# SOME REALISM ABOUT CHOICE-OF-LAW STATUTES AND THE COMMON LAW: THE OREGON EXAMPLE

*by*
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*Choice-of-law doctrine presents perpetual change. Common law doctrine is the primary driver of these changes, but change and reform need not come from common law alone. As Robert Leflar once observed, "it should not make much difference whether a governing choice-of-law rule . . . is found in the common law or in a statute. The same rule might be formulated in either way." This Article assess the utility of choice-of-law statutes, on their own merits and as a substitute for common law reform. The Article begins by surveying the choice-of-law landscape, with its twin problems of multiplicity of methods and complexity of methodology. The Article also explains why federal law is unlikely ever to provide a solution. Multiplicity, at least, is here for the long haul. But state choice-of-law statutes provide some hope for tackling the problem of complexity. To that end, this Article examines the Oregon choice-of-law statutes and their reception by state and federal courts. After noting the clear achievements of the statutes, the Article also points out their costs, including failure to eliminate complexity and the real risk that courts will import old common methods and results into the new statutory structure. The Article also addresses the prominent role—good and bad—that federal courts play in state choice-of-law doctrine. The Article closes by drawing lessons from the Oregon experience for other states and assessing the reasons for and against statutory reform of choice of law, as compared to the status quo and the forthcoming Third Restatement. It will be no surprise that the Article favors statutes and the Third Restatement over the status quo. As between statutes and the Third Restatement, the Article is ultimately agnostic.*



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## INTRODUCTION

The only constant in American choice of law is change. Since at least the 1960s, waves of reform have rolled through the case law, generated by debates among professors and judges that stretch back even further. Although judicial decisions have generated most of the doctrinal change, reform need not come from common law. As Robert Leflar observed 46 years ago, "it should not make much difference whether a governing choice-of-law rule applicable to any given case is found in the common law or in a statute. The same rule might be formulated in either way."[1] As if to illustrate Leflar's point, the Oregon legislature adopted choice-of-law statutes for contracts and torts in 2001 and 2009, at a time when the American Law Institute was still deciding whether to embark on a new round of common law reform through a Third Restatement.

[1] Robert A. Leflar, *Choice-of-Law Statutes*, 44 TENN. L. REV. 951, 952 (1977).

This Article considers the utility of choice-of-law statutes, both on their own merits and as compared with common law methods. Part I begins by assessing the current state of common law choice-of-law doctrine, plagued as it is by numerous and often complex methods. Part I also discusses the unlikely—and likely undesirable—prospects for federal reform, before introducing the possibility of state choice-of-law statutes (of which, it turns out, there are already many).

Part II first discusses the Oregon common law landscape, the move to a statutory system, and the key features of the Oregon choice-of-law statutes. Next, Part II discusses the reception of the statutes by state and federal courts in Oregon, with particular emphasis on the decisions in *Portfolio Recovery Associates v. Sanders*.[2] Part II closes by summarizing the Oregon experience and noting Oregon-specific concerns about judicial interaction with the statutes.

Part III uses the Oregon experience—good and bad—to support a brief assessment of the prospects for statutory choice-of-law reform. Comprehensive choice-of-law statutes are probably superior to the common law on the merits, but the case is not airtight. Statutory reform was a good idea, at least until drafts of the Third Restatement began to appear in late 2015, but as the shape of the new Restatement becomes clearer, the arguments for choice of law statutes become weaker. In addition, the politics of choice-of-law reform in a particular state could weigh heavily against legislation and in favor of either the status quo or waiting for the Third Restatement.

## I. THE STATE OF THE FIELD AND THE RABBIT HOLES OF REFORM

### *A. Multiplicity and Complexity*

Commentators generally agree that American choice-of-law doctrine is a mess.[3] One reason is multiplicity. States pursue at least six different common law approaches to determining the law that will apply in a particular case: the traditional

[2] *See* Portfolio Recovery Assocs. v. Sanders, 425 P.3d 455 (Or. Ct. App. 2018), *aff'd*, 462 P.3d 263 (Or. 2020).

[3] *See, e.g.*, Kermit Roosevelt III, *Brainerd Currie's Contribution to Choice of Law: Looking Back, Looking Forward*, 65 MERCER L. REV. 501, 502 (2014) ("Many people think choice of law is a mess."); *id.* at 515 ("[C]hoice of law is a mess.").

vested rights or First Restatement approach,[4] grouping of contacts,[5] interest analysis,[6] comparative impairment,[7] the better law,[8] and the Second Restatement.[9] Many states follow hybrid approaches of more than one method.[10] Several scholars contend that a preference for forum law—*lex fori*—provides an additional legitimate

[4] *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 332, 358, 377 (AM. L. INST. 1934) (stating the law of the place of contracting or place of performance governs most contract issues, while the law of the place of injury governs most tort issues); 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 73, at 107 (1916); Alabama Great S.R.R. Co. v. Carroll, 11 So. 803 (Ala. 1892) (holding that the *lex loci delicti* rule mandates application of Mississippi fellow-servant doctrine—not the Alabama Employer's Liability Act—to a claim brought by Alabama employee against Alabama railroad employer over injury suffered while train was in Mississippi). For the suggestion that the traditions of American choice of law are complex and that the First Restatement may not deserve the label "traditional," see Daniel B. Listwa & Lea Brilmayer, *Jurisdictional Problems, Comity Solutions*, 100 TEX. L. REV. 1373, 1375 (2022).

[5] *See* Harvey Couch, *Is Significant Contacts a Choice-of-Law Methodology?*, 56 ARK. L. REV. 745, 746–47 (2004).

[6] *See, e.g.*, BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 183–84 (1963).

[7] *See* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 18–20 (1963). For the current status of the comparative impairment approach in California, see Michael H. Hoffheimer, *California's Territorial Turn in Choice of Law*, 67 RUTGERS U. L. REV. 167, 170 (2015).

[8] *See* Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1588 (1966).

[9] *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145, 146 (AM. L. INST. 1971) (for torts, courts should apply "the local law of the state which . . . has the most significant relationship to the occurrence and the parties under the principles stated in § 6," which in turn provides several general principles to consider, even as other sections provide presumptive rules for certain situations).

[10] For a rough breakdown of which states follow which methods, including hybrids, see Symeon C. Symeonides, *Choice of Law in the American Courts in 2020: Thirty-Fourth Annual Survey*, 69 AM. J. COMPAR. L. 177, 194–95 (2021) [hereinafter Symeonides, *Choice of Law in the American Courts in 2020*].

approach,[11] and there is some evidence that state courts do prefer their own law.[12] Yet another method—the Third Restatement—is on its way.[13]

The conflicts mess has a second cause: the flexible, open-ended, and sometimes ad hoc quality that characterizes several of the extant methods.[14] At their best, these methods give courts the tools to do justice (or, more precisely, "material justice"[15])

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[11] *See* CURRIE, *supra* note 6, at 183–84 (asserting that until Congress provides a different approach, "the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum," and that the forum preference also applies if both the forum and another jurisdiction each have an interest in applying the policies expressed in their laws); Albert A. Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637, 643 (1960) (urging "acceptance of the lex fori as a basic rule and relegation of traditional conflicts rules to the status of exceptions keyed to ever narrower fact situations"); Gary J. Simson, *Plotting the Next "Revolution" in Choice of Law: A Proposed Approach*, 24 CORNELL INT'L L.J. 279, 279 (1991) (proposing that courts apply a rebuttable presumption that forum law applies). For assessment of *lex fori* as a method, see Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT'L L.J. 559 (2002).

[12] *Compare* Peter Hay, *The Use and Determination of Foreign Law in Civil Litigation in the United States*, 62 AM. J. COMPAR. L. 213, 217 (2014) (asserting "American cases do show a far greater 'homeward' trend than does the decisional law of other [countries]"), *with* Symeonides, *Choice of Law in the American Courts in 2020*, *supra* note 10, at 184–86 (discussing Michigan's *lex fori* preference but also noting evidence that in products liability cases, "Courts did not unduly favor the law of the forum"); *see also* Daniel Klerman, *Bias in Choice of Law: New Empirical and Experimental Evidence*, 179 J. INST. & THEORETICAL ECON. 32 (2023) (reporting findings from vehicular accident cases showing bias in favor of plaintiffs, no bias in favor of forum law, and a state court bias for local residents); Symeon C. Symeonides, *Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey*, 62 AM. J. COMPAR. L. 223, 254 (2014) ("Michigan courts are notorious in applying Michigan law when it favors local litigants and finding a non-'rational reason' to apply foreign law when it disfavors foreign litigants."); *infra* notes 62–67 (discussing Oregon common law before adoption of choice-of-law statutes).

[13] *See Restatement of the Law Third, Conflict of Laws*, AM. L. INST., https://www.ali.org/projects/show/conflict-laws/ (last visited Apr. 19, 2023).

[14] Professor Symeonides provides a forceful statement of the view that efforts to replace the First Restatement "careened to the . . . extreme of denouncing . . . all choice-of-law rules in general":

> Rules were replaced with . . . flexible formulae that do not prescribe solutions in advance, but simply enumerate the factors to be considered in the judicial fashioning of an ad hoc solution for each conflict. Although these factors differ from one approach to the next, all such approaches are open-ended and call for an individualized, ad hoc handling of each case. . . . Just as the traditional system had gone too far toward certainty to the exclusion of flexibility, the revolution went too far in embracing flexibility to the exclusion of certainty.

Symeon C. Symeonides, *Oregon's New Choice-of-Law Codification for Tort Conflicts: An Exegesis*, 88 OR. L. REV. 963, 968 (2009) [hereinafter Symeonides, *Oregon Tort Conflicts*].

[15] For an interesting re-reading of the debate about the relative merits of and distinctions between "conflicts justice" and "material justice," see Roxana Banu, *Conflicting Justice in Conflict of Laws*, 53 VAND. J. TRANSNAT'L. L. 461 (2020).

by tailoring the applicable legal rules to reflect the number and strength of the connections among the parties, the relevant jurisdictions, and the dispute, as well as the state interests and policies triggered by these connections. But even at their best, these methods can be difficult and exhausting for lawyers and judges. Judges thus have an incentive to seek shortcuts that undermine the goals of a more complex methodology.[16] At their worst, these methods license a manipulative process that produces inconsistent decisions and forum chauvinism.[17]

To address this mess, commentators have proposed multiple solutions across decades. To date, only one common law solution has provided a reasonably safe but limited path for litigants and judges. When drafting a contract, parties often choose the law that will apply to their dealings.[18] Although choice-of-law clauses can raise significant issues relating to scope, reasonableness, and bargaining power, courts typically will accept party autonomy to choose the applicable law to govern their

[16] Despite the obvious inference, the difficulty of applying choice-of-law doctrine does not necessarily translate into bad judicial decisions about what law will apply. *See* Symeonides, *Choice of Law in the American Courts in 2020*, *supra* note 10, at 187 ("[R]ather than disparaging judges for their knowledge of choice-of-law theory, we should focus on the results of their decisions. Under that criterion, my overall assessment of the courts' performance is much more favorable than that of most academic writers.").

[17] On inconsistency, see WILLIAM M. RICHMAN, WILLIAM L. REYNOLDS & CHRISTOPHER A. WHYTOCK, UNDERSTANDING CONFLICT OF LAWS § 85, at 287 (4th ed. 2013) (noting that disarray in common law choice-of-law methodology "increases the appearance of arbitrary or biased decision-making"), and Symeonides, *Oregon Tort Conflicts*, *supra* note 14, at 969 (decrying the appearance of "judicial subjectivism and dissimilar handling of cases"). On the preference for forum law, see *supra* notes 11–12 (discussing *lex fori* approaches), and *infra* note 67 and accompanying text (noting the tendency of Oregon courts to choose forum law).

[18] *See* John F. Coyle, *A Short History of the Choice-of-Law Clause*, 91 U. COLO. L. REV. 1147, 1149–50 (2020) (noting, for example, that "[o]ne recent study found that 75 percent of material contracts executed by public companies contain such a clause"); John F. Coyle, *The Mystery of the Missing Choice-of-Law Clause*, 56 U.C. DAVIS L. REV. 707, 709–10 (2022) [hereinafter Coyle, *Mystery*]. Insurance contracts appear to be the major exception. *See id.* at 711–13.

contracts.[19] As a result, well-drafted choice-of-law clauses in contracts can mitigate many of the problems that arise from choice-of-law litigation.[20]

Yet claims involving contracts with enforceable choice-of-law clauses hardly exhaust the category of cases that raise choice-of-law issues. For the remaining cases—including nearly all tort claims—the best solution, so far, is to do better with the existing approaches. For example, and notwithstanding the claims of critics, the Second Restatement does not require incoherent or indeterminate analysis.[21] Instead, courts can pay greater attention to the presumptive rules that favor the law of

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[19] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. L. INST. 1971); *see also* John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 633 (2017). For a specific example of disputes about scope, a choice-of-law clause might say that the law of a specific state will govern "all issues relating to this contract." Does the law of the selected state apply to tort claims that are related to the contract? Probably not, unless one finds oneself in California or Minnesota. *See id.* at 667–80. The Oregon choice-of-law statutes follow the majority approach. *See infra* note 76. The Third Restatement may adopt the minority view. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 8.03(2)(b) (AM. L. INST., Council Draft No. 5, 2021) ("A statement that the laws of a particular state govern claims 'relating to' and 'arising in connection with' the contract is presumed to select the law of that state to govern issues of both contractual and noncontractual law relating to the contract.").

[20] *But cf.* Coyle, *supra* note 19, at 633–34 (observing that contracting parties often do not research the applicable law and instead bargain over their preferences for their home-state law, sometimes without understanding the consequences of that choice).

[21] For a sense of the criticism, see, for example, Michael H. Gottesman, *Adrift on the Sea of Indeterminacy*, 75 IND. L.J. 527, 527 (2000) (describing the Second Restatement as "a cacophonous formula or formulae, a blend of indeterminate indeterminacy [and a] total disaster in practice"); Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403, 406 (2000) ("[B]y mixing together all manner of doctrinal currents, [the Second Restatement] simply furnished courts with any number of plausible reasons to support whatever results they wished to reach."); Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMPAR. L. 465, 486–87 (1991) (describing "just how badly the Second Restatement works in practice"); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 253 (1992) ("Trying to be all things to all people, [the Second Restatement produced] mush."); Mark D. Rosen, *Choice-of-Law as Non-Constitutional Federal Law*, 99 MINN. L. REV. 1017, 1067 (2015) ("The Second Restatement is notoriously indeterminate. Enumerating what seems to be all conceivably relevant considerations, it provides no guidance when different factors point to the application of different states' laws."); Russell J. Weintraub, *The Restatement Third of Conflict of Laws: An Idea Whose Time Has Not Come*, 75 IND. L.J. 679, 679 (2000) (stating the Second Restatement is "incoherent," "bizarre," and "mystif[ying]").

For a more nuanced view, see Kermit Roosevelt III, *Certainty Versus Flexibility in the Conflict of Laws*, *in* PRIVATE INTERNATIONAL LAW: CONTEMPORARY CHALLENGES AND CONTEMPORARY RELEVANCE 6, 23 (Franco Ferrari & Diego P. Fernandez Arroyo eds., 2019) ("[T]he Second Restatement . . . has less the feel of a set of instructions for judges than that of an invitation to them: take these considerations and show us how you decide cases. [The hope] was not that the Second Restatement would last indefinitely . . . but that experience applying it would generate data that could be used to draft narrow and policy-sensitive rules."); *cf. infra* note 24.

a particular state before assessing the § 6 factors to determine whether another state has a more significant relationship to the relevant issue.[22] Exhortations about the right way to implement the Second Restatement are likely to fail, however, given the myriad ways that courts actually use it.[23]

The Third Restatement project is another version of the effort to do better. This Article is not about the Third Restatement, but clearly, one of the primary goals of that project is to develop a better, more determinate, and broadly acceptable method for common law choice of law.[24] Yet the history of the other modern methods indicates that this effort will be only partly successful. Many states will not adopt the Third Restatement. Of the ones that do, most will take shortcuts, apply it in disparate ways, or use it to justify selection of forum law.[25]

At the end of the day, moreover, doing better can only resolve half of the mess. A complete solution would replace the "bad" common law approaches with a method that is better *and* uniform. But so long as choice of law remains a creature of state law, uniformity will not happen. Only federal law can aspire to uniformity.

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[22] *But see* Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L.J. 475, 477–79, 486–90 (2000) (criticizing the approach suggested in the text but very much approving of § 6 in general).

[23] One leading casebook observes that "[m]ost courts pay lip service to the rules but make their own evaluation under § 6" and that this analysis "looks an awful lot like interest analysis." HERMA HILL KAY, LARRY KRAMER, KERMIT ROOSEVELT & DAVID L. FRANKLIN, CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 265 (11th ed. 2022). Some courts, by contrast, "essentially end their analysis with the rules: little or no attention is paid to § 6, and instead the court makes the presumption effectively irrebuttable." *Id.* Another leading casebook suggests even more variety:

> Some courts use the Second Restatement's specific presumptive rules to break a true conflict. Other courts ignore the Second Restatement's specific presumptive rules even when they are on point. Some courts use the Second Restatement to perform a "groupings-of-contacts" analysis, others use it to curtail but not avoid interest analysis, and yet others use it in a manner akin to the First Restatement. There are many other possibilities.

LEA BRILMAYER, JACK GOLDSMITH & ERIN O'HARA O'CONNOR, CONFLICT OF LAWS: CASES AND MATERIALS 251 (7th ed. 2015) (citations omitted).

[24] *See Conflict of Laws*, THE ALI ADVISER, https://www.thealiadviser.org/conflict-of-laws (last visited Apr. 19, 2023) ("What a Third Restatement could do is to take the accumulated wisdom of decades of experience with the modern approaches and present it in an administrable and user-friendly form. If we could produce a set of administrable rules that embodied the wisdom of the modern approaches, along with a clear statement of what the rules were intended to achieve and how to use them, it would have substantial appeal."); *see also* Kermit Roosevelt III & Pethan Jones, *What a Third Restatement of Conflict of Laws Can Do*, 110 AM. J. INT'L L. UNBOUND 139, 141–42 (2016) (suggesting that Third Restatement can draw on experience with the Second Restatement and other methods to "bring greater predictability to choice of law," provide a better theoretical framework, and describe choice-of-law analysis in more intelligible terms).

[25] For a somewhat similar assessment, see Joseph William Singer, *Choice of Law Rules*, 50 CUMB. L. REV. 347 (2020).

As the next Section will suggest, however, federal solutions are unrealistic and implausible.

### *B. The (Unlikely) Federal Option*

Some commentators promote a federal solution to the conflicts mess. These suggestions are misguided; a federal solution would probably make things worse.

Most proposals focus on state law claims in federal court. Under the *Klaxon* rule,[26] federal district courts apply the choice-of-law rules of the state in which they sit, which means that federal courts risk reproducing the complexity, inconsistency, and sometimes unfairness that plagues state choice-of-law doctrine.[27] But the results of *Klaxon* may be more complex in good and bad ways.

On the one hand, well-crafted federal court decisions might be of higher quality than the average state court decision,[28] and federal court application of state choice-of-law doctrines could have a positive impact on state law. On the other hand, federal courts may end up developing their own versions of their home state's choice-of-law doctrine, with local district courts citing each other's decisions as much or more than state court decisions.[29] District courts that sit in a state that follows the Second Restatement could also rely on Second Restatement decisions from out-of-state federal courts. The result could be a kind of federal Second Restatement common law (notwithstanding *Klaxon*). Finally, in some states, the number of published or searchable federal court choice-of-law decisions may far exceed

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[26] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

[27] *Klaxon* critics abound. *See, e.g.*, Baxter, *supra* note 7, at 41 (1963); Allan Erbsen, Erie's *Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579, 644–45 (2013); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 514–15 (1954); Laycock, *supra* note 21, at 282; Rosen, *supra* note 21. For a defense of *Klaxon*, see Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, 169 U. PA. L. REV. 2193, 2196–98 (2021).

