The Conflicts Provisions of the ALI's Complex Litigation Project: A Glass Half Full?

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I. INTRODUCTION: THE INHERENT DIFFICULTY OF CHOOSING THE APPLICABLE LAW IN INTERSTATE MASS TORTS AND CONTRACTS

In the United States, ordinary tort and contract cases have been traditionally allocated to state law and state judicial systems on the assumption that the dimension of such cases typically was local. This is consistent with the idea of vertical federalism, which basically means that national issues should be handled nationally and local ones locally. But at least in some fields, especially mass torts and certain standardized contracts, the assumption of localism is no longer true. However, local law is still being used to cover transactions and occurrences that are national in scope. This anachronism creates a problem of incommensurability that the discipline of Conflict of Laws is incapable of solving adequately. The mission of Conflict of Laws is to screen multi-state situations in order to discover the properly applicable, usually single, local law that should govern. Where a particular situation, however, is genuinely dispersed over many states, no law of a single jurisdiction is ever truly appropriate.

For example, air transportation, both in terms of its activities and of its instrumentalities, has a nationwide, if not global, dimension.1 People from different states often fly across local borders in planes designed and made in many places. Indeed, in recognition of this reality, the Warsaw Convention has unified certain aspects of international air transportation law. But, in the United States, liability for air crashes remains subject to the patchwork of state-by-state rules; the same is true of train crashes—witness the recent Amtrak disaster in Alabama. Likewise, the design and manufacture of most mass-produced products—medications, for example—is conducted and managed at the national or regional level. Their distribution reaches consumers across state borders in standardized transactions. Yet, products liability for medications is determined on a local law basis. Certain types of investment, franchising, and insurance transactions are promoted and handled on a national basis and in standardized formats. Still, their main features are governed by state law.

To be sure, Congress has provided some regulation, especially regarding safety standards and securities fraud in these fields. Nevertheless, Congress has shied away from comprehensive legislation because of the difficulty in reaching a national consensus, especially as various special interests took aim at the enactment of a federal product liability statute,2 and due to a certain deference

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1. See James A. R. Nafziger, Choice of Law in Air Disaster Cases: Complex Litigation Rules and the Common Law, infra this issue at 1001.
2. On the federal reform movement in the 1980s, see P. John Kozyris, Values and Methods in
to the "states-as-laboratories" ideology that has been overextended beyond temporality and issues that are basically local.

The Complex Litigation Project indeed recognizes that "the most direct way to attempt to solve the issues posed would be to adopt national standards to govern the conduct of individuals or entities who are engaging in activity having interstate effects and who now are controlled by multiple, sometimes conflicting, state laws." But, in the face of current realities, the Project limits itself to the second best alternative, namely procedural and choice-of-law efficiency. It is also evident that this efficiency extends only to "consolidated" cases in the federal courts, a grouping based more on convenience than on principle, which adds another questionable distinction. On balance, however, it makes sense to start somewhere and hope for more complete coverage later.

The power to federalize interstate choice of law conflicts is not controversial and emanates mainly from the Commerce Clause and the Full Faith and Credit Clause. The latter Clause supports what may be termed "horizontal" federalism, i.e., the respect owed by each state to the co-equal sovereignty of the others, implemented by national legislation.

II. THE CONFLICTS APPROACH OF THE PROJECT

A. Introduction

The main impulse for the Project has been efficiency in the administration of justice: repeated relitigation of common issues in multi-forum, multi-party, complex cases currently wastes the resources of attorney and client, burdens overcrowded dockets, and delays compensation of those in need. The pursuit of efficiency, however, does not stop with consolidation. Consolidated proceedings must also be freed of unnecessary complexities.

It is principally in the pursuit of simplification that the Project favors, in Chapter 6, entitled "Choice of Law," a "single law" approach. This single-law-mindedness has two prongs. The first and farther reaching prong covers the


choice-of-law question itself. Indeed, Chapter 6 sets up a total, self-contained, single, "coherent and uniform" conflicts system for the consolidated cases. The second prong, operating within this single conflicts system, demonstrates a certain preference for a single applicable substantive law not so much in the narrow sense of avoiding dépeçage—the application of different laws to the various issues arising in a single claim—but more broadly in subjecting to the same law the similar issues in the claims of different persons against the same defendant.

The Project could have finessed the choice-of-law dilemma by dumping the problem on the lap of the federal courts called upon to create new types of common law. But, the cost in efficiency and legitimacy would have been high without any demonstrable improvement in fairness. One version of such common law could have been a substantive federal common law just for interstate or even international mass torts and contracts, a new "jus gentium" incorporating the best and most modern tort standards, as pressed on the ALI by Professor F. Juenger. Such an approach not only raises serious questions of legitimacy in the face both of Erie\(^{10}\) and of the congressional unwillingness to legislate in this field, but also is highly impractical. The substantive choices are so complex and laden with policy choices that the process of selection requires in-depth study and concentrated, coordinated deliberation. These choices are ideally suited for the legislative process because they cannot be efficiently and fairly handled under the pressures and narrow focus of ad hoc adjudication. Besides, a long period of uncertainty and experimentation will be required as the courts seek their way through the masses of data and policy choices with no assurance of better results.

A more limited version of the new federal common law approach would, in essence, abolish the import of Klaxon\(^{11}\) and impose on the federal courts the duty to develop, in the consolidated cases, their own conflicts standards from scratch.\(^{12}\) Perhaps the delay and uncertainties of such a method would have

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7. See, e.g., id. §§ 6.04 and 6.05 applying the same law to statutes of limitations and compensation as to the substantive issues; but see id. § 6.06 on punitive damages.
8. See, e.g., id. §§ 6.01(a) and 6.03(a) in fine.
9. In a letter to the Project Associate Reporter dated December 4, 1992 (five pages, copy with the author), and at the May 1993 ALI Meeting, Professor Juenger criticized the Project and offered his own conflicts alternative, which is heavily geared toward enabling the courts to choose the "most suitable rule of decision." For a more complete description of the Juenger position, see Friedrich K. Juenger, Mass Disasters and the Conflict of Laws, 1989 U. Ill. L. Rev. 105, especially at 121-27 (1989); Friedrich K. Juenger, Choice of Law and Multistate Justice 192-99 (1993).
been worth it had the expected outcome been promising. However, the problem in conflicts today is not that we do not have enough experience or ideas and options but, on the contrary, that we are in a deluge stage and there is pressing need to make up our minds on how to hold our heads above water. Burdening the federal courts with such a complex task on a case-by-case basis, without guidance, makes little sense at the present juncture.

