

Choice of Law

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Patterns, Arguments,
Practices

Joseph William Singer

BUSSEY PROFESSOR OF LAW
HARVARD LAW SCHOOL



CAROLINA ACADEMIC PRESS
Durham, North Carolina

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ISBN 978-1-5310-1652-4
e-ISBN 978-1-5310-1653-1
LCCN 2020933808

Carolina Academic Press
700 Kent Street
Durham, NC 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.caplawn.com

Printed in the United States of America

For Symeon C. Symeonides

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- S**
- Saharceski v. Marcure, 366 N.E.2d
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 Schiele v. Charles Vogel Manufacturing
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 State v. Mallan, 950 P.2d 178, 189–190
 (Haw. 1998), 514n732

- State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003), 193
- Stearns v. Metropolitan Life Ins. Co., 117 N.E.3d 694 (Mass. 2019), 531n
- Steele v. Bulova Watch Co., 344 U.S. 280 (1952), 13
- Strate v. A-1 Contractors, 520 U.S. 438 (1997), 507–508, 511, 559, 561
- Succession of Miller v. Moss, 479 So. 2d 1035 (La. Ct. App. 1985), 386–389
- Sullivan v. Burkin, 460 N.E.2d 572 (Mass. 1984), 410–411
- Sun Oil v. Wortman, 486 U.S. 717 (1988), 476–477
- Sutherland v. Kennington Truck Service, Ltd., 562 N.W.2d 466 (Mich. 1997), 318
- Szatkowski v. Turner & Harrison, Inc., 584 N.Y.S.2d 170 (1992), 524
- T**
- Tanges v. Heidelberg North America, Inc., 710 N.E.2d 250 (N.Y. 1999), 532n
- Taylor v. E. Connection Operating, Inc., 988 N.E.2d 408 (Mass. 2013), 286–288
- Tele-Save Merchandising Co. v. Consumers Distributing Co., 814 F.2d 1120 (6th Cir. 1987), 269–272
- Thinn v. Navajo Generating Station, 2007 WL 5601033, 7 Am. Tribal Law 558 (Navajo Nation S. Ct. 2007), 561
- Thoring v. Bottonsek, 350 N.W.2d 586 (N.D. 1984), 99–100, 102, 108, 171
- Thornell v. Seattle Serv. Bureau, Inc., 363 P.3d 587 (Wash. 2015), 83n
- TIAA Global Invs., LLC v. One Astoria Square LLC, 7 N.Y.S.3d 1 (App. Div. 2015), 526
- U**
- United States v. American Tobacco Co., 221 U.S. 106 (1911), 13
- University of Chicago V. Dater, 270 N.W. 175 (Mich. 1936), 336–337
- V**
- Verreux v. D’Onofrio, 824 P.2d 1021 (Nev. 1992), 402
- Vickrey v. Caterpillar Tractor Co., 497 N.E.2d 814 (Ill. App. Ct. 1986), 524
- W**
- Walden v. Fiore, 571 U.S. 277 (2014), 439, 440, 448–449, 521
- Washington v. Confederated Tribes of the Colville Indiana Reservation, 447 U.S. 134 (1980), 491–492
- Watson v. Employers’ Liability Ins. Corp., 348 U.S. 66 (1954), 464, 465
- Wayman v. Southward, 23 U.S. 1 (1825), 210
- Webb v. Paragon Casino, 872 So. 2d 641 (La. Ct. App. 2004), 561
- West American Ins. Co. v. Westin, Inc., 337 N.W.2d 676 (Minn. 1983), 100–101
- Wha Ja Yu v. The Neenah Foundry Co., 518 N.E.2d 635 (Ill. App. Ct. 1987), 524
- White Mountain Apache v. Bracker, 448 U.S. 136 (1980), 491
- White v. Tennant, 8 S.E. 596 (W. Va. 1888), 354, 359–363
- Williams v. Lee, 358 U.S. 217 (1959), 490–491, 511, 561
- Williams v. Mason, 556 So. 2d 1045 (Miss. 1990), 558
- Williams v. North Carolina, 317 U.S. 287 (1942), 373n366, 541n743
- Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), 561