[28] The literature on parity between state and federal courts is often critical of state courts. *See, e.g.*, Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 144 (2009) (asserting "[s]tandards of professionalism among state courts, particularly at the trial level, are lower than they are among federal courts, and the likelihood of local, personal relationships coming into play in the far smaller trial-level units of the state judiciaries is higher"); *id.* at 147 (concluding that, "on the whole—and particularly outside the highest echelons of the state court systems—federal judges are likely to be more skilled legal analysts and judicial craftspersons than their counterparts on the state courts"). For the foundational article, see Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

[29] *See* Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1645 (2020) ("For purposes of efficiency and consistency, federal judges may be tempted to follow the lead of other federal judges when [identifying and applying state law].").

the number of available state court decisions, with the result (for good or ill) that federal courts will become the primary expositors of state choice-of-law doctrine.[30]

Should *Klaxon* therefore go? If the Supreme Court took this step—presumably through a dramatic reinterpretation of Full Faith and Credit principles[31]—it would also have to commit the federal courts to an overarching choice-of-law method.[32] And then what? At first, the federal choice-of-law method might be similar to some state-law methods, but over time it would become a distinct, additional method as federal courts developed the federal common law of choice of law without reference to state law. Watching the Supreme Court develop and attempt to superintend new choice-of-law rules and the inevitable lower court variations on those rules would be . . . interesting.[33]

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[30] Most choice-of-law decisions do not reach the appellate level, and state trial court opinions are not as easily available in print or online as federal district court opinions. *See also* Gardner, *supra* note 29, at 1649–50 ("In an era in which state courts rarely resolve cases with written opinions and in which tort cases have largely disappeared from their dockets, there may be significant gaps in any given state's development of its common law, particularly when it comes to novel questions. The leading case law may instead be federal opinions that purport to apply state law but are instead more generalized analyses of how common law *should* develop."). For a discussion of these issues in connection with the Oregon choice-of-law statutes, see *infra* notes 129–138 and accompanying text (providing general discussion), and *infra* notes 155–170 and accompanying text (discussing the *Schedler* case).

[31] *See* Baxter, *supra* note 7, at 41–42 (suggesting Full Faith and Credit and the Rules of Decision Act); Laycock, *supra* note 21, at 331 (Full Faith and Credit); Rosen, *supra* note 21, at 1098–1103 (Full Faith and Credit statute or Rules of Decision Act); *see also* Erbsen, *supra* note 27, at 642 (suggesting the Diversity Clause). As Professor Woolley points out, using the Full Faith and Credit Clause to achieve this result requires revising the Supreme Court's unanimous view in *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981). *See* Patrick Woolley, Erie *and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723, 1750 n.138 (2006).

[32] My bet would be on rules with a strong territorial component. *See* Roosevelt, *supra* note 21, at 13–14 (suggesting contemporary choice-of-law doctrine has turned back towards rules and territorial factors); Laycock, *supra* note 21, at 322–32 (urging territory-based rules). *But see* Baxter, *supra* note 7, at 42 (arguing for comparative impairment). Professor Gottesman argued that the benefits of a single choice-of-law method outweigh the costs of a suboptimal rule, and he contended that, if Congress took this step, it probably would not enact a truly awful choice-of-law rule. *See* Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 33–36 (1991).

[33] *Cf.* Juenger, *supra* note 21, at 404 ("[O]ne cannot help but shudder when thinking about the Supreme Court's taking an active role in this field considering what it has done to the far simpler subject of jurisdiction.").

Congress also could overrule *Klaxon*.[34] In so doing, it could either leave the development of new rules to the federal courts or enact its own choice-of-law code.[35] If Congress simply cleared the ground for the development of federal common law choice-of-law rules in diversity cases, then the same issues that I noted above would apply just as strongly. If Congress enacted new rules, those rules would be subject to the general concerns about choice-of-law statutes that I address in Part IV.

Either approach—judicial or legislative adoption of federal choice-of-law rules for cases in federal court—would have the immediate effect of adding choice of law to the list of reasons to prefer federal or state court. Moreover, a federal choice-of-law code that applied only in federal court would inevitably produce diverging choices of law (and outcomes) in cases depending on whether they were brought in state or federal court. Federal rules for federal courts would therefore foster forum shopping and undermine the overall goals of the *Erie* doctrine.

So far, overruling *Klaxon* and creating federal choice-of-law rules for all diversity cases does not produce an obvious net benefit. Is there some specific federal interest that tips the scale more clearly? *Klaxon* already sits alongside the *Allstate*/*Shutts* rule that gives effect to the federal interest (based in Due Process and Full Faith and Credit) in preventing arbitrary choice-of-law decisions.[36] And federal

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[34] *See* COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS ch. 6, introductory n., cmt. B at 310 (AM. L. INST. 1994) (suggesting the Commerce Clause, the Full Faith and Credit Clause, and "the Judicial Power Clause, Article III, § 2, as implemented by the Necessary and Proper Clause"); RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 592 (7th ed. 2015) ("Congress, acting under its power to make laws 'necessary and proper' to the exercise of jurisdiction under Article III, could certainly enact, or authorize the formulation of, federal choice-of-law rules for federal courts. . . . Moreover, Congress is generally believed to have authority under the Full Faith and Credit Clause to federalize choice of law by enacting conflicts rules binding on state as well as federal courts."); Erbsen, *supra* note 27, at 642 (Article III); Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 402 (1964) ("'[N]ecessary and proper' to enabling federal judges to function, and consistent with the general role of the central government under the Constitution."); Gottesman, *supra* note 32, at 24–28 (Full Faith and Credit Clause); Laycock, *supra* note 21, at 331 (same); Rosen, *supra* note 21, at 1093–95 (Full Faith and Credit and Diversity Clauses); Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 TEX. L. REV. 1715, 1726–27 (1992).

[35] Congress has considered choice-of-law proposals in the past but has failed to enact them. *See* Edward H. Cooper, *Aggregation and Choice of Law*, 14 ROGER WILLIAMS U. L. REV. 12, 22 (2009) (collecting examples from the 1990s); Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001–05 (2008) (discussing various proposals up to and including the Class Action Fairness Act (CAFA)); Woolley, *supra* note 31, at 748–49 (discussing the effort to add a choice-of-law provision to CAFA).

[36] *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981) (plurality opinion) ("[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that

common law is available to decide the merits of claims that implicate strong federal interests.[37]

Professors Roosevelt and Wolff plausibly assert the existence of a broad federal interest in "interstate relations."[38] In their view, this interest best explains the *Klaxon* rule, which they treat not as a federal common law rule for selecting the proper choice-of-law approach but instead as a rule that responds to this federal interest by (1) adopting or incorporating state choice-of-law rules into federal common law and (2) allowing a complete federal override when state law "privileges local law over foreign law to an unreasonable degree."[39] For what it is worth, I do not agree with this interpretation of *Klaxon*.[40] Notably, though, neither Roosevelt nor Wolff argues

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choice of its law is neither arbitrary nor fundamentally unfair."); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818–19 (1985) (confirming the *Allstate* plurality's rule).

[37] *See* Clearfield Tr. Co. v. United States, 318 U.S. 363, 363–70 (1943); Boyle v. United Tech. Corp., 487 U.S. 500, 504 (1988); *see also* Clopton, *supra* note 27, at 2226.

[38] Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 U. PA. L. REV. 1847, 1884–85 (2017); *see also* Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 NW. U. L. REV. 1, 21 (2012). For similar arguments, see Gottesman, *supra* note 32, at 16 ("[W]herever a subject is a frequent source of litigation with multistate implications, and the costs of indeterminacy and/or non-neutrality have grown unacceptable, Congress should adopt federal choice of law legislation containing rules to determine which state's law applies."); Trautman, *supra* note 34, at 1734 ("[S]tate courts deciding choice-of-law questions are at bottom deciding federal questions.").

[39] Roosevelt, *supra* note 38, at 21 (footnote omitted).

[40] True, *Klaxon* decided as a matter of federal common law that state choice of law determines the law that governs state law claims, but the Court's language suggests simply that federal courts must apply state law, not that they would adopt or incorporate state law into federal common law:

> We are of opinion that the prohibition declared in [*Erie*] against such independent determinations by the federal courts, extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law.

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496–97 (1941) (footnote omitted) (citation omitted); *see also* Kevin M. Clermont, *Degrees of Deference: Applying vs. Adopting Another Sovereign's Law*, 103 CORNELL L. REV. 243, 259–61 (2018) (arguing *Klaxon* requires federal courts to apply state choice-of-law rules, not adopt them into federal law); Clopton, *supra* note 27, at 2199–2201 (applying a similar analysis); *cf.* Carlos M. Vázquez, *The Federal "Claim" in the District Courts:* Osborn*,* Verlinden*, and Protective Jurisdiction*, 95 CALIF. L. REV. 1731, 1753–56

that this federal interest requires replacement of *Klaxon* in all cases. Instead, Wolff argues that this interest supports a federal choice-of-law rule for cases brought into federal court under the Class Action Fairness Act (CAFA).[41] Professor Woolley makes a similar argument,[42] and other commentators agree that federal choice-of-law standards would be valuable in CAFA, class action, or similar types of "complex" cases.[43]

Federal courts have already moved in this direction. Professors Bradt and Rave suggest that the multidistrict litigation (MDL) process, at best, pays lip service to *Klaxon*.[44] And Professor Kramer has described the creative approaches that some federal judges have taken in complex cases:

> Some say that the various tests, while different, all share the same basic objective . . . making it less surprising when all point to the same law in a given case. Other judges collapse approaches together, asserting that they use differ-

(2007) (discussing "naked adoption" of state law by federal courts). Thus, the *Klaxon* rule is quite different from the Court's adoption of state law as the presumptive source of federal common law claim preclusion rules for federal court diversity judgments. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 498, 508–09 (2001) ("federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity. . . . This is, it seems to us, a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits [except for] situations in which the state law is incompatible with federal interests."). Commentators frequently find *Klaxon*'s analysis inadequate, and they attempt to rewrite it—usually to support a federal approach to choice of law. *See* Erbsen, *supra* note 27, at 644–46; Wolff, *supra* note 38, at 1878–82. Fair enough, but the result is no longer *Klaxon*.

[41] Wolff, *supra* note 38, at 1888–91.

[42] Woolley, *supra* note 31, at 1755–56.

[43] *See* Cooper, *supra* note 35, at 13 (indicating support for special choice-of-law rules for cases that involve "large-scale aggregations of parties" in multiple states); Silberman, *supra* note 35, at 2002 (arguing for a federal choice-of-law rule instead of *Klaxon* in CAFA cases); *see also* COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS ch. 6, app. A at 448–53 (AM. L. INST. 1994) (proposing special rules). The choice-of-law section in the ALI's more recent *Principles of Aggregate Litigation* urges courts to "ascertain the substantive law governing [common] issues," notes the *Klaxon* rule, and "leaves open the possibility of a federal choice-of-law code." PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 2.05(a), at 129, § 2.05 cmt. a, rep.'s note at 134–35 (AM. L. INST. 2010). *But see* Clopton, *supra* note 27, at 2220–23 (discussing and opposing this family of proposals); Kramer, *supra* note 21, at 569–72 (opposing special rules for complex cases).

[44] *See* Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1307–09 (2018) (arguing *Klaxon* is "honored only in the breach" in MDL cases, and that "differences in state law so studiously respected by *Klaxon* tend to be smoothed out" in mass settlements, resulting in "an undermining of the *Klaxon* principle while formally following it.").

> ent words to describe what are really identical inquiries. Still other judges purport faithfully to apply the assorted tests only to find (surprise, surprise) that all happen to mandate the same result in the particular case.[45]

Outside of complex litigation, federal courts have developed their own choice-of-law methods (often the Second Restatement) in bankruptcy, admiralty, and other areas.[46] One could conclude that these developments (or some of them) go too far.[47] Federal choice-of-law rules plainly subordinate state law and create tension with *Klaxon*, as the Supreme Court recently made clear in *Cassirer v. Thyssen-Bornemisza Collection Foundation* with respect to Foreign Sovereign Immunities Act cases,[48] and the *Cassirer* decision has clear implications for other contexts in which federal courts have ignored state conflicts law. Or, perhaps these developments (again, or some of them) define the proper scope of the circumstances in which federal interests justify displacement of state choice-of-law rules.

More dramatic options exist for the true *Klaxon* critic. First, perhaps these developments have eroded *Klaxon* enough that actual overruling is just the next logical step. Going beyond complex cases and federal enclaves, in other words, the federal interest articulated by Roosevelt and Wolff could easily support a uniform federal approach for all choice-of-law decisions in federal court. Second, without much extension this federal interest also supports applying federal choice-of-law rules to cases

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[45] Kramer, *supra* note 21, at 554 (footnotes omitted).

[46] *See* Clopton, *supra* note 27, at 2201–09 (discussing these examples and disagreeing with the decision to adopt federal standards). *See also* LAURA E. LITTLE, CONFLICT OF LAWS: CASES, MATERIALS, AND PROBLEMS 779 (2d ed. 2018) (collecting federal decisions on these issues, as well as "international banking, copyright, and cases concerning the rights and obligations of [the] United States in contract." (footnotes omitted)).

[47] *See* Clopton, *supra* note 27, at 2202, 2212. Professor Little has collected a different set of cases in which federal courts applied the Second Restatement "as a 'general' choice of law methodology because they concluded that state choice of law principles were not sufficiently clear or developed." LITTLE, *supra* note 46, at 779–80. She cites a number of cases to make this point. LITTLE, *supra* note 46, at 780 n.38 (citing American Triticale, Inc. v. NYTCO Servs., Inc., 664 F.2d 1136, 1142 (9th Cir. 1981) (using Second Restatement because Idaho did not have an applicable rule); Commercial Ins. Co. of Newark, New Jersey. v. Pacific-Peru Const. Corp., 558 F.2d 948, 952 (1977) (same for Hawaii choice of law), Dashiell v. Keauhou-Kona Co., 487 F.2d 957 (9th Cir. 1973) (same), and Gates v. P.F. Collier, Inc., 378 F.2d 888, 892 (9th Cir. 1967) (same)). However justified these decisions may be in their specific contexts, they create significant tension with *Klaxon*, and courts should follow them only *in extremis*.

[48] *See* Cassirer v. Thyssen-Bornemisza Collection Found., 142 S. Ct. 1502, 1509 (2022) ("No one would think federal law displaces the substantive rule of decision in those suits; and we see no greater warrant for federal law to supplant the otherwise applicable choice-of-law rule." (citing Brief for the United States as Amicus Curiae Supporting Petitioners, Cassirer v. Thyssen-Bornemisza Collection Found., No. 20-1566, 2021 WL 5513717, at *21 (Apr. 21, 2022))).

in state court.[49] To that end, Professor Rosen develops a position that is roughly similar to that of Roosevelt and Wolff—arguing that choice of law implicates two federal interests, the "character of the federal union" and the "health of the interstate system"[50]—but he contends that these interests (and other reasons) compel the conclusion that *all* choice-of-law decisions are necessarily federal law. The result, he argues, is that Congress ought to legislate in this area, that the Supreme Court should overrule *Klaxon*, and that state and federal courts should begin the shared enterprise of developing the new federal common law of choice of law.[51]

Framed in this way, these federal interest arguments sweep too broadly and unfairly ignore or discount the individual and collective interests of the states. It is one thing to accept a federal interest at some high level of generality, based on notions of what it means to have a federal system and to apply this interest in the uncommon situation in which a state choice-of-law doctrine or decision threatens that system. It is quite another to hold that this federal interest is so strong that it requires wholesale replacement of state substantive law with federal common law.[52] Put differently, how far does the federal interest identified in different ways by Professors Roosevelt, Rosen, and Wolff go beyond ensuring that the choice made by state law is not arbitrary[53] or "unreasonably aggressive"?[54] I do not think this interest

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[49] *See* Roosevelt, *supra* note 38, at 22 n.109 ("Uniform rules of priority, promulgated under Congress's Full Faith and Credit Clause power, would actually be a nice thing to have."). Professor Wolff asserts that, "[i]n the seventy-five years since *Klaxon*, the interstate judicial system has produced reasons to question the wisdom of that answer in general diversity cases." Wolff, *supra* note 38, at 1887. He approvingly cites William Baxter's argument that Full Faith and Credit doctrine requires "a uniform approach to choice of law that would control in federal courts and state courts alike." *Id.* at 1887 n.146 (citing Baxter, *supra* note 7, 32–33).

[50] Rosen, *supra* note 21, at 1089–92.

[51] For a short summary, see *id.* at 1075; *see also* Baxter, *supra* note 7, at 41–42 (reaching the same conclusion). As Rosen points out, the forum-shopping concerns associated with overruling *Klaxon* arguably disappear if federal law governs all choice-of-law decisions. *See* Rosen, *supra* note 21, at 1107.

[52] *See* Kramer, *supra* note 43, at 569–72 (explaining why choice-of-law doctrines are substantive law); Russell J. Weintraub, *The Erie Doctrine and State Conflict of Laws Rules*, 39 IND. L.J. 228, 242 (1963) ("[T]he choice-of-law rules of a state are important expressions of its domestic policy.").

[53] *See supra* note 36.

[54] Roosevelt, *supra* note 38, at 21; *see id.* at 21, 21 n.108 (explaining federal interests outweigh state interests when a state "privileges local law over foreign law to an unreasonable degree" and identifying misuse of a local statute of limitations and abuses of "public policy" as "perhaps [the] only two" examples); *cf.* Clopton, *supra* note 27, at 2229 ("[O]nce a federal court has gotten to the point of choosing among state laws, it has concluded that, on balance, state interests win out."). For one reasonable suggestion of when federal interests might require a federal common law choice-of-law rule, see Allan Erbsen, Erie*'s Starting Points: The Potential Role of Default Rules in Structuring Choice of Law Analysis*, 10 J.L. ECON. & POL'Y 125, 143 (2013) (suggesting a hybrid approach in which "[f]or example, the forum state's choice of law rules might

goes nearly far enough to justify a federal choice-of-law takeover or even the lesser evil of wholesale federal incorporation of state law.[55]

Of the available options, in sum, overruling *Klaxon* but leaving the state courts alone is the worst, because it partly overrides state law and undermines *Erie* values without addressing either source of the conflicts mess. Far better, I believe, either to maintain *Klaxon* and the current mess or to transform all choice of law into a set of federal rules. And between these two, maintaining *Klaxon* is clearly the best choice. The suggested federal interests are simply not strong enough to legitimize a full federal takeover.

Practical considerations also weigh heavily against a full federal takeover. First, whatever the abstract merits of this debate, the odds that the Supreme Court will overrule *Klaxon*, let alone federalize all of choice of law, are slim. Broad congressional action of any kind also seems unlikely.

Second, a full federal takeover is probably unworkable. I've already suggested the difficulty that the Supreme Court would have overseeing federal choice-of-law rules for state law claims in federal court.[56] Adding claims in state courts greatly increases the degree of difficulty. Unless the federal standards were crafted with incredible—and unlikely—precision, lower courts would have considerable discretion to manipulate them according to their own views on choice of law and their own assessment of desirable results. Especially in the state courts, trial judges likely would go their own way, knowing that (1) appellate courts would rarely have the chance to review a choice-of-law ruling and (2) state appellate enforcement of federal standards would likely be anemic. Nor does it seem at all likely that the Supreme Court would have the resources to define or oversee a preemptive set of federal choice-of-law rules. The result might be uniformity in theory but almost certainly would be multiplicity and ad hoc decisions in practice. In other words, a different kind of mess, but still a mess.

On balance, therefore, the *Klaxon* regime remains the least worst option, even if that option also means that federal law cannot fix choice of law.

### *C. State Choice-of-Law Statutes?*

Although congressional action on choice of law is unlikely and probably undesirable, statutory reform need not be federal. Numerous subject-matter-specific

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yield to federal rules in cases implicating strong federal interests in regulating disputes involving foreign parties or foreign conduct.").

[55] Perhaps one can analogize these arguments for a federal choice-of-law rule based on hypothetical federal concerns to the arguments made for the still-elusive doctrine of protective subject matter jurisdiction. *See, e.g.*, Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CALIF. L. REV. 1775, 1777–79 (2007) (describing theories of protective jurisdiction).