My evaluation of the Project should start with ample praise for the fixation on conflicts efficiency. Conflicts theorists, especially the "modern" ones, have been notoriously indifferent to the issue of efficiency, treating every case as a unique specimen calling for custom-made handling on the tacit assumption that litigational resources are infinite. But, it is too obvious to need elaboration that justice does not come for free. The high cost, including delay, of justice is part of the problem of injustice. The very act of adding a choice-of-law phase to adjudication, rather than always having recourse to the substantive law of the forum, is costly. Applying multiple choice-of-law systems leading to different substantive laws in the same consolidated proceeding is even more expensive. The important question is whether and especially to what extent these extra conflicts costs are justified in terms of other values operating in this field.

B. Eschewing Agnosticism

The Project also must be praised for not being seduced by the siren song of American conflicts agnosticism, originating in the early works of no lesser a figure than Professor David F. Cavers and subliminally affecting many of the so-called "modern" theories. Under this approach, the search for conflicts justice through "jurisdiction-selecting" rules and methods is abandoned and the focus shifts to discovering "just results in the individual case." However appealing such a simplified quest may sound, it tends to become platitudinous, beg the question, and undermine the very justice that it seeks. It is a truism to say that all law aims in the end at justice in the individual case. But, what is justice and how can we find it? Certainly not by pulling an outcome out of some hat. This approach is dangerous because it implies that just results can be perceived directly, through some form of impressionist intuition, rather than reasoned out and explained publicly in reliance on existing norms. Also, the implication is that each just result is somehow unique and separate from the others, discourag-


14. David F. Cavers, A Critique of the Choice-of Law Problem, 47 Harv. L. Rev. 173, 189-94 (1933). Professor Cavers later tried to explain that he was not really advocating a free-law approach to conflicts, but mainly raising questions about the bad rules of the First Restatement of Conflicts. David F. Cavers, The Choice of Law Process 75-87 (1966) [hereinafter Choice of Law]. While the explanation is rather delphic, his subsequent development of his "principles of preference," see infra note 14, evidence his commitment both to the use and to the concretization of conflicts norms. See also Eugene F. Scoles and Peter Hay, Conflict of Laws 28 n.9 (2d ed. 1992).
ing categorization and the search for common features and issues. Finally, the legislative jurisdiction issue—which state’s sense of justice should prevail in a particular multistate context—is wished away and conflated into substance. The truth is that in every conflicts case, the sense of justice of at least two states is implicated. Thus, by definition, there are at least two potentially just results. In what mysterious ways are we able to select one without engaging in a jurisdictional inquiry is beyond my comprehension. In his later writings, Cavers apparently sought to escape from the agnostic implications of his theory and resorted to developing specific contacts-based conflicts guidelines with emphasis on territorial connections, calling them “principles of preference.” What remained of “individualized justice” took the form of certain alternative reference rules favoring tort plaintiffs.¹⁶

The pursuit of individualized justice, without or beyond conflicts, has a certain affinity with the “better law” theory attributed to Professor Robert Leflar, which suggests that, in cases of conflicts doubt, the judge gravitates toward the law that he likes best.¹⁷ To the extent that this theory says that when everything else fails, judges are influenced by their substantive preferences, it is unexceptional and consistent with common sense. But, when the theory goes beyond reporting an empirical observation and claims normative status, it fails to explain by what authority a judge may decide that the law of his own state is not “best”—and how the best law can be found in any event. The “jus gentium” unification movement of Professor Juenger,¹⁸ in a sense, shares the goals of the individualized justice and better law approaches; it is also vulnerable to the same criticisms to the extent that it pursues them judicially by conflicts manipulation, rather than legislatively on the merits.

The intellectual roots of conflicts agnosticism can be traced, at least in part, to American legal realism and its more generic challenge to legalism. This is not the place, however, to consider this challenge in detail. It suffices to point out that certain insights of such realism have become incorporated, or co-opted, into mainstream legal thought, whereas certain other implications make little sense. The more extreme implications of realism have mushroomed into the nihilism of the Critical Legal Studies Movement, which on the one hand argues that the law has no ascertainable meaning, while on the other espouses the proposition that law clearly and predictably serves the interests of the powerful.¹⁹

¹⁵. Cavers, Choice of Law, supra note 13, at 114-81. It is remarkable that Professor Cavers did not hesitate to support the development of federal statutory choice of law responses, at least in special situations, id. at 225-49, which would make him a potential source of support for the approach taken by the Project.

¹⁶. See infra note 35.

¹⁷. For the most recent version of the Leflar approach, see R. Leflar et al., American Conflicts Law 278-79, 300 (1986).

¹⁸. See supra note 8.

Few people, if any, will deny that judges and other appliers of the law are human, that social institutions are fallible, and that language has no perfect meaning, thus no legal outcome may be mathematically ordained by the formal law. Equally undeniable is the proposition that the study and the application of the law should ignore neither its social context and consequences, nor the traditions which gave it birth and the values that inspire it. Thus, law exists not only in the books, but in action. But, to extrapolate that, therefore, formal legal rules and principles are meaningless, separation of the legislative from the judicial function is illusory, systematic-analytical study of the legal order is useless, and legal outcomes are indeterminate and unpredictable, is totally out of line. The very existence of legal science and practice is based on the empirically verifiable assumption that formal law matters a great deal.

A scholar whose skepticism carried the realist challenge into conflicts, and contributed to undermining the formalist system of the Restatement of Conflicts of Law (1934), is Professor Walter W. Cook. Cook's general commitment to what he calls "scientific empiricism," combining radical empiricism with methodological rationalism and critical pragmatism, is quite admirable. So too is his insistence that the application of the scientific methods of inquiry to the field of values, including law, will make our choices of ends more intelligent, better grounded, and less subject to caprice. Furthermore, Cook's detailed critical commentary on specific rules of the Restatement, and his pursuit of more particularized solutions, are quite stimulating and worthwhile. But, Cook's musings on conflicts methodology are quite perplexing and disorienting. His variation of the "local law" theory, to the effect that the forum never applies foreign law as such, but fashions a local rule that resembles the foreign rule, addresses an arcane, inconsequential issue debated at that time and since forgotten. But, his emphasis on the actions of courts, instead of on what courts say, and his realist perception of the law, in Holmesian terms, as a prophecy of what the courts will do in the future, caused him to attack, without offering viable alternatives, deductive, syllogistic reasoning, and the use of territorial connectors. In particular, he opposed the use of "rights" discourse in conflicts, arguing that concepts such as domicile, jurisdiction, and contract have no consistent or inherent meaning. Thus, he proposed recourse to social and economic considerations to resolve the choice-of-law disputes. None other

22. Id. at 59.
24. Id. at 20-21, 323-24, 338-39.
25. Supra note 23 at e.g. 10, 29-31, 41, 194-210, 216.
than Cavers himself, the early conflicts agnostic, took him to task for destroying conflicts without offering a "substitute order," and expressed serious doubt that such vague standards as "social and economic considerations" can be of much help. In a little-known later piece, Cook significantly moderated his position so that he may now be better classified as a traditional common-law-type reformer rather than as an agnostic.

