded wholly in disembarrassing ourselves of the remnants of vested rights theory" and courts and commentators commonly "still fall into the habit of thinking that at the time of a transaction or occurrence rights and duties somehow 'vest.'"[111] Few courts today would resolve a choice of law issue by saying that rights "vested" at some point in the past. Yet courts do persistently refer to matters as they stood in the past and analyze cases as if the relevant law and facts were fixed at that point. To the extent a rationale can be observed, courts do this not on the ground that an unalterable right vests but for pragmatic reasons. Or perhaps courts do so out of mere habit of thought. To distinguish this tendency to use old rather than current law from the former conception of vested rights (and from the more modern but distinct term "vestedness"[112]) I have referred to such an approach as "fixed" or "anchoring."

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110. *See, e.g.*, Babcock v. Jackson, 191 N.E.2d 279, 281 (1963) ("[T]he vested rights doctrine has long since been discredited because it fails to take account of underlying policy considerations."); Roosevelt, *supra* note 9, at 2459 (noting the "ferocity and the success, of the realist assault on Beale's verities"); Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1279 (1989) (explaining that the critics of vested rights "offered in its stead a functional theory by which states were advised to further their own interests and substantive policies").

111. Louise Weinberg, *Conflicts Cases and the Problem of Relevant Time: A Response to the Hague Symposium*, 10 HOFSTRA L. REV. 1023, 1043 (1982).

112. Perry Dane's much-cited article, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987) introduced the term "vestedness." It has often since

A. Changing States

The old Bealian system failed to take the content of the competing state laws into account and so failed to consider whether a state really had any stake in the matter.[113] But the analysis of state interests is foundational to modern choice of law.[114] A state has no legitimate claim to have its law applied if applying it would not further its polices. Such a state lacks an interest in applying its law.[115] The inquiry is then to first identify each state's policies and then, second, to see if the facts of the case establish a connection such that the policy is furthered by applying the law.[116] If the policy of the state, for example, is to protect defendants from excessive liability, then the state will have an interest if it is the defendant's home; but if the defendant is not local to that state, it would have no such interest.[117] The dominance of state interests in choice of law today is reflected in the modern test for a state's constitutional power to apply its law, which asks whether the state has contacts creating an interest.[118] The Second Restatement captures the modern mix of choice of law concerns of both implementing state policies and interests and also

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been used in a generalized way to refer to any notion that rights or obligations are or become fixed at some point. I hesitate to use the term because Dane had a more specific meaning in mind: one should expect choice of law rules "to generate the same set of substantive criteria if they were applied by any other forum in an actual adjudication." *Id.* at 1205. Dane based this requirement on a norm-based jurisprudential view. *See id.* at 1245.

113. *See* Kermit Roosevelt III & Bethan R. Jones, *The* Draft Restatement (Third) of Conflict of Laws*: A Response to Brilmayer & Listwa*, 128 YALE L.J.F. 293, 296 (2018) ("[T]he *Restatement (First)* often dictated arbitrary and unsatisfying results because its rules were insensitive to the content of state laws. Consequently, choice-of-law decisions were made without regard to relevant state policies."); Clyde Spillenger, *Risk Regulation, Extraterritoriality, and Domicile: The Constitutionalization of American Choice of Law, 1850–1940*, 62 UCLA L. REV. 1240, 1254 (2015) (arguing that Beale's system was faulted for "inattention to the actual substantive content of the laws competing for recognition").

114. *See* Roosevelt & Jones, *supra* note 113, at 303 ("[M]odern approaches identify one or more [states whose law may apply] by asking whether the policies behind the state's laws are implicated by the particular facts of a multistate case."); Symeon C. Symeonides, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1, 26 (2001) ("[T]he majority of modern American academic and judicial approaches recognize the concept of state interests as an important choice-of-law factor.").

115. *See* Roosevelt, *supra* note 9, at 2461–64.

116. *Id.*

117. *See, e.g.*, Schippers v. United States, 715 F.3d 879, 890 (11th Cir. 2013) (noting that the purpose "of limiting the beneficiaries is to protect defendants—which should not be applied when the defendant, as here, is a non-domiciliary").

118. *See* Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 494–95 (2003).

the private party concerns of upholding expectations, certainty, and predictability.[119]

States, history teaches us, are mortal things. Old states are moved off stage. "The Prussian State together with its central government and all its agencies is abolished," declared the Allies after World War II.[120] New states arise, some durable and others, like Czechoslovakia (b. 1918, d. 1992)[121], ephemeral. How are we to analyze state interests (and more broadly choice of law) when one of the states involved no longer exists? Or what of the opposite problem: can a state be said to have an interest in a transaction or event that occurred before it came into existence? This choice of law issue arises at the intersection of geography, the usual domain of choice of law, and time. Transactions and events happen in physical space. A particular piece of the earth, a territory, was the location of the event, but the sovereign governance of that location has changed. The choice of law issue is to choose between the former but now defunct state or the currently existing regime of that place.

Public international law touches upon a related but distinct issue: what are the obligations of a successor state as to treaties, contractual obligations, or torts of a predecessor state? There are several approaches to this question of successor liability. Universal succession theory holds that obligations of the predecessor state remain binding upon the successor, while others advocate a "clean slate" approach that allows repudiation of the former's obligations.[122] But these are matters of the obligations in contract, tort, and property of the state itself, not of private parties. In contrast, generally "private property rights are not affected by a change in sovereignty over the territory in which the property is located or in which its owner resides."[123] This is the basis of the enclave doctrine discussed above, which provides that upon cessation of land from a state to the federal government "laws

119. *See* RESTATEMENT (SECOND) OF CONFLICT OF L., § 6 (AM. L. INST. 1971) (listing choice of law factors).

120. Allied Control Authority Germany, *Control Council Law No. 46: Abolition of Prussia* art. I (Feb. 25, 1947), https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-VI.pdf.

121. *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Czechoslovakia*, U.S. DEP'T OF STATE OFFICE OF THE HISTORIAN, https://history.state.gov/countries/czechoslovakia (last visited Jan. 30, 2022).

122. *See* Tai-Heng Cheng, *Why New States Accept Old Obligations*, 2011 U. ILL. L. REV. 1, 8–9 (2011). For a discussion of successor liability for torts ("international delicts"), see Michael John Volkovitsch, *Righting Wrongs: Towards A New Theory of State Succession to Responsibility for International Delicts*, 92 COLUM. L. REV. 2162 (1992).

123. RESTATEMENT (THIRD) OF FOREIGN RELATIONS L. § 209 cmt. a (AM. L. INST. 1987).

which are intended for the protection of private rights continue in force until abrogated or changed by the new government or sovereign" in order to "to secure its peaceful use and enjoyment."[124] But there is no absolute guarantee that rights and obligations between private parties will remain unaffected by a change of sovereign. Rights "arising from contract or usage remain[] in full force and unchanged, *except* so far as they [are] in their nature and character . . . in conflict with . . . any regulations which the conquering and occupying authority should ordain."[125] Current public policy thus holds a trump card over the established legal relations of the past.

How is a change of actors on the world stage accounted for in choice of law based on modern interest analysis? Several courts have applied the law of a now-deceased state, creating a legal zombie—controlling legal relations even though its animating sovereignty no longer exists. For example, in *Vishipco Line v. Chase Manhattan Bank, N.A.*, plaintiffs who had deposits at a Chase branch bank in Saigon, South Vietnam in April, 1975 sued Chase for denying them the ability to withdraw funds from the bank during the last days of South Vietnam's existence.[126] In addressing the choice of law issue, the district court noted that New York had some interest but that "Vietnam is the jurisdiction having the greatest concern with the issues raised in this litigation."[127] Accordingly, the court applied "the law of Vietnam operative in Saigon at the time the plaintiffs allegedly sought to withdraw funds . . . and the law of Vietnam now operative in South Vietnam."[128] In particular, the court applied the law of the former country of South Vietnam to the question of the standing of the plaintiffs to represent certain corporate entities who owned the accounts.[129] On appeal, the Second Circuit reversed, finding that the plaintiffs had demonstrated capacity to represent the corporation, but it did not disagree on the choice of law question.[130] "Vietnamese law," it said without clarification, applied.[131]

Other cases using interest analysis likewise consider the "interests" of a state that is no longer viable. In *Kashef v. BNP Paribas*

124. Chicago, Rock Island & Pac. Ry. Co. v. McGlinn, 114 U.S. 542, 546 (1885).

125. Leitensdorfer v. Webb, 61 U.S. 176, 177 (1857) (emphasis added).

126. Vishipco Line v. Chase Manhattan Bank, N.A., No. 77 CIV. 1251 (RLC), 1980 WL 13801, at *1–2 (S.D.N.Y. Nov. 26, 1980), *rev'd*, 660 F.2d 854 (2d Cir. 1981).

127. *Id.* at *5.

128. *Id.*

129. *Id.*

130. Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 860 (2d Cir. 1981).

131. *Id.* The court allowed the use of forum law as to the plaintiff's prima facie case as neither party demonstrated the content of Vietnamese law but applied "Vietnamese law" to the affirmative defenses raised by Chase. *Id.*

SA, plaintiffs sued a French financial institution for the conduct of its Swiss subsidiary that helped the Sudanese government evade human rights sanctions, resulting in harm in the Sudan to the plaintiff.[132] The court applied New York's interest analysis and found that Switzerland had the greatest interest although Sudan "certainly has an interest in this litigation."[133] But the location of many of the harms "is now in the Republic of South Sudan, a separate country that seceded from Sudan in 2011."[134] The court rejected applying the law of the country *currently* in control of the region, South Sudan, since "the pertinent time for purposes of choice-of-law analysis is the time of the tort rather than any later time."[135] *Kashef* differs from *Vishipco* in that instead of the state in question being defunct, it still existed but no longer was sovereign in the area where the events occurred. Despite this, the court concluded that the Sudan "has an interest" (present tense) in an area outside its current territorial jurisdiction.[136]

To the same effect is *Pancotto v. Sociedade de Safaris de Mocambique, S.A.R.L.*[137] Plaintiff sued for injuries sustained on a safari in Mozambique.[138] The court applied Mozambique law, finding that its interests were "significant."[139] At the time of the harm Mozambique was a territory of Portugal, but by the time the court decided the choice of law issue it had gained independence. The court shrugged this off, holding that "to the extent that Mozambique law is controlling, it is the law as it existed at the time of the alleged wrong."[140] The court thus stated that Mozambique was interested in an event that happened before it became a state and then applied the older Mozambique law, which was actually the law of Portugal, a state that at the time of the litigation was not sovereign in that territory.[141]

Applying the law of a non-existent state may be defensible under a territorialist, vested rights approach. There, one avoids the embarrassment of explaining how a state, such as the former South Vietnam, can have an "interest" when the state no longer exists. Such was the case in *Baragona v. Kuwait Gulf Link Transp. Co.*[142] The parents of a U.S. soldier killed in an automobile accident sued in

132. 442 F. Supp. 3d 809, 814 (S.D.N.Y. 2020).
133. *Id.* at 818–23.
134. *Id.* at 822 n.2.
135. *Id.* (quoting Youngman v. Robert Bosch LLC, 923 F. Supp. 2d 411, 420 (E.D.N.Y. 2013)).
136. *Id.*
137. 422 F. Supp. 405 (N.D. Ill. 1976).
138. *Id.* at 406.
139. *Id.* at 408.
140. *Id.* at 407 n.1.
141. *Id.*
142. 688 F. Supp. 2d 1353 (N.D. Ga. 2007).

federal court in Georgia under diversity jurisdiction.[143] Georgia law uses *lex loci delecti*, the law of the place of the wrong.[144] In *Baragona* that was the place that had been until recently Saddam Hussein's Iraq.[145] The accident occurred soon after a provisional government had been formed for Iraq to govern in the time between the Saddam Hussein regime and the planned first post-Hussein government.[146] The provisional government had "declared . . . that the laws then-existing in Iraq remained in force until superceded."[147] Thus, the court applied the law of the defunct Iraqi regime, "as it existed under Saddam Hussein at the end of his reign."[148] But one day after the May 19, 2006 accident, Iraq's first permanent post-Saddam Hussein government came into existence.[149] The court did not discuss the possibility that the current (time of litigation) law of Iraq should apply. But applying the law of a dissolved predecessor provisional government that had incorporated the law of a defunct state (the grandfather state, so to speak) makes perfect sense if one views choice of law as enforcing rights that vest at a particular time and place, here, the time of the accident, when Saddam Hussein-era law was in force by adoption.