- Wood Bros. Homes, Inc. v. Walker
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- Worcester v. Georgia, 31 U.S. 515
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- World-Wide Volkswagen Corp. v.
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- Wright-Moore Corp. v. Ricoh Corp.,
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272–275, 342–343
- Wyatt v. Fulrath, 211 N.E.2d 637 (N.Y.
1965), 411–413
- Y**
- Yarborough v. Yarborough, 290 U.S.
202 (1933), 478n621

Why I Wrote This Book

When a relationship has contacts with more than one state and those states have different laws, we face a conundrum. Which law do we apply? Some cases of this type are easy, and everyone agrees on what should be done. Of course, which cases are easy has changed dramatically over time. A case that might be thought easy in 1825 might not be thought so in 1880 or 1960 or 2020. Moreover, if it is the case that each state's law reflects policies it cares about or its sense of justice and fairness, and if each party is connected to a state that wants to protect that party, then we have a real problem. It is hard enough to decide which of several competing common law rules to adopt or statutes to enact. It is harder still when the states disagree, and they each have defensible reasons to govern a case that touches another state, and they each have a sense that it is only just or fair that their law apply to protect people in their state and each of the parties has a claim to the protection of their own state's law.

There are many books about conflict of laws or the choice-of-law problem, and they are quite good. But there are several things missing from most books. I wrote this book for four reasons.

Hard cases. First, I wanted to focus attention on the cases that are hard rather than those that are easy. Of course, we need to know the cases that are easily addressed, and this book explains those clearly. But hard cases abound in the area of conflict of laws. In my view, there are many more of them than others may think. That means it matters a great deal how to analyze those cases. Further, one cannot advise a client or act as an advocate for that client without understanding the strongest arguments on both sides of hard cases. Nor can a judge make a fair and wise decision without having a full sense of the complexity of the case. That understanding only comes from diving deeply into the arguments on both sides of hard cases.

Experiential learning about persuasion. Second, learning how to argue both sides of hard cases will increase sophistication in this field of law, legal reasoning, and normative argument. It provides a unique and helpful context for studying the art of persuasion and justification. In addition, it provides the perfect opportunity for experiential learning. With a foundation based on the history of approaches that have been adopted over time, and the variety of methods of choosing law that exist among the states today, as well as numerous examples that show why cases are hard and the best arguments on both sides, it will be possible for students to practice framing the question, telling the story, making the arguments of policy and fairness

required by current legal doctrine, and explaining what is right and what is not right about the strongest counterarguments.

Substantive policy and values. Third, in the United States, choice-of-law doctrine is, for the most part, state common law. While it focuses on choosing which state's law should apply to a multistate case, it is important to remember that a choice between the tort rules of two states is still an issue of tort law. The same goes for contracts and property. Moreover, the modern approach to choice-of-law issues requires attention to the policies underlying the legal rules in question. That requires sophisticated understanding of competing policies in the fields of torts, contracts, property, and family law. Traditional conflict of laws textbooks have a tendency to oversimplify the policies in these fields.

One way to avoid that is to think carefully about all the possible reasons why one state might choose one legal rule rather than the rule chosen by the other state. Doing that requires sympathizing with each state and constructing a view of its rules that may plausibly justify them. While the modern approach to choosing law avoids mechanically categorizing an issue as one of torts or property when it involves two or more areas of doctrine, policy, and norms, that does not mean that we do not need to attend carefully to the reasons why a state might adopt alternative rules of law. Doing that requires attention to the debates that would arise in domestic torts, contracts, and property cases.

Lawyers need also attend to both to conduct-regulating and loss-allocating policies. Some rules are designed to shape conduct directly or indirectly by creating appropriate incentives. Others are primarily designed to reflect norms, values, and considered judgments about justice, fairness, and to redress wrongs. This book goes into more detail than most other books on conflict of laws on the various reasons why each state may have adopted the rule it has so that the various and competing policies and norms of tort, contract, and property law can become apparent and can aid in analysis.