One of the main tenets of conflicts agnosticism, especially that of Cook when he joined the chorus against the "vested rights" approach, is that states and nations are free to establish their own conflicts systems as they choose. This is because there are no significant international obligations in this field and, within the United States, the related constitutional requirements are minimal. Assuming for the sake of the argument that these propositions are true, it still does not follow that a state should adopt a posture of unilateralism that abandons comity and the search for just conflicts rules. Even if a state has the power to apply its own law to every case that comes before its courts, it would not be reasonable to apply its law to events and parties not connected to the state. Ignoring considerations of fairness to the parties and of respect for the comparable powers of other states not only would lead to injustice, but would invite retaliation to the detriment of everyone. In other words, a state cannot avoid facing the choice-of-law question on a theory that the absence of international or constitutional mandates enables it to be agnostic and not have conflicts rules. After all, applying forum law in every case is a "comprehensive default" conflicts rule of the most certain and parochial kind.

C. Handling the "Escape Clause" Conundrum

Conflicts agnosticism, especially that of Cook, has been reinforced by the perception, extracted from a few rather aberrational cases, that the three "escape clauses" of traditional conflicts—characterization, public policy, and renvoi—enable any manipulator to bypass every purported conflicts rule or principle at will. In a certain sense, the "escape clauses" logic denies the possibility of


In attacking the infallibility of categories and of rules and principles, there is no intention to deny that we have them or that they have utility. Indeed, they are indispensable. The aim is merely to point out their nature and limitations. When a "new" situation presents itself to a court for decision, existing rules and principles do not automatically give an answer. Intelligently used, they help us to seize upon those elements in the "new" situation that need consideration, and to evaluate them in the light of past experience. The result is, most emphatically, not "chaos," or anything approaching it. Our legal "rules" and "principles" will give us the answer to the vast bulk of human transactions; only a small number will present new and unusual aspects.

Id. at 418-21.
having both rules and exceptions to the rules, hardly a tenable proposition. At best, this argument is grossly exaggerated. Indeed, it is the agnostic conflicts theories themselves that give the green light to judges to engage in the grand escape of doing justice in the individual case, or choosing the better law or considering the social and economic factors, without any guidance.

Beginning with characterization, there is no question that, in substantive law, key categorizations are constantly being made; for example, we distinguish between torts and contracts, and substance and procedure. To be sure, these distinctions are neither perfect nor fool-proof, but they do help us differentiate among situations and handle most issues, most of the time, in an orderly, predictable way, taking into account the social policies underlying the various fields. Conflicts simply takes over these categories in a broad-minded way and attaches choice-of-law consequences depending on what are considered to be the most suitable connectors. If substantive law were to drop such characterizations, conflicts certainly would follow suit, but not before then.

Mass accidents present difficult questions of characterization under products liability because in many factual contexts the claimant may be able to pursue both contractual and tort theories of recovery and remedies. The Project properly takes account of both this reality as well as that certain types of insurance, investment, and franchising contracts have an interstate dimension, by providing two compatible, but different, conflicts systems. Section 6.01 for torts and Sections 6.02-6.03 for contracts. In addition, it deals with limitations, remedies, and general procedure separately in Sections 6.04-6.07.

The public policy exception to the application of a particular foreign law, when it is fundamentally inconsistent with the forum’s notions of justice, is recognized world-wide. It has been so rarely used by our courts, however, that it is surprising that it has been included in the list of purported subterfuges. The Project does not refer to it expressly, but leaves a small opening for it under the general exception of “avoiding arbitrary results” where foreign-country law is involved. 29

For a long time, there has been a pervasive rejection of renvoi on general principles in American conflicts law. Thus, to treat the Project’s rejection of renvoi as a significant escape clause is making a mountain out of a molehill. 30

D. Opting for Policy and Party Neutrality

The idea that the conflicts process may be geared to favor certain substantive outcomes is not new, but it always had a very limited scope. The typical example is an alternative reference rule that validates a will as to form if it complies with either the law of the place of execution or of the domicile of the

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29. Proposed Final Draft, supra note 2, § 6.01(d), cmt. d, at 433.
30. Proposed Final Draft, supra note 2, Ch. 6, Intro. Note, cmt. c, at 392, referring to a chosen state’s “internal law.”
testator, or the law that governs substantive validity. The assumption is that all states have a common policy of effectuating the intentions of a testator and of choosing substance over form, justifying a meta-conflicts rule that chooses the validating substantive law of any state having some significant contact with the testator or with the will. On similar reasoning, it has been argued that a “rule of validation” ought to extend to most voluntary transactions, especially contracts, but such an approach is not persuasive. No similar consensus exists here because this approach would potentially subvert basic invalidating policies of the state of the otherwise applicable law. The Project does not include any contract-validating preference and this is a reasonable choice.

A more controversial issue is whether tort plaintiffs should receive a conflicts break on the theory of a common interstate policy favoring the spreading of losses through “compensation.” Professor Russell J. Weintraub supports a presumption favoring it on the theory that it reflects the direction of modern tort law, a proposition less credible now after the wave of restrictive statutory tort reform in many states. Whether this idea has merit is debatable and an analogy from contracts will not help since, in contracts appears validation consistent with the intention of all parties and the priority of substance over form in a win-win context, whereas in torts, the parties are typically unconnected and have no common interests, being in a win-lose situation. In any event, favoring compensation is not very sensible in situations not limited to a simple personal tort claim arising, for example, in a car accident involving two persons. Where product liability is at stake, the ultimate effects of providing compensation are not confined to the transfer of wealth from an actor to a victim merely to redress individual harm. Decisions on whether there is liability, and for how much, are bound to transcend the interests of the particular litigants and affect the practices of entire industries, with repercussions for the economy in general.

Another reason why the principle of compensation is questionable is that it addresses the loss situation ex post (after the event), rather than ex ante, as it should be. In many situations, it is quite possible that the plaintiff had been already compensated ex ante for assuming the risk, for example, by paying a lower price for the product. Favoring recoveries in the form of tort damages undermines other options of handling losses—social or first-party insurance—and reduces opportunities to use resources in the marketplace to satisfy other preferences.