But if, as in *Vishipco*, *Kashef*, and *Pancotto*, the choice of law methodology is interest analysis, the use of the law of a state not viable in that territory is hard to understand. Two possibilities are present. First, such cases may reveal that the state interests that drive the interest analysis machine are not only intangible ideations (and for that reason malleable in the hands of any decent lawyer), they are *unreal* ideations—mythic creatures about which we debate much as medieval scholars might analyze the exploits of Prester John.[150] The second possibility is that the former state does not *have*

143. *Id.* at 1354.
144. *Id.* at 1354–55.
145. *Id.* at 1354.
146. *Id.* at 1355.
147. *Id.*
148. *Id.* at 1355 n.3.
149. *Iraq's new unity government sworn in*, CNN INT'L, http://edition.cnn.com/2006/WORLD/meast/05/20/iraq.main/index.html (last visited Jan. 21, 2021).
150. *See generally* Patrick J. Borchers, *Professor Brilmayer and the Holy Grail*, 1991 WIS. L. REV. 465, 477 (1991) ("[I]t seems very unlikely that states are subjectively interested ('concerned') in the outcome of multistate cases between private parties."); P. John Kozyris, *Interest Analysis Facing Its Critics—And, Incidentally, What Should Be Done About Choice of Law for Products Liability?*, 46 OHIO ST. L.J. 569, 571 (1985) ("[C]oncepts such as true and false conflicts, the unprovided-for case, and the disinterested forum have no life of their own but exist only in the subjective universe of interest analysis. They are devices animated by the spirits of such analysis and have no magic for the disbeliever."); Maurice Rosenberg, *The Comeback of Choice-of-Law*

an interest (as it no longer exists) but it *had* an interest, and the existence of interests is to be determined at the time of the transaction or event, not at the time of litigation. But this temporal explanation may be mere goalpost shifting. It tells us that we must look at the interests of the relevant states at a fixed time in the past but fails to tell us *why* we must do so. The hard question remains: what is the point of attempting to further the policy ends of a country that no longer exists?

Of the three temporal problems considered here, those posed by a change in sovereign in the territory in question is of the least practical importance. The issue arises rarely in international choice of law cases and because of the stability of American states even less frequently in interstate cases. The formation of a new nation out of an old happens occasionally, but we have not had a new sovereign state replace a former state of the United States since West Virginia was calved off of the seceding commonwealth of Virginia in 1862.[151] This provides scant precedent, but it is the only one we have for going forward for interstate cases unless and until another state subdivides from an existing one.[152] It is worth an examination because it reveals the basic problem in temporal choice of law.

The West Virginians considered the question of what law applied upon their departure, providing in their constitution that:

> [P]rivate rights and interests in lands in this state derived from or under the laws of the state of Virginia, and from or under the constitution and laws of this state prior to the time this constitution goes into operation, shall remain valid and secure and shall be determined by the laws in force in Virginia, prior to the formation of this state, and by the constitution and

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Rules, 81 COLUM. L. REV. 946, 957 (1981) (arguing that interest analysis "presupposes that the purposes behind substantive rules are clear and singular and are susceptible to discovery with certainty and wide agreement. But this is at odds with reality."); Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 430–31 (1980) ("[I]t is a fiction to speak of 'legislative intent'" as to territorial scope of a statute in the absence of explicit statutory provisions).

151. *See* Act of Dec. 31, 1862, ch. VI, 12 Stat. 633 (1862). The story of West Virginia's creation—in effect is secession from a secessionist state—is told in Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional*, 90 CAL. L. REV. 291, 297–324 (2002).

152. Texas, for example, is occasionally discussed as a candidate for subdivision. *See* Vasan Kesavan & Michael Stokes Paulsen, *Let's Mess with Texas*, 82 TEX. L. REV. 1587, 1590 (2004).

> laws in force in this state prior to the time this constitution goes into effect.[153]

The constitution thus adopted a choice of law rule that applied the law of Virginia to pre-existing land titles. But not all property rights were inviolate. There was, of course, the problem of slave property. As to this, prior titles did not count; West Virginia came into the Union upon providing for the gradual emancipation of slaves.[154]

This differing treatment of property rights reveals the fundamental conflict that arises when states change. There is a perfectly understandable desire to protect individuals from the loss of property. Property, after all, is a legal relationship that is sufficiently enforceable to earn that label. It is "an interest one can insist upon, rather than one which turns upon the good will of another."[155] If it is a right in this sense, something that the law will predictably enforce, then it should be all means be protected as one sovereign passes to another. But there is an equally strong desire to apply the policy—the sense of fundamental public good—that is in force in the new state. Indeed, as the example of West Virginia illustrates, a dispute over a deep-seated value may be the source of the change of the sovereign. And so land titles, which no one objected to, were maintained. But property in slaves, which was to say the least contentious, was not. The West Virginia experience mirrors that generally obtaining under international law: Rights of private parties persist, but only if they are not violative of a policy of the new sovereign sufficiently strong to overcome them.[156]

While the problem of the creation of new states of the United States and of new nations may be too rare to be of much concern for choice of law, the solution suggested is important and has application to other aspects of the time problem. The irreducible question is under what circumstances the desires of the present will bow to the needs of

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153. W. VA. CONST. art. XIII, § 1.

154. Act of Dec. 31, 1862, ch. VI, 12 Stat. 633, 634 (1862):

> The children of slaves born within the limits of this State after the fourth day of July, eighteen hundred and sixty-three, shall be free; and that all slaves within the said State who shall, at the time aforesaid, be under the age of ten years, shall be free when they arrive at the age of twenty-one years; and all slaves over ten and under twenty-one years shall be free when they arrive at the age of twenty-five years; and no slave shall be permitted to come into the State for permanent residence therein.

155. Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CAL. L. REV. 146, 171 (1983).

156. *See supra* notes 123–25 and accompanying text.

the past. But this formula, while useful, requires clarification. "The past" is not an entity that has needs or which ought to be protected. Nor is "the present" an independent thing having legal interests. Rather it is *people* who have needs and interests. One side of the conflict is thus a rule that will serve the needs of the people of today, which must be assumed to be the new law, otherwise the legislature or common law court would not have established it as the new law. The other side of the conflict is not the people of the past. The only people involved in litigation are those who are in the present with rights or obligations to be now determined. The people to be protected are those who are in the present but who acted or who were acted upon in the past. This tension between the needs of the present and expectations set in the past appears in the qualification to the doctrine that parties intend to incorporate current law into their contract: they intend not only current law but also anticipate the "reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy."[157]

With this clarification of what is at stake, one may venture some observations. First, how one regards the law of a defunct state in choice of law depends to some extent upon the choice of law methodology the court is committed to. To the extent the court is using a choice of law methodology that is driven by an analysis of state interests, the former state should be flatly disregarded. It makes no sense to seek to uphold the interests of a sovereign that no longer exists. If, on the other hand, the court is using a choice of law methodology that gives prime consideration to upholding party expectations and stability, then it does make sense to look to the law of a defunct sovereign. In addition to these two poles, it is possible to have a choice of law regime, like that of the Second Restatement, which attempts to give due accord to both state policies and party expectations.[158] Here the choice is less clear but should be guided by the following considerations.

The subject matter of the underlying dispute: It is generally agreed that upholding expectations is more important with planned consensual transactions, i.e. in property transactions, contract cases, and testamentary dispositions.[159] If the litigation involves such a subject matter, greater regard should be given to the expectations formed under the law of the former State. But as the example of West

157. *In re* Marriage of Walton, 104 Cal. Rptr. 472, 476 (Cal. Ct. App. 1972).

158. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF L. § 6 (AM. L. INST. 1969).

159. *See id.* § 145 cmt. b ("[T]he protection of the justified expectations of the parties, which is of extreme importance in such fields as contracts, property, wills and trusts, is of lesser importance in the field of torts.").

Virginia and the general principles of international law shows, a new state can divest what were once thought to be vested rights to meet the policy demands of the present.[160] But the court should be clear in its thinking. It should not defer to a policy of protecting expectations of a State that no longer exits. The question of how much protection to give to expectations—to nominally vested rights—is one for the present not the past. Thus, the court should consult the policies relating to expectations of the current, not the former state. It is this policy that is to be balanced against the substantive policies of the new State.

The nature of the difference between the law of the new state and the law of the old: Some differences between the laws of the old and the new state will not reflect any deep policy. They instead merely choose one regulatory rule over another. In *Vishipco Line v. Chase Manhattan Bank, N.A.*, for example, an underlying legal issue was capacity of an individual to represent the interests of a corporation.[161] As to such an issue, it is unlikely that the successor state would have a law that reflects a deep-seated value.

Anachronism: There is a danger in a court applying the law of a successor state to legal arrangements existing under a predecessor. Again, *Vishipco* provides an example. Using the law of communist Vietnam to address standing to assert the rights of a corporation and to assess its liability is on its face problematic if the law of the successor state does not even allow for the existence of a private corporation or does so under such a radically different conception that it is impossible to graft the new onto the old.[162]

Substance and Procedure: For the same reasons that a forum applies its own procedural rules, the law of the current and not the old sovereign should control matters of procedure. A procedural rule is designed to control or influence the course of litigation in the courts created by the sovereign. To the extent that the law of a former state was intended only to regulate the procedure of its courts, it has no place in litigation when that court system no longer exists.

B. Changing Law

We come now to horizontal choice of law cases in which the law has changed between the time of the underlying events and the litigation. This problem raises several general questions. First, a change in substantive law can either create or eliminate a conflict between the potentially applicable states' law. If the new law of one of

160. *See supra* notes 154–57 and accompanying text.
161. *See supra* note 129 and accompanying text.
162. *See supra* notes 126–28 and accompanying text.

the involved states creates a conflict where none existed before, should a court regard this as a choice of law problem at all or use the uniform previously existing law to obviate the potential choice of law problem? Alternatively, the new law of one state could, if applied, eliminate a conflict that would have existed under previous law. Should the court use the new law to eliminate the choice of law issue? Second, courts often use an analysis of state policy in deciding choice of law issues. When the law (and underlying policy) has changed, should a court give regard to a state's current or former policy? Third, what role do the expectations of the parties play? Finally, does the law of retroactivity of the state whose law has changed bind or affect the forum's decision of these matters?

Justice Traynor captured some of these possibilities in noting that a court interacting with its own common law in a choice of law case has two potential questions: which law to apply and the content of the forum's common law.[163] As to the latter, the court always has the option of adopting a new forum substantive rule. This can either eliminate or create a conflict:

> Should [the forum] find that the local policy has not yet been articulated in statute or precedent, it may proceed to articulate it for the first time, for purely local as well as interstate cases, and thereby *create an open conflict with the other policy*. . . . . [I]t can *revise backward local precedent to harmonize* with an enlightened policy of another state. *It can also set an enlightened local precedent to conflict with the backward policy of another state.*[164]

The interaction between choice of law and state common law raises a jurisprudential issue.[165] When a court recognizes a common law rule different from that which it had previously held to, has the law really changed? Before the advent of legal realism and positivism, courts viewed their function as declaratory; they discovered rather than made the law.[166] When a common law rule is replaced with another, revised, common law rule, Blackstone explained, "the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former

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163. Roger J. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 673 (1959).

164. *Id.* (emphasis added).

165. *See* Andreas F. Lowenfeld, *Revolt Against Intellectual Tyranny*, 38 STAN. L. REV. 1411, 1411 (1986) ("[C]onflict of laws is applied jurisprudence.").

166. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES 70 (1893).

decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*."[167] This is thought today to be an old-fashioned way of looking at the law. *Erie* overruled *Swift v. Tyson*, which had denied that the decisions of courts constitute laws but are instead "only evidence of what the laws are."[168] So today, we would say, with Justice Holmes, that the law is not an "outside thing to be found"[169] but instead exists only with "some definite authority behind it" and that common law rules therefore "exist[] by the authority of [a] State" not as a "transcendental body of law."[170] But despite our modernity, natural law concepts have persisted.[171] It is hard to shake off the idea that the law exists independent of its judicial proclaimer. One can readily find recent cases with language like this: "a decision of a court . . . overruling a former decision is retrospective . . . and that the effect is not that the former decision was bad law but that it *never was the law*."[172] And we all still speak of the Supreme Court deciding a particular case "wrongly." Under a purely positivist view, this is a curious statement. It means something only if there is a body of law or legal principles outside of but possessing a greater authority than the Supreme Court's opinions.[173]

If one accepts a natural law, declaratory, view of the law, a court applying the common law of another state should always apply the current law because (although only lately discovered) it was really the law all along. But this is hardly a satisfactory solution. It cuts against the grain of modern thought about the nature of the common law, which holds judges do indeed make and not merely discover law. Moreover, it is an overly theoretical way to solve a very practical problem. But it is worth noting since it may have a significant attraction to some courts.

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167. *Id.*

168. 41 U.S. 1, 18 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

169. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

170. *Id.*

171. *See* Robert W. Adler, *Natural Resources and Natural Law Part I: Prior Appropriation*, 60 WM. & MARY L. REV. 739, 748 (2019) (noting "[r]enewed reliance on natural law" in a variety of areas of the law); Santiago Legarre, *A New Natural Law Reading of the Constitution*, 78 LA. L. REV. 877, 879 n.11 (2018) (discussing a "revival of natural law theory").

172. Expansion Pointe Properties v. Procopio, Cory, Hargreaves & Savitch, LLP, 61 Cal. Rptr. 3d 166, 173 (Cal. Ct. App. 2007) (emphasis added) (quoting *In re* Ret. Cases, 1 Cal. Rptr. 3d 790, 803 (Cal. Ct. App. 2003)).

173. *Cf.* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

Ardoyno v. Kyzar nicely illustrates a court using new law to eliminate or solve a conflict (one could characterize the case either way).[174] Louisiana plaintiffs sued in federal court in Louisiana for a slander spoken in Mississippi by a Mississippi domiciliary.[175] Mississippi, but not Louisiana law, allowed punitive damages for slander.[176] The court, applying interest analysis, found that both states were interested, but that using the Second Restatement section 6 factors as a tiebreaker Mississippi law allowing punitive damages would apply.[177] As an additional reason for using Mississippi law, the court relied upon a change to Louisiana law: by the time of the litigation, Louisiana law allowed punitive damages for slander.[178] As a result, "the current policies of Louisiana and Mississippi regarding punitive damages for slander are best accommodated by application of Mississippi law."[179] That conclusion of course requires one to assess Louisiana's policy by looking to current, not time-of-transaction, law. As to that, the court reasoned that "a court in assaying conflicting interests ought be concerned with those policies articulated by the legislature at the time of the judicial determination, not at the time of the relevant transaction. If the legislature has no current interest in promoting the policy, there is little purpose in the court giving weight to it."[180] Thus, the court used law created after the commission of the tort to eliminate the conflict.

There are other examples. In *Hill v. Hill*, an ex-husband sued his ex-wife, a California domiciliary, for personal injuries stemming from a car accident that occurred in British Columbia, Canada while they were still married.[181] At the time of the accident, British Columbia had interspousal immunity, but California had abolished it.[182] But by the time the case was litigated, British Columbia had eliminated interspousal immunity, although the abolition under British Columbian law was to be prospective.[183] Because of the change in British Columbian law, the court concluded, it "would be an anomaly" to find a true conflict when "it cannot be said that application of California law here would offend [British Columbia's] current public

174. *Ardoyno v. Kyzar*, 426 F. Supp. 78 (E.D. La. 1976).
175. *Id.* at 79–80.
176. *Id.* at 80.
177. *Id.* at 83–84.
178. *Id.* at 84 n.20.
179. *Id.*
180. *Id.* at 84 n.21.
181. *See* Hill v. Hill, 238 Cal. Rptr. 745, 745 (Cal. Ct. App. 1987).
182. *Id.* at 748.
183. *Id.*

policy."[184] The court therefore concluded that California law applied.[185]

Likewise, in *Berghammer v. Smith*, the court applied the post-event version of another state's law.[186] This new law of the other state happened to coincide with the rule in place at all times in the forum, thus eliminating the conflict.[187] A Minnesota plaintiff sued an Illinois defendant in Iowa for the death of her husband in an Iowa car accident.[188] At the time of the accident, Minnesota did not grant a loss of consortium cause of action to a wife for the negligent death of her husband, but,by the time of the litigation, it did.[189] The court ruled that Minnesota law applied as the state of most significant relationship since it was the marital domicile, and that Iowa had no interest.[190] But rather than apply the law of Minnesota as it stood at the time of the accident, it chose to apply current Minnesota law.[191] Even though the Minnesota case changing the law stated that its new rule would apply prospectively, using the old law would only "give life to a policy which that state has now repudiated" and serve no interest of Minnesota.[192] While Minnesota might have had an interest in only prospective application to protect the expectations (and insurance planning) of defendants who relied on the old law, the Illinois defendant had no reason to have relied on Minnesota law, especially since Illinois had at all times allowed the cause of action.[193]

From the standpoint of interest analysis, *Berghammer*'s analysis is impeccable.[194] A state which has changed its policy to allow recovery

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184. *Id.* at 749. The court cited *American Bank of Com. v. Corondoni*, 169 Cal. App. 3d 368, 373, (Cal. Ct. App. 1985) in support of its conclusion. In that case, the court similarly relied upon a later amendment to the law of the other state to conclude that applying forum law would not offend the other state's public policy. *Id.*

185. *See Hill*, 238 Cal. Rptr. at 750. The court also relied upon the post-accident changes of domicile and the post-accident divorce to lessen or eliminate the interest of British Columbia. *See id.* at 749.

186. Berghammer v. Smith, 185 N.W.2d 226, 233 (Iowa 1971).

187. *Id.* at 232.

188. *Id.* at 231.

189. *Id.* at 230.

190. *Id.* at 231.

191. *Id.* at 233.

192. *Id.* at 232.

193. *See id.* at 232–33.

194. There was a well-articulated concurrence which disagreed with the majority's temporal analysis. It relied on the Bealian premise that "substantive law as of the time of an occurrence is applied to that occurrence, rather than the law as of the time of the trial." *See id.* at 236 (Uhlenhopp, J., concurring). The concurrence argued that the Iowa forum must apply the Minnesota law of retroactivity. *See id.* at 237. That question—should a forum court always apply the retroactivity law of the state whose law is applicable—is taken up below. *See infra* notes 241–62 and accompanying text.

for one of its citizens has no interest in denying recovery to her. The only reason to do so would be to further its interest in protecting a Minnesota defendant from unfair surprise, but there was no Minnesota defendant. The defendant was from Illinois and never had reason to rely on Minnesota law.[195] The same can be said of *Ardoyno*.[196] Louisiana had no interest in denying punitive damages to one of its citizens when current law allowed recovery and the defendant acted in and lived in a state that had always allowed them. The Better Law approach advocated by Robert Leflar also supports using current rather than prior state policy.[197] Leflar wrote that a state's "governmental interest in a case is to be . . . viewed as of the time when the question is presented" and, for that reason, a court may disregard statutory or common law that is "old or out of tune with the times."[198]

Other cases avoid a conflict by instead applying the *former* law of the other state, which happened to coincide with the current law of the forum. In *Kentucky Bluegrass Contracting, LLC v. Cincinnati Insurance Co.*, a Kentucky corporation sued its insurer for failure to defend a claim arising in Oklahoma.[199] The insurer argued that Kentucky law applied and that a recent Kentucky case supported their position that the claim was not covered.[200] But the court concluded that there was no conflict between forum law (Oklahoma) and Kentucky law because the insurer "failed to demonstrate an actual conflict of law between that state and Oklahoma at the time relevant for deciding this case, i.e., when Insurer denied" coverage.[201]

In addition, a later Iowa case declined to extend *Berghammer* to a change in statutory law. While the rule in *Berghammer* was a common law rule, a statutory change with an explicit effective date leaves no room for the court to "sort through and decide the policy considerations." *Zurn v. State Farm Mut. Auto. Ins. Co.*, 482 N.W.2d 923, 926 (Iowa 1992). The "Minnesota legislature had clear authority to set the effective date for change of its statutory rule [and] we are bound to abide by it." *Id.*

195. *Id.* at 233.

196. *Ardoyno v. Kyzar*, 426 F. Supp. 78, 84 (E.D. La. 1976).

197. *See* Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1587 (1966).

198. *Id.* The time issue was raised but avoided in *Jepson v. Gen. Cas. Co. of Wis.*, 513 N.W.2d 467 (Minn. 1994). In that case, North Dakota law had at all times prohibited stacking of uninsured motorist coverage, but at the time of the accident, Minnesota allowed it. Minnesota law had changed by the time of the litigation to disallow stacking. *See id.* at 472. Was the new law of Minnesota the "better law" or was the insured allowed to rely upon the former law that allowed stacking? The court concluded that neither law was better; they were simply "different." *Id.* at 473.

199. Ky. Bluegrass Contracting v. Cincinnati Ins. Co., 363 P.3d 1270, 1271 (Okla. Civ. App. 2015).

200. *See id.* at 1272.

201. *Id.* at 1275. The court ended up applying Oklahoma law as the place of performance. *Id.*

Thus, the court avoided a choice of law issue that existed under the *current* law of the other state by using that state's old law, which coincided with forum law.[202] The court's reasoning is consistent with the domestic law rule that presumes that parties contract in light of the law existing at the time of entering the contract although the court did not explicitly rely upon it.[203] To similar effect is *SPV-LS, LLC v. Transamerica Life Insurance Co.*[204] The underlying issue in *SPV-LS* was the validity of a life insurance policy assigned to an entity with no insurable interest shortly after the policy was taken out.[205] The court concluded that New Jersey and New York (the two involved states) both allowed such "stranger-originated life insurance policies."[206] But a New York statute enacted after the insurance transaction prohibited such arrangements.[207] Relying on the New York law of retroactivity, the court concluded that the statute applied only prospectively and that it had to apply the older version of New York law.[208]

Like *Kentucky Bluegrass Contracting*, *SPV-LS* eliminated a conflict of laws issue by using the older version of a state's law and did so on the basis of retroactivity principles in place for that state's domestic cases. One can view such cases as dealing with retroactivity issues, but they are also choice of law cases and show how retroactivity rules interact with choice of law. In this context, a rule of non-retroactivity eliminated a choice of law issue. But they present a contrast to cases like *Ardoyno*, *Hill*, and *Berghammer*. These cases are similar in that they eliminate a choice of law problem by using the version of a state's law that is not in conflict. But *Ardoyno*, *Hill*, and *Berghammer* differ in that, to reach that result, they *ignore* rather than employ the usual rules of retroactivity. That is, they apply the new law of the other state to avoid a conflict, sometimes (in *Hill* and *Berghammer*) in contravention of the law of retroactivity of the state whose law changed. One is tempted to see, in this collection of cases, the frequent ingenuity that courts employ to "escape" undesirable

202. *Id.* at 1275.

203. *See supra* notes 41–62 and accompanying text. In *Kentucky Bluegrass Contracting*, the court noted that liability for failure to defend is measured by what was known at the time of the request. The Kentucky caselaw argued by the insurer was issued after the time of the request. *See Ky. Bluegrass Contracting*, 363 P.3d at 1274.

204. No. CIV 14-4092, 2016 WL 1466529 (D.S.D. Apr. 14, 2016).

205. *Id.* at *2.

206. *Id.* at *6.

207. *Id.* at *3 n.2.