Because choice-of-law doctrine is an upper-level course, I assume that students know how to read cases and to make arguments about whether a case holding should be interpreted broadly or narrowly and that they are able to consider the policy arguments and values on both sides of a contested question of law. This book is intended to bring students up to speed on the various approaches to choice of law that have been adopted over time, the emerging rules of the Third Restatement, the fact-law patterns in torts, contracts, property, and family law, and the arguments that can be made on both sides of hard cases. In a sense, it treats the students as if they are already practicing lawyers and are seeking guidance on how to best represent a client in a case that presents a choice-of-law issue.

Indian nations and tribal sovereignty. Finally, most conflict-of-laws textbooks and law professors focus on the relations among state governments and between the states and foreign nations, with some attention to federal-state relations. But the United States has 573 governments other than the United States and the several

states that are not included in existing books. Those governments are the federally recognized Indian nations. The subject of conflict of laws among the states and between states and foreign nations should not ignore tribal sovereigns and tribal law. Conflicts between state law and tribal law arise frequently, and an introductory text in this field should at least introduce law students to the way the law about tribal-state choice of law analysis differs from analysis of state-state relations.

It is true that the law in the tribal-state relations area is based on federal common law rather than on state law and that the field of federal Indian law is extremely complex. At the same time, it is possible to introduce students to choices between tribal law and state law by focusing on the basic framework defining when state law can apply within Indian country and when Indian nations have the power to apply their law to those who live or act within reservation borders but are not citizens of the tribe in question. While the materials included here are no more than an introduction, it is an introduction that is sorely needed not just for lawyers representing tribes but for those representing businesses that enter commercial agreements with Indian nations and those representing people who are not citizens of an Indian nation but enter or live in their sovereign territory. If our subject concerns conflicts among states and between those states and foreign nations, surely we should pay attention to domestic, as well as foreign, nations.

Patterns, arguments, practices. The subtitle to this book emphasizes three things. First, it is important to be able to recognize the patterns of cases that involve choice of law issues. A case where the conduct and injury are in different states will raise different issues than one in which they are in the same state. Similarly, if one state's law is more plaintiff-favoring and another is more defendant-favoring, then different issues will emerge if we reverse the laws. Being able to fit a new problem into one of the established patterns will trigger a whole set of concerns, arguments, and solutions that would otherwise be hard to see. Learning to recognize those patterns is a central aim of this book. Second, as we have already noted, the book goes into depth to present the strongest arguments and counterarguments that are relevant to each of the patterns. Third, the book explains the prevailing approach that courts take to each pattern and why some courts go the other way. It also explains the various approaches courts have adopted for analyzing and adjudicating choice of law issues, including the rules that are emerging in the Third Restatement that is currently still being written.

Acknowledgments

A word about the dedication is warranted. Dean Symeon C. Symeonides has provided an incomparable service to lawyers, law professors, and the legal profession by keeping track of every choice of law case ever decided over several decades, reporting about them to other scholars in the academy, discerning patterns of results, helping to craft legislation codifying new choice-of-law rules, and setting the stage for a new Third Restatement of Conflict of Laws. His analysis has been instrumental in understanding patterns of cases, and the patterns he identified and discovered are the basis of the analysis in this book. His contribution to the field of conflict of laws deserves to be celebrated and I am indebted to his scholarship, his common sense, and his attention to both theory and practice.

Thanks and affection go to Martha Minow and Mira Singer. I also want to thank Harvard Law School, whose funding for scholarly research—especially a research leave and sabbatical—made this book possible. Matthew Kim helped enormously with careful proofreading of the draft.

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Note on editing

When quoting from case opinions, citations have often been omitted without the omission being noted. Internal quotations have also generally been omitted so that the text is more readable. Keeping quotation marks within quotation marks within quotation marks quickly gets tedious and hampers comprehension.

Joseph William Singer
5780/2020