In conclusion, I disagree with the proposals of Weintraub and Cavers,

32. See Proposed Final Draft, supra note 2, § 6.02, Reporter’s Note 3 to cmt. a, at 447.
33. Weintraub, supra note 30, at §§ 6.4 and 6.32, at 284-85 and 359-61. See also Cook, supra note 22, at 345.
34. See infra text at 17.
35. Weintraub, supra note 30, at 359-61.
which have not received much explicit recognition in case law, to adopt alternative reference rules giving the tort plaintiff certain choices, however few and circumscribed, among the potentially applicable law. I applaud the decision of the Project to maintain strict policy and party neutrality. Such neutrality is further reinforced by the fact that, by its very nature, the Project eliminates horizontal forum shopping for favorable conflicts rules, a practice used to hunt for pro-plaintiff outcomes. Conversely, the preference of the Project for a single substantive law to govern all of the issues raised with respect to each defendant, not plaintiff, should not be interpreted as being biased in favor of defendants. The conflicts philosophy of the Project is based on the concept of mutuality—the idea that both the claimants and the respondents must have some purposeful connection with the state of the applicable law. Since, in mass tort and contract cases, it is typical for many persons to assert similar claims against one defendant, it is not inappropriate to aggregate the issues for conflicts purposes by reference to such defendant.

E. Avoiding the Wrong Turns of Interest Analysis

The agony and ecstasy of interest analysis is too long a story to recite in the present article—I have dwelt on it at some length elsewhere. Incidentally, but for the brilliance of Brainerd Currie and the favorable climate at the time for iconoclastic attacks on the traditional doctrine, this approach would have attracted much less attention. But, in view of its impact on the American scene and the references to state “interests” in the Project, a brief visit here is clearly justified.


37. Professor Weintraub has recently moderated, if not reversed, his pro-recovery advocacy. See Russell J. Weintraub, An Approach to Choice of Law that Focuses on Consequences, 56 Alb. L. Rev. 701, 719-20 (1993).

38. “[F]ederal choice of law rules should not be designed with the objective of promoting substantive preferences for one party rather than the other . . . . A decision to favor either plaintiffs or defendants is perfectly legitimate when a state decides to develop choice of law rules reflecting a substantive policy decision properly within its control. However, federal choice of law rules for complex litigation should not be based on similar determinations. Their purpose is to identify when conflicts exist between states having regulatory interests in particular litigation and to resolve those conflicts among the affected states.” Proposed Final Draft, supra note 2, at 387-88. It is also worth noting that the Hague Convention on the Law Applicable to Products Liability, 11 Int’l Legal Materials 1283 (Nov. 1972) [hereinafter the “Hague Convention”], now in effect among many European and some other states, is also basically policy and party neutral, with the minor exception of Article 6 which gives the claimant a choice between the law of the defendant’s principal place of business and the law of the place of injury in the rare situation not covered by the main choice of law rules of Articles 4 and 5.

39. Proposed Final Draft, supra note 2, Ch. 6, Intro. Note, cmt. c, at 388; id. §§ 6.01(a) and 6.03(a).

On the one hand, interest analysis points to certain unimpeachable propositions, such as that if the legislature determines the conflicts reach of a statute, the courts should obey; and, generally that the courts are bound to apply the law of their own state and it is only through that law that foreign law is accessed. Consistent with these propositions, this theory not only points to the empirical fact that courts gravitate toward the law of the forum for reasons of familiarity and efficiency, but also takes the position that this is justified because the law of the forum is presumptively applicable as the default law, unless and until it is displaced by another law. Another uncontroversial proposition is that the law pursues policies which may be discovered in the process of interpretation, mainly through teleology.

The trouble with interest analysis starts with methodology. It invokes ordinary "statutory interpretation"\textsuperscript{4} in an ad hoc way to figure out the reach of the law on a provision-by-provision and case-by-case basis and eventually ends up rejecting conflicts rules and even a separate conflicts system of any kind.\textsuperscript{42} This is troublesome because actual legislative intent on these kinds of issues is virtually nonexistent, given that legislators typically think of the domestic situation only—which involves local people and local events—hence such an approach is an exercise in futility. Furthermore, and even worse for interest analysis, legislators normally assume that the choice-of-law questions will be answered by the separate conflicts doctrine developed by the courts in the common-law tradition so that its conflicts hihilism is antithetical to the legislative expectations.

In the face of these unpleasant realities, interest analysis changes its color and takes the mantle of a revolutionary normative doctrine. It argues that the legislators should use the choice of law process to vindicate state "interests" and that, most importantly, in the absence of actual legislative intent on the reach of a statute, the courts should use interest analysis on an ad hoc basis in every multistate case.

The problem with these "interests," as defined by the dogma of interest analysis, is that they are not only elusive, but also potentially malignant. In the public and even in the regulatory law fields, the choice of law question does not arise at all: the only issue is how far does the domestic law apply, labelled the question of "extraterritoriality." Public law has the capability of applying globally to the maximum extent permitted by constitutional and the (minimal) international law rules. The first major wrong turn of interest analysis was to posit that states have certain kinds of interests, in the public sense, rather than policies or powers, which can help define the territorial and personal reach of their private law where the conflicts process operates. But, the typical characteristic of private law (contracts, torts, estates, property, domestic relations, and commercial transactions) is the absence of state interests and the predominance of considerations of justice between the parties. It was in this context that the United States Supreme Court has used state interest language to inform constitutional scrutiny under The Full Faith

\textsuperscript{41} Brainerd Currie, Selected Essays on the Conflict of Laws 185 (1964).

\textsuperscript{42} Id. at 183.
and Credit and Due Process Clauses: where a choice is indicated, a state has the legitimate power to apply its own law, to the exclusion of another state's law, to any situation which has minimum personal or territorial contacts with the state.\textsuperscript{43} However, even where a state has the power to apply its law imperially to the world, it does not follow that it should do so in every instance. This is precisely where the conflicts question arises. In the regulatory field, the Restatement (Third) of the Foreign Relations Law of the United States addresses extraterritoriality and provides that while a state may apply its law in all situations where there are some contacts with it, it should not do so where other states are also involved, if that would be "unreasonable" on the basis of a balancing test.\textsuperscript{44} This requirement of reasonableness based on comity would have applied in the realm of conflicts even if the distinction between public and private law were disregarded. Comity in conflicts extends not only to restraining the applicability of domestic law extraterritorially, but also affirmatively applying foreign law where the balance leans in that direction. The fault of interest analysis is that it took a concept used to establish state power—what a state may do—and used it to answer questions relating to comity and reasonableness—what a state should do—especially where other states are also involved.