208. *See id.*

results in choice of law problems.[209] In this connection, it is notable that in four of five of the cases, the result was either pro-recovery or validated a consensual transaction, factors that are thought to often explain choice of law manipulation.[210]

But not all courts use the temporal version of the law that avoids a conflict. Some cases base their choice of law analysis on a conflict between one state's law and the former law of another state. These are in direct opposition to cases such as *Ardoyno*, *Hill*, and *Berghammer* which avoid a conflict with former law by using the new law. In *Hanley v. Tribune Publishing Co.*, a Nevada domiciliary sued a California defendant for an alleged libel that appeared in both California and Nevada.[211] California law required plaintiff to prove special damages unless he demanded and did not receive a retraction, but Nevada law formerly had no such requirements.[212] But Nevada law was in flux. *Before* the publication, the legislature added similar requirements and thus eliminated the conflict, but the legislation had an effective date of after the publication.[213] The Nevada federal district court, using Nevada's most significant relationship choice of law approach, held that California law applied.[214] It reasoned that before the publication, the "Legislature of the State of Nevada had declared the public policy of [that] state to be identical with that of California."[215] Even though the statute had a post-publication effective date, it still "constituted an established announcement of the legislative purpose and intent" so that California law should apply "to sustain the declared and identical public policies of both states."[216] This is essentially the reasoning of the cases above (*Ardoyno*, *Hill*, and *Berghammer*) that used the new law of a state to find an absence of a conflict in state policies. But the Ninth Circuit reversed. In its view, the district court "misconstrued the state of Nevada policy at the

209. *See generally* Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1133–35 (2010); Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 987 (1994) ("[J]ust as vested rights doctrine afforded courts enough escape hatches to permit them to reach almost any result in any case, modern choice of law theory provides ample authority to permit a court to reach virtually any result in any litigated case.").

210. *See* Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49, 89 (1989) ("Perhaps driven by the pro-recovery nature of much of modern tort law, courts seem to be inclined to utilize modern choice of law doctrine to achieve the goal of the substantive law . . . .").

211. *See* Hanley v. Tribune Publ'g Co., 527 F.2d 68, 69 (9th Cir. 1975).

212. *See id.*

213. *See id.*

214. *See id.*

215. *Id.*

216. *Id.*

critical time of publication" because at "the time of publication Nevada law was contrary to that of California."[217] The district court had, in effect, changed "the substantive law of Nevada so that retroactive effect was given to a statute to which the Legislature had given a fixed effective date."[218]

*Perloff v. Symmes Hospital*also takes this approach.[219] The plaintiff, who was formerly a citizen of Massachusetts but who later moved to California, sued a Massachusetts hospital for malpractice.[220] At the time of the malpractice, Massachusetts had charitable immunity; California did not.[221] The court, using interest analysis, concluded that Massachusetts law applied.[222] California had no interest since its only connection was the after-acquired domicile of the plaintiff, and that did not create an interest under California choice of law rules.[223] But Massachusetts had abolished charitable immunity several years after the alleged malpractice and nine years before the court's choice of law decision.[224] The court in *Perloff* declined retroactive application to the statutory abolition of the immunity based on prior state court decisions that concluded the statute applied only prospectively.[225] Similarly, in *In re BP p.l.c. Derivative Litigation*, a federal court exercising diversity jurisdiction used New York choice of law rules (the internal affairs rule) to apply the law of the United Kingdom to a derivative action brought against an English corporation.[226] Such derivative actions were allowed under current U.K. law, but not under the law as it existed at the time of the alleged wrongs.[227] The court disallowed the action, applying the older version of U.K. law (in accordance with the U.K. law of retroactivity), even though the remedy of a derivative action was allowed both under New York law and current U.K. law.[228]

Hanley, *Perloff*, and *In re BP p.l.c. Derivative Litigation* thus take the opposite approach of cases such as *Ardoyno*, *Hill*, and *Berghammer*. They take the retroactivity law of the state whose

217. *Id.* at 70.
218. *Id.*
219. Perloff v. Symmes Hosp., 487 F. Supp. 426 (D. Mass. 1980).
220. *Id.* at 427.
221. *See id.* at 427–28.
222. *Id.* at 428–29.
223. *See id.*
224. *See id.* at 429.
225. *See id.* (citing Johnson v. Wesson Women's Hosp., 328 N.E.2d 490, 491 (Mass. 1975)).
226. *In re* BP p.l.c. Derivative Litig., 507 F. Supp. 2d 302, 310 (S.D.N.Y. 2007).
227. *Id.* at 311.
228. *See id.* Another court reached the same conclusion on structurally identical facts. *See* City of Harper Woods Emps.' Ret. Sys. v. Olver, 589 F.3d 1292, 1292 (D.C. Cir. 2009), *aff'g* 577 F. Supp. 2d 124, 137 (D.D.C. 2008).

substantive law governs as decisive not only in the domestic context, but also in the choice of law context. This may be the correct approach, but the decisions neither explain it nor attempt to square it with interest analysis. In *Perloff*, for example, what interest does Massachusetts, which had for nine years allowed suits against charities, have in denying an injured plaintiff recovery against a negligent medical provider? If it is not a matter of interest, then the result must surely be explained by reliance interests and party expectations. But the defendant had been operating in a non-immunity regime for nine years. Surely, the vigor of its expectations, like all flesh, must wane with time. And presumably its current liability insurance policy was written with reference to a lack of charitable immunity, and rates were set accordingly.

Finally, some cases perform something of a finesse. They apply the law of a state whose law has not changed, which happens to coincide with the new law of the other state. They are thus applying the law as it currently exists in both states, albeit through the vehicle of applying the unchanged law of one of the states. In *Lewis v. Chemetron Corp.*, a Pennsylvania plaintiff was injured in that state while driving a truck for his Ohio employer.[229] He sued a Pennsylvania company which had loaded (allegedly negligently) his truck in Pennsylvania and the defendant sought to join the plaintiff's employer as a third-party defendant.[230] The plaintiff had accepted an award under the Ohio workmen's compensation system, and Ohio law forbade third-party action against employers who were paying workmen's compensation.[231] Pennsylvania law, at the time of the injury, on the other hand, allowed such actions.[232] The court, applying Pennsylvania choice of law's most significant relationship test, concluded that Ohio law applied and that the third-party action was unavailable.[233] To buttress the result, the court looked to the new law of Pennsylvania, which had changed to bar, like Ohio, third-party actions: applying Ohio law "is consonant with the present trends of Pennsylvania law. If [the] accident had occurred just two months later . . . a conflict of laws question would not confront us because the laws of Ohio and Pennsylvania would be the same."[234] A similar maneuver

229. Lewis v. Chemetron Corp., 448 F. Supp. 211, 212 (W.D. Pa. 1978).
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.* at 213.
234. *Id.* at 213–14. The court also relied on a Pennsylvania intermediate appellate court opinion, in which that court applied the new Pennsylvania statute to a case, like *Chemetron*, based on pre-amendment injuries, but which was not filed until after the effective date of the statute. That case, however, was reversed on appeal. *See id.* at

to get to new law is to select forum law under the forum's choice of law approach and then, if the substantive rule is a common law one, to change it to an updated modern rule that coincides with the law of the other state. In *Pevoski v. Pevoski*, a Massachusetts wife sued her Massachusetts husband for personal injuries sustained in a New York car accident.[235] At the time of the accident, Massachusetts had interspousal immunity; New York did not.[236] The court held that Massachusetts law applied, but then decided that another case, decided after the underlying events in *Pevoski*, that abolished spousal immunity, applied retroactively.[237] It did so because the "public policy" reasons cited by the earlier case were "equally compelling" in the case before it.[238] The end result was that, as between old and new law, the court found a way to apply the current policy of the state.[239] Technically, the court is making a retroactivity decision about its recent case, but if its recent case had not yet been decided, it presumably would have made the same substantive decision in *Pevoski*.[240]

These cases also present the question of how to regard another state's law of retroactivity. One can imagine the suggestion that what is at issue here is not really a choice of law problem. It is instead a problem of retroactivity (or prospectivity) under the law of the state whose law has changed. But this suggestion is wide of the mark. The effect to be given to a changed law of another state is unavoidably a choice of law problem.

It is true that some courts faced with a change in the law of the state whose law applies use the law of retroactivity of that state. But such an outcome is the result of an unstated choice of law rule. Using the other state's law of retroactivity may be a good choice of law rule or a bad one, but it is a choice of law rule. It was, for example, in *In re BP p.l.c. Derivative Litigation* a federal court in New York applying New York choice of law that used the U.K. law of retroactivity.[241] Under the *Erie* choice of law rule, the court applied New York law. Under the New York choice of law rule, it applied U.K. law, including

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214 (citing Bell v. Koppers Co., 384 A.2d 980, 980–81 (Pa. Super. Ct. 1978), *rev'd*, 392 A.2d 1380, 1383 (Pa. 1978)).

235. Pevoski v. Pevoski, 371 Mass. 358, 358 N.E.2d 416, 417 (Mass. 1976).

236. *See id.*

237. *Id.* at 418.

238. *Id.*

239. *Id.*

240. *See* Louise Weinberg, *On Departing From Forum Law*, 35 MERCER L. REV. 595, 602 (1984) ("This was a 'retroactive' application of *Lewis*, but in the absence of *Lewis*, the court obviously could have seized the occasion presented in *Pevoski* to perform the same revision.").

241. *In re* BP p.l.c. Derivative Litig., 507 F. Supp. 2d 302, 310 (S.D.N.Y. 2007).

the U.K law of retroactivity.[242] A New York court, as a federal court in New York under diversity jurisdiction is supposed to be, applies U.K. law only if it has employed a choice of law rule. Other examples of courts reflexively using the retroactivity law of the other state are easy to find.[243]

But not all cases feel bound by the law of retroactivity of the state whose substantive law has changed. In *Hill v. Hill* and in *Berghammer v. Smith*, discussed above, the court applied the new version of the other state's law and explicitly rejected being bound by the other state's prospective application of the law.[244] "Even though Minnesota has made the new rule prospective," the court in *Berghammer* said, "we are not bound to do likewise."[245] Other cases take the same approach in the context of a contractual choice of law clause. Under the Second Restatement, such clauses are enforced unless "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest . . . and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties."[246] What if the law of the other state has changed so that what was against a fundamental policy at the time the contract was entered into is no longer against public policy? And what if that change in the other state's law was to be prospective only? Several cases take the position that one should use the current policy of the state whose law has changed even if that state made its law only prospective.[247]

The matter addressed here is indeed a choice of law problem. To be sure, how the other state would apply its new rule—retroactively or prospectively—in a case domestic to its courts may well be a factor for the forum to consider on the temporal choice of law question, but it should not be decisive. The issue must ultimately be decided by the forum court under its choice of law principles. A forum court gets to the other state's law of retroactivity only if it applies a choice of law rule. That is, if the proposed solution is that the forum should apply

242. *See id.* at 311.

243. *See, e.g.*, SPV-LS, LLC v. Transamerica Life Ins. Co., No. CIV 14-4092, 2016 WL 1466529, at *3 n.2 (D.S.D. Apr. 14, 2016) (using South Dakota choice of law to apply New York law retroactivity); White v. Am. Motors Sales Corp., 550 F. Supp. 1287, 1293 (W.D. Va. 1982), *aff'd*, 714 F.2d 135, 135 (4th Cir. 1983) (using West Virginia choice of law applies North Carolina law and uses North Carolina law of retroactivity).

244. *See* Hill v. Hill, 238 Cal. Rptr. 745, 749 (Cal. Ct. App. 1987); Berghammer v. Smith, 185 N.W.2d 226, 232 (Iowa 1971).

245. *Berghammer*, 185 N.W.2d at 232.