[56] *See supra* notes 31–34 and accompanying text.

choice-of-law statutes already exist at the state level. Section 1-301 of the Uniform Commercial Code (UCC) is probably the best-known and most widely adopted statutory choice-of-law provision.[57] In Oregon, choice-of-law statutes also exist for arbitration and conciliation, insurance, statutes of limitation, unclaimed property, premarital agreements, child custody, foreign adoptions, marital property, family support, wills and gifts, environmental cleanup assistance, and transboundary pollution.[58] Other states no doubt have similar statutes. More ambitiously, Louisiana and Oregon have adopted comprehensive choice-of-law statutes for contracts, torts, and other claims.[59]

State choice-of-law statutes do not solve the problem of proliferating methodologies, but well-drafted statutes can improve on the extant common law approaches.[60] State statutes can also curb the inclination towards overly result-oriented decisions. And—again, if well-drafted—state statutes can even control or channel the tendency towards reflexively applying forum law. As with any attempt at reform, however, the real test is how these statutes work in practice.

The rest of this Article assesses the prospects for statutory reform at the state level, using the Oregon experience as a point of reference.[61] Briefly stated, the Oregon experience supports cautious optimism about statutory reform. The Oregon statutes are well-drafted and provide a reasonably determinate and consistent method for resolving choice-of-law issues. But the Oregon experience also reveals

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[57] For Oregon's version of UCC § 1-301, see OR. REV. STAT. § 71.3010 (2021).

[58] *See* James A.R. Nafziger, *Oregon's Conflicts Law Applicable to Contracts*, 38 WILLAMETTE L. REV. 397, 419 (2002) [hereinafter Nafziger, *Oregon's Conflicts Law*] (listing statutory provisions).

[59] James A.R. Nafziger, *The Louisiana and Oregon Codifications of Choice-of-Law Rules in Context*, 58 AM. J. COMPAR. L. 165, 175 (Supp. 2010) [hereinafter Nafziger, *Louisiana and Oregon Codifications*].

[60] For early discussions of choice-of-law statutes, see Leflar, *supra* note 1, and Willis L.M. Reese, *Statutes in Choice of Law*, 35 AM. J. COMPAR. L. 395 (1987).

[61] I do not address the Louisiana codification, in part for lack of familiarity, and in part because the reception and operation of those rules presumably reflects the specifics of the Louisiana system. *See* Symeon C. Symeonides, *The Conflicts Book of the Louisiana Civil Code: Civilian, American, or Original?*, 83 TUL. L. REV. 1041, 1054 (2009) [hereinafter Symeonides, *Conflicts Book Louisiana*] (describing the Louisiana rules as "an independent third path between the common law and civil law paths." (emphasis omitted)); *see also* John F. Coyle, William S. Dodge & Aaron D. Simowitz, *Choice of Law in the American Courts in 2021: Thirty-Fifth Annual Survey*, 70 AM. J. COMPAR. L. 318, 330 (2022) (discussing recent Louisiana cases that "developed shorthand rules" for applying that state's contracts choice-of-law statutes). That said, the Louisiana choice-of-law rules share much with the Oregon rules. *See* Symeonides, *Oregon Tort Conflicts*, *supra* note 14, at 965 n.3 (stating the Oregon tort statute "draws heavily" from the Louisiana rules); Nafziger, *Oregon's Conflicts Law*, *supra* note 58, at 399 (stating the Oregon contracts statute draws from the Louisiana rules but even more from the draft choice-of-law code for Puerto Rico); *see also* Nafziger, *Louisiana and Oregon Codifications*, *supra* note 59, at 174–76.

that statutes do not necessarily lead to reform on the ground. Lawyers and judges may be slow or unwilling to adapt, and statutory solutions create risks as well as benefits.

## II. CHOICE-OF-LAW STATUTES IN OREGON

### *A. The Shift from Common Law to Statutes*

Before enactment of the choice-of-law statutes, Oregon courts developed a two-step common law method for choice of law. First, the court would determine whether a potential conflict existed between the laws of two states.[62] Second, and similar to the practice in many states, the court would sample a variety of open-ended inquiries within a rough Second Restatement framework:

> Sometimes the court's analysis is indistinguishable from a more or less mechanical gravity of contacts approach. Sometimes the opinions weigh opposing governmental interests, typically finding a false conflict, during an analysis of the most significant "contacts" or "relationships," but seldom do the opinions reveal careful attention to the complex policies underlying conflicting laws. Indeed, the role assigned . . . to public policy as a critical factor in the analysis remains vague. Sometimes it dominates the analysis from start to finish as a sort of parochial *ordre public* exception to a normal choice of foreign law; at other times, it serves (as it should) to define significance of a particular contact or territorial relationship. At still other times, Oregon's public policy serves as the so-called third step in a three-step test . . . . According to this methodology, public policy may serve either as a tie-breaker to resolve a true conflict . . . or, even more expansively, to trump foreign law even when the foreign jurisdiction is deemed to have the most significant relationship with a case or particular issue in a case. Finally, the courts have occasionally abandoned any pretense of policy-and-interests methodology in favor of a form of neoterritorialism.[63]

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[62] Professor Nafziger observed that courts would often say they were looking for an "actual" conflict, but that the true purpose of their inquiry was to discover whether an "*ostensible* conflict" exists. "After all, if the analysis is to rely on some sort of most significant relationship or governmental interest analysis, the court could hardly conclude in the first step that there is an 'actual' conflict before determining, in the second step, where the most significant relationship or interests lie." James A.R. Nafziger, *Oregon's Project to Codify Choice-of-Law Rules*, 60 LA. L. REV. 1189, 1195–96 (2000) [hereinafter Nafziger, *Oregon's Contracts Project*]. The Oregon choice-of-law statutes that Nafziger helped draft use the term "apparently conflicting laws." *See, e.g.*, OR. REV. STAT. § 15.360(2) (2021). For the Oregon Supreme Court's engagement with this language, see *infra* notes 209–212 and accompanying text.

[63] Nafziger, *Oregon's Contracts Project*, *supra* note 62, at 1196 (footnotes omitted) (citations omitted). For states that use a hybrid methodology in practice, see, for example, Symeonides, *Choice of Law in the American Courts, supra* note 10, at 194–95.

According to Professor Nafziger, this "methodological eclecticism produce[d] unexpected or doubtful results in a substantial percentage of conflicts decisions."[64] Elsewhere, Nafziger described the Oregon cases as "puzzling," "extraordinarily undisciplined," and "bewildering."[65] Nor was Oregon alone. As Section I.A makes clear, Nafziger's conclusions about Oregon would probably describe the law of many common law states.

Aware that the existing common law approach was dysfunctional, the Oregon Law Commission began work on a statutory framework for choice of law.[66] The goal was "to provide a clear, comprehensive set of choice-of-law rules to replace the jumble of rather ambiguous and unstable jurisprudence created by Oregon courts" and also "to overcome the *lex fori* orientation of judicial decisions while protecting Oregon interests, especially those of its residents, to the greatest extent possible."[67] These goals are not unique to Oregon. The current project to draft a *Restatement (Third) of Conflict of Laws* proceeds from a similar set of criticisms and embraces a similar set of goals.[68]

In 2001 and 2009, respectively, the Oregon Legislative Assembly enacted the Commission's contracts and torts choice-of-law proposals "with only minor changes."[69] These statutes provide a comprehensive approach to choice of law that displaces Oregon's former common law doctrines, although the full extent of that displacement remains unclear.[70] The new legislation joined a handful of other Oregon statutes that govern choice of law on specific topics.[71]

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[64] Nafziger, *Oregon's Contracts Project*, *supra* note 62, at 1197; *see also* Symeonides, *Oregon Tort Conflicts*, *supra* note 14, at 968–71.

[65] James A.R. Nafziger, *Oregon's Project to Codify Conflicts Law Applicable to Torts*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 287, 293, 295, 304 (2004).

[66] Professor Nafziger proposed the project to the Oregon Law Commission. *See* Nafziger, *Louisiana and Oregon Codifications*, *supra* note 59, at 170; Nafziger, *Oregon's Contracts Project*, *supra* note 62, at 1189.

[67] Nafziger, *Oregon's Conflicts Law*, *supra* note 58, at 398–99. The Oregon Law Commission reports confirm these goals. *See id.* at 407–08 (reproducing the report on choice of law for contracts); SYMEON C. SYMEONIDES & JAMES A.R. NAFZIGER, OREGON LAW COMMISSION WORK GROUP ON CHOICE OF LAW FOR TORTS, CHOICE-OF-LAW FOR TORTS AND OTHER NON-CONTRACTUAL CLAIMS REPORT AND COMMENTS, S. 561, Reg. Sess., at 5 (2009).

[68] *See supra* note 24.

[69] Portfolio Recovery Assocs. v. Sanders, 462 P.3d 263, 266–67 (Or. 2020) (noting the enactment of the contracts statute "with only minor changes"); *see also* OR. REV. STAT. §§ 15.300–380 (2021) (contracts, originally enacted in 2001); OR. REV. STAT. §§ 15.400–460 (torts and other non-contractual claims, originally enacted in 2009).

[70] *See infra* Sections II.C–II.E.

[71] *See supra* note 58.

### *B. The Oregon Choice-of-Law Statutes*

#### *1. Contracts*[72]

Enacted in 2001, the choice-of-law statutes for contracts create four categories.[73] The first category includes contracts for goods or services provided in Oregon, where the state is a party to the contract, contracts for "construction work to be performed primarily in Oregon," employment contracts "for services to be rendered primarily in Oregon by a resident of Oregon," and consumer contracts if the consumer is "a resident of Oregon at the time of contracting."[74] The statutes mandate the application of Oregon law to all of these contracts, even if the parties contracted for application of some other jurisdiction's law.

The second category is contracts in which the parties have chosen their own law. The statutes direct courts to honor this choice, subject to the limits in the previous paragraph and so long as the choice is "express or clearly demonstrated from the terms of the contract."[75] This category is limited to "contractual rights and duties," which prevents parties from contracting for the law that would apply, for example, to torts arising out of or relating to the contract.[76]

The third category creates a set of presumptions if "an effective choice of law has not been made by the parties . . . unless a party demonstrates that the application of that law would be clearly inappropriate under the principles of Oregon Revised Statutes (ORS) 15.360."[77] The presumptions apply to contracts involving occupancy or use of real property, contracts for personal services, franchise contracts, licensing contracts, and agency contracts.[78]

The final category applies to contracts that do not fall into one of the other three categories:

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[72] For detailed analysis of the Oregon choice-of-law statutes relating to contracts, see Symeon C. Symeonides, *Oregon's Choice-of-Law Codification for Contract Conflicts: An Exegesis*, 44 WILLAMETTE L. REV. 205 (2007) [hereinafter Symeonides, *Oregon Contract Conflicts*].

[73] The statutes also include provisions about form and validity, capacity, and consent. *See* OR. REV. STAT. §§ 15.325, 15.330, 15.335 (2021).

[74] OR. REV. STAT. § 15.320 (2021). The consumer contracts provisions also mandate Oregon law if "[t]he consumer's assent to the contract is obtained in Oregon, or the consumer is induced to enter into the contract in substantial measure by an invitation or advertisement in Oregon." *Id.* § 15.320(4)(a)(B).

[75] OR. REV. STAT. § 15.350(2) (2021).

[76] *Id.* § 15.350(1) follows the majority approach. *See supra* note 17; *see also* Nafziger, *Oregon's Conflicts Law*, *supra* note 58, at 420 (reproducing Oregon Law Commission comment stating that ORS 15.350(1) "makes clear that the exercise of party autonomy within this Act extends only to contractual rights and duties of the parties and not to non-contractual rights and duties such as those arising out of the law of torts and property"); Symeonides, *Oregon Contract Conflicts*, *supra* note 72, at 223–26 (explaining the same point).

[77] OR. REV. STAT. § 15.380(1) (2021).

[78] *See id.* § 15.380(2).

> To the extent that an effective choice of law has not been made by the parties pursuant to ORS 15.350 or 15.355, or is not prescribed by ORS 15.320, 15.325, 15.330, 15.335 or 15.380, the rights and duties of the parties with regard to an issue in a contract are governed by the law, in light of the multistate elements of the contract, that is the most appropriate for a resolution of that issue. The most appropriate law is determined by:
>
> (1) Identifying the states that have a relevant connection with the transaction or the parties, such as the place of negotiation, making, performance or subject matter of the contract, or the domicile, habitual residence or pertinent place of business of a party;
>
> (2) Identifying the policies underlying any apparently conflicting laws of these states that are relevant to the issue; and
>
> (3) Evaluating the relative strength and pertinence of these policies in:
>
> (a) Meeting the needs and giving effect to the policies of the interstate and international systems; and
>
> (b) Facilitating the planning of transactions, protecting a party from undue imposition by another party, giving effect to justified expectations of the parties concerning which state's law applies to the issue and minimizing adverse effects on strong legal policies of other states.[79]

This provision has several notable features. First, the overall standard is the "most appropriate" law, not the law that has "the most significant relationship" to the parties or event[80]—suggesting a broader inquiry rooted in material justice rather than contacts. Second, although the statute still asks which states are connected with the issue, it does not match those contacts with state interests; instead, it asks courts to identify and evaluate the substantive "policies" of those states with respect to specific goals that include minimizing adverse impacts on the "strong legal policies of other states."[81]

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[79] OR. REV. STAT. § 15.360 (2021).

[80] *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (AM. L. INST. 1971) (for contracts, courts should apply "the local law of the state which . . . has the most significant relationship to the transaction and parties under the principles stated in § 6").

[81] § 15.360(3)(b). Professor Symeonides provided the following explanation of this task:

> One should strive for decisions that . . . are deferential to the needs and policies of the interstate and international systems, such as discouraging forum shopping and aiming for interstate and international uniformity of result. . . . [O]ne should [also] consider which choice of law would produce the least adverse consequences on the strongly held policies of the involved states. In this sense, the approach . . . focuses on consequences. It aspires to identify the state which, in light of its policies rendered pertinent by its factual and other relationship to the contract, the underlying transactions and the parties would bear the most serious legal, social, economic, and other consequences if its law were not applied to the particular issue.

Symeonides, *Oregon Contract Conflicts*, *supra* note 72, at 238; *see also infra* note 91 (discussing the torts statutes). The effort to avoid adverse consequences to the policies of other states has an

The Oregon Law Commission (OLC) also provided commentary on each section of the statute.[82]

*2. Torts and Other Noncontractual Claims*[83]

Enacted in 2009, the choice-of-law statutes for torts and other noncontractual claims similarly divide claims into different categories. The torts statutes also contain general provisions that the contracts statutes lack.[84]

The first category of claims is those to which Oregon law automatically applies. This broad category includes claims "against a public body of the State of Oregon," claims against the owner or occupant of land "for, or to prevent, injury on that property and arising out of conduct that occurs in Oregon," claims against an employer by an employee "who is primarily employed in Oregon that arise out of injury that occurs in Oregon," and claims for "professional malpractice arising from services rendered entirely in Oregon by personnel licensed to perform those services under Oregon law."[85] A second set of mandates requires application of Oregon law if, "after the events giving rise to the dispute, the parties agree to the application of the law of Oregon," if "none of the parties raises the applicability of foreign law," and when the parties "fail to assist the court in establishing the relevant provisions of foreign law after being requested by the court to do so."[86] Products liability claims have their own set of mandates that require application of Oregon law in some circumstances, with an escape clause for situations in which "the application of the law of a state other than Oregon to a disputed issue is substantially more appropriate."[87]

The second category is arguably the heart of the torts choice-of-law statutes: a set of general rules—similar to the presumptions in the contracts statutes—that address specific kinds of fact patterns based on "the location of the injury, the location

obvious kinship to the comparative impairment method developed by Professor Baxter and applied to some degree by California courts in torts cases, despite the fact that the Oregon Law Commission's Work Group rejected that approach as a general framework. *See* Nafziger, *Louisiana and Oregon Codifications*, *supra* note 59, at 172. Perhaps a more precise claim is that—like the Louisiana codification—Oregon has a "consequences-based" approach to choice of law. *See* Symeonides, *Conflicts Book Louisiana*, *supra* note 61, at 1053 (quoting RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6.9, at 355 (4th ed. 2001) (the Weintraub passage appears on page 403 of the most recent 2010 sixth edition).

[82] *See* Nafziger, *Oregon's Conflicts Law*, *supra* note 58, at 419–25 (reproducing the OLC commentary).

[83] For detailed analysis of the Oregon choice-of-law statutes relating to torts and other noncontractual claims, see Symeonides, *Oregon Tort Conflicts*, *supra* note 14.

[84] The torts statutes add provisions on characterization, localization, and domicile. *See* OR. REV. STAT. §§ 15.410, 15.415, 15.420 (2021). Whether these provisions apply in part to the contracts statutes remains an open question.

[85] OR. REV. STAT. § 15.430(4)–(7) (2021).

[86] *Id.* § 15.430(1)–(3).

[87] OR. REV. STAT. § 15.435(3) (2021).

of the injurious conduct, and the domicile of the parties."[88] Here again, an escape clause allows application of the law "of a state other than the state designated [by the general rules]," if application of the other state's law "is substantially more appropriate."[89]

The final category is the "general and residual approach":

> Except as provided in ORS 15.430, 15.435, 15.440 and 15.455, the rights and liabilities of the parties with regard to disputed issues in a noncontractual claim are governed by the law of the state whose contacts with the parties and the dispute and whose policies on the disputed issues make application of the state's law the most appropriate for those issues. The most appropriate law is determined by:
>
> (1) Identifying the states that have a relevant contact with the dispute, such as the place of the injurious conduct, the place of the resulting injury, the domicile, habitual residence or pertinent place of business of each person, or the place in which the relationship between the parties was centered;
>
> (2) Identifying the policies embodied in the laws of these states on the disputed issues; and
>
> (3) Evaluating the relative strength and pertinence of these policies with due regard to:
>
> > (a) The policies of encouraging responsible conduct, deterring injurious conduct and providing adequate remedies for the conduct; and
> >
> > (b) The needs and policies of the interstate and international systems, including the policy of minimizing adverse effects on strongly held policies of other states.[90]

This section shares the general features of the similar provision for contracts. Again, the overall standard is the "most appropriate" law. Unlike the contracts statutes, however, the most appropriate law standard also runs through the torts statutes as an escape from the presumptions mentioned above, albeit with the modifier "substantially." The residual statute also asks which states have contacts with the "disputed issue," but instead of matching those contacts with state interests, it follows the contracts statutes and asks courts to identify and evaluate the substantive "policies" of those states with respect to specific goals. Those goals differ from the ones in the contracts statutes, except for the goal of minimizing adverse impacts on "strongly held legal policies of other states."[91]

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[88] For a good example of these provisions in action, see R.M. *ex rel.* M.W. v. Am. Airlines, Inc., 338 F. Supp. 3d 1203, 1210 (D. Or. 2018). *See* OR. REV. STAT. § 15.440 (2021).

[89] § 15.440(4).

[90] OR. REV. STAT. § 15.445 (2021).

[91] *Id.* § 15.445(3)(b). As Professor Symeonides explained:

As it did for the contracts statutes, the OLC provided commentary on each provision, although the torts commentary is much more extensive and includes charts that help attorneys and judges work through the general rules in ORS 15.440.[92] Also, the torts statutes include a mandate that the OLC must "make available on the website maintained by the commission a copy of the commentary approved by the commission for the provisions of ORS 15.400 to 15.460"[93]—which suggests that the commentary is intended to assist and influence judicial application and interpretation of the statutes.

*3. Evaluating the Oregon Choice-of-Law Statutes*

The statutes simplify the choice-of-law process in Oregon in two primary ways. First, the statutes mandate Oregon law in numerous circumstances—circumstances which, by and large, appropriately qualify for Oregon law. Second, the statutes create strong presumptions to guide choice of law for specific kinds of cases. All of these provisions draw from decades of experience with interest analysis, the Second Restatement, and other methods. But these provisions also respond to the eclecticism and uncertainty of the older methods and their accompanying case law by creating a more determinate structure for choice-of-law decisions.