Even so, this wrong turn would not have been as harmful had the idea of "interests deriving from contacts" been implanted in an environment of comity and forum neutrality, and cultivated to produce reasonable guidelines, predictable and reciprocal, to lead us out of the conflict of laws labyrinth. In other words, it is quite sensible to take the position that private substantive laws pursue policies; that states normally expect that their own sense of justice should apply in every case before their courts; and, that in multistate situations, where the law of another state may be invoked, the contacts of the parties and the events may be used in a systematic and reciprocal way to determine the extent of the applicability of each state's law, in light of these policies and considerations of fairness to the parties.

Instead, in interest analysis, the residual preference for forum law became a dominant choice; the notion of reciprocal, neutral rules of conflicts became an anathema; and, in an environment of ad hoc unilateral quests for speculative state interests, the spirit of parochialism was reinforced with the pernicious idea that the state should manipulate conflicts in a selfish way to enrich itself and its people, for example, by favoring tort recoveries by persons residing or injured in the state. As a result, interest analysis became a system worse than a pure and simple application of the law of the forum, which is not only party-neutral but predictable and efficient as well. The fact that interest analysis provoked us to retrace conflicts theory all the way down to its roots, and helped recognize the importance of personal and extraterritorial contacts, is not enough to offset the wrong directions and confusion that it has generated. Attempts to moderate it

\textsuperscript{44} Restatement (Third) of the Foreign Relations Law of the United States §§ 402-03 (1987).
in the enlightened direction of reciprocity—for example, through a "comparative impairment" variation—are quite welcome. But, these attempts still suffer from their commitment to pursue state "interests" in an ad hoc way for the purpose of discovering not what is fair to the parties in view of the alignment of the various contacts, but which state order will be offended "more" if its law was not applied in a particular situation.

The Project treads carefully in the realm of interest analysis. This may be, in part, explainable as a response to the "conflict incorrectness" of ignoring or attacking it, especially as the objective is maximum consensus. In terms of fundamentals, however, the Project totally rejects the ad hoc, provision-by-provision, case-by-case exploration central in interest analysis. Instead, it proceeds to adopt precise, reciprocal, comprehensive conflicts rules which will lead to predictable outcomes in most instances and also be less vulnerable to subversion through exceptions. The most harmful and destabilizing exception concerns the language, "unless another state has more significant relationship," which is determinable under a smorgasbord of vague standards in the manner of Section 6 of the Restatement (Second) of the Conflict of Laws. The outcomes may be qualified only to the limited extent appropriate to "avoid unfair surprise or arbitrary results." This is basically intended to vindicate the concerns of the parties instead of the state, thus protecting the defendants from unforeseeable laws and the plaintiffs from foreign laws that are fundamentally less protective of tort victims and thus contrary to public policy. These rules are bilateral and policy and party neutral and, in addition, they do not refer to the forum as a relevant consideration. On the contrary, a policy against forum shopping, which is notorious and accepted in interest analysis, is articulated in the commentary. In terms of theory, the Project accepts the idea that state laws pursue substantive "policies," but makes clear that whether such policies will be effectuated in particular contexts depends upon the various contacts of the relevant persons and events. While it also uses the term "interest" in the comments to describe the connection between the policy and the contacts, it emphasizes that the selection among competing states must be "principled" on the basis of fair and neutral criteria. The Project also does not miss the

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45. William F. Baxter, *Choice of Law and the Federal System*, 16 Stan. L. Rev. 1 (1963). The terminology of "comparative impairment" has found its way into the recent Louisiana codification of some of its torts conflicts law in a unilateral mode, especially in the General Rule of Article 3542 and in the escape clause of Article 3547 of 1991 La. Acts No. 923. The Reporter cautions us, however, not to assume that the terminology carries with it all the baggage of the Baxter proposal, which had an interest analysis point of departure. Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 Tul. L. Rev. 677, 689-92 (1992). Indeed, a perusal of the new provisions clearly shows not only that they are contact-policy based, but also contain specific rules which cover automatically, or at least presumptively, certain common situations.

46. See, e.g., Restatement (Second) of the Conflict of Laws (1971); Proposed Final Draft, *supra* note 2, § 6.01(d), cmt. d, at 430-34.

47. Proposed Final Draft, *supra* note 2, Ch. 6, Intro. Note, cmt. a, at 376-80.

48. *Id.* Ch. 6, Intro. Note, cmt. b, at 384, and cmt. c, at 392-93.
opportunity to take a swipe at the "intrinsic indeterminacy" of interest analysis.49

In the text of the various Sections, the reference to state "interests" is minimal and perfunctory. In contracts, the word "interest" does not even appear. Section 6.02 gives broad scope to party autonomy to choose the applicable law, which interest analysts view with suspicion, and allows a departure from it only where such law is "in material conflict with fundamental regulatory objectives" of the state of the otherwise applicable law. Where no choice has been made by the parties, Section 6.03(b) lists four factors, referring respectively to the places of contracting, performance, location of subject matter, and primary business or habitual residence of the parties. If, among the states of these contacts, only one state's regulatory policy will be furthered by application of its law, then the court will choose such law. Otherwise, the court must apply the law of the state where the common contracting party has its primary place of business, with certain exceptions in favor of the law of the state of performance, or of the habitual place of residence of the other contracting parties. Comment (a) makes clear that this process is intended to operate in a "significant contacts" mode in accordance with the Restatement (Second) of the Conflicts of Law,50 not under interest analysis.

For mass torts, Section 6.01 basically follows the pattern of Section 6.03. The four general factors listed in Section 6.01(b) are the places, respectively, of injury, conduct, primary business, or habitual residence of the parties and if, among these states, only one has a regulatory policy which will be furthered, then its law will be chosen. Quite importantly, Section 6.01(c) lists four precise combinations of these factors which control the selection among the laws of the "interested" states. These four combinations operate in an automatic mode—pointing to specific results and leaving no openings for subjective or interests-oriented judicial discretion—in the following order of preference: (a) place of injury plus conduct (Section 6.01(c)(1)); (b) primary place of business or habitual residence of all plaintiffs plus defendant (Section 6.01(c)(2)); (c) primary place of business or habitual residence of all plaintiffs plus injury (Section 6.01(c)(3)); and (d) place of conduct, provided that where the relevant conduct occurred in more than one state, the place where the conduct has the "most significant relationship to the occurrence" prevails (Section 6.01(c)(4)). As explained earlier, the possibility of escaping from this concatenation of factors under Section 6.01(d) is very limited and party-oriented (avoiding unfair surprise or arbitrary results) and leaves no opening for any of the "modern" conflicts deviations, especially interest analysis.51

Section 6.06, which governs punitive damages, also basically operates in an automatic manner, depending on the concentration of specified contacts. Section 6.05, which governs monetary relief, generally adopts the law that governs substance, with a garbled exception in (b) for situations where the monetary relief

49. Id. Ch. 6, Intro. Note, cmt. c, at 386.
50. Id. § 6.03, cmt. a, at 458-62.
51. Supra note 48.
issues involve policies different from those underlying the liability issues and the Section 6.01(c) factors would ignore the policies of interested states. This exception should apply very rarely, in view of the fact that Section 6.01(c) puts so much weight on plaintiff-related connectors such as place of habitual residence of plaintiffs and place of injury.