246. RESTATEMENT (SECOND) OF CONFLICT OF L. § 187(2)(b) (AM. L. INST. 1971).

247. *See* Park-Ohio Indus., Inc. v. Carter, No. 06-15652, 2007 WL 470405, at *7 (E.D. Mich. Feb. 8, 2007); Shipley Co. v. Clark, 728 F. Supp. 818, 826 (D. Mass. 1990).

the retroactivity law of the state the parties chose, that obviously results from a choice of law process. Absent a choice of law rule, the forum applies its own law.[248]

More fundamentally, when the law of a jurisdiction changes and a decision is made to apply the new law retroactively or only prospectively, there is a choice of law issue *within* that jurisdiction. There are, in effect, two competing rules within such a state—the old and the new versions of the law—and the court in doing a retroactivity analysis is choosing between the two. We are accustomed to thinking of choice of law problems as existing only between two sovereigns, but there is no reason to limit the scope of the field. To be sure, the domestic problem of retroactivity does not require moderation between two separate sovereigns as is the case with the normal choice of law inquiry, but the concerns of fairness to the parties and protecting expectations figure both in retroactivity and choice of law.[249] Even differing *contemporaneous* versions of the law maintained by coordinate intermediate appellate courts of a single sovereign—circuit splits in the federal courts—present a similar choice of law problem.[250] These may be thought of as *fractionalized* choice of law issues, as they look at a subdivision—temporal or spatial—within a state. The *Erie* doctrine, commonly thought of as a species of choice of law, illustrates yet another such fractionalized choice of law issue. After all, the states are constituent elements of a single federal government. All *Erie* questions are in this sense a question of which law existing within the United States (a single sovereign) shall be applied. That the choice of law analysis here is driven by the Constitution and statute does not make it any less a choice of law problem.[251] The choice of law rules of the United States

248. *See, e.g.*, *SPV-LS, LLC*, 2016 WL 1466529, at *3 n.2 (in using South Dakota choice of law to apply New York law, the court also uses New York law of retroactivity); *White*, 550 F. Supp. at 1293 (court using West Virginia choice of law applies North Carolina law and uses North Carolina law of retroactivity).

249. *See Carter*, 2007 WL 470405, at *7; *Clark*, 728 F. Supp. at 826; *Hill*, 238 Cal. Rptr. at 749; *Berghammer*, 185 N.W.2d at 232; RESTATEMENT (SECOND) OF CONFLICT OF L. § 187(2)(b) (AM. L. INST. 1971).

250. *See* Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 677–79 (1984); Jeffrey L. Rensberger, *The Metasplit: The Law Applied After Transfer in Federal Question Cases*, 2018 WIS. L. REV. 847, 848 (2018); James Durling, *The Intercircuit Exclusionary Rule*, 128 YALE L.J. 231, 231 (2018).

251. *Erie* relied on a largely unarticulated constitutional basis for disallowing a general federal common law. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 80 (1938) (referring to "rights which . . . are reserved by the Constitution to the several States"). When a federal rule of civil procedure is involved, the *Erie* issue is governed by the Rules Enabling Act, 28 U.S.C. § 2072 (2018). *See* Burlington N.R. R. Co. v. Woods, 480

for these intrasovereign conflict problems are found in the Constitution and the Rules Enabling Act, but they are indeed choice of law rules that decide which element of a single sovereign's law applies.

Retroactivity seeks to balance the protection of party expectations against the right of the state to implement current policy.[252] These are included in the set of policies that underlie interstate choice of law.[253] When the litigation occurs outside the courts of the state whose law has changed, it is for the courts of that other state—the forum—to achieve that balance. This is especially true in choice of law cases because more than one state has an interest in protecting the parties and more than one state's policy is involved.

Moreover, referring the question of retroactivity in the interstate context to the law of the other state is similar to the generally rejected use of renvoi. Renvoi is the practice of applying not just the substantive law of another state under the forum's choice of law rule but also the other state's choice of law rules.[254] Renvoi is almost universally rejected in choice of law.[255] The temporal question cannot be decided without a choice of law analysis. Even if the forum determines that it should follow the retroactivity rules of the chosen state, that in itself is a choice of law question and should be informed by the usual choice of law policies of upholding state interests, protecting the parties' expectations, certainty, and uniformity.

Finally, European law regards the temporal problem and specifically international retroactivity as a part of conflict of laws. The topic was addressed by the Institute of International Law (Institut de Droit International) in 1975[256] and became the subject of a resolution

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U.S. 1, 5 (1987) (holding that a federal rule "must then be applied if it represents a valid exercise of Congress' rulemaking authority, which . . . has been bestowed on this Court by the Rules Enabling Act").

252. *See* Landgraf v. USI Film Prod., 511 U.S. 244, 265–66 (1994); *see supra* notes 31–32 and accompanying text; *see also* 2 SINGER & SINGER, *supra* note 34, § 41:2, at 386–93.

253. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 6 (AM. L. INST. 1971) (listing choice of law factors).

254. *See* Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 979 (1991) ("[T]he renvoi question . . . asks whether a forum state applying foreign law should refer to the foreign state's choice-of-law rules instead of merely to that state's substantive law.").

255. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 8 cmt. b (AM. L. INST. 1971).

256. INST. OF INT'L L., THE INTERTEMPORAL PROBLEM IN PUBLIC INTERNATIONAL LAW (Aug. 11, 1975), https://www.idi-iil.org/app/uploads/2017/06/1975_wies_01_en.pdf.

in 1979.[257] That resolution adopts several principles relevant here. As to legal relations that are intended to extend over time, such as "personal status, property or obligation," the "rights acquired before the happening of a relevant change of law should be protected so far as may be possible."[258] In general, "[t]he temporal effect of change in the applicable law shall be determined by the *lex causae*" i.e., the law which is chosen to govern.[259] As to retroactivity, "[t]he effect of retrospective legal provisions whether legislative, executive or judicial, should normally be determined by reference to the legal system in which they originate."[260]

The solution is thus for the forum to choose a state whose law governs and then to use that state's rules to determine the relevance of a change in law. That state would, however, normally follow any retroactivity rules of the state whose law changed.[261] An English source offers the following example of how this works:

> If a German died in the year 1939 domiciled in Germany and left a will made in 1899, the English conflict rule allows German law, as being the testator's *lex domicilii* at the date of his death, to decide whether the will is valid. Under German law the validity of the will depends upon the law which was applicable when the will was made, i.e. at a time before the Civil Code came into force on 1 January 1900. The English judge would therefore have to apply the appropriate pre-1900 law.[262]

One may agree or disagree with these solutions,[263] but the point is that they are choice of law rules.

What then should be the approach of courts when the law of one of the states has changed? Again, some observations are possible:

Vestedness: An argument for applying the law as it existed at the time of the transaction or event lies in "vestedness," an idea explicated

257. *See* INSTITUT DE DROIT INTERNATIONAL, DELIBERATIONS OF THE INSTITUTE DURING PLENARY MEETINGS TOME 58 II, at 182 (1979), https://www.idi-iil.org/app/uploads/2017/05/4025-58-B-OCR.pdf.

258. *Id.*

259. *Id.*

260. *Id.*

261. F. A. Mann, *The Time Element in the Conflict of Laws*, 31 BRIT. Y.B. INT'L L. 217, 232–33 (1954).

262. *Id.*

263. *See, e.g.*, Ignaz Seidl-Hohenveldern, Book Review, 77 AM. J. INT'L L. 701, 701 (1983).

by Perry Dane.[264] Dane argues that the law is norm-based and norm-based law should be ascertainable independently of (and hence before) litigation.[265] Although applying current law would better serve the policy ends of the sovereign (why else would it have changed the law?), using the law extant at the time of the transaction preserves the rights or, if that is too strong of a word, expectations of the parties. Choosing whether to protect a litigant's expectation of and investment in an established norm or, on the other hand, advancing the current prerogatives and interests of the state is one of the most fundamental tensions in choice of law.[266] In many contexts, from prospective application of new statutes to the presumption that the parties intend to incorporate (only) current law into their contract, the argument for having fixed rights anchored in the past has carried the day.

Comparative Impairment of the Past and the Present: The contest, as noted above, is between the demands of the past and the desires of the present, or more precisely demands of present people who acted in the past versus the policy demands of the present.[267] The state has decided that a new policy should prevail, presumably to promote some aspect of the social good.[268] Against that are the interests of parties whose expectations may be undone. The question is which prevails:

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264. Dane, *supra* note 10, at 1205.

265. *See* Dane, *supra* note 10, at 1205, 1218–19, 1245, 1265. Dane argued that choice of law rules should "be expected to generate the same set of substantive criteria if they were applied by any other forum in an actual adjudication." *See id.* at 1205. Dane based this requirement on a norm-based jurisprudential view:

> [I]f the defining function of courts is to enforce legal rights that exist, in some sense, apart from their enforcement, any court committed to that view cannot hold that the analysis of substantive legal rights depends on the manner in which they are sought to be enforced or, more specifically, on the forum in which an adjudication happens to be brought.

Id. at 1245. As to time, vestedness, as used by Dane, imposes limits: "there are conceptual boundaries to a legal transaction—limits on the relevant sets of events and actors—that make some choice of law variables irrelevant." *Id.* at 1262.

266. The Second Restatement explains that there are several "groups" of choice of law policies, one of which concerns itself with "the purposes, policies, aims and objectives of each of the competing" states and another of which "involves the needs of the parties, namely the protection of their justified expectations and certainty and predictability of result." *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 188 cmt. b (AM. L. INST. 1971).

267. *See In re* Marriage of Walton, 104 Cal. Rptr. 472, 476 (Cal. Ct. App. 1972).

268. For an excellent discussion of the competing concerns of the past and the present in the context of retroactivity, see J.-R. Trahan, *Time for A Change: A Call to Reform Louisiana's Intertemporal Conflicts Law (Law of Retroactivity of Laws)*, 59 LA. L. REV. 661, 668–78 (1999).

the current, presumably from the standpoint of the state "better" law,[269] or the older law that shaped the parties' expectations? The Second Restatement advises that a forum should not merely take into account its own domestic policies (which in this context would be represented by current law) but should also consider multistate policies, such as "the needs of the interstate and international systems" and "predictability and uniformity of result."[270] Indeed, according to the Second Restatement the "most important function" of choice of law is that its rules "make the interstate and international systems work well [and] seek to further harmonious relations between states and to facilitate commercial intercourse between them."[271]

Even if one thinks that as a general approach to choice of law this goes too far in subordinating the domestic policy of the state to multistate policies, in the context of temporal choice of law the state's domestic interests are not that greatly impaired. One can approach this problem using comparative impairment.[272] The state with new law will be able to apply its new policy to all cases arising from events occurring after the law has changed and its new law will shape behaviors going forward.[273] It loses the ability to command only as to a comparatively small set of cases that are in the past and which are in litigation or are not yet time-barred by the statute of limitations. The application of the old law to past transaction is a closed set; the scope of application to the future yawns to the horizon. Under this view, the general default should be toward applying the law as it existed at an earlier time.[274] The loss to current policy is simply not that great.

A State's Interest is Determined by Current Law: While the foregoing argues for using former law, other factors inform the decision as well. Any part of the choice of law analysis that turns on the substantive policies of the states should under no circumstance rely upon former law to ascertain policy. A state's policy is used to

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269. *See generally* Leflar, *supra* note 197, at 1588 (arguing for a choice of law rule that selects "rules of law which make good socio-economic sense").

270. RESTATEMENT (SECOND) OF CONFLICT OF L. § 6 (AM. L. INST. 1971); *see* Arthur Taylor von Mehren, *Recent Trends in Choice-Of-Law Methodology*, 60 CORNELL L. REV. 927, 938 (1974–1975) ("[I]n a multistate situation . . . a policy of protecting legitimate expectations, irrelevant in analogous fully domestic situations, requires attention. Likewise, a multistate situation can involve policies—such as the facilitation of multistate activity—that are peculiar to the multistate context.").

271. RESTATEMENT (SECOND) OF CONFLICT OF L. § 6 cmt. d (AM. L. INST. 1971).

272. *See* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 17–18 (1963). Under this approach, courts should "subordinate" application of the law "of the state whose internal objective will be least impaired in general scope and impact by subordination in cases like the one at hand." *Id.* at 18.

273. *Id.* at 17–18.

274. *See* Trahan, *supra* note 268, at 670–72.

determine whether it has an interest.[275] A state cannot have an interest in applying a version of the law it has abandoned.[276] A state that has lowered the age of majority from 21 to 18, for example, has no interest in protecting a 19-year-old from his or her decisions. If it did, it would not have lowered the age.