Overall, therefore, the new statutes surpass the state common law doctrines that they displaced. Drafts of the new *Restatement (Third) of Conflicts of Law* acknowledge the merit of Oregon's statutory approach to choice of law.[94] Indeed,

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> [T]he court . . . should (1) always be mindful of the adverse consequences of the choice-of-law decision on the strongly held policies of the involved states; and (2) choose the law of the state which, in light of its relationship to the parties and the dispute and its policies rendered pertinent by that relationship, would sustain the most serious legal, social, economic, and other consequences of the choice-of-law decision.

Symeonides, *Oregon Tort Conflicts*, *supra* note 14, at 1037 (emphasis omitted); *see also supra* note 81 (discussing the contracts statutes and the overall nature of this approach).

[92] *See generally* SYMEON C. SYMEONIDES & JAMES A.R. NAFZIGER, OREGON LAW COMMISSION WORK GROUP ON CHOICE OF LAW FOR TORTS, CHOICE-OF-LAW FOR TORTS AND OTHER NON-CONTRACTUAL CLAIMS REPORT AND COMMENTS, S. 561, Reg. Sess. (2009).

[93] OR. REV. STAT. § 15.460 (2021).

[94] *See, e.g.*, RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 2.02 rep.'s note 4, at 38 (AM. L. INST., Tentative Draft No. 2, 2021) ("By making allowance for the 'manifestly more appropriate' exception in evaluating the role of domicile in choice-of-law determinations, this Section was influenced by the general approach of the Oregon Choice of Law Code."); *id.* § 2.08 rep.'s note 6, at 100 ("Significantly for the purpose of this Section, Oregon's choice-of-law statute designates a corporation's principal place of business as its presumptive domicile."); RESTATEMENT (THIRD) OF CONFLICT OF LAWS §§ 6.08 rep.'s note at 37, 6.09 rep.'s note at 41, 6.10 rep.'s note at 43 (AM. L. INST., Council Draft No. 4, 2020) (highlighting the influence of Oregon statutory provisions allowing party choice of law for tort claims); RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 8.12 rep.'s note 7, at 153 (AM. L. INST., Council Draft No. 5, 2021) ("Subsection (3) of this Section is inspired in part by Oregon Revised Statutes § 15.360. Case law

the Third Restatement borrows its core inquiry—choosing "the most appropriate law"—directly from the Oregon statutes.[95]

But Oregon's choice-of-law statutes do not consist entirely of mandates and presumptions. They also include residual or general provisions that develop the "most appropriate law" standard. Here as well, the statutes improve on the common law, including the Restatements, by providing narrower guidance for selecting the most appropriate law (in contrast to the Second Restatement's § 6 factors). Yet the precise methodology for selecting the most appropriate law remains ambiguous. What, exactly, makes one state's law more appropriate than another state's law? How does a court identify the relevant policies? How exactly does it use the statutory goals to evaluate the "strength and pertinence" of the relevant policies? What is the meaning and relative weight of the various evaluation factors?

Presumably, the answer to these questions is that the courts will develop answers over time through an essentially common law process of statutory interpretation. But if judicial interpretation is the key to applying these residual provisions, what role should Oregon's old common law cases play in framing those answers? After all, the common law of choice of law also struggled with identifying and evaluating state interests and policies, and the evaluation factors in the new statutes are not foreign to the questions posed by the older common law methods.

Be that as it may, the language of the statutes clearly suggests an intent to displace the methodology and rules of the old common law, and the legislative history makes that intention clearer.[96] For contracts, ORS 15.305 provides, "ORS 15.300 to 15.380 govern the choice of law applicable to any contract, or part of a contract, when a choice between the laws of different states is at issue" unless "another Oregon statute expressly designates the law applicable to the contract or part of a contract."[97]

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interpreting that statute can provide further guidance on applying the contract-law goals in the choice-of-law decisions.").

[95] *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.01 (AM. L. INST., Tentative Draft No. 3, 2022) (stating that when a conflict of relevant laws exists, choice-of-law analysis directs courts to select "the most appropriate relevant law to govern particular issues in such matters."); *id.* § 5.02 cmt. e & rep.'s note 3 (tracing this standard to the Oregon statutes). Drafts of § 5.02 also referred explicitly to the "most appropriate law" until Tentative Draft No. 3. *See, e.g.*, RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.02(3) (AM. L. INST., Preliminary Draft No. 7, 2021).

[96] Discussing both statutes, Professor Nafziger stated that the Oregon Law Commission's initial study group explicitly "reject[ed] interest analysis" and that its work group rejected "several features of the Second Restatement, including its specific sets of connecting factors, its specific presumptive rules, and the matrix of substantive principles in Section 6 of that approach." Nafziger, *Louisiana and Oregon Codifications*, *supra* note 59, at 172. Nafziger was the reporter for the contracts project and co-reporter for the torts project. *Id.* at 172 n.35.

[97] OR. REV. STAT. § 15.305 (2021). The statute also provides that "ORS 15.320 does not apply to any contract in which one of the parties is a financial institution, as defined by 15 U.S.C. 6827, as in effect on January 1, 2002." *Id.*

Section 11 of the choice-of-law legislation for contracts states that the new rules "apply to all contracts, whether entered into before, on or after the effective date of this 2001 Act, unless that application would violate constitutional prohibitions against impairment of contracts."[98] The Oregon Law Institute's commentary explains:

> Section 11 establishes a uniform choice-of-law regime in Oregon applicable to all contracts, regardless of when they may have been made. The only exceptions would occur if the application of a choice-of-law rule would unconstitutionally impair a contract or if the choice of law is at issue in an action or proceeding commenced before the effective date of the Act.[99]

What does it mean to have a "uniform choice-of-law regime"? Professor Symeonides admitted that the statutory language is not as clear as it could be.[100] But he asserts:

> [T]he Act applies when the contract at issue has such contacts with more than one state (multistate contract) as to raise the question of which state's law should govern the parties' rights and obligations (choice-of-law question). Conversely, the Act does not apply when the contract in question does not have meaningful contacts with more than one state (a fully-domestic or intrastate contract).[101]

As for the underlying approach or theory that drives the statutes, Symeonides asserted that the "most appropriate law" standard for contracts choice of law "disassociates the Oregon Act . . . from a significant-contacts or significant-relationship analysis like the Second Restatement."[102] Nafziger confirmed that "[o]ne of the purposes of the legislation is to displace the cumbersome methodology prescribed by the Second Restatement."[103] That is to say, the statutes superseded the old common law choice-of-law rules. Even more, according to Nafziger, if there is a role for common law rules or analysis—for example, if a court discovers a "gap" in the statutes—the court should develop a new common law that reflects the principles of the new

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[98] Act of Apr. 12, 2001, ch. 164, § 11(1), 2001 Or. Laws 382, 384; *see also* Nafziger, *Oregon's Conflicts Law*, *supra* note 58, at 418. Section 11 was enacted by the Oregon legislature as part of the contracts choice-of-law statute, but it was not codified in the Oregon Revised Statutes.

[99] Nafziger, *Oregon's Conflicts Law*, *supra* note 58, at 425 (reproducing the Oregon Law Commission's comment to § 11).

[100] Symeonides, *Oregon Contract Conflicts*, *supra* note 72, at 210 (stating "the Act delineates its scope of operation by stating somewhat circularly that it 'governs[s] the choice of law applicable to any contract . . . when a choice between the laws of different states is at issue'" (quoting OR. REV. STAT. § 81.102 (2005))). Symeonides was a member of the Oregon Law Commission's contracts project and was chair and co-reporter for the torts project.

[101] *Id.*

[102] *Id.* at 236.

[103] Nafziger, *Oregon's Conflicts Law*, *supra* note 58, at 403.

statutes: "Oregon's new law itself will shape the content of the common law methodology applicable to any residual conflicts not specifically covered by the law itself."[104]

For torts, ORS 15.405 provides that "ORS 15.400 to 15.460 govern the choice of law applicable to noncontractual claims when a choice between or among the laws of more than one state is at issue," unless another Oregon statute "expressly designate[s] the law governing a particular noncontractual claim."[105] This statement leaves no express room for common law. Further, Symeonides has written that, like the contracts statutes, the approach of the torts statutes "is intended to be—and *is*—different" from the Second Restatement and other modern approaches.[106] He goes on to explain:

> ORS 31.878 and the Act avoid using the term "interest" in order to disassociate the approach of this section and this Act from Professor Currie's "governmental interest analysis" and other modern American approaches that seem to perceive the choice-of-law problem as a problem of interstate competition, rather than as a problem of interstate cooperation in conflict avoidance.[107]

As with the contracts statutes, therefore, the best conclusion for torts is that the Oregon Law Commission—and presumably the legislature that adopted these proposals almost completely as drafted—intended to displace the common law methodology and rules in their entirety.

As Nafziger had for contracts, Symeonides went on to suggest that in applying the torts statutes, courts would exercise their discretion in accordance with the statutes' goals and structure.[108] That is to say, if courts use common law rules or analysis for choice of law in torts, those rules should be new rules, consistent with and developed under the guidance of the new statutes.

Any effort to determine the relationship between the choice-of-law statutes and the older common law rules should also take account of the Oregon courts' more general approach to interpreting statutes that interact with common law. Oregon courts no longer hold that statutes in derogation of the common law must be strictly construed.[109] Oregon courts also recognize that clear statutory language overrides

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[104] *Id.*

[105] OR. REV. STAT. § 15.405 (2021).

[106] Symeonides, *Oregon Tort Conflicts*, *supra* note 14, at 1033.

[107] *Id.* at 1037.

[108] *See id.* at 1043–45.

[109] *Compare* Naber v. Thompson, 546 P.2d 467, 468 (Or. 1976) (interpreting Oregon's former guest statute and declaring "[i]t is a cardinal rule of statutory construction that statutes in derogation of a common law right must be strictly construed."), *with* Beaver *ex rel.* Beaver v. Pelett, 705 P.2d 1149, 1151 (Or. 1985) ("The 'no-derogation' formula, coupled with the tendency to treat statutes, when possible, as codifications of prior caselaw, denigrates and confines

common law rules or judicial policy preferences.[110] The Oregon Supreme Court has also made clear that Oregon courts must consider legislative history, whether or not the text of the statute is ambiguous.[111] And the Supreme Court and lower courts routinely rely on the official comments that accompany Restatements.[112] Bringing these doctrines to bear on the choice-of-law statutes, one easily could confirm that the statutes not only derogate the old common law choice-of-law rules, but also that the statutes should be construed generously, not strictly, in recognition of their underlying purposes.

But this analysis and conclusion—sweeping though it may appear—does not quite answer the common law question. It is one thing to displace a common law rule, for example, governing choice of law for consumer contracts, with a different or more precise statutory rule, or to replace a particular formal analytical structure. It is quite another thing to displace common law habits of thought, approaches to particular questions, or preferences in favor of certain results.

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the role of legislative examination, discussion, and enactment of public policies in those fields of law that traditionally have developed in private litigation."), *and* Olcott v. Rogge Wood Prods., Inc., 932 P.2d 1204, 1206 (Or. Ct. App. 1997) ("Although it may be appropriate to use certain canons of construction in order to help determine [legislative] intent . . . the canon that statutes in derogation of the common law should be strictly construed is not one of them.").

[110] *See* State v. Sandoval, 156 P.3d 60 (Or. 2007) (overturning common law duty to retreat doctrine and returning to the text of the Oregon self-defense statute, which does not require retreat).

[111] *See* State v. Gaines, 206 P.3d 1042, 1050–51 (Or. 2009) (providing three-step methodology for statutory interpretation: (1) "an examination of text and context"; (2) "consideration of pertinent legislative history that a party may proffer," which the court must consider "even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis," although "the extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine"; and (3) "[i]f the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty."). In the choice-of-law context, the OLC's reports may be more significant than formal legislative history, although they do not provide direct evidence of what legislators thought. Arguably, those reports should have the same status as a legislative committee report. But even if those reports do not qualify formally as legislative history, they are at least as important as the commentary that accompanies Restatement provisions. *See infra* note 112.

[112] *See, e.g.*, Troubled Asset Sols., LLC. v. Wilcher, 445 P.3d 881, 888, 890 (Or. 2019) (relying on comments to Restatement (Second) of Contracts); State v. Turnidge, 374 P.3d 853, 917 n.60, 925 n.72 (Or. 2016) (relying in criminal case on comments to Restatement (Third) of Torts about causation); Bagley v. Mt. Bachelor, Inc., 340 P.3d 27, 34–35, 38 n.11 (Or. 2014) (relying on comments to Restatement (Second) of Contracts and Restatement (Second) of Torts). Whether or not OLC commentary qualifies as legislative history, it is at least as meaningful as the official comments that accompany Restatements.

More precise assessments of these issues will emerge from judicial application of the statutes. As the next sections indicate, some answers are taking shape.

### *C. The New Statutes in Court*[113]

The bench and bar initially paid little attention to the new statutes. In the first years after enactment of the contracts statutes—and to a lesser extent after the torts statutes—published state and federal court decisions rarely mentioned them. Unreported federal court discussions of the statutes were easier to find. State trial courts may also have applied the statutes in unpublished opinions. But anyone who searched for choice-of-law decisions that applied the new statutes in the early years after enactment would find far more opinions that used the common law and Second Restatement to resolve choice-of-law issues under Oregon law, even though those doctrines were no longer the law of Oregon.

#### *1. The New Statutes in Reported State Court Decisions*

Before the *Portfolio Recovery Associates v. Sanders* opinions in 2018 and 2020,[114] the choice-of-law statutes rarely appeared in reported Oregon state court decisions. The Oregon Supreme Court cited the statutes twice while discussing other topics, but its references shed no light on how the statutes were to be interpreted or applied.[115]

The Oregon Court of Appeals often ignored or misapplied the statutes. At least three post-statutory decisions failed to mention the relevant choice-of-law statutes and instead used superseded common law methods to resolve choice-of-law issues.[116] One of those cases was particularly odd, because the court relied on an earlier decision that had not only cited the contracts choice-of-law statutes but had also

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[113] Much of the material in Sections II.C and II.D, and to a lesser extent II.E, is adapted from John T. Parry, *The Dead Hand of the Past in Oregon Choice of Law*, 23 LEWIS & CLARK L. REV. ONLINE J. (2019), https://law.lclark.edu/live/files/29064-parryreadytopublishcroppedpdf.

[114] *See* Portfolio Recovery Assocs. v. Sanders, 425 P.3d 455 (Or. Ct. App. 2018), *aff'd*, 462 P.3d 263 (Or. 2020) (discussed *infra* Section II.E).

[115] *See* Espinoza v. Evergreen Helicopters, 376 P.3d 960, 992 (Or. 2016) (citing ORS 15.440 because choice of law plays a role in forum non conveniens analysis but not analyzing or applying the statute); ACN Opportunity, LLC v. Emp. Dep't, 418 P.3d 719, 726 n.3 (Or. 2018) (rejecting appellant's reliance on ORS 15.420(2) for a general definition of the word "maintain").

[116] *See* Mid-Century Ins. Co. v. Perkins, 149 P.3d 265, 267–68 (Or. Ct. App. 2006), *aff'd*, 179 P.3d 633 (Or. 2008) (ignoring statutes and using Second Restatement); Yoshida's Inc. v. Dunn Carney Allen Higgins & Tongue LLP, 356 P.3d 121, 130 (Or. Ct. App. 2015) (citing Angelini v. Delaney, 966 P.2d 223, 227 (Or. Ct. App. 1998)) (ignoring statutes and applying pre-statutory common law case that held Oregon law applies if there is a false conflict between the law of Oregon and another state); AS 2014–11 5W LLC v. Caplan Landlord, LLC, 359 P.3d 1225, 1235 (Or. Ct. App. 2015) (citing M+W Zander v. Scott Co. of Cal., 78 P.3d 118, 121 (Or. Ct. App. 2003)) (ignoring statutes and using Second Restatement case).

taken care to explain that it was not applying the statutes only because the case "was commenced before the effective date of the Act."[117]

Before the *Portfolio* litigation, only two court of appeals decisions had used the statutes to decide a choice-of-law question. The first case was *Johnson v. J.G. Wentworth Originations, LLC*, in which the court considered whether to follow a settlement agreement's choice of California law.[118] The court provided three citations to explain its decision to accept the parties' choice:

> ORS 15.350 ("[t]he contractual rights and duties of the parties are governed by the law or laws that the parties have chosen."); *see M+W Zander v. Scott Co. of California*, 190 Or.App. 268, 78 P.3d 118 (2003) (when parties specify their choice of law in a contract, that choice will be effectuated subject to limitations under the *Restatement (Second) of Conflicts of Laws* (1971)); *Pinela v. Neiman Marcus Group, Inc.*, 238 Cal.App.4th 227, 251, 190 Cal.Rptr.3d 159 (2015) (contractual choice of law clauses are generally construed to designate the substantive law of the chosen jurisdiction as well as the interpretation of the agreement).[119]

The court improved on the earlier cases by properly citing the relevant choice-of-law statute. But why did the court also cite a superseded common law decision that applied the Second Restatement, when the statute clearly controlled the analysis?[120]

The second court of appeals decision is equally frustrating. In *Peace River Seed Co-Operative Ltd. v. Proseeds Marketing, Inc.*,[121] a Canadian entity sought attorney fees after prevailing against an Oregon corporation in Oregon court. The court applied the Second Restatement's "most significant relationship" test and held that Oregon law governed the attorney fees issue in this contract dispute.[122] Along the

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[117] *See AS 2014–11 5W LLC*, 359 P.3d at 1235 (citing *M+W Zander*, 78 P.3d at 121 n.1). A handful of other court of appeals opinions also stated that the statutes did not apply because of their effective date or their limited application to contracts involving financial institutions. *See* Unifund CCR Partners v. DeBoer, 277 P.3d 562, 563 n.1 (Or. Ct. App. 2012) (using Second Restatement because contracts choice-of-law statutes did not apply to financial institutions); CACV of Colo., LLC v. Stevens, 274 P.3d 859, 863 n.6 (Or. Ct. App. 2012) (same); Cap. One Bank v. Fort, 255 P.3d 508, 510–11 n.3 (Or. Ct. App. 2011) (same); Machado-Miller v. Mersereau & Shannon, LLP, 43 P.3d 1207, 1210 n.3 (Or. Ct. App. 2002) (noting case predated contracts choice-of-law statutes).

[118] Johnson v. J.G. Wentworth Originations, LLC, 391 P.3d 865, 868 (Or. Ct. App. 2017).

[119] *Id.*

[120] The citation to the California decision could have had some purpose, for the court may have cited it to suggest the scope of the choice-of-law clause and as a transition to the next part of the opinion. *See id.* at 868–69 (discussing California law on anti-assignment provisions in contracts).

[121] Peace River Seed Coop., Ltd. v. Proseeds Mktg., Inc., 293 P.3d 1058, 1062 (Or. Ct. App. 2012), *aff'd in part*, *rev'd in part*, 322 P.3d 531 (2014).

[122] *Id.* at 1068–70.

way, the court twice provided "see also" citations to the relevant choice-of-law statute, ORS 15.360.[123] For the second of those citations, the court first cited the Second Restatement's list of relevant contacts in contract cases and only then noted ORS 15.360(1)'s broadly similar list.[124] The court did not explicitly state that it was equating the approach of the Second Restatement and the approach of ORS 15.360, but that legally incorrect equation is the most natural reading of the citation. The Oregon Supreme Court granted review and decided the case on other grounds without addressing choice of law.[125]

*2. The New Statutes in Federal Court Decisions*

In contrast with the small number of state court decisions, numerous opinions from the United States District Court for the District of Oregon addressed choice-of-law issues in the years between enactment of the statutes and the state courts' *Portfolio* decisions. For many years, the bulk of federal court opinions continued to apply the Second Restatement or rely on Oregon decisions that predate the statutes.[126] But a growing number of district court opinions began to discuss and apply the statutes.[127] By the end of 2018, the vast majority of choice-of-law decisions by Oregon federal courts relied on the statutes, not the Second Restatement or other common law doctrines that were no longer the law of Oregon. By and large, moreover, the federal courts have been applying the statutes in a reasonable way.[128]

### *D. Problems with the New Statutes*

Although the new statutes appear to be operating well in federal court, and hopefully will operate well in state court after the *Portfolio* decisions (discussed below), implementation of the statutes reveals two significant issues: the outsized importance of federal decisions and the persistence of common law methods.