F. Joining the Trend Toward Articulated, Significant Territorial and Personal Contacts

It should be clear by now that the Project has sought and succeeded to avoid the disorientations produced by the so-called "modern conflicts" theories, setting up a system of rules based on recognizable and easily identifiable territorial and personal contacts which by themselves cover most situations. In other words, the Project transcends the dreamworld of selecting the applicable law on some theory of merit, ad hoc intuitions, and selfish interest analysis, or by parochial preference for the law of the forum. Instead, it returns to the primordial and elementary notion that the contacts of the persons and the events with a particular state undergird that state's assertion of authority to apply its law with due deference to the comparable claims of other states. Such an approach, which deserves the venerable name "grouping of contacts," is closely related to, but even tighter than, that of the Restatement (Second) of the Conflicts of Law and very much in line with the trend in recent caselaw.2

The Project goes a long way toward achieving its proclaimed goals of predictability, efficiency, and neutrality. In the rest of this article, I will address the question whether it has made the best choice of connectors in a well crafted way, concentrating on the provisions dealing with mass torts.

III. CHOICE OF LAW FOR MASS TORTS: ECLECTICISM OR SEARCHING FOR THE MOST PROPER LAW?

While the general conflicts approach of the Project appears wise and sensible, there are problems in execution, hence the reference to a "glass half full." Section 6.01, in particular, is not perfect. First, its aim is not sufficiently

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focused. It is good for torts in general, but not custom-made enough to fit the
typical mass torts in consolidated cases. Second, the key connectors in this field,
in light of the pertinent substantive policies, are not adequately highlighted, while
certain peripheral factors are included in an excessively eclectic environment.

Starting with the issue of particularization, one of the justified criticisms
against the Restatement of the Conflicts of Law (1934) was that its connectors—for example, place of the wrong—were too general and thus applicable to
overly broad categories—for example, torts as a whole. In special situations
such as mass torts, especially where product liability is at issue, which lie at the
heart of Section 6.01, the conflicts rules should have been drafted to fit the
prototypical patterns. This process requires both an understanding of the types
of conduct and effects that predominate in this narrow field and an exploration
of the related substantive policies.

Mass product-liability torts in the United States basically fall into two major
patterns. First, persons located in many states are injured at different times in
separate occurrences, but in a similar way, by the use of an identical product
which was usually acquired in the state of injury by local residents. The design
and the production of the particular item, however, had been decided upon and
carried out by one company, or a group of related companies, not necessarily in
the states of the injury. Injuries from pharmaceutical and most consumer
products fall into this category. Another significant group of products, namely
industrial machinery and equipment, display comparable characteristics, except
that the aquirer of the product is the employer of the user instead of the user.

The second major pattern covers the so-called “single accident” event where,
again, many persons are injured or die, but at the same time and in the same
occurrence. The product in question is, again, normally interstate in the sense
used above, although it is possible that more than one producer participated,
especially by supplying parts. Whether or not the victims are also from many
states and involved in interstate activity depends on whether the event is, for
example, an air crash or a boiler explosion. But, in neither case did the victims
acquire the product themselves from the producer or its chain of distribution.

Another way of subdividing product-liability mass torts is by reference to
whether or not the victims and the producer had dealt with each other, directly
or indirectly. In the dispersed-event situation, the answer is usually affirmative,
whereas in the single-accident event, especially the local one, many victims are
just “bystanders.”

Before proceeding to the assessment of particular conflicts rules, it is
important to consider the perspectives of the parties and the states in these
contexts. In virtually all of the above situations, the ideal conflicts perspective
of the victim-plaintiff is simple and singular: adequacy of compensation,
measured under the law of his own state, where the long-term effects of the loss
are likely to come to rest. For the same reason, the victim’s state may assert a
parallel claim of authority. In the easy situation where the victim acquired the
product through commercial channels his own state and the accident took place
there, as is often the case, there is an overwhelming consensus that the local law
should apply. This result will also be reached under Section 6.01(c)(3) where all the plaintiffs so qualify.

At the other end of the spectrum, if the habitual residence of the plaintiff is the sole connector with that state, its significance should be minimal not only because the related events—for example, conduct and injury—are located elsewhere, but also, and very importantly, because it is unilateral—and not related to the defendant. In other words, there is a strong requirement of reciprocity in the contacts that support the choice of a particular law. Unilateral contacts of a plaintiff are clearly insufficient to trigger the application of favorable law to his claim (compare the "passive personality principle" of legislative jurisdiction, which is generally disapproved in international law) and unilateral contacts of the defendant also do not suffice to protect him or even to burden him, except where outrageous conduct is to be deterred or there is a likelihood of effects on local victims.

A special, but common, conflicts situation is presented by the pattern in which the product was acquired in the market of another state under circumstances indicating that it was likely to be used there. It seems that the primary application of the law of such a state would be supportable on deterrent (regulating conduct likely to have local effects) and ex ante compensatory (providing for the likely local effects) grounds. But, most importantly, and beyond the interests of actors and victims, the standards of safety and compensation applied to a product vitally affect its price and its availability; the state of marketing has the paramount claim to set them as it sees fit in the interests of its consumers and its economy in general. Neither the producer, whose product was made available in the state through commercial channels, nor the victim, who went there to acquire the product, may complain that they had no purposeful affiliation with the state. However, the text of Section 6.01 does not make any reference to the law of the state of commercial distribution—at least directly. This may be understandable, but not necessarily justifiable, under the single-substantive-law goal of the Project since, in the consolidated dispersed-events cases, multiple plaintiffs typically acquired the product in many markets. It would seem that the best way to pursue the single-law goal in this context is to subdivide the classes rather than force uniformity of law on diversity of fact.