The foregoing is true even if the effective date of a statutorily-changed law would render the new law inapplicable. Currently stated law—that to be applied to new transactions events—reflects the current substantive policy of a state.[277] But an effective date provision may reflect another policy of the state separate from its policy as to the underlying substantive law. A deferred effective date may be designed to protect parties' expectations and avoid unfair surprise.[278] A state could, for example, change its substantive policy to void certain contract provisions in order to give greater protection to consumers but choose to apply this new law prospectively in order to serve a separate policy of upholding expectations. If that is the policy behind a deferred effective date, it should be given weight, but *only* if the person to be protected is within the ambit of the enacting state's protection. If, for example, the party who would benefit from the older law is not a resident of the state whose law has changed, the state has relatively little concern for him or her.[279] Moreover, the party will have a difficult time establishing reliance on the older law of a state foreign to him or her.[280]

Changes in common law rules should be treated similarly. A court's ruling that its new rule will or will not have retroactive application is a factor but is not decisive.[281] A court stating that its rule applies only prospectively does not speak to its current substantive policy, which must be ascertained from current law. Prospective application can only go to the concern of protecting a party from surprise. Whether that state's desire to grant such protection should be honored turns on the analysis noted above and depends upon whether the party has a connection to that state that puts him or her within the protective sphere of that state or gives a reason to have formed a reliance upon the law of that state.[282]

The Purpose Behind a Particular Choice of Law Rule: The fundamental policy choices made by a particular choice of law rule also informs the temporal analysis. Choice of law should select prior

275. *See* Shipley Co. v. Clark, 728 F. Supp. 818, 825–26 (D. Mass 1990).
276. *Id.*
277. *Id.*
278. *See* Trahan, *supra* note 268, at 670.
279. *See, e.g.*, Berghammer v. Smith, 185 N.W.2d 226, 230, 232–33 (Iowa 1971).
280. *Id.* at 233.
281. *See id.* at 232.
282. *Id.* at 232–33.

law when the dominant purpose underlying the particular choice of law rule is to uphold expectations, such as in contract and property cases. As an exception, if the conflict exists only if one applies the older law of the two states, the court should apply the new law instead to eliminate the conflict if that new law validates a consensual transaction. Validating a consensual transaction gives effect to the parties' intentions and the contract would be allowed under the law of either state using current law.

Choice of law should select the new law when the dominant purpose underlying the particular choice of law rule is to uphold the interests of the most concerned state. Such choice of law rules are more likely to be found in those governing tort issues. A former defendant-protecting rule in tort should not be applied when the current law of the state interested in protecting the defendant does not protect him. An exception may be appropriate if the defendant can demonstrate provable reliance upon the former law in shaping its behavior or in financial planning for potential liability.

C. Changing Facts

The last temporal problem in choice of law is a change in the facts relevant to a choice of law analysis. In contrast to the temporal problems posed by changing states and changing law, changes in the facts of a case concern a choice of law input. A choice of law input is a fact which is used in the choice of law analysis. Where an injury occurred, where parties were domiciled, and where a contract was entered into are choice of law inputs.[283] Choice of law outputs, on the other hand, are the result of this analysis. "California law applies" is a choice of law output. Changing states and changing law are choice of law outputs in that they are relevant issues only after one has decided that the law of a particular sovereign applies.

Some choice of law inputs—i.e., facts relevant to the choice of law issue—are immutable: not subject to change over time. The place of making of a contract, for example, is a historical fact that does not change over time. The place of injury is likewise an accomplished fact, although even here the initial injury may occur in one state and later-arising consequences of the tort in another. The First Restatement, consistent with its commitment to vested rights, chose to regard the place of the initial injury as the sole relevant input, disregarding subsequent additional symptoms.[284] The Second Restatement carries

283. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF L. § 391 cmt. b (AM. L. INST. 1934).

284. *Id.* ("It is the law of the place of wrong . . . and not that of the place where the defendant's conduct occurs or the place of death, which governs the right.").

this forward.[285] But other inputs, such as party domicile and the place of contractual performance are not inherently fixed unless the law chooses to make them so by dictating that they are to be determined as of a certain time.

Given that some facts are immutable and others can change over time, the question for choice of law and time as to changing facts is whether the choice of law rule selects an immutable fact (such as the place of contracting) or a changeable one. If the former is selected, then the matter is at an end and the chosen law is fixed. If the latter is selected, then one must confront the issue of whether the relevant fact (such as domicile) is to be that as of the date of the underlying events or the date of litigation.

Some choice of law rules formally make time a variable in their application. That is, these choice of law rules explicitly address the time question and choose the facts as they exist at a particular time. For example, under the Second Restatement, a marriage that is valid at the place where the marriage ceremony takes place is generally to be upheld elsewhere.[286] But there is an exception if the marriage "violates the strong public policy of another state" with "the most significant relationship to the spouses and the marriage."[287] But this exception refers not a state that *currently* has the most significant relationship, but one which "*had* the most significant relationship to the spouses and the marriage *at the time of the marriage.*"[288] Thus, marriages have been invalidated under this exception "only when it violated a strong policy of a state where at least one of the spouses *was domiciled at the time of the marriage* and where both made their home *immediately thereafter.*"[289] In this context, the temporal choice of law rule is to use the parties' domiciliary connections only as of the date of the marriage or soon thereafter. Later-acquired domicile is ignored.

Property choice of law rules often have a time element. Personal property of an intestate passes under the law of his or her domicile at death.[290] Likewise, the validity and effect of a will of personal property

285. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 175 cmt. b (AM. L. INST. 1971) ("The place where the injury occurs is the place where the force set in motion by the actor first takes effect on the person. This place is not necessarily that where the death occurs.").

286. *See id.* § 283(2) ("A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid.").

287. *Id.*

288. *Id.* (emphasis added).

289. *Id.* cmt. j (emphasis added).

290. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 260 (AM. L. INST. 1971) ("[I]nterests in movables upon intestacy is determined by the law that would be

is decided under the law of the decedent's domicile at death.[291] These choice of law rules allow the applicable law to change over time as a person moves. But the opposite temporal choice of law rule obtains for interests created in personal property in an *inter vivos* conveyance. Here the choice of law rule points to a fixed time. The law of the "location of the chattel . . . *at the time of the conveyance*" is accorded greater weight than any other contact.[292] Similarly, as to marital interests in personal property acquired during marriage, "greater weight will usually be given to the state where the spouses were domiciled at the time the movable was acquired than to any other contact."[293] Thus, for these personal property interests the applicable law is fixed and the later change in the location of the chattel or of its owners is irrelevant.

The time problem also appears in choice of law rules concerning the effect of illegality on a contract, although this is more an instance of a change in law than a change in facts, unless one makes the somewhat unusual characterization of the legal situation prevailing in the place of performance as a fact. Here is the problem: What if a contract was legal at the time it was entered into but later became illegal in the place of performance? According the First Restatement, "[i]f performance of a contract is illegal by the law of the place of performance *at the time for performance*, there is no obligation to perform so long as the illegality continues."[294] The legality or illegality of performance thus changes over time. The First Restatement kept its commitment to vested rights by making what seems a metaphysical distinction between the validity of the contract itself—which continues despite later illegality—and the duty to perform, which can change over time.[295] The Second Restatement similarly

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applied by the courts of the state where the decedent was domiciled at the time of his death.").

291. *See id.* § 263(1) ("Whether a will transfers an interest in movables and the nature of the interest transferred are determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death.").

292. *Id.* § 244(2) (emphasis added). The rule was even clearer in the First Restatement: "The nature and characteristics of an interest created by a conveyance of an interest in a chattel is determined by the law of the place where the chattel is at the time of the conveyance." RESTATEMENT (FIRST) OF CONFLICT OF L. § 258 (AM. L. INST. 1934).

293. RESTATEMENT (SECOND) OF CONFLICT OF L. § 258(2) (AM. L. INST. 1971).

294. RESTATEMENT (FIRST) OF CONFLICT OF L. § 360 (AM. L. INST. 1934) (emphasis added).

295. The First Restatement went on:

> [I]f a contract is made in New York to do an act in Russia which at the time of the agreement it was lawful to do and then, before the

states that "[w]hen performance is illegal in the place of performance, the contract will usually be denied enforcement" and makes clear that this "rule applies to illegality existing when the contract was made or arising thereafter."[296]

Other choice of law rules leave the temporal question open, not specifying the time at which the input is to be assessed. For example, the Second Restatement selects the "the local law of the state of [a party's] domicil" to determine capacity to contract[297] but does not specify the time at which the party's domicile is relevant. What if, for example, the party was domiciled in a state in which she had capacity but by the time of litigation had relocated to a state in which she lacks capacity? The Restatement provides no guidance here.

Of those choice of law rules that do have a specified time component, some tether the law to beginning of the time period (such as situs at acquisition of personalty)[298] and others to the end of it (personal property passes under a will as determined by testator's domicile at death, not at the time the will is drafted).[299] Is there any discernible pattern in these rules? Is there any principled basis for selecting a time?

One would be tempted to say that property cases are or should be treated under a choice of law rule with a fixed and unchanging time component because of the greater concern of stability and predictability in property law.[300] But the Second Restatement is

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> time for the performance, the act is made illegal by Russian law, the contract is still binding upon the parties as a valid obligation although the duty to perform the act promised is suspended.

Id. cmt. d.

296. RESTATEMENT (SECOND) OF CONFLICT OF L. § 202 & cmt. b (AM. L. INST. 1971).

297. *Id.* § 198(2).

298. *See id.* § 244; *see also* RESTATEMENT (FIRST) OF CONFLICT OF L. § 258 (AM. L. INST. 1934).

299. The Restatement states:

> If, after making his will, a person changes his domicil, the validity and effect of his will are determined . . . by the law that would be applied by the courts of the state of his domicil at the time of his death, and not by the law that would be applied by the courts of the state of his domicil at the time of executing the will.

RESTATEMENT (SECOND) OF CONFLICT OF L. § 263 cmt. d (AM. L. INST. 1971).

300. The Restatement continues:

> [P]rotection of the justified expectations of the parties is of considerable importance in the field of property. Parties enter into

inconsistent in this regard. Its choice of law for *inter vivos* conveyances of personalty uses a time period fixed to the initial acquisition. But testamentary dispositions are decided under the law to be determined not at the time of the asset's acquisition, or even at the date of the creation of the will, but at the last possible time: the decedent's domicile at death.

One might similarly expect contract choice of law rules to have a greater concern for fixedness because "the protection of the justified expectations of the parties is of considerable importance in contracts."[301] But the results are mixed. Many of the contracts rules of the Second Restatement have a fixed character: "[f]ormalities [such as a requirement of a writing] which meet the requirements of the place where the parties execute the contract will usually be acceptable."[302] Tying the issue of formalities to the place of execution servers to fix the formal validity across time. Likewise, a contract for services is governed by the "law of the state where the contract requires that the services, or a major portion of the services, be rendered."[303] This rule thus fixes the law applicable to that ascertainable at the time the contract was entered into. Life insurance contracts are also governed by a fixed, time-of-contracting law: the Restatement selects the "law of the state where the insured was domiciled at the time the policy was applied for."[304]

Whether a contract is illegal, on the other hand, is determined by the place of performance, although the effect of illegality—whether it excuses nonperformance or allow rescission of a contract—is determined by the general choice of law rule for contracts, section188.[305] But, as noted above, illegality rules are not time-bound. They apply "to illegality existing when the contract was made or arising thereafter."[306] And other contract rules are indeterminate as to time. Issues of "details of performance" are determined, for example, by the "law of the place of performance"[307] but the Restatement does not specify how the court is to identify the place of

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> property transactions with forethought and are likely to consult a lawyer before doing so. They will expect certain legal consequences to ensue from a given transaction and, in the absence of strong countervailing considerations, their expectations should not be disappointed.

Id. § 222 cmt. b.