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[123] *Id.* at 1069.

[124] *Id.* The court of appeals repeated this erroneous equation of the new statutes with the old Restatement in its *Portfolio* opinion. *See infra* notes 181–85 and accompanying text.

[125] Peace River Seed Coop., Ltd. v. Proseeds Mktg., Inc., 322 P.3d 531, 545–46 (Or. 2014).

[126] *See* Parry, *supra* note 113, at 10 n.44 (citing 15 District of Oregon opinions from 2005 through 2018 that used the Second Restatement instead of the relevant Oregon choice-of-law statute). As Maggie Gardner notes, Oregon federal district judges tended either to cite their own pre-statutory choice-of-law opinions or to employ a standard set of citations that persisted even after the law changed. *See* Gardner, *supra* note 29, 1619, 1645–46.

[127] *See* Parry, *supra* note 113, at 11 n.45 (citing 29 District of Oregon opinions from 2007 through 2018 (including 15 from 2016 to 2018) that applied the relevant Oregon choice-of-law statute, as well as four additional opinions that also cited the statutes).

[128] *See, e.g.*, R.M. *ex rel.* M.W. v. Am. Airlines, Inc., 338 F. Supp. 3d 1203, 1210–13 (D. Or. 2018).

*1. The Role of Federal Courts*

The volume of federal court decisions and the paucity of state court opinions means that the District of Oregon is the leading source of case law for interpretation and application of the state's choice-of-law statutes. Somewhat relatedly, commentators have raised concerns about the nationwide phenomenon of federal courts displacing state courts as the leading expositors of state contract law in certain areas, often involving aggregate litigation.[129] Similar concerns apply to aspects of tort doctrine.[130] The specific circumstances that drive these phenomena do not overlap neatly with the average case that generates a choice-of-law decision in federal court. Nonetheless, all of these cases share the fact that the basic circumstances of federal litigation make it easy for federal courts to influence or even determine the content of state law, despite the formal requirements of the *Erie* doctrine.[131]

Federal district court opinions are more widely available on legal databases than state trial court rulings, and federal district court decisions on choice-of-law issues rarely face appellate review within the federal system. (Nor, of course, are federal court decisions on choice-of-law issues subject to review by state appellate courts.) Federal judges, therefore, will find it easier to rely on the reasoning of other federal district court opinions, whether or not those opinions accord with the way that state courts are applying state law.[132] Litigants may also cite relevant federal opinions to state courts, and those state courts may in turn rely on the federal decisions, particularly in a difficult area such as choice of law.[133] As a result, federal court choice-of-

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[129] *See* Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600 (2020); Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2176–80 (2019); *see also* Stephen A. Plass, *Federalizing Contract Law*, 24 LEWIS & CLARK L. REV. 191 (2020) (arguing arbitration decisions, which courts generally must enforce, have created a significant body of federal contract law that has displaced state law).

[130] *See* Bradt & Rave, *supra* note 44, at 1308–09 (arguing the MDL process for mass torts "facilitates a nationwide aggregation that formally respects our inherited norms while also sweeping them aside in the name of mass resolution. It is, other words, a federalization of tort law without saying so"); Gardner, *supra* note 29, at 1649 (stating "tort cases have largely disappeared" from state dockets and "state courts rarely resolve cases with written opinions"). Employment law decisions may be in the same category, to the extent that plaintiffs tend to join state law claims to federal claims and litigate in federal court by choice or because of removal.

[131] *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[132] *See* Gardner, *supra* note 29, at 1645, 1649 (observing that, "[f]or purposes of efficiency and consistency, federal judges may be tempted to follow the lead of other federal judges," especially "given the thinness of alternative legal sources"). Of course, this issue gains complexity if one believes that rules are also relevant to choice among interpretive methodologies. *See* Abbe R. Gluck, *Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898 (2011); Zachary B. Pohlman, *State Statutory Interpretation and Horizontal Choice of Law*, 70 KAN. L. REV. 505 (2022).

[133] *See* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1681 (1992) (suggesting erroneous federal court decisions on

law decisions almost certainly will impact state choice-of-law doctrine. And that is true even if the federal court decision is erroneous, because the chance is small that the error will be corrected—or even detected. Repetition could turn those errors into settled law, at least in federal court and at least until a state court rejects the federal court's specific interpretation or its more general approach.[134]

This shift towards federal courts as the source of choice-of-law precedent need not be pernicious. True, state sovereignty suffers to the extent that state courts lose control over interpretation of their laws.[135] But some of that loss is the necessary consequence of diversity jurisdiction, which in the post-*Erie* era requires federal judges to interpret and apply state law. The loss of control is also contingent, for state appellate courts have the power to wrest back control over choice-of-law doctrine (unlike some of the issues that generate the concern about state contract and tort law). In the meantime, as noted above, federal court decisions on choice-of-law issues could be of higher quality than the average state court decision,[136] which would benefit litigants and doctrinal development (so long as the federal courts do their *Erie* best to use the same analysis that a state court would).

Importantly, this phenomenon seems more likely to take place, and to persist, in a state that follows the Second Restatement rather than in a state such as Oregon that has choice-of-law statutes. Federal courts tend to view the Second Restatement's choice-of-law provisions as a kind of general common law applicable to the subset of non-diversity federal cases that require independent choice-of-law analysis.[137] In a diversity case in which the forum state uses some variation on the Second Restatement, therefore, federal courts may just as easily assume they know what to do or

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state law issues "may even mislead lower state courts that may be inclined to accept federal predictions as applicable precedent").

[134] *Cf. id.* at 1679 ("[T]he state courts have found fault with a not insignificant number of past '*Erie* guesses' made by the Third Circuit and our district courts."). My discussion leans towards assuming there is a correct interpretation of state law in these cases. Sometimes that will be true, because an appellate state court actually has addressed the issue. Other times, of course, there will be no specific state doctrine other than the *Erie* guesses of federal courts. For a straightforward articulation of how federal courts ought to determine state law, see Clermont, *supra* note 40, at 259, 261–63.

[135] *See* Sloviter, *supra* note 133, at 1671 ("[T]he filing of approximately 60,000 diversity cases in the federal courts each year results in the inevitable erosion of the state courts' sovereign right and duty to develop state law as they deem appropriate."); *id.* at 1687 ("When federal judges make state law—and we do, by whatever euphemism one chooses to call it—judges who are not [selected] under the state's system and who are not answerable to its constituency are undertaking an inherent state court function."). For a forceful articulation of this view, see Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459 (1997).

[136] *See supra* note 28.

[137] *See supra* note 46 and accompanying text. Perhaps the same is true for other areas of law covered by Restatements, but that question is beyond the scope of this Article.

rely on other federal court decisions, with less concern for state-specific variations. Less so with state-specific statutes, where the only authoritative interpretive touchstone is within the state. Put differently, to the extent federal courts have moved towards a Second Restatement-based federal common law of choice of law, state choice-of-law statutes push back against that development.[138]

If Oregon federal courts assumed that the Second Restatement was the obvious way to resolve choice-of-law issues (and it was roughly Oregon's approach until the statutes), and if they developed their own approaches to that analysis, then their initial failure to recognize or adapt to the statutes is understandable. Whatever the reason for the lag, the local federal courts know about the statutes now. As in other areas of state law, careful federal court interpretations of the choice-of-law statutes could have a positive impact on attorney arguments and state court opinions in subsequent cases.[139] But as suggested above and in the following Sections, the reverse can also be true; a loose or erroneous federal court decision can also influence subsequent state court decisions.

*2. The Persistence of the Common Law*

To what extent do the new statutes displace the old common law methods and attitudes? As I detailed above, the Oregon choice-of-law statutes were intended to replace the common law methodology and rules, in their entirety, with a new approach that emphasizes different issues and factors.[140] But choice of law traditionally has been a common law doctrine controlled by judges. In Oregon, innovative (if also controversial) decisions by the Oregon Supreme Court—such as *Lilienthal v. Kaufman*[141] and *Erwin v. Thomas*[142]—were critical parts of the American choice-of-law revolution and remain in casebooks today. Against this history, no one should be shocked to learn that judges had difficulty adapting to the new statutes.

Benign explanations exist for this difficulty. At first, courts probably continued to use the Second Restatement because they didn't know about the statutes. Once judges became aware of the statutes, moreover, they could have concluded at first glance that the statutes mostly codify Second Restatement ideas and results. For

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[138] Some readers may approve of a Second Restatement-based federal common law of choice of law, while others will not. I believe such a development would be inconsistent with *Klaxon* and also undesirable. For discussion of the extent to which federal courts should act on their own when doing choice of law, see *supra* notes 31–56 and accompanying text.

[139] *See supra* notes 135–136 and accompanying text.

[140] *See supra* notes 62–112 and accompanying text.

[141] Lilienthal v. Kaufman, 395 P.2d 543, 549 (Or. 1964) (stating "[c]ourts are instruments of state policy" and must "apply that choice-of-law rule which will 'advance the policies or interests of' Oregon.'" (quoting Alfred Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 474 (1960))).

[142] Erwin v. Thomas, 506 P.2d 494, 496–97 (Or. 1973) ("[N]either state has a vital interest in the outcome of this litigation and there can be no conceivable material conflict of policies or interests if an Oregon court does what comes naturally and applies Oregon law.").

example, one might conclude that "most appropriate law" is just another way of saying "most significant relationship."[143] And if the new language simply paraphrases the old standard, then surely the old cases will provide guidance for interpreting the new language. Arguably reasonable conclusions, but incorrect.

A third possibility is that some judges preferred the Second Restatement and deliberately interpreted the new statutes to preserve those doctrines. A nicer way to make this point is to say that common law attitudes toward choice of law survive the new statutes.[144] The problem is that, whatever their attractions, the persistence of these attitudes will frustrate the new statutory choice-of-law scheme that the Oregon legislature enacted to replace the common law.

Case law in state and federal court suggests that this third possibility has some explanatory force. Several state and federal decisions used a hybrid approach that combined statutory and common law analysis.[145] These decisions may have developed this approach by accident, and not as an act of resistance; the courts made no effort to explain how their methodology was consistent with the new statutes. Cases of this kind might fade away as judges and lawyers become used to the statutes—although these decisions will remain as unfortunate precedents.

A second set of cases more self-consciously considered whether any of the old common law doctrines survive the enactment of the choice-of-law statutes. The state court *Portfolio* decisions belong in this group, and I will explore their analysis in the

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[143] *See supra* notes 121–24 and accompanying text.

[144] *Cf. supra* notes 112–13 and accompanying text.

[145] The *Johnson* and *Proseeds* decisions from the Oregon Court of Appeals provide examples of this approach. *See supra* notes 118–125 and accompanying text. For federal court decisions, see Powell v. Sys. Transp., Inc., 83 F. Supp. 3d 1016, 1021–24 (D. Or. 2015) (moving back and forth between statutes and common law while analyzing choice-of-law clause), and Indoor Billboard Nw. Inc. v. M2 Sys. Corp., No. 12-CV-01338, 2013 WL 3146850, at *2–4 (D. Or. June 18, 2013) (using Second Restatement analysis supplemented by public policy provisions of contracts choice-of-law statutes).

For a more complex federal court example, see Superior Leasing, LLC v. Kaman Aerospace Corp., No. 04-3099, 2006 WL 3756950, at *7–8 (D. Or. Dec. 19, 2006). The district court used the contracts choice-of-law statutes and the Second Restatement to decide whether a choice-of-law clause applied to a tort claim. The court ultimately held that the claim must be characterized as a tort claim, that as a matter of Ninth Circuit law tort issues are governed by state choice-of-law doctrine (not by choice-of-law clauses in contracts), and that the Second Restatement controlled the tort choice-of-law determination. This analysis contains two flaws. First, Oregon law, not Ninth Circuit law, governs the relationship between tort claims and choice-of-law clauses in diversity jurisdiction cases involving contracts. *Cf.* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 487 (1941). Second, Oregon law specifically addresses this issue. The choice-of-law statutes for contracts, and their commentary make clear that a choice-of-law clause in a contract cannot control the law that applies to a related tort claim. *See* OR. REV. STAT. § 15.350(1) (2021). The court's ultimate decision to use the Second Restatement for the tort analysis was correct in 2006, however, because the tort choice-of-law statutes did not yet exist.

next Section. Here I will discuss the opinions of Oregon federal judges who directly addressed this issue before *Portfolio*—with diverging results.

In *Herron v. Wells Fargo Financial, Inc.*,[146] Judge Anna Brown noted the common law practice of applying Oregon law if there is no material difference among the laws of the states that have a connection with the case. She applied that doctrine for the non-contractual claims in the case (the choice-of-law statutes for torts had not yet been enacted, and thus, the common law still applied). But, she determined that doctrine did not survive the enactment of the choice-of-law statutes for contracts: "Upon examining the language of the statutes, their exceptions and its goals, this court concludes that they were intended to replace the common law practice of applying Oregon law when there are no material differences between the interested states."[147] Using the statutes, Judge Brown found that the law of the Northern Mariana Islands would apply.[148]

Judge Michael Simon considered the common law's survival in two cases, and he reached the opposite conclusion. The first case, *Richard v. Deutsche Bank National Trust Co.*,[149] raised the question of what law governs breach of contract damages when the contract contains a choice-of-law clause. ORS 15.350(1) provides that "the contractual rights and duties of the parties are governed by the law or laws that the parties have chosen," but Judge Simon declared that this language "does not . . . provide what law should govern the measure of damages."[150] Relying on a 1992 Oregon Court of Appeals decision, Judge Simon used the Second Restatement to decide this issue—although he ended up applying California law, the same law that the parties had chosen to govern their contractual "rights and duties."[151]

Judge Simon embraced Second Restatement analysis, despite the Oregon legislature's decision to jettison it, by identifying what he thought was a gap in the statutes. But that gap does not exist. The OLC's report on the choice-of-law statutes for contracts explains that the phrase "contractual rights and duties" in ORS

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[146] Herron v. Wells Fargo Fin., Inc., No. 05-CV-659, 2006 WL 2422831 (D. Or. Aug. 16, 2006), *recons. denied*, 2006 WL 3803398 (D. Or. Dec. 22, 2006), *aff'd*, 299 F. App'x 713 (9th Cir. 2008).

[147] *Id.* at *10.

[148] *Id.* at *11.

[149] § 15.350(1) (2021); Richard v. Deutsche Bank Nat'l Tr. Co., No. 09-cv-00123, 2012 WL 1082602 (D. Or. Mar. 30, 2012).

[150] *Richard*, 2012 WL 1082602, at *9.

[151] *Id.* ("Although [the] Restatement (Second) [of] Conflict of Laws is not the law of Oregon, our courts refer to its provisions as a guide in resolving conflict of laws questions, especially in contract cases." (quoting Manz v. Cont'l Am. Life Ins. Co., 843 P.2d 480, 482 (Or. Ct. App. 1992))); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 207 (AM. L. INST. 1971) ("The measure of recovery for a breach of contract is determined by the local law of the state selected by application of the rules of §§ 187–188.").

15.350(1) serves the function of distinguishing between contractual and non-contractual issues.[152] Further, Professor (and choice-of-law reporter) Symeonides pointed out that, for the new statutes, "the contractual choice of another state's law [means] that state's 'substantive' law"[153]—and "substantive law" ordinarily includes damages issues, as Judge Simon recognized.[154]

Judge Simon's analysis thus depended on two erroneous conclusions: first, that the language of ORS 15.350(1) is intentionally narrower than the Second Restatement with respect to the contract-related issues in a case, and second, that Second Restatement analysis survives enactment of the statutes. The first conclusion is at odds with the tenor of the Oregon statutes, ignores the drafting history, and assumes without explanation that they depart from other modern approaches to characterizing damages for choice-of-law purposes. The second conclusion disregards the clear goal of the legislature to displace the Second Restatement.

The second case, *Schedler v. Fieldturf USA*,[155] required a choice between Oregon and Washington law, where the parties had chosen Oregon law in an employment agreement but disputed whether plaintiff's claims were contractual or non-contractual.[156] Because Oregon law would apply if the claims were contractual, Judge Simon considered whether the answer would be different under Oregon's non-contractual choice-of-law statutes. Judge Simon first quoted the "most appropriate law" standard, ORS 15.445,[157] but he then quoted a pre-codification court of appeals opinion as support for blending statutory and common law analysis: "In addition, '[w]hen evaluating contacts, [courts] look to those that show that the state has some interest in having its law apply to the dispute.'"[158] And, although Judge

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[152] *See* Nafziger, *Oregon's Conflicts Law*, *supra* note 58, at 420 (reproducing the Oregon Law Commission's comment 1 to § 7, codified as Oregon Revised Statutes 15.350(1)); *see also* Symeonides, *Oregon Contract Conflicts*, *supra* note 72, at 223.

[153] Symeonides, *Oregon Contract Conflicts*, *supra* note 73, at 229.

[154] *See Richard*, 2012 WL 1082602, at *9. The Second Restatement takes the same view, although it seeks to avoid the substance-procedure distinction. *See supra* note 151; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 171 cmt. a (AM. L. INST. 1971) (observing that tort damages are also distinct from issues of judicial administration that would be governed by forum law).

[155] The case produced a series of opinions that discuss whether common law choice-of-law rules survive the choice-of-law statutes. *See* Schedler v. FieldTurf USA, Inc., No. 16-CV-0344, 2017 WL 3412205, at *2–3 (D. Or. Aug. 9, 2017); Schedler v. FieldTurf USA, Inc., No. 16-CV-344, 2017 WL 8948593, at *6 (D. Or. Oct. 16, 2017); Schedler v. FieldTurf USA, Inc., No. 16-CV-0344, 2018 WL 451555, at *3 (D. Or. Jan. 17, 2018).

[156] Before this issue reached Judge Simon, Magistrate Judge Papak applied the choice-of-law statutes and concluded Oregon law should apply. *See Schedler*, 2017 WL 3412205, at *1.

[157] *See id.* at *3. For the text of ORS 15.445, *see supra* note 90 and accompanying text.

[158] *Schedler*, 2017 WL 3412205, at *3 (alteration in original) (quoting Manz v. Cont'l Am. Life Ins. Co., 843 P.2d 480, 483 (Or. Ct. App.1992)). *Manz* is the same Oregon Court of Appeals decision that Judge Simon cited in *Richard*. *See supra* note 151.

Simon's subsequent analysis began by invoking the statutory concern with "policies,"[159] the heart of his analysis was a non-statutory concern with Oregon and Washington "interests."[160]

Having determined both states had an "interest" in seeing their law applied, Judge Simon departed from the choice-of-law statutes altogether. Citing *Lilienthal v. Kaufman* and two other cases, Judge Simon declared, "[w]hen both states have a substantial interest, Oregon law applies."[161] He went on to explain why he thought *Lilienthal*'s approach remained relevant despite the existence of the statutes: "Although these cases were decided before Oregon codified its choice-of-law rules, the Court does not believe that their underlying reasoning on this point has been undermined by Oregon's statutory framework for choice of law analysis."[162]

After this decision, the defendants sought certification to the Oregon Supreme Court, seeking to determine whether the choice-of-law statutes "replace, in their entirety, Oregon's common law choice of law cases and their methodology, including 'governmental interest analysis' and the Restatement (Second) of Conflict of Laws."[163] Judge Simon's opinion rejecting certification provided greater detail about his reliance on pre-codification cases:

> Defendants try to frame the question broadly as whether pre-codification case law is at all relevant to post-codification choice of law analysis. But the issue for which these cases were cited is much narrower. Section 15.445(3) instructs courts to evaluate the relative strength of the policies of the relevant states. Although the term has changed from "interest" to "relative strength," the underlying principle from the cited pre-codification cases is the same—courts must still weigh one state against the other. There is no indication (and Defendants point to no authority so indicating) that where, all other factors being the same, both states have an equal interest (or equal "strength") in the case, Oregon's policy of having its interest (or strength) prevail has changed. Nor do Defendants posit a different method for determining which state's choice of law should prevail when both states' interests are equal.[164]

On the one hand, Judge Simon's reliance on pre-codification law—especially *Lilienthal*—conflicts with the intended operation of the choice-of-law statutes and their goal of displacing both the common law[165] and the common law's "*lex fori*

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[159] *See Schedler*, 2017 WL 3412205, at *3.

[160] *See id.* at *4.

[161] *Id.* (citing Lilienthal v. Kaufman, 395 P.2d 543, 549 (Or. 1964)).

[162] *Id.*

[163] Schedler v. FieldTurf USA, Inc., No. 16-CV-344, 2017 WL 8948593, at *6 (D. Or. Oct. 16, 2017).

[164] Schedler v. FieldTurf USA, Inc., No. 16-CV-0344, 2018 WL 451555, at *3 (D. Or. Jan. 17, 2018).

[165] *See supra* notes 67–112 and accompanying text.

orientation."[166] Indeed, the statutes were drafted specifically to reject *Lilienthal*'s reasoning.[167]

On the other hand, Judge Simon raised valid concerns about how courts should apply the general provisions of the statutes when they conclude that a clearly more appropriate option does not exist. Judge Simon's hesitation is particularly apt for the "residual" sections that articulate the "most appropriate law" standard.[168] Even more, at the time Judge Simon wrote, the Oregon Supreme Court had not given any guidance on the new statutes. His default to *Lilienthal*—rather than forging new state common law from his seat in the federal courthouse—may have been the better *Erie* guess.[169]

Judge Simon's opinions are particularly important because they may have influenced the analysis of the state courts in the subsequent *Portfolio* decisions. That is to say, the possibility that federal courts will determine the content of state law may have come to pass on a critical issue about the meaning and scope of the choice-of-law statutes.[170]

### *E. The* Portfolio *Opinions*

*Portfolio Recovery Associates, LLC v. Sanders*[171] was an action to collect a credit card debt. The credit card agreement stated that it would be "interpreted using Virginia law" and that the statute of limitations would be "the longer period provided by Virginia or the jurisdiction where you live."[172] The credit card company assigned

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[166] Nafziger, *Oregon's Conflicts Law*, *supra* note 58, at 399.

[167] *See* Symeonides, *Oregon Contract Conflicts*, *supra* note 72, at 239–45 (explaining why *Lilienthal* is inconsistent with the statutes and referring to that decision as an example of "forum chauvinism"); *see also* Nafziger, *Oregon's Conflicts Law*, *supra* note 58, at 399 ("An ancillary purpose of the draft codification was to overcome the *lex fori* orientation of judicial decisions while protecting Oregon interests, especially those of its residents, to the greatest extent possible."). For general criticism of *Lilienthal*, see PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS 1144 (6th ed. 2018) (describing *Lilienthal* as "an inappropriate sacrifice of party expectations" that "did not even undertake the task of interpreting forum policy with restraint and moderation . . . but rather elevated its oddball local policy to be the only and decisive consideration"); RICHMAN, *supra* note 17, § 84, at 279 (listing *Lilienthal* as an example of "questionable decisions favoring forum residents"); CLYDE SPILLENGER, PRINCIPLES OF CONFLICT OF LAWS 91 n.27 (2010) (describing *Lilienthal* as "somewhat notorious"); RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 7.3E, at 539 (6th ed. 2010) (stating *Lilienthal* illustrates "forum-preference reasoning").

[168] *See supra* notes 79, 90 and accompanying text.

[169] As indeed turned out to be the case, albeit perhaps not for good reasons. *See infra* notes 222–224 and accompanying text.

[170] *See supra* notes 129–136 and accompanying text.

[171] Portfolio Recovery Assocs. v. Sanders, 425 P.3d 455 (Or. Ct. App. 2018), *aff'd*, 462 P.3d 263 (Or. 2020).

[172] Portfolio Recovery Assocs. v. Sanders, 462 P.3d 263, 266–67 (Or. 2020).

the debt to Portfolio Associates, which brought an account-stated claim in Oregon state court to collect it.[173] The debtor, Sanders, objected that the suit was untimely under Virginia's three-year statute of limitations, but Portfolio contended that Oregon's six-year statute controlled. Oregon has adopted the Uniform Conflict of Laws Limitations Act (UCLLA), which instructs courts to resolve statute-of-limitations disputes by using choice-of-law analysis to determine which state provides the law upon which the claim is "substantively based."[174] Thus, determining whether or not the claim was time-barred required the courts to interpret and apply both the UCLLA and the contracts choice-of-law statutes.

*1. The Court of Appeals Decision in* Portfolio

To decide whether the Oregon or Virginia statute of limitations applied, the court of appeals cited the UCLLA but did not consider its specific requirements.[175] Instead, the court turned immediately to the contracts choice-of-law statutes to resolve the statute of limitations conflict. The court found that ORS 15.350—which generally requires application of the law chosen by the parties—did not apply because the claim had been brought as an action on an account stated, not an action for breach of the original credit card agreement.[176] With the original contract and its choice-of-law clause inapplicable, and with no relevant statutory mandate or presumptions,[177] the court applied ORS 15.360's "most appropriate law" test to determine which statute of limitations would apply.[178]

Following ORS 15.360(1), the court identified the states that had "a relevant connection with the transaction or parties." The debtor, Sanders, lived in Oregon when the case was litigated, but he had lived in Washington at the time of default and the formation of the account stated, and he claimed to have lived in Utah when he obtained the credit card. Capital One, which is chartered in Virginia, issued the

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[173] *See Portfolio*, 425 P.3d at 458.

[174] OR. REV. STAT. § 12.430(1) (2021). For explanation of the UCLLA, see Parry, *supra* note 113, at 23–24.

[175] *See Portfolio*, 425 P.3d at 459. As the Oregon Supreme Court later pointed out, the court of appeals should have resolved the statute of limitations conflict by determining which state's law provided the "substantiv[e] bas[is]" for the claim. *See* OR. REV. STAT. § 12.430 (2021); *Portfolio*, 462 P.3d at 268; *infra* note 202 and accompanying text; *see also* Parry, *supra* note 113, at 22–32 (describing difficulties Oregon courts have faced when applying the UCLLA).

[176] *Portfolio*, 425 P.3d at 460 (citing Tri-County Ins., Inc. v. Mars, 608 P.2d 190 (Or. Ct. App. 1980)). The Oregon Supreme Court agreed with this conclusion and with the court's decision that ORS 15.360 applied instead of ORS 15.325. *See Portfolio*, 462 P.3d at 270. Portfolio probably chose to sue on an account stated to avoid uncertainties about the limitations period in the credit card agreement. *See* Parry, *supra* note 113, at 28–30.

[177] *See Portfolio*, 425 P.3d at 460 n.6; *see also supra* notes 73–78 and accompanying text (discussing this aspect of the contracts choice-of-law statutes).

[178] For the text of ORS 15.360, see *supra* note 79 and accompanying text.

credit card. The court never mentioned the location of Portfolio Recovery Associates—the plaintiff and purchaser of the debt—but it appears to be a Virginia company.[179] The court refused to consider any connections with Utah because the defendant had waived the applicability of Utah law in the trial court.[180] Also, although the court mentioned that Washington was "the place of formation of the alleged contract" (the account stated) and the place "where defendant resided" at that time—both of which are factors under ORS 15.360(1)—the court gave no further consideration to Washington contacts or policies.

Instead, the court only considered the connections of Oregon and Virginia, and it found them both inadequate:

> [A]s between Virginia and Oregon, the relevance of the connections does not resolve the conflict-of-law issue, as none of those connections is of the type that evidences a *state* interest in having its law applied to Portfolio's claim. Also, the parties have not identified, and we do not readily perceive, any state policies underlying the length of time provided in the respective statutes of limitation of Virginia or Oregon that is relevant to the matters that the statute directs us to consider. *See* ORS 15.360(2) (determining appropriate law to apply includes identifying relevant state policies); ORS 15.360(3) (listing policy goals to be considered in evaluating the relative strength and pertinence of the identified state policies). In particular, Virginia would have no *substantial interest* in having its statute prevent Portfolio's action because defendant was not a resident of Virginia.[181]

The court should not have asked whether either state had an "interest" or "substantial interest." Like the federal court in *Schedler*, the court of appeals may have believed that "policy" and "interest" are equivalent terms, but the Oregon choice-of-law statutes deliberately use the term "policies" to create a contrast with interest-based approaches to choice of law.[182] The court's focus on "interests" likely resulted from its odd reliance on a 1992 decision that applied the Second Restatement and used the language of state interests[183]—the same case that the federal court relied on in the earlier *Richard* and *Schedler* decisions.[184] The state court, in short, relied on a

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[179] *See* PORTFOLIO RECOVERY, https://www.portfoliorecovery.com (last visited Apr. 19, 2023).

[180] *See Portfolio*, 425 P.3d at 458 n.1, 460 n.5.

[181] *Id.* at 461 (second emphasis added). Note, again, that Portfolio was probably a Virginia company. *See supra* note 179.

[182] Nafziger, *Oregon's Conflicts Law*, *supra* note 58, at 424 (reproducing the Oregon Law Commission's comment 2 to § 9 of the contracts choice-of-law statute); *see also supra* notes 102–103 and accompanying text (discussing this issue).

[183] *Portfolio*, 425 P.3d at 461 ("In evaluating relevant connections, which apply only when there is no choice-of-law agreement between the parties, 'we look to those that show the *state* has some interest in having its law apply to the dispute. We are not concerned with the subjective desires of the parties.'" (quoting Manz v. Cont'l Am. Life Ins. Co., 843 P.2d 480 (1992)).

[184] *See supra* notes 151, 158 and accompanying text.

superseded common law decision to create a hybrid statutory-common law analysis. The court's approach, moreover, closely tracked the federal district court's earlier analysis in *Richard* and especially *Schedler*.

Second, the court considered the Oregon and Virginia interests in applying their statutes of limitation, but that is the wrong question to ask in a UCLLA state. Under the UCLLA, "the limitation issue is not generally subject to an independent conflicts analysis. Instead, it is tied to the law that forms the substantive basis for the claim," unless "no single substantive base for the case can be identified."[185] And to answer this question, the forum state "will apply its own conflicts law, whatever it may be, to select the substantive law that governs the litigated claim."[186] Instead of looking to state interests in a particular statute of limitations, therefore, the court should have considered the policies that underlie the relevant doctrines of Oregon and Virginia contract law.

Having found no relevant state interests, the court of appeals departed completely from the statute and relied instead on the common law to hold that Oregon's statute of limitations would apply:

> Where neither state has a connection to the transaction such that it has an interest in having its law applied, we will apply the law of Oregon as the forum state. *See* Erwin v. Thomas, 264 Or. 454, 459–60, 506 P.2d 494 (1973) ("It is apparent, therefore, that neither state has a vital interest in the outcome of this litigation and there can be no conceivable material conflict of policies or interests if an Oregon court does what comes naturally and applies Oregon law.").[187]

Here again, the court's analysis parallels that of the federal court in *Schedler*. Both decisions depart from the statutes and default to the common law. The *Schedler* court applied *Lilienthal v. Kaufman* to reach forum law because it determined that both states had an interest.[188] The court of appeals in *Portfolio* achieved the same result but was forced to rely on *Erwin v. Thomas* instead of *Lilienthal* because it determined that no state had an interest.[189]

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[185] Christopher R.M. Stanton, *Implementing the Uniform Conflict of Laws-Limitations Act in Washington*, 71 WASH. L. REV. 871, 883 (1996); *see also* Parry, *supra* note 113, at 24, 30–31 (discussing this issue and the appellate court's decision in *Portfolio*).

[186] UNIF. CONFLICT OF LS.—LIMITATIONS ACT § 2 cmt., 12 U.L.A. 159–60 (2008); *see also* Robert A. Leflar, *The New Conflicts-Limitations Act*, 35 MERCER L. REV. 461, 468 (1984) ("[T]he forum state's own conflicts law will always choose the limitations law that is substantively governing.").

[187] *Portfolio*, 425 P.3d at 461. The court also cited *Stubbs v. Weathersby*, 869 P.2d 893, 898 (Or. Ct. App. 1994), *aff'd*, 892 P.2d 991 (Or. 1995) ("There is no choice of law issue if, in a particular factual context, the interests and policies of one state are involved and those of the other are not or are involved in only minor ways.").

[188] *Schedler*, 2017 WL 3412205, at *4.

[189] *Portfolio*, 425 P.3d at 461.

Notwithstanding this difference, the court of appeals's reliance on the common law is equally flawed. As Professor Symeonides pointed out several years earlier, most states have rejected *Erwin*'s "[doing] what comes naturally" approach, and the Oregon choice-of-law statutes for torts also reject *Erwin*.[190] If *Erwin* no longer applies to tort cases, it is difficult to see how it could apply to contracts, particularly when the choice-of-law statutes for contracts also reject the result in *Lilienthal v. Kaufman*, which similarly held that an Oregon court must apply Oregon law when the policies of the interested states are equally strong.[191]

Reliance on *Erwin* also risks a federal constitutional problem. *Erwin* announces a rule for situations in which no state has an interest in applying its law (the unprovided-for case). By following *Erwin* and applying Oregon law despite also finding that Oregon had no interest in applying its law, the court of appeals may have acted arbitrarily, in violation of the federal Due Process and Full Faith and Credit Clauses.[192]

*2. The Supreme Court Decision in* Portfolio

The Oregon Supreme Court unanimously affirmed the court of appeals, but its analysis was significantly different from that of the lower court. In its first true engagement with the choice-of-law statutes, the Supreme Court began by explaining the legislature's goal of addressing the problems endemic to contemporary common law methods for choice of law, and significantly it relied on the OLC's commentary to make that point.[193]

The supreme court agreed with the court of appeals that ORS 15.360 was the relevant statutory choice-of-law provision,[194] but it called out the lower court's divergence from the statutory language. Relying again on the OLC commentary, the court stated:

> We caution that the court's focus on "a state interest" to determine which states have a "relevant connection" is not rooted in the text of ORS 15.360. Rather, the "state interest" test cited by the Court of Appeals is taken from decisions of that court that predate adoption of Oregon's statutory framework for resolving conflicts of law . . . We are mindful of the advice to the legislature that the statutory framework "largely replace[d]" the existing choice-of-

[190] Symeonides, *Oregon Tort Conflicts*, *supra* note 14, at 1019. Symeonides subsequently called out the court's reliance on *Erwin*. *See* Symeon Symeonides, *Choice of Law in the American Courts in 2018: Thirty-Second Annual Survey*, 67 AM. J. COMPAR. L. 1, 53 (2019) ("Apparently, the parties and the court were unaware that the Oregon codifications for contract and tort conflicts have both repudiated *Erwin*'s methodology and the tort codification overruled its result.").

[191] *See supra* note 141.

[192] *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981) (plurality opinion).

[193] *See* Portfolio Recovery Assocs. v. Sanders, 462 P.3d 263, 270 (Or. 2020); *cf. supra* note 112–113 and accompanying text.

[194] *Portfolio*, 462 P.3d at 270.

> law case law and, thus, we caution against any resort to that case law to resolve issues that the statutory framework addresses.[195]

Applying the proper statutory framework, the court concluded that Virginia had a relevant connection based on the original credit card agreement (but with no mention of Portfolio's location in Virginia). By finding that at least one state had significant contacts with the dispute, the court avoided the federal constitutional issue raised by the court of appeals' no-interest conclusion.[196]

More questionably, the court also concluded that Oregon—but *not* Washington—had a relevant connection, based on Sanders's domicile in Oregon at the time the suit was filed.[197] The court rejected Sanders's claim that the relevant connections "must be determined *at the time of the transaction*" because the statutes do not specifically restrict connections in that way and because a party's domicile in a state at the time of filing gives that state a relevant connection.[198] Assuming the court was correct on this issue,[199] nonetheless, it should also have found a connection with Washington, where Sanders lived when the account stated was formed. The court instead ignored Sanders's domicile at a more relevant time, because "neither party argues that the State of Washington has a relevant connection to the account-stated claim."[200]

The court's identification of relevant connections required it to go deeper into ORS 15.360 to consider "the policies underlying any apparently conflicting laws of these states . . . "[201] Although the Oregon and Virginia statutes of limitation conflicted, the court correctly noted that, under the UCLLA, the relevant law was not the statute of limitations itself but instead the law that formed the basis for the claim.[202] The UCLLA's focus on the law of the claim was critical because the parties

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[195] *Id.* at 271 (quoting OLC commentary on the contracts statutes); *see also* Nafziger, *Oregon's Conflicts Law*, *supra* note 58, at 413 (reproducing the OLC commentary); *Apr. 24, 2001 Hearing on HB 2414 Before the Senate Committee on Judiciary*, 2001 Leg., 71st. Sess. (Or. 2001) (Exhibit A. comments and report of the Oregon Law Commission).

[196] *See supra* note 192 and accompanying text.

[197] *Portfolio*, 462 P.3d at 271–72.

[198] *Id.* at 272.

[199] *See infra* notes 226–233 and accompanying text.

[200] *Portfolio*, 462 P.3d at 267 n.4. Oregon and Washington also share a six-year statute of limitations for contract claims. *See* OR. REV. STAT. § 12.080 (2021); WASH. REV. CODE § 4.16.040 (2022). Thus, the lack of engagement with Washington connections could turn on the lack of a statute of limitations conflict. Note, however, that (1) the UCLLA looks to the law that forms the basis of the claim, not the statute of limitation, and (2) it would have been to Portfolio's benefit to argue that either Oregon or Washington law applied based on Sanders' domicile at the relevant times.

[201] OR. REV. STAT. § 15.360 (2) (2021); *Portfolio*, 462 P.3d at 272.

[202] *Portfolio*, 462 P.3d at 268, 273; *see also* Parry, *supra* note 113, at 23–32 (explaining the proper methodology for applying the UCLLA).

identified "no difference between the account-stated law of Virginia and the account-stated law of Oregon that could create a conflict of consequence to the substance of Portfolio's claim."[203] At that point, the analysis would be over if the issue were not the proper statute of limitations; "a choice between the laws of different states [would not be] at issue,"[204] and Oregon courts would apply Oregon law to the contract issues in the case because "practicality and convenience make the application of forum law the most sensible solution."[205]

But the lack of a conflict on account-stated issues did not immediately resolve the statute of limitations conflict. Instead, the court had two options. First, it could have held that (1) under the UCLLA, the statute of limitations conflict still required it to determine which state's law provided the substantive basis for the claim,[206] and (2) ORS 15.380 required application of the choice-of-law statutes whenever there was a choice-of-law issue in a contracts case.[207] Adopting this method would require a court to determine the "most appropriate law" by considering the remaining factors in ORS 15.360—a determination that, while possible, also risks some statutory textual tension.[208]

Or, second, the court could have held that, because there was no underlying contract law conflict, the courts would apply Oregon law to the claim, with the results that Oregon law would provide the substantive basis for the claim and Oregon's statute of limitations would apply. The court essentially adopted this second option. First, the court looked for a definition of the phrase "apparently conflicting" in ORS 15.360(2), which neither the statute nor the commentary defines. Curiously, the court then highlighted the fact that a 1985 court of appeals decision had used the phrase "apparent conflict" as part of the first step in the common law choice-of-law analysis.[209] The court went on to observe that, under the common

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[203] *Portfolio*, 462 P.3d at 274. If the court had also considered Washington law, as its analysis properly required it to do, then perhaps there would have been a conflict of account-stated law, which would have led the court's subsequent analysis in an entirely different direction.

[204] OR. REV. STAT. § 15.305 (2021) ("ORS 15.300 to 15.380 govern the choice of law applicable to any contract, or part of a contract, when a choice between the laws of different states is at issue.").

[205] Symeonides, *Choice of Law in the American Courts in 2020*, *supra* note 10, at 236 (discussing the Oregon Supreme Court's decision).

[206] *See* OR. REV. STAT. § 12.430(1) (2021).

[207] *See* OR. REV. STAT. § 15.380 (2021); *see also* § 15.305; *supra* notes 100–101 and accompanying text; Symeonides, *Choice of Law in the American Courts in 2020*, *supra* note 10, at 234–37 (asserting the court should have chosen this option).

[208] *See infra* notes 240–243 and accompanying text (discussing this issue).

[209] Portfolio Recovery Assocs. v. Sanders, 462 P.3d 263, 273 (Or. 2020) (citing Deerfield Commodities v. Nerco, Inc., 696 P.2d 1096, 1104 (Or. Ct. App. 1985) ("If, however, there is no apparent conflict between the relevant principles of Pennsylvania and Oregon law, we are free to apply the latter.")); *see also supra* note 62 and accompanying text.

law method, Oregon courts would apply Oregon law "if there is no 'apparent conflict' or 'material difference' between the laws of Oregon and the other state."[210] Relying on *Erwin v. Thomas*, the court then held that before conducting the ORS 15.360 analysis, a court must first determine whether a conflict exists.[211] From there:

> [I]f the party moving for summary judgment identifies no difference between the substantive contract law of another state and the substantive contract law of Oregon, then ORS 15.360 provides no mechanism for the court to determine on summary judgment that the claim is substantively based on the law of another state.[212]

The court's phrasing here is unclear. The words "substantively based" suggest that the court's holding is limited to cases about the appropriate statute of limitation.[213] But the court's words could be taken as a broader holding. Consider a case in which the parties do not raise a choice-of-law issue. The court need not raise the issue sua sponte. Instead, it will apply forum (Oregon) law. Or, it will apply a different jurisdiction's law if the parties agree that the other jurisdiction's law applies. Either way, to paraphrase the contracts statutes, "a choice between the laws of different states is [not] at issue."[214] But if a party does raise a choice-of-law issue, the court's language can be read to hold that the statutorily-required analysis does not apply until that party not only raises the issue but also carries a threshold burden of showing a "difference" in law.[215]

Next, the court addressed what to do in the situation that it had identified—where a party "identifies no difference between the substantive contract law of another state and the substantive contract law of Oregon," such that the statute "provides no mechanism for the court to determine on summary judgment that the claim is substantively based on the law of another state."[216] The court adopted Portfolio's proposal "to turn to the common law conflicts decisions that predate the statutory

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[210] *Portfolio*, 462 P.3d at 273.

[211] *Id.* (citing Erwin v. Thomas, 506 P.2d 494, 495 (Or. 1973)).

[212] *Id.* For a suggestion of why this statement is incorrect, see *infra* notes 239–42; *see also supra* notes 96–101 and accompanying text (discussing the scope of the statutes).

[213] The UCLLA sidelines consideration of the policies that animate conflicting statutes of limitations, in favor of an inquiry into the law of the claim itself. *See* OR. REV. STAT. § 12.430(1) (2021); Parry, *supra* note 113, at 23–24. This requirement arguably modifies the operation of the contracts choice-of-law statute, which asks courts to evaluate the policies behind the conflicting laws.

[214] OR. REV. STAT. § 15.305 (2021) (contracts); *see also* OR. REV. STAT. § 15.405 (2021) (torts choice-of-law statutes apply "when a choice between or among the laws of more than one state is at issue," but Oregon law applies if no party suggests that foreign law applies); *id.* § 15.430(2) (2021).

[215] For more discussion of this point, see *infra* notes 234–235 and accompanying text.

[216] *Portfolio*, 462 P.3d at 273.

framework."[217] The court cautioned that "courts should hesitate to resort to conflicts decisions that predate the statutory framework"[218] because "the text of ORS 15.305 suggests that the legislature intended [the statutes] to comprehensively resolve 'all' conflicts regarding contract claims," and the statutes were "drafted to 'largely replace' the case law for resolving choice-of-law issues in contract claims."[219] But in this case, according to the court, the statutes "do not resolve [the] need to choose the state on whose law a contract claim is based even though the applicable contract laws are not 'apparently conflicting.'"[220] Because the UCLLA "requires some mechanism" for resolving the limitations issues, the court held that "our common-law conflicts principles fill that gap."[221]

What are those "principles"? The court defined the common law rule as a "default-to-Oregon principle when the laws on which the claim is based do not 'apparently conflict.'"[222] Relying again on *Erwin v. Thomas*—this time for its *lex fori* conclusion—the court held that Oregon law applies:

> [A]n Oregon court should do "what comes naturally and appl[y] Oregon law" to resolve the substance of the account-stated claim. That conclusion resolves the statute of limitations dispute as well; because the claim is not substantively based on the law of Virginia, "[t]he limitation period of this state applies to" the claim.[223]

Applying Oregon's statute of limitations, the court held that Portfolio's account stated claim was not time-barred, but it went on to hold that summary judgment in Portfolio's favor on the merits of the claim was not warranted.[224]

*3.* Portfolio*'s Issues*

There is much to cheer in the supreme court's opinion. The court properly interpreted the UCLLA, highlighted the importance of the OLC's commentary,[225]

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[217] *Id.*

[218] *Id.*

[219] *Id.* at 273–74 (quoting OLC commentary on the contracts statutes); *see also* Nafziger, *Oregon's Conflicts Law*, *supra* note 58, at 413 (reproducing the OLC commentary); *Apr. 24, 2001 Hearing on HB 2414 Before the Senate Committee on Judiciary*, 2001 Leg., 71st. Sess. (Or. 2001) (Exhibit A. comments and report of the Oregon Law Commission).

[220] *Portfolio*, 462 P.3d at 274.

[221] *Id.*

[222] *Id.*

[223] *Id.* at 274–75 (first quoting Erwin v. Thomas, 506 P.2d 494, 496–97 (Or. 1973); and then quoting OR. REV. STAT. § 12.430(2) (2021)) (alterations in the original).

[224] *Id.* at 277–78.

[225] The court also relied on the commentary to the UCLLA. *See id.* at 268. Whether or not reliance on OLC or UCLLA commentary is akin to reliance on legislative history, it at least accords with the Oregon Supreme Court's routine reliance on the official comments that accompany Restatements. *See supra* notes 111–112 and accompanying text.

provided guidance on applying the "relevant connections" prong of ORS 15.360, rejected the idea that the policy analysis required by the statutes retreads Second Restatement interest analysis, and recognized that the statutes "largely" replaced the old common law.

Other aspects of the court's analysis, however, will complicate the application of the statutes in future cases.

*a. After-Acquired Domicile*

The Court considered Sanders' domicile in Oregon at the time the case commenced, because ORS 15.360(1) does not specify the time frame for determining the "domicile" or "habitual residence" of a party.[226] Oddly, the court did not mention ORS 15.320(4)(a)(A), which explicitly focuses on whether "[t]he consumer is a resident of Oregon at the time of contracting" for consumer contracts.[227] The court's analysis would have been stronger if it had addressed this difference in language—a difference that appears to support its permissive reading of ORS 15.360(1).

The torts statutes have a similar structure. ORS 15.420(3) specifically provides that "[t]he domicile of a person is determined as *of* the date of the injury for which the noncontractual claim is made," but the residual clause contains roughly the same reference to domicile as the similar clause in the contracts statutes.[228] Interpreting these two references to domicile in the torts statutes, the OLC stated that, "although a party's domicile at the time of injury remains the most relevant, the court is free to also take into account a party's domicile at the time of the choice-of-law decision if this factor is relevant" to applying the residual provisions.[229] The same conclusion seems permissible for the contracts statutes.

Still, the court's embrace of after-acquired domicile on the facts of *Portfolio* is surprising. "For resolving choice-of-law issues, courts usually consider a natural person's domicile at the time of the events giving rise to the choice-of-law problem."[230]

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[226] OR. REV. STAT. § 15.360(1) (2021). The OLC commentary does not address this issue, and the court did not cite any cases in support of its analysis.

[227] OR. REV. STAT. § 15.320(4)(a)(A) (2021).

[228] *Compare* OR. REV. STAT. § 15.420(3) (2021) (domicile determined at time of injury), *with* OR. REV. STAT. § 15.445(1) (2021) (domicile of parties is relevant).

[229] SYMEON C. SYMEONIDES & JAMES A.R. NAFZIGER, OREGON LAW COMMISSION WORK GROUP ON CHOICE OF LAW FOR TORTS, CHOICE-OF-LAW FOR TORTS AND OTHER NON-CONTRACTUAL CLAIMS REPORT AND COMMENTS, S. 561, Reg. Sess. 28 (Or. 2009).

[230] RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 2.06 cmt. h (AM. L. INST., Tentative Draft No. 2, 2021); *see also* Jeffrey L. Rensberger, *Choice of Law and Time*, 89 TENN. L. REV. 419, 479 (2021) (concluding courts "tend to show a preference for having the factual variables that drive choice of law be fixed in time [and] domicile cases usually discount later-acquired domicile.").

"[C]ourts generally have rejected using after-acquired domicile in choice-of-law determinations," unless the new state has "a welfare interest in protecting the party that may be implicated by the particular choice-of-law issue involved."[231]

Put differently, the decision to consider after-acquired domicile has two parts: (1) can it be relevant, and (2) when is it relevant? The court's decision that after-acquired domicile can be relevant is consistent with the statutes and developing common law doctrine. More concerning is the court's analysis of *when* after-acquired domicile is relevant. The court made no effort to assert "a welfare interest" and instead declared that Sanders' domicile in Oregon was relevant because it "furnishe[d] one basis for Oregon to exercise personal jurisdiction over Sanders and, as a result, authority to exercise jurisdiction over the action and to enter a judgment."[232] The court thus double counted the relevance of domicile as it relates to jurisdiction and never explained how after-acquired domicile was relevant to the actual claims, which is what the statute requires—or at least what it required until *Portfolio*.

The court's analysis is particularly stark because it affirmed a broad timeframe for determining relevant connections but then ignored Sanders's domicile in Washington at the most relevant time: when the account-stated was formed.[233] By ignoring this connection and emphasizing after-acquired domicile, the court gave disproportionate weight to a minor Oregon connection (at least as the court described it). The court also made it easier for Oregon courts to find Oregon connections based on the domicile of a party in Oregon at the time of the litigation, with the inevitable result that Oregon courts will choose Oregon law more often.

*b. A Conflicts Prerequisite?*

The *Portfolio* court interpreted the statute to require parties not simply to assert a conflict of laws but also to meet a threshold burden of proving that the conflict

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[231] *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 2.06 rep.'s note 8 (AM. L. INST., Tentative Draft No. 2, 2021) (collecting cases rejecting after-acquired domicile); *id.* § 2.06 cmt. h, rep.'s note 8 ("[W]hen a party acquires a domicile in a new State after the relevant events have taken place, the new State may have a welfare interest in protecting the party that may be implicated by the particular choice-of-law issue involved."); *cf.* Allstate Ins. Co. v. Hague, 449 U.S. 302, 319–20 (1981) (plurality opinion) (stating after-acquired domicile, combined with two other contacts, gave rise to a legitimate forum interest for due process purposes).

[232] Portfolio Recovery Assocs. v. Sanders, 462 P.3d 263, 272 (Or. 2020). The court went on to assert that "if Oregon's connection with a party makes it the forum jurisdiction, then that connection justifies applying Oregon law at least to resolve the conflict." *Id.* But isn't it more correct to state that Oregon has jurisdiction to determine whether it has jurisdiction (e.g., subject matter jurisdiction over the case and personal jurisdiction over the defendant), and that once it has jurisdiction, then as the forum it has an interest in applying its own choice-of-law rules?

[233] True, the parties did not argue that Washington connections were relevant. *See supra* note 200 and accompanying text. But the Court remained free to assess the actual facts of the case.

actually exists—otherwise the statutes do not apply.[234] Standing alone, this burden probably does not amount to much. If a party argues for a choice of another state's law, but there are no differences among the laws of the relevant states, then no conflict exists, and applying Oregon law will not produce "adverse effects on strong legal polices of other states"[235] (so long as Oregon has a constitutionally-sufficient connection with the case to justify applying its law).

In the normal case, moreover, requiring a party to point specifically to the differences among the laws of the interested states will have little practical effect, because parties will not press a choice-of-law issue unless they think a meaningful difference exists. Perhaps, then, the primary objection to this burden is that it creates a rebuttable presumption of no conflict, which in turn creates a slight tension with the methodology created by the statutes.[236]

The real bite of this non-statutory burden may be limited to conflicts over statutes of limitations, which require application of the UCLLA as well as the choice-of-law statutes. The court's analysis will tilt the UCLLA more strongly towards applying Oregon's statutes of limitations if there is no conflict among the laws of the states that could form the basis of the underlying claims. That is a good result for those who favor application of the forum's statute of limitations. For those who think statute of limitations conflicts implicate the substantive concerns of the states that adopted them, the court's analysis is retrograde. Or perhaps the UCLLA is the real problem, because it deliberately collapses the limitations conflict into the substantive law that governs the claim but then tells states to work it all out with their underlying choice-of-law rules.

*c. Finding Gaps, or Making Them?*

As noted above, the fact that Oregon and Virginia law did not conflict on account-stated issues did not automatically resolve the conflict over the statute of limitations, and the court had two options for resolving that conflict.[237] The court chose the option of finding a gap in the statutes, which allowed it to depart from the statutory analysis and return to the old common law rules.

If one gap exists, could there be more? This gap may be the accidental result of the collision between UCLLA analysis and the analysis required by the choice-of-law statutes. But going forward, will Oregon state courts take *Portfolio* as a license

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[234] *See Portfolio*, 462 P.3d at 273.

[235] OR. REV. STAT. § 15.360(3)(b) (2021) (contracts); *see also* OR. REV. STAT. § 15.445(3)(b) (2021) (using the phrase "strongly held policies of other states").

[236] Note that, at least on the surface, the *Portfolio* court's approach is consistent with Restatement (Third) of Conflict of Laws § 5.02(a) (Am. Law. Inst. Tentative Draft No. 3, 2022) ("A court will decide a choice-of-law issue by determining whether there exists a material difference among relevant laws and, if so, deciding which of the conflicting laws will be given priority.").

[237] *See supra* notes 206–212 and accompanying text.

to find other "gaps" in the statutes—as the federal court did in *Richard*[238] and again in a post-*Portfolio* case (discussed below)—with the goal of increasing their ability to apply forum law? In particular, will courts attempt the same thing with the torts choice-of-law statutes?[239]

The court too easily rejected the second option of finding no gap. The court could have held that the statute of limitations conflict still required it to determine which state's law provided the substantive basis for the claim[240] and that ORS 15.380 requires application of the choice-of-law statutes whenever there is a choice-of-law issue in a contracts case.[241] This approach would require a court to determine the "most appropriate law" by considering the remaining provisions of ORS 15.360.[242] The court could have considered the relevant policies of Oregon and Virginia and evaluated them in light of the factors in ORS 15.360(3): "[m]eeting the needs and giving effect to the policies of the interstate and international systems," and "[f]acilitating the planning of transactions, protecting a party from undue imposition by another party, giving effect to justified expectations of the parties concerning which state's law applies to the issue, and minimizing adverse effects on strong legal policies of other states."[243]

If the court had taken this course, it would have had to consider whether "planning" and "justified expectations" weighed in favor of Oregon or Virginia law (or perhaps Washington law), as well as whether defaulting to Oregon law would meet

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[238] *See supra* notes 149–154 and accompanying text

[239] Doing so could be more complicated, because ORS 15.445—the residual statute for torts—does not include the "apparently conflicting" language that appears in ORS 15.360 and that provided the statutory basis for the *Portfolio* court's holding. Instead, it uses the phrase "disputed issues." Still, the federal district court's opinion in *Schedler* conducted a torts analysis, and it grafted a forum-law preference onto those statutes. *See supra* notes 156–164 and accompanying text.

[240] *See* OR. REV. STAT. § 12.430(1) (2021).

[241] *See* OR. REV. STAT. § 15.380 (2021); *see also* OR. REV. STAT. § 15.305 (2021); *supra* notes 100–101 and accompanying text; *see also* Symeonides, *Choice of Law in the American Courts*, *supra* note 10, at 234–37 (asserting the court should have chosen this option).

[242] ORS 15.360 asks courts to determine the most appropriate law by (1) "[i]dentifying the states that have a relevant connection with the transaction or the parties," (2) "[i]dentifying the policies underlying any apparently conflicting laws of these states that are relevant to the issue" (the factor that the court said it could not apply because the UCLLA required a focus on substantive law that did not conflict), and (3) "[e]valuating the relative strength and pertinence of these polices" (the policies identified under the second inquiry). *See supra* note 79.

[243] OR. REV. STAT. § 15.360(3) (2021); *see also* Symeonides, *Choice of Law in the American Courts in 2020*, *supra* note 10, at 236 ("Despite the [*Portfolio*] court's contrary conclusion, the Oregon statute does provide a path for an intelligent solution to such a conflict by listing several factors, in addition to the policies of the conflicting laws"); *id*. at 235 (noting that the relevant connections and underlying policies, which include "general policies of contract law" remain relevant).

"the needs and give effect to the policies of the interstate and international systems." The problem, of course, is that openly applying these factors would undermine the assertion that Oregon's account-stated law should govern an agreement made in Washington between a Washington domiciliary and a Virginia company.

True, taking this step would require the court to act in some tension with the text of the statutes. But the court's actual choice—to depart from the statutes altogether in favor of old common law rules—created far greater tension.

*d. The Reanimated Common Law*

Despite the legislative goal of displacing the common law, the court determined that a gap existed in the statutes and that the best way to fill the gap was to exhume the old common law rules. Put differently, at the critical moment, the court could not discard the old common law preference for Oregon law.

The court's insistence on forum preference for "gap" cases is jarring because the choice-of-law statutes *already* take account of Oregon's interest in applying forum law—that is why so many of sections of the statutes specifically select Oregon law.[244] In *Portfolio*, the court was interpreting the residual clause (ORS 15.360), the part of the statute that instructs courts how to proceed if the mandates and presumptions—the parts of the statutes that often instruct courts to apply Oregon law—do *not* apply. Although the residual clause does not expressly foreclose a default to Oregon law if its method produces no result, still it leans away from forum law in favor of assessing state interests with an eye toward comity and comparative impairment.[245]

Even if the court correctly identified a gap in the statutes, why did the court default to the past to fill that gap, when the clear goal of the statutes is to foster new common law rules based in the statutes? The court's embrace of the infamous "do what comes naturally" language of *Erwin* is particularly jarring. *Erwin* is an "unprovided-for" case within an interest analysis framework; with *Lilienthal* it embraces a method that identifies and compares state interests in applying their own law.[246] By contrast, ORS 15.360 expressly foregrounds "[m]eeting the needs and giving effect to the policies of the interstate and international systems," and it instructs courts to "minimiz[e] adverse effects on strong legal policies of other states." As I noted above, both here and in the torts statute, the legislature reoriented Oregon choice of law

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[244] *See supra* notes 73–78 and accompanying text (discussing the contracts statutes); *supra* notes 84–89 and accompanying text (discussing the torts statutes); Nafziger, *Oregon's Conflicts Law*, *supra* note 58, at 399 ("An ancillary purpose of the draft codification was to overcome the *lex fori* orientation of judicial decisions while protecting Oregon interests, especially those of its residents, to the greatest extent possible.").

[245] *See supra* note 81 and accompanying text (discussing this point); *see also infra* note 247 and accompanying text.

[246] Symeonides, *Oregon Tort Conflicts*, *supra* note 14, at 1018–19; Symeonides, *Oregon Contract Conflicts*, *supra* note 72, at 205.

away from a battle of interests and towards a comparative impairment or "consequences-based" approach.[247] The court inserted *Erwin* into the statutory analysis without explaining how the *Erwin* rule is consistent with the new statutes; as a result, it undermined the purpose of the residual rule.

The court easily could have made new common law that is consistent with the statutes by, for example, thinking about "planning of transactions" and "justified expectations." As I stated above, however, it is difficult to see how a focus on these factors would support a "default to Oregon" rule.

*e. State and Federal Court, Once More*

Finally, we may never know whether the federal district court's analysis in *Schedler* or *Richard* had any influence on the Oregon Supreme Court's analysis in *Portfolio* (or on the arguments of counsel). The parties did not cite these decisions in their briefs,[248] and the court's analysis did not come as close to *Schedler* as that of the court of appeals; after all, the supreme court took care to stress the difference between "interests" and "policies."[249] But the court's ultimate analysis parallels *Schedler*'s reliance on old common law rules that express a preference for Oregon law and that are at odds with the goals of the statutes' residual provisions.

Thus, there is at least some chance that a federal court decision guided the undesirable development of state law. Whether or not that is true, federal courts as well as state courts are now relying on *Portfolio* and its version of the statutes when

[247] *See supra* note 81 and accompanying text (discussing this point); *see also supra* notes 190–191 and accompanying text (highlighting the rejection of *Erwin v. Thomas*); *supra* note 167 and accompanying text (highlighting the rejection of *Lilienthal v. Kaufman*).

[248] Petitioner's Opening Brief for Defendant-Appellant Jason Sanders, Portfolio Recovery Assocs. v. Sanders, 425 P.3d 455 (Or. Ct. App. 2018) (No. 14CV05489); Respondent's Answering Brief, *Portfolio*, 425 P.3d 455 (No. 14CV05489); Reply Brief for Defendant-Appellant, *Portfolio*, 425 P.3d 455 (No. 14CV05489); Brief for Defendant-Petitioner Jason Sanders on the Merits, Portfolio Recovery Assocs. v. Sanders, 462 P.3d 263 (Or. 2020) (No. 14CV05489); Brief for Petitioner on Review Portfolio Recovery Associates, LLC's Reply on the Merits, *Portfolio*, 462 P.3d 263 (No. 14CV05489); Brief for Defendant-Appellant Jason Sanders on the Merits, *Portfolio*, 462 P.3d 263 (No. 14CV05489); Brief for Respondent on Review Portfolio Recovery Associates, LLC's on the Merits, *Portfolio*, 462 P.3d 263 (No. 14CV05489); Corrected Brief for Defendant-Petitioner on Review Jason Sanders on the Merits, *Portfolio*, 462 P.3d 263 (No. 14CV05489); Brief for Petitioner on Review Portfolio Recovery Associates, LLC's on the Merits, *Portfolio*, 462 P.3d 263 (No. 14CV05489).

[249] Portfolio Recovery Assocs. LLC v. Sanders, 462 P.3d 263, 271 n.8 (Or. 2020).

they decide choice-of-law issues.[250] Already, the District of Oregon has noted *Portfolio*'s ruling about the timing of "relevant connections,"[251] as well as the default to Oregon law when there is no "apparent conflict."[252] One decision has made an explicit attempt to reconcile the language of the choice-of-law statutes with *Portfolio*'s analysis, stating that "Oregon has codified choice of law rules that override the pre-codification precedent plaintiff cites in an effort to avoid the conflict of law analysis," but also noting that "the Oregon Supreme Court recently said of *Erwin* that it reflects a fallback mentality that, when material differences in the laws of two states are not shown, the preference is to apply the law of the forum."[253]

Most significantly, in *Svenhard's Swedish Bakery v. United States Bakery*,[254] the district court identified another "gap" in the statutes. The parties had signed a series of agreements, all of which selected Oregon law to control disputes about those agreements. But Judge Simon noted that the plaintiff "did not assert any direct claims for breach of contract"; instead, it "alleged only claims of successor liability, lender liability, breach of fiduciary duty, fraud, conversion, rescission, and violation of a California law governing unfair competition."[255] The court did not characterize these claims but noted that "all claims asserted by Svenhard's depend on the formation, existence, and construction of the parties' several interrelated agreements,

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[250] *See, e.g.*, Sprayberry v. Portfolio Recovery Assocs., No. 17-CV-00111, 2021 WL 5183516, at *6 (D. Or. May 7, 2021) (citing *Portfolio* for recognizing "that a debt collector's account stated claim to collect an outstanding credit card debt is subject to Oregon's six-year statute of limitations for claims sounding in contract," although that is the result of *Portfolio*'s analysis, not its holding); de Borja v. Razon, 340 F.R.D. 400, 411 n.4 (D. Or. 2021) (citing *Portfolio* for "explaining the evolution of Oregon's choice-of-law rules"). As of December 1, 2022, no reported Oregon state court decisions relied on *Portfolio*'s choice-of-law analysis; indeed, there were no reported state court choice-of-law decisions at all.

[251] *See* Hillbro LLC v. Oregon Mut. Ins. Co., 558 F. Supp. 3d 1037, 1044 (D. Or. 2021); Nari Suda LLC v. Oregon Mut. Ins. Co., 558 F. Supp. 3d 1017, 1023 (D. Or. 2021); Nue, LLC v. Oregon Mut. Ins. Co., 558 F. Supp. 3d 1000, 1006 (D. Or. 2021).

[252] *See Hillbro LLC*, 558 F. Supp. 3d at 1045; *Nari Suda LLC*, 558 F. Supp. 3d at 1024; *Nue*, 558 F. Supp.3d at 1006; Dakota Ventures, LLC v. Or. Mut. Ins. Co., 553 F. Supp. 3d 848, 854–55 (D. Or. 2021) (citing *Portfolio* for holding that where "there is no conflict, the Court will apply Oregon law"); *see also* Smith v. Ethicon, Inc., No. 20-CV-00851, 2022 WL 1799807, at *1 (D. Or. June 2, 2022) (citing *Portfolio* for the rule that the first choice-of-law issue in a case is whether an "actual[] conflict" exists and finding a conflict); Mil-Ray v. EVP Int'l, LLC, No. 19-CV-00944, 2021 WL 2903224, at *13 (D. Or. July 08, 2021) (citing *Portfolio* when applying the public interest factors of the forum non conveniens test and stating "[i]f there is no material difference, Oregon law applies").

[253] Ivie v. AstraZeneca Pharm., LP, No. 19-CV-01657, 2021 WL 5167283, at *5 n.6 (D. Or. Nov. 5, 2021).

[254] Svenhard's Swedish Bakery v. Utd. States Bakery, No. 20-CV-1454, 2022 WL 2341731 (D. Or. June 29, 2022).

[255] *Id.* at *4.

and the primary relief that Svenhard's seeks is rescission of those agreements and return to the status quo ante."[256]

To determine the relevant law, Judge Simon cited the Oregon statutory rule that "the contractual rights and duties of the parties are governed by the law or laws that the parties have chosen,"[257] as well as the torts rule that where "injurious conduct occurs in more than one state, the state where the conduct occurred that is primarily responsible for the injury is the state where the injurious conduct occurred."[258] But he asserted that these rules "do not seem to address this situation."[259] Citing *Portfolio*, he stated that "the Oregon Supreme Court [has] explained that when there is a choice-of-law scenario that the statutes do not explicitly resolve, it may be appropriate to look to common law conflicts principles to 'fill that gap.'"[260] He then turned to § 187(1) of the Restatement (Second) and held that Oregon law applied because the parties "could have resolved this choice of law dispute by an explicit provision directed to that issue [and] the Court will apply the substantive law expressly chosen by the parties to govern their contractual rights and duties."[261]

The court's discovery of a "gap" in *Svenhard's* is forced. The court could instead have interpreted the choice-of-law clause to determine whether it applied to the plaintiff's claims.[262] If the choice-of-law clause did not cover the claims, then the court could have turned to the relevant choice-of-law statutes to resolve the issue. If the clause did cover the plaintiff's claims, then the court could have asked whether the plaintiff's claims actually involved contractual rights. The commentary to the contracts choice-of-law statutes makes clear that "the exercise of party autonomy within this Act extends only to contractual rights and duties of the parties and not to non-contractual rights and duties such as those arising out of the law of torts and

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[256] *Id.*

[257] *Id.* (quoting OR. REV. STAT. § 15.350(1) (2021)).

[258] *Id.* (quoting OR. REV. STAT. § 15.415(1) (2021)).

[259] *Id.* at *5.

[260] *Id.*

[261] *Id.* Section 187(1) provides, "The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed at that issue." RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 187 (AM. LAW. INST. 1971). The district court's reliance on that language in *Svenhard's* is curious, because § 187 governs the validity of choice-of-law clauses and provides different approaches to issues that the parties were free to address in their contract, and issues (such as capacity) that they were not entitled to determine by contract. *See id.* § 187 cmts. c & d. Section 187(1) does not endorse the application of a choice-of-law clause to non-contractual issues that arguably could have been covered by a better-drafted choice-of-law clause.

[262] *See* Vesta Corp. v. Amdocs Mgmt. Ltd., 80 F. Supp. 3d 1152, 1161–63 (D. Or. 2015) (adopting a narrow interpretation of a choice of law clause to not cover a trade secret misappropriation claim but not applying the choice-of-law statutes). *See generally* Coyle, *supra* note 19, at 666–681 (discussing judicial approaches to the scope of choice-of-law clauses).

property."[263] If, therefore, plaintiff's claims were contractual, the statutes would direct the application of the law chosen by the parties, but if those claims were non-contractual, then the choice-of-law statutes for torts and other non-contractual claims would govern the issue. Under this analysis, there is no gap. Nonetheless, *Svenhard's* joins *Portfolio* and *Schedler* as cases in which state and federal courts have found ways to opt out of the statutes.

### *F. Summing Up the Oregon Experience, So Far*

The Oregon experience with choice-of-law statutes is generally positive. The statutes provide a sound methodology to guide judges in choice-of-law decisions. Most of the federal district court opinions that apply the statutes do so in a straightforward way, thus demonstrating the statutes' utility. Finding information about state trial courts is more difficult but, as we have seen, the Oregon appellate courts have a more mixed record with the statutes.

At least some of the state courts' difficulty with the statutes results from the fact that, although the overall method is sound, with many clear rules that courts easily can apply, the residual provisions are less clear, even as they require the most engagement and creativity from judges. As with the other parts of the statutes, the residual provisions were drafted to replace the common law, and they reflect the fact that some level of vagueness is inevitable for any modern choice-of-law method. Unfortunately, the commentary to the new statutes does not provide a great deal of concrete guidance about how to assess state policies and weigh the statutory goals when applying the residual provisions. In particular, if judges are meant to develop new common law approaches based on the factors in the residual provisions, the statutes appear not to be capable of reorienting them away from older common law habits of mind.

Still, whatever the defects of the statutes, the courts could also do better. If the Oregon Supreme Court wants to maintain some of the old common law doctrines, it should do more to explain how those rules fit into the new statutory framework. For example, if the statutes reject parochialism as a residual approach, then how do *Erwin* and *Lilienthal* fit into that framework?

From the OLC's (and presumably the legislature's) perspective, of course, the court should forge new common law paths based in the statutes. But Oregon courts may not appreciate the invitation to make new policy. Choice of law already asks a lot of judges. Why should they take on the extra task of making new common law

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[263] Nafziger, *Oregon's Conflicts Law*, *supra* note 58, at 420 (reproducing OLC comment to ORS 15.350(1)). ORS § 15.455 states that "an agreement providing that [a tort or other non-contractual claim] will be governed by the law of a state other than Oregon is enforceable," but only "if the agreement was entered into after the parties had knowledge of the events giving rise to the dispute"—with the result that it could not apply in *Svenhard's*, where there was no such agreement.

when the old common law already addresses these issues (usually by defaulting to Oregon)? Adhering to *Erwin* and *Lilienthal* could appear "neutral," in the sense that the court is giving effect to prior policy decisions instead of imposing new and contestable policy choices.

In short, as Judge Simon's opinions in *Schedler* make clear, the decision to stick with the common law when applying the residual tests is rational.[264] The old rules provide a supplemental default framework that frees judges from having to do the kind of express weighing and balancing that the statutes require but that judges may not wish to do. Whatever the intentions or logic of this position, however, it creates tension with the text of the choice-of-law statutes and contradicts the purposes of those statutes.

Full implementation of the choice-of-law statutes requires judges to change their attitudes and assumptions about Oregon choice of law and also requires them to engage openly in evaluating and balancing policies. The early returns indicate some judicial resistance to taking that step when applying the residual provisions. But even in the form imposed on them by *Portfolio*, the choice-of-law statutes mark a significant advance in Oregon choice of law and provide a useful template for other states and for the Third Restatement.

## III. STATUTES OR COMMON LAW? INERTIA, IMPROVEMENT, AND CHANGE

Robert Leflar's 1977 article on choice-of-law statutes provides a balanced starting point for assessing the choice between statutes and common law. Leflar noted, for example, that "statutes are typically less flexible, [but] flexibility is not a virtue for every type of conflicts case."[265] Well-drafted choice-of-law statutes can be successful, but "the same considerations underlying sound judge-made law for choice between competing laws must equally underlie choice-of-law statutes if they are to produce sound results in subsequently decided cases."[266] Leflar suggested that choice-of-law statutes should be "framed with due regard to the kind of problems and the kind of answers that would best serve the functions of law in the area."[267] Choice-of-law statutes that thoughtfully address specific topics, therefore, have a fair chance of being successful.

By contrast, Leflar expressed skepticism about broader efforts to codify choice of law. For example, he declared:

> [I]t may well be that, however confident modern scholars are that they really appreciate the function of conflicts law in a nation of federated states and

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[264] As discussed above, the decision in *Svenhard's* is less clear.

[265] Leflar, *supra* note 1, at 952.

[266] *Id.*

[267] *Id.* at 965.

> understand the considerations that make for wise rules and decisions in the field, we are not yet ready for the formalization that overall choice-of-law statutes, either state or federal, would enforce upon the states. Better understanding may still come from further judicial experimentation and scholarly study.[268]

He went on to hope "that no such attempt will succeed until the bench and the bar have achieved a much better understanding of conflicts theory and the conflicts law itself has come to be more completely stabilized in keeping with the socio-economic and legal functions that it should serve."[269]

In the years since Leflar wrote, courts continued to experiment and scholars continued to study. Many of them concluded that better and more stable rules are possible, and that the Second Restatement had run its course. Soon after the OLC began to draft choice-of-law statutes, the American Law Institute initiated the Third Restatement project. This last Part briefly considers the extent to which the Oregon statutes provide a model for broader statutory reform and a meaningful alternative to the forthcoming Third Restatement. I conclude that Oregon's statutes provide a good model for statutory choice-of-law reform, but states that consider this path must be aware of the pitfalls that statutes create and should carefully compare the costs and benefits of statutes to those of the status quo and the Third Restatement.

First, the Oregon statutes reveal several reasons to favor comprehensive statutes over common law. Statutes can provide a clear and consistent methodology for courts, as well as clear rules for specific categories of cases. Statutes can also sort out different kinds of cases: those in which the choice of law is mandated, those in which certain presumptions will apply, and the remainder that require a more open-ended assessment. Although statutes are usually more formal and less flexible than common law, that formality and relative inflexibility can still allow nuance even as it introduces rigor into choice-of-law analysis. Put slightly differently, common law choice-of-law rules may not always operate as rules in individual cases, whereas a court acting in good faith should apply a statutory directive.

Of course statutes are not automatically better than common law; the statutes may contain bad rules. But what makes a bad choice-of-law rule? If the legislature makes a policy decision in favor of certain factors or results, in an area that is marked

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[268] *Id.* at 957.

[269] *Id.* at 971. Willis Reese was more skeptical about choice-of-law statutes. He warned against them unless necessary to further "an important substantive policy." Reese, *supra* note 60, at 400. He also admitted that choice-of-law provisions could work if they were "subject to some broad and rather vague exception" that would provide courts with an easy escape device, *id.* at 399–400, although he understandably questioned the value of such an approach. Professor Roosevelt is also skeptical. *See* KERMIT ROOSEVELT, CONFLICT OF LAWS 37 (3d ed. 2022) ("[T]here are two problems with relying on legislatures to solve choice-of-law problems for courts. First, legislatures seldom attempt to do so, and when they *do*, their solutions are limited. Second, it isn't clear that even their best efforts could solve the choice-of-law problem completely.").

by disagreement about methodologies and results, what exactly is the touchstone for declaring that the legislature made the wrong choice? Choice-of-law statutes ensure that many of the important policy decisions come from the legislature, not the courts, and many people would call that a reason to favor statutes. It is far from obvious that relying on open-ended and often ungrounded decisions by a shifting mix of judges is the correct way to make the policy judgments associated with choice of law. In the case of the Oregon statutes, moreover, the legislature's policy choices are appropriate and balanced. Thus, formality and inflexibility are a benefit, not a cost, if they result from the legislature's well-considered policy decisions.

Second, however, the Oregon statutes and their reception by the courts reveal weaknesses that other states would do well to avoid. Choice-of-law statutes should be drafted on the assumption that they will encounter varying degrees of skepticism, hostility, hesitation, overwork, or even laziness among judges (and, of course, counsel)—attitudes that could undermine the full potential of statutes and allow common law methods to continue. To address this concern, the legislature should be as clear as possible in all parts of the statute, including any residual clauses. The legislature should assume that when courts find ambiguities or gaps, they will return to the old common law rules. Thus, the legislature should also be as clear as possible about how the new statutes will relate to the old common law. Do they replace it, supplement it, or something else? And what, exactly, should courts do when they encounter gaps or find themselves forced to juggle open-ended factors?

States that adopt choice-of-law statutes should also assume that courts will interpret those statutes using their ordinary background rules: whether to rely on legislative history and what rules of construction apply to statutes that derogate the common law, etc. Thus, if the legislature believes that the legislative history is relevant, or that the statute should be construed in a particular way, it should say so explicitly in the text of the statute.

Third, the Oregon experience suggests that reformers should keep in mind that federal courts will play a large role in interpreting the statutes. Here again, clarity is important. Federal courts sometimes need to be reminded that a state's choice-of-law rules are its own and are not part of a shared general law. State choice-of-law statutes ought to carry that message more clearly than common law decisions that draw in whole or in part from the Second Restatement (or the Third). Federal courts might even welcome greater clarity in state choice-of-law rules because they would have less need to guess at how a state court would apply open-ended common law rules in a particular case. That is to say, state choice-of-law statutes can advance the purposes of the *Erie* doctrine by avoiding "inequitable administration" of choice-of-law rules.[270]

Fourth, even a detailed choice-of-law statute—however innovative it might be at first—could work against law reform in the long run. Put differently, well-crafted

[270] Hanna v. Plumer, 380 U.S. 460, 468 (1965).

statutes that replace ambiguous, contradictory, or indeterminate rules and methods will immediately produce the benefits of reform. But statutes can also freeze the law by preventing further development until the legislature returns to the issue—and it's unlikely that the legislature will return to the issue of choice of law unless a truly serious problem arises.[271]

Freezing the law is less of a risk if the statute adopts open-ended rules that create significant room for courts to develop and modify specific rules. But, of course, open-ended statutes create their own set of risks, as I have already noted. Perhaps the risk of frozen law is also minimal if we've arrived at the end of an era of doctrinal development and can expect the law to remain stable for the foreseeable future. But who would bet on that prospect? If choice of law continues to see experimentation and development, then a state that adopts statutes might find itself slipping from the vanguard to the rear over time.

Turning to the Third Restatement, variations on these same issues apply to that project as well. Providing a clear and consistent common law methodology is a benefit, but at the cost of greater formality and inflexibility for courts that actually follow the methodology. The Third Restatement makes policy judgments—are those judgments appropriate or not, and will they hold up over time? Are the drafters being clear enough that the new methodology and presumptions are meant to replace the Second Restatement and that courts should not construct a grotesque hybrid of the two approaches? Again, this is not an article about the Third Restatement, but my sense is that the drafters are navigating these issues appropriately.

Moving forward, should states maintain the status quo, whatever that is? Should they adopt the Third Restatement when that project is complete? Or should they replace the common law with statutes? This Article has suggested that, on the merits, well-drafted statutes might be the best option. But drafting legislation requires a great deal of effort, and legislators may not feel strongly enough about choice-of-law policy to make it a priority. Choice-of-law legislation also risks getting entangled in lobbying among various interests looking to game the rules in their favor. Legislation probably also requires explicit or implicit support from the state supreme court, which may not endorse the effort. Better, the