The conflicts angle must be looked at next from the perspective of the defendant because the issue of whether it is fair to apply a certain law to a party is most significant where such party will be charged with a burden rather than receive a benefit. Indeed, applying a law against a party which has no purposeful affiliation with the state is probably unconstitutional.53 The perspective of the defendant is more complex because, behind the defendant, a host of other categories of persons and interests bear upon the ultimate consequences. In the product liability mass tort, the transfer of wealth from actors to victims is not all that is at stake. The outcome of discrete litigation is

bound to have pervasive effects on the safety standards and costs of production of entire industries, intersecting with government regulation, as well as on prices, thus affecting consumers as a whole. Also, the question of how acceptable risk will eventually be handled extends beyond mere compensation into insurance, first or third party, and even touches on general considerations of public welfare. Less directly, the impact is likely to be felt by laborers, investors, lenders, and other participants in the production process, as well as taxpayers. These consequences are likely to have a multistate dimension.

While the state of the primary place of business of the defendant manufacturer may legitimately assert a concern for the defendant’s general welfare, it can hardly claim the power to shield the defendant from liability for activities which occur or have direct consequences in other states. Conversely, it makes little sense to argue that because such manufacturer is familiar and generally complies with the private laws of the state of his primary place of business, those laws follow him around the world and he must obey them when he acts or produces direct effects abroad. A state would assert extraterritorial regulatory power against such a person only where its vital public interests are concerned, which is not the case here. Thus, the primary place of business of the defendant, especially when standing alone, is the typical unilateral contact which should not be used either against or for the benefit of an unrelated plaintiff. Nevertheless, Section 6.01(b)(3) lists the primary place of business of the defendants among the relevant conflicts factors. Section 6.01(c)(2) even directs that, where the place of conduct and injury do not coincide, the applicable law is that of the state where the defendant and all the plaintiffs have their primary place of business or habitual residence (states with the same law being counted as the same state) regardless of the location of the relevant events and transactions. While this residual “common domicile” type rule may be plausible in ordinary tort situations, it is questionable in the typical product liability context where the actor and the victim had dealt with each other in the market where the product was acquired. That common party-transactional connector appears more directly related to the claim and, furthermore, the application of the law of that state would vindicate its primary regulatory powers over the local markets and economy.

Another connector of the defendant, namely the place or places where the product was made (designed and/or manufactured), has received some support in the literature and in a few cases. It is on this issue that I have expressed

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the strongest dissent in various publications.\textsuperscript{55} In a nutshell, I argue that the mere designing or manufacturing of a product generates no danger of any damage or injury from the product to anyone. The product creates risks only when it is placed in circulation—in the hands of potential users—and this occurs in the place of its marketing or distribution. Consequently, the state where a product is made for sale abroad has no reason whatsoever, with very rare exceptions,\textsuperscript{56} to regulate its safety features or the related liabilities. Recognition of this fact is important for at least three reasons. First, it is obvious that such state has no effective power to force on other states a reduction of the standards and liabilities attaching to such products. Second, an attempt to increase standards and liabilities will add burdens on its own people and provide windfalls to others without good cause. Third, regulating standards and liabilities will prevent a state's own producers from custom-making products to serve particular foreign markets, affect what is available in such markets, and the price of products, thus overriding the laws of the market state where the key transactions and events are centered. A producer should be free to make, in one place, different products for different markets or, in many places, the same product for one market, in compliance with each market's requirements. Downgrading the place of making also alleviates the problem of differentiating between defects in production and defects in design. Another incidental complication from using this connector is that design and production often take place in many states. The problem is multiplied where the product, such as an airplane, has separate component parts.

The Project does not address the place of design or manufacturing directly. This sounds like a good idea, until it is realized that this factor may come in through the back door of the place of conduct. Thankfully, certain clarifications in the comments appear to close this door in the important dispersed mass torts field.

In Section 6.01, the place where the defendant "acted" plays a significant role. Indeed, the comments advance the dubious proposition that "most of the tort rules that will be at issue are directed toward conduct regulation rather than loss allocation."\textsuperscript{57} In terms of the particulars, first, conduct is specifically included in the list of the relevant connectors in Section 6.01(b)(2). Second, when coupled with the place of injury, conduct provides the first and principal automatic choice of tort law rule of the Project under Section 6.01(c)(1), along the lines of Section 146 of the Restatement (Second) of the Conflict of Laws.

\textsuperscript{55} See Kozyris, supra note 1, at 499-501 and Kozyris, supra note 39, at 586-87.
\textsuperscript{56} E.g., involving extraordinarily dangerous products such as weapons and narcotics where the state of making may wish to control them in a global fashion. See Kozyris, supra note 1, at 501 n.52.
\textsuperscript{57} Proposed Final Draft, supra note 2, § 6.01, cmt. a, at 399.
Third, conduct becomes the residual single automatic choice of law rule under Section 6.01(c)(4) where the other combinations of factors are not present.

The key question thus becomes what type of conduct are we talking about? Section 6.01(c)(4) anticipates that all kinds of conduct may be relevant and provides that "when conduct occurred in more than one state," we choose the one with the "most significant relationship to the occurrence." In the comments, the places of manufacture and design are included among the places of conduct,\textsuperscript{58} but so are the places of distribution and marketing.\textsuperscript{59} Which place is more significant in product liability mass torts? At least for the dispersed, rather than single-event, mass torts, the comments give some very specific and welcome guidance that deserves quoting:

[T]he need to formulate rules premised on factors or contacts general enough to be relevant in either [single-event or dispersed tort] situation necessitates eliminating certain formulations that might be viewed as more refined and clearer. . . . A choice of law rule for products liability cases could be modelled much like the one set out in this section, except that rather than focusing on the place of defendant's conduct as provided in subsection (b)(2), reference could be made to the place where the product was first acquired through commercial channels, or to the place of injury if the product were distributed regularly there.

The application of the rules set out in this section should not produce results different from those obtained under these more precise approaches.\textsuperscript{60}

It is hoped that this gloss on which conduct is predominant in dispersed mass torts will answer the "most significant relationship" question in Section 6.01(c)4 once and for all, eliminating the underlying ambiguity. Furthermore, it should also inform the application of the conduct connector in Section 6.06, dealing with punitive damages, where it plays an even more important role.

Potentially the most harmful ambiguity in the Project, when coupled with the ambiguities about whether the key relevant conduct consists of the introduction of the product in the market, is the failure to recognize loudly and clearly the "commercial unavailability" defense against the otherwise applicable laws, which occupies a prominent place in most comparable texts and in the related literature. For example, Article 7 of the Hague Convention trumps the law of the states of the injury and of the habitual residence of the plaintiff if the defendant establishes that "he could not reasonably have foreseen that the product or his

\textsuperscript{58} Id. § 6.01, cmt. a, at 406, cmt. b, at 415-16, and cmt. c, at 420-22.
\textsuperscript{59} Id. § 6.01, cmt. a, at 406, § 6.01, cmt. c, at 420. Some tantalizing ambiguity is evident, however, in passages which put distribution and marketing aside, id. § 6.01, cmt. a, at 405, or arguably consider them as connected more to injury than conduct, id. § 6.01, cmt. c, at 420.
\textsuperscript{60} Id. § 6.01, cmt. a, at 406-07.
own products of the same type would be made available in that State through commercial channels;" Louisiana Civil Code article 3545, which replaced Articles 14 and 15, excludes the application of Louisiana substantive law to a products liability claim "if neither the product that caused the injury nor any of the defendant's products of the same type were made available in this state through ordinary commercial channels;"61 in the detailed Weintraub proposal,62 the foreseeable availability of the product or products of the same type through commercial channels is a significant factor; and, in the Cavers proposal, a total defense to an otherwise applicable law is available to the producer who "establishes that he could not have reasonably foreseen the presence in that State of his product which caused harm."63

The Project apparently subsumes the commercial unavailability defense under the general escape clause, or safety valve, of Section 6.01(d), which allows the court "when appropriate to avoid unfair surprise or arbitrary results" to choose the applicable law either on the basis of factors additional to those in Section 6.01(b) or in a different order of preference than that of Section 6.01(c). In Comment (d), commercial unavailability is linked to unfair surprise in the following way:

If a defendant could demonstrate that it was not reasonably foreseeable that the designated state's law [place of injury and habitual residence of plaintiffs] would control its potential liability because it did not place any of its products into the stream of commerce in that state, then it might be deemed arbitrary to allow that state's law to govern. Instead, the court might apply . . . the law of the state where the defendant's conduct took place for purposes of adjudicating those claims.64

On one hand, this clarification is quite potent in the right direction, especially if the relevant conduct focuses on the place of distribution rather than the making of the product. On the other hand, it is diluted by the language that follows, which suggests that this exception will apply rarely because, in mass tort situations, the defendants are likely to have placed their products into the national market and obtained nationwide insurance.65

The Project apparently assumes, in line with most of the other approaches, but not that of Cavers, that it is not necessary that the specific product which caused the harm became foreseeably available through commercial channels in the state of the otherwise applicable law. It suffices if similar products of the same defendant meet that criterion. I suggest that this represents too limited a

63. Cavers, supra note 35, at 728-29.
64. Proposed Final Draft, supra note 2, § 6.01, cmt. d, at 432. See also id. § 6.06(c) referring to foreseeability in the context of liability in punitive damages.
65. Id. § 6.01, cmt. d, at 432.
view of the appropriate scope of that exception. It seems that the main reason
the defense of commercial unavailability is recognized is to protect the defendant
against the application of an unexpected and improper law under the circum-
cstances. Imposing liability on a manufacturer under the law of state $X$ for a
product introduced in the market in state $Y$, a no-liability state, just because his
similar products are marketed in $Y$, and there are some other connections there,
is akin to taking into account the law of a state where he does business. This
idea is disapproved by the Project, and discourages the manufacturer from
tailoring his products to the specifications of particular markets, to the detriment
of international trade especially. Incidentally, from the fact that insurance would
cover certain liability, it does not follow that there should be liability.
Maximizing liability because of insurability merely increases recoveries and
spreads the losses. This result is not necessarily consistent with the aims of the
applicable substantive law. Perhaps one imaginative way of enlarging the scope
of the non-availability defense, despite the “similarity” qualification, is to read
“similar” to mean “having identical features,” which would at least exclude the
design-defect situations.

The main thrust of my friendly overall critique of the specific provisions of the
Project stems from a disagreement on whether the connector “place of commercial
distribution of the product which caused the harm” should be treated as peripheral
or central. My argument in favor of the latter in the dispersed mass tort context,
where typically the producer and the victim dealt with each other directly or
indirectly, reflects considerations of reciprocity and fairness to the parties. This
preference rests on the fact that that place is the common place where the product
was marketed, where the parties connected with each other, and on the legitimacy
of such state’s primary regulatory power over the legal regime that governs
transactions in its markets. In addition, the emphasis on this connector serves the
interests of efficiency and simplicity because it enables us to encapsulate the entire
conflicts system for product-liability dispersed mass torts within a rule focusing on
the state of the original delivery and intended use of the product where the harm is
also likely to occur. While the centrality of the place of distribution is not
congruent with the pursuit by the Project of the “single-law-for-each-defendant”
idea, a reasonable accommodation comes in the form of subdividing the claims into
state-by-state classes. Assuming that the laws of many states are similar on many
of the issues, this should not result in excessive fragmentation in consolidated cases
and is a decent price to pay for a tailor-made choice of the applicable law.

For single-event torts and in all instances where the victim had no connection
with the defendant, the provisions of the Project make reasonable sense, especially
to the extent that they rely on connectors such as the place of the harm and the place
of the habitual residence of the victim, assuming that the requirement of reasonable
foreseeability of the presence of the product there is observed.

66. Id. § 6.01, cmt. a, at 404-05.
67. For a model version of such a rule, see Kozyris, supra note 1, at 506-07.
The Project provides us with a good opportunity to review the conflicts rules, standards, and paradigms that are pertinent to interstate mass torts and contracts, especially in the context of products liability. The need for some form of catharsis, if not purgation, in conflicts has never been greater in view of the accumulation of the debris of theories that failed to deliver. The failure is due in good part to the utopian project of escaping from the twin pillars of choice of law, territory and citizenship, or local and personal affiliation. The specific and comprehensive provisions of the Project evidence a welcome decision to transcend the vague, subjective, and convoluted ad hoc methods advocated by the “modern” conflicts theories and to generate choice-of-law legal norms to cover most situations in principled, predictable, efficient, and intelligible ways. Thus, the provisions before us are amenable to concrete discussion and commentary, including the possibility of agreement or dissent. In addition, the Project basically aligns itself with the desirable conflicts objectives of party, policy, and forum neutrality, and bilaterality of the rules. In other words, the Project’s orientation is ex ante principle, not ex post intuition. My main, and predictable, reservation about the specific choice of connectors made by the Project for products liability concerns the failure to explicitly recognize the importance of the place of the commercial distribution and probable intended use of the product in the dispersed mass tort context. However, while this contact is not expressly included in the initial list of the relevant connectors or as a defense to the choice of another law, a major door is left open for its introduction indirectly under the connector of the “conduct” and through the defense of “unfair surprise.” It is to be hoped that Congress and the courts will take the Project seriously into account, including its conflicts provisions, and that they will support and apply it in a manner that will combine conflicts fairness with adjudicatory efficiency.