301. *Id.* § 188 cmt. b.
302. *Id.* § 199(2).
303. *Id.* § 196.
304. *Id.* § 192.
305. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 202 (AM. L. INST. 1971).
306. *Id.* cmt. b.
307. *Id.* § 206.

performance where it changes over time. The general fallback rule of section 188 has little time-determinacy built into it. Its presumptive rule is to apply the law of the state of contracting and performance when those are both in the same state.[308] The place of performance can, as noted above, change over time. But the Restatement advises that when the place of performance is changeable over time, it carries less significance.[309] This limited anchoring of the applicable law is undermined by the Second Restatement's identification of other contacts relevant to choice of law (domicile and the location of the subject matter of the contract) that can change over time.[310]

What is found in the caselaw? Perhaps the most frequently encountered change in the facts in choice of law cases is a post-event change of domicile. Here is the problem: Interest analysis assumes that states are interested in protecting (or sometimes burdening with regulation) their locals.[311] What if a party was not domiciled in the state at the time of the underlying events but moved there by the time of the litigation? As a constitutional matter, the Supreme Court at one time, in *John Hancock Mutual Life Insurance Co. v. Yates*, seemed to indicate that a post event change of domicile was completely irrelevant and could not be counted as a basis for applying the law of the new domicile.[312] But that decision dates from the heyday of territorialism, which had little use for domicile at any point in time,

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308. *See id.* § 188(3).

309. *See id.* cmt. e ("[T]he place of performance can bear little weight in the choice of the applicable law when . . . at the time of contracting it is either uncertain or unknown.").

310. *See id.* § 188(2).

311. *See* Brilmayer & Anglin, *supra* note 187, at 1156 ("Interests, for Currie, were driven by domiciliary connecting factors . . . ."); Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning*, 2015 U. ILL. L. REV. 1847, 1852 (2015) ("Currie assumed that, in the vast majority of cases, a state has an interest in applying its law only when it would benefit its domiciliaries . . . ."). As to burdening or regulating locals, see, e.g., Kaiser-Georgetown Cmty. Health Plan, Inc. v. Stutsman, 491 A.2d 502, 509–10 (D.C. 1985) (finding that the state has a "significant interest . . . in holding its corporations liable for the full extent of the negligence attributable to them"); Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 687 (N.Y. 1985) (referring to a "[s]tate's interest in enforcing the decision of its domiciliaries to accept the burdens as well as the benefits of that State's loss-distribution tort rules"); Neumeier v. Kuehner, 286 N.E.2d 454, 455 (N.Y. 1972) (guest statute policy is to inhibit recovery by "ungrateful guests"). *See generally* William A. Reppy, Jr., *Codifying Interest Analysis in the Torts Chapter of a New Conflicts Restatement*, 75 IND. L.J. 591, 606–07 (2000) (discussing cases).

312. In *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936), the plaintiff moved to Georgia after the death of her husband, who had life insurance with the defendant. *See id.* at 178. Georgia had a more favorable law, but the Court held that Georgia could not apply its law since "there was no occurrence, nothing done, to which the law of Georgia could apply." *Id.* at 182.

and the Supreme Court has since retreated from that position.[313] As to the common law of choice of law, an early case under interest analysis categorically discounted after-acquired domicile.[314] But another early case allowed the consideration of after-acquired domicile when the defendant moved to a state with less favorable law (thus vitiating any forum shopping concerns). His former state, which had defendant-favoring law, lost its interest in protecting him when he departed.[315] The Second Restatement noted the issue but took no position on it.[316] The draft of the Third Restatement selects domicile "at the time of the events giving rise to the choice-of-law problem" as the normal rule but reserves an exception to "take into account the interest of a State that may not have been implicated as of the time the events that gave rise to the lawsuit."[317] The majority of more recent cases favor anchoring domicile at the time of the underlying event and not considering either new interests that arise or the elimination of interests that formerly existed because of a post-event change in domicile. For example, a defendant in *Schultz v. Boy Scouts of America, Inc.* had been headquartered in New Jersey at the time of the events giving rise to the litigation but had since relocated to Texas.[318] The court analyzed the state interests as if that defendant were still a New Jersey domiciliary and within that state's interest in protecting charities via a charitable immunity defense.[319] One finds many similar cases.[320] This preference for an anchored approach to

313. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 311 (1981) (plurality opinion) (emphasis added) ("[A] postoccurrence change of residence to the forum State—*standing alone*—[is] insufficient to justify application of forum law.").

314. *See* Reich v. Purcell, 432 P.2d 727, 730 (Cal. 1967) (holding plaintiffs' "domicile at the time of the accident" alone is relevant and "plaintiffs' present domicile in California does not give this state any interest in applying its law").

315. *See* Miller v. Miller, 237 N.E.2d 877, 882 (N.Y. 1968) (defendant's former home state "would have no concern with the nature of the recovery awarded against defendants who are no longer residents of that State and who are, therefore, no longer proper objects of its legislative concern").

316. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. ch. 7, topic 1, intro. n.2 (AM. L. INST. 1971).

317. RESTATEMENT (THIRD) OF CONFLICT OF L. §2.06 cmt. h (AM. L. INST., Tentative Draft No. 2, 2021).

318. Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 682 (N.Y. 1985).

319. *See id.* The dissent highlighted this fact, arguing that a defendant's post-event change of domicile is "often critical insofar as it affects state interest analysis." *Id.* at 690 (Jasen, J., dissenting).

320. *See, e.g.*, Desir Austin v. Ray's Rapid Transporting LLC, No. 13CV912, 2015 WL 9412542, at *6 (E.D.N.Y. Dec. 21, 2015) ("[T]he pertinent time for purposes of choice-of-law analysis is the time of the tort rather than any later time") (quoting Youngman v. Robert Bosch LLC, 923 F. Supp. 2d 411, 420 (E.D.N.Y. 2013)); Blais v. Islamic Republic of Iran, 459 F. Supp. 2d 40, 54 n.6 (D.D.C. 2006) ("[T]he proper

domicile may reflect "concerns about potential manipulation of the judicial decision-making process by parties" by changing domicile "in order to influence the result."[321]

The problem of change of domicile is an artifact of interest analysis in that a party's domicile is a key input for that system.[322] Vested rights, on the other hand, did not attach importance to domicile and instead mostly relied upon completed events as connectors such as the place of the injury or the place of contracting.[323] Such connectors are safely entombed in the past do not change over time.[324] The modern caselaw that favors the anchoring approach seems contrary to Currie's interest analysis. States have interests in protecting their domiciliaries whether they are late arrivals or not.[325] But even Currie accepted the anchor approach to the change of domicile problem. In defending the result in *Yates* that a state could not apply its law for the benefit of a new domiciliary, Currie wrote that "the determination of state interests is to be made at *the time of the action or event whose legal consequences are at issue*, not at the time of litigation, except with respect to laws which might reasonably be given retroactive application in a domestic context."[326] One could, he noted, analogize after-acquired domicile to new legislation and that the former, like the latter, should not be given "retroactive" effect.[327]

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governing law is the law of the state where the plaintiff was domiciled at the time of the injury, not the law of domicile at the time the action was filed."); McCann v. Foster Wheeler LLC, 225 P.3d 516, 534, 537 (Cal. 2010) (declining to give effect to plaintiff's later move to a state with a more plaintiff-friendly limitations period); Esser v. McIntyre, 661 N.E.2d 1138, 1141 (Ill. 1996) ("[T]he relevant time to examine the domicile of the parties is at the time of the accident."); Boardman v. United Servs. Auto. Ass'n, 470 So. 2d 1024, 1036 (Miss. 1985) ("The suggestion that plaintiffs can change the substantive law according to which a particular action must be adjudicated by changing their citizenship prior to filing suit simply won't wash. The choice of law inquiry must relate to the times relevant to the transaction or occurrence giving rise to the claim ab initio.").

321. RESTATEMENT (THIRD) OF CONFLICT OF L. §2.06 cmt. h (AM. L. INST., Tentative Draft No. 2, 2021).

322. *See Schultz*, 480 N.E.2d at 684.

323. *See* Miller v. Miller, 237 N.E.2d 877, 882 (N.Y. 1968).

324. On the irrelevance of domicile to the traditional vested rights system, see Jeffrey L. Rensberger, *Who Was Dick? Constitutional Limitations on State Choice of Law*, 1998 UTAH L. REV. 37, 51 n.98 (1998).

325. *See* Brilmayer, *supra* note 104, at 1286 ("It is not easy to explain from a strictly consequentialist perspective why it matters whether the plaintiff moved before or after the accident.").

326. Brainerd Currie, *The Verdict of Quiescent Years*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 584, 621 (1963) (emphasis added) (quoting David Cavers, *The Conditional Seller's Remedies and the Choice-of-Law Process*, 35 N.Y.U. L. REV. 1126, 1137 n.27 (1960)).

327. *See* Currie, *supra* note 326, at 621.

But he preferred to explain the result in terms of the "relatively precise tool" of interest analysis.[328] Interest analysis requires, according to Currie "a governmental policy" and the "*concurrent* existence of an appropriate relationship between the state having the policy and transaction, the parties, or the litigation."[329] But this merely restates the problem as an answer. Why must the state interest be concurrent with the transaction? Currie never really answers that question except to say that the rights in *Yates* have "vested."[330] That the problem of after-acquired domicile drove Currie to a ground of "vesting" demonstrates how deep the roots of the anchoring approach run.

In addition to post-event changes of domicile, facts relevant to choice of law may change in other ways. The domicile cases involve a tort fully completed or a contract breached and then a later acquisition of a new domicile after the cause of action arises. But sometimes facts change after an initial portion of the events but before the cause of action arises. *Clay v. Sun Insurance Office, Ltd*, illustrates such midstream fact changes. [331] The plaintiff in *Clay* purchased a personal property insurance contract while living in Illinois, then moved with his property to Florida where he thereafter suffered a loss.[332] Florida law, unlike Illinois law, voided a limitation on the time to sue in the contract.[333] The change of facts here occurred after some facts giving rise to the cause of action (the contract formation) but before others (the loss). Is the post-contract but pre-loss change of domicile (or change of location of the property insured) too late? Currie was uncertain, but his discussion again assumed an anchoring approach: neither plaintiff nor his property "had any Florida connection until after the contract . . . was complete and the company's obligation presumably *fixed*."[334] But the Supreme Court (in affirming Florida's decision to apply its own law) thought otherwise. The nature of the contract was decisive. It covered the purchaser from loss "in States far away from the place where the contract is made" and was sold on the basis that the insured "could take his property anywhere in the world he saw fit without losing the protection of his insurance."[335]

Clay was addressing the constitutional question of whether a state could under due process and the full faith and credit clauses apply its

328. *Id.*
329. *Id.* (emphasis added).
330. *See id.*
331. Clay v. Sun Ins. Office, Ltd, 377 U.S. 179 (1964).
332. *See id.* at 180.
333. *See id.* at 180.
334. Currie, *supra* note 326, at 625 (emphasis added).
335. *Clay*, 377 U.S. at 182.

law in such a situation. The result—to allow departure from an anchoring approach—is often not followed by courts applying their choice of law rules. Instead, even though *Clay* might allow them to apply a later-connected law, they tend to anchor the applicable law to the time of the contract. The general context of this problem is the creation of a contract in one state and a later failure to perform in another. Put another way, the question is whether to apply the law of the place of making of the contract or the place of performance, a problem that has long been difficult for choice of law.[336] But because performance comes later in time than contract formation, this is also a temporal choice of law problem.

The Second Restatement lists the place of performance as a contact to be taken into account in deciding what law to apply,[337] but advises that "the place of performance can bear little weight in the choice of the applicable law when . . . at the time of contracting it is either uncertain or unknown."[338] Many cases cite this comment and in doing so discount the importance of the later place of performance.[339] In dismissing the later place of performance, courts are thereby adopting an anchoring approach. A common application is in insurance cases where coverage can extend to multiple states, the identity of which is unknown at the time of the contracting. For example in *Certain Underwriters at Lloyds, London v. Chemtura Corp.*,[340] the court assessed the law to be applied to an environmental liability insurance contract entered in the 1950s in New York by a predecessor corporation to the current insured.[341] After the contract was formed, the original insured relocated and added operations in many states, some of which became cleanup sites and thus generating liability.[342] The lower court determined that the law of each state in which a cleanup site existed controlled as to the insurance coverage

336. *See* Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 803–04 (1983) ("[C]ontract cases often involve an extended and geographically dispersed course of dealing between the parties. . . . It would be surprising if any fixed rule of choice could cope with all these problems, and for this reason the contract field is widely thought to be the most intractable in all conflicts.").

337. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 188(2)(c) (AM. L. INST. 1971).

338. *Id.* § 188 cmt. e.

339. *See, e.g.*, Nautilus Ins. Co. v. Reuter, 537 F.3d 733, 740 (7th Cir. 2008); QSP, Inc. v. Aetna Cas. & Sur. Co., No. 326873, 1998 WL 892997, at *16 (Conn. Super. Ct. Dec. 8, 1998); Am. Employers Ins. Co. v. Coachmen Indus., Inc., 838 N.E.2d 1172, 1180 (Ind. Ct. App. 2005); Hartford Acc. & Indem. Co. v. Dana Corp., 690 N.E.2d 285, 293 (Ind. Ct. App. 1997); Modroo v. Nationwide Mut. Fire Ins. Co., 191 P.3d 389, 402 (Mont. 2008).

340. 160 A.3d 457 (Del. 2017).

341. *See id.* at 460–61.

342. *See id.* at 461–62.

for that claim.[343] The Supreme Court of Delaware reversed, finding instead that a single state's law should apply based on the "parties' expectations at an earlier point in time."[344] The key question was time:

> The final important framing point is the time period in which to look for contacts. The Superior Court gave greatest weight to contacts that exist today. We disagree with that approach. *[T]he appropriate time period to consider is the time at which the contract was formed, and the expectations of the parties about the contacts that would arise from the contract at that time.* [E]xamining the contacts from the perspective of the time when the contract was formed most helps protect those expectations.[345]

The court applied New York law largely because it was the principal place of business of the predecessor company "at the outset of the insurance program."[346]

The facts relevant to choice of law may change even after the litigation commences. The parties' affiliations (e.g., domicile or principal place of business) fuels the engine of interest analysis. What if there is a change of party structure during the litigation, such as the dismissal of one of the defendants? That obviously has the potential to eliminate a state interest or at least to alter the calculus of which state stands to lose the most under a comparative impairment analysis.[347] In *Chen v. Los Angeles Truck Centers, LLC*, a group of ten Chinese plaintiffs sued defendants from California and Indiana for injuries in a bus accident in Arizona.[348] The trial court ruled that Indiana law (the home of the bus manufacturer) applied, but the plaintiffs later settled with the Indiana defendant.[349] The plaintiffs then argued to the trial court that "[f]or choice-of-law purposes, plaintiffs' settlement with the Indiana defendants has

343. *See id.* at 463.

344. *Id.* at 466 (citations omitted).

345. *Id.* at 468 (emphasis added).

346. *Id.* at 460. The *Chemtura* case is discussed and criticized in Symeon C. Symeonides, *Choice of Law in the American Courts in 2017: Thirty-First Annual Survey*, 66 AM. J. COMP. L. 1, 57 (2018) ("[T]he court apparently assumed that party expectations formed at the beginning of the relationship remain frozen in time.").

347. Comparative impairment "seeks to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state." *See* Bernhard v. Harrah's Club, 546 P.2d 719, 723 (Cal. 1976).

348. Chen v. L.A. Truck Ctrs., LLC, P.3d 727, 728–29 (Cal. 2019).

349. *See id.* at 729.

completely transformed the relevant legal landscape" and that Indiana law should no longer apply.[350] The trial court denied the motion to reconsider: the law to be applied "should not change at the last hour before trial because of settlement of certain parties. The parties have prepared for trial based on a definitive ruling. . . . The parties should be able to rely on that ruling in their trial preparation."[351] The court of appeals reversed the trial court because after the Indiana defendant had been dismissed from the case, "any interest Indiana had in applying its law to [that defendant] was no longer at issue."[352] But the California Supreme Court reinstated the trials court's judgment, finding no reversible error in declining to revisit the choice of law ruling.[353] Without deciding if *revising* a choice of law ruling following a change in party structure would be error, the court held it was not reversible error to *decline* to do so on the facts of the case.[354] It was motivated by the practical considerations of the law applied being fixed and determinate in order to allow for adequate trial preparation and management.[355]

Similarly, in *Huddy v. Fruehauf Corp.*,[356] the plaintiff lived in Texas at the time of a trucking accident and when he filed suit but moved to New Jersey three years later, while the ligation was still in progress.[357] *Huddy* is thus a post-event change of domicile case, similar to those discussed above. But because the plaintiff left Texas after the ligation commenced, it also in the same category as *Chen*—a mid-litigation change of facts. The lower court declined to apply Texas law, accepting the defendant's argument that because the plaintiff "is no longer a Texas resident, Texas has no significant interest in this case."[358] The Fifth Circuit gave two reasons for Texas law continuing to apply after the plaintiff left the state. First, for "more than three years after the accident [the plaintiff] remained a Texas resident" and "Texas does not lose its interest in this case because [he] is no longer a resident."[359] Second, and more important for present purposes, the court relied on prudential reasons. In the

350. *Id.*
351. *Id.*
352. *Id.* at 730.
353. *See id.* at 732.
354. *See id.* ("[The] circumstances in which trial courts are *required* to revisit a choice of law determination, if any, should be the exception and not the rule. We hold only that . . . plaintiffs fail to demonstrate that their decision to accept a settlement offer from one defendant constitutes such an exceptional circumstance.").
355. *See id.*
356. 953 F.2d 955 (5th Cir. 1992).
357. *See id.* at 956.
358. *Id.* at 957.
359. *Id.*

court's view, the change of domicile problem was a by-product of "the slow pace of justice in today's courts" given that the lower court's choice of law ruling was not until six years after the accident.[360] Delays of this magnitude increase the possibility that a party will relocate in the interim. And taking a change of domicile into account in choice of law "would chain litigants to the state of residence at the time of the accident lest they lose the protection of its laws."[361] The court was thus motivated by the practical concerns of (1) litigation delays creating problems choice of law problems where none should have existed and (2) what one might call a reverse forum shopping policy. Just as a party should not be rewarded by tactical post-event change of domicile, he should not be punished for a good-faith relocation unrelated to litigation tactics. *Chen* and *Huddy* both show a concern for not allowing changes in party structure to alter the course of litigation once it is commenced. Most courts discount all *post-event* changes in domicile. These cases add another barrier to the assessment of later arising or declining state interests: changes *after the initiation of litigation* should not count either.

Taken together, these cases show a preference for anchoring the dispute between the parties to a fixed point in the past. Note that, as *Chen* illustrates, the "fixed point in the past" may be well after the cause of action arose—the time at which facts are finally frozen may be in the early phases of the litigation when discovery and litigation strategy is being mapped out.[362] It would be beneficial if all choice of law rules addressed the temporal question. Under the First Restatement, the orientation toward the law of the place where rights first vested obviated this problem. But under modern approaches, the issue must be confronted. Some rules, as noted above, have a time variable embedded in them, others do not. But while it would be helpful if all choice of law rules addressed time, they need not all address it in the same way. Whether a choice of law rule should be crafted with a fixed or floating time inputs should be informed by several factors.

In General, the Facts Should be Fixed as of the Time of the Underlying Events: The cases examined above tend to show a preference for having the factual variables that drive choice of law be fixed in time. The domicile cases usually discount later-acquired domicile.[363] Most of these cases are tort cases,[364] but some are contract

360. *Id.*
361. *Id.*
362. *Id.*
363. *See supra* notes 318–21 and accompanying text.
364. *See* cases cited *supra* note 320.

cases as domicile is a relevant factor there as well.[365] In contract cases, the place of performance can change over time but the Second Restatement advises to discount the place of performance when it is indeterminate at the time of contracting, and the cases bear this out.[366] Apart from domicile and place of performance, other relevant contacts in a contract case—the place of contracting and negotiation[367]— are immutable. The sole other contact—the location of the subject matter of the contract[368]—is theoretically subject to change, but the Restatement indicates that it has in mind only subject matters that have a "fixed" location.[369] The final subset of changing facts deals with changes in the array of the parties after the litigation has commenced. After the suit is filed, a domicile may be added to or dropped from the case as parties are dismissed or settle or relocate. Here again, the approach has been to discount these later fact changes.[370]

Pragmatism Over Theory: These results seem to be driven by pragmatic concerns more than by theory. As to contracts, the dominant concern of upholding expectations is served by relying on immutable connectors and discounting those that can change over time. As to domicile, cases like *Chen* and *Huddy* show that changes to domicile must be determined and fixed at some point; litigation would be all but impossible were the state interests derived from domicile to be constantly—even during a trial—subject to revision. And since domiciliary connections must be fixed at some point, limiting them to those existing at the time of the underlying events serves better than any other approach because it removes the need for a messy assessment of whether post-event but pre-ligation change of domicile was bona fide as opposed to strategic. Moreover, a change of facts is policy-neutral. Changing states or changing law involve a new set of policies in tension with the old. But when all that is involved is a change in facts, there is no need to accommodate competing polices. Concerns of party expectations therefore rise to the surface. True, a

365. *See* Boardman v. United Servs. Auto. Ass'n, 470 So. 2d 1024, 1036 (Miss. 1985) (holding that in litigation regarding an insurance contract, the "suggestion that plaintiffs can change the substantive law according to which a particular action must be adjudicated by changing their citizenship prior to filing suit simply won't wash. The choice of law inquiry must relate to the times relevant to the transaction or occurrence giving rise to the claim ab initio.").

366. *See supra* note 309 and accompanying text.

367. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 188 (AM. L. INST. 1971).

368. *See id.*

369. *See id.* § 188 cmt. e (noting the importance of the location of the subject matter of the contract when it "deals with a specific physical thing, such as land or a chattel, or affords protection against a localized risk, such as the dishonesty of an employee in a fixed place of employment").

370. *See* cases cited *supra* notes 348–61 and accompanying text.

change of domicile might eliminate one state's interest or create an interest in another state or both. But comparative impairment again shows that the interests of a newly involved state are not that greatly impaired since it may enforce its policies as to all those persons who did not live elsewhere at the time of events relevant to the ligation. The interests of the state of former domicile may well have ceased to exist, but that state should be regarded as if it were interested even though it is not in order to fulfill the pragmatic concerns of establishing the facts at some point. In short, courts should disregard after-acquired domicile not because the state of former domicile is interested but in order to fix a party's liability within limits at the time he or she acted.

CONCLUSION

The law interacts with time in many contexts. We are perhaps more used to thinking of the interaction between the law and time in the domestic context. Retroactivity doctrines are well-known and much discussed. But, as this article makes clear, temporal issues arise in interstate cases—choice of law cases—as well.

Choice of law would be improved were choice of law rules written with an eye toward these temporal issues. The draft Third Restatement offers an opportunity for such a project. When the issue is a change of law—either because one of the involved states has been replaced by a new one or because of a simple revision in the law of a state—the problem is to choose between party expectations rooted in the past and the policy dictates of the present. Past policy of a state or the policy of a past state should be ignored. In resolving the tension between present policy and expectations, a form of comparative impairment is useful: the present is comparatively little impaired since the set of cases to which it can apply its new law is potentially unlimited while the set of cases anchored in the past is finite. An exception to this general preference for a fixed or anchored approach to choice of law should be made when the conflict can be eliminated by applying a new law that will validate a consensual transaction. This does a better job of upholding expectations than relying on old law that invalidates an agreement the parties voluntarily entered. Also, expectations are less important in tort cases and so a greater deference is due here to the policy demands of the present.

As to changing facts, it would again be useful for choice of law rules to specify the time at which a choice of law input is to be determined, as some rules currently do. In general, preference should be given here to fixing the facts as they existed at the time of the transaction. They must be fixed at some point as the cases involving changes during litigation show, and the most judicially convenient

place to fix them is at the time of the underlying transaction. This may rob the state of a new domicile from being able to apply its law to a person in whom it is now interested, but because it can apply its policy to others who are not late arrivals, its interests are not that greatly impaired. This allows the rights and liabilities of the parties to be fixed and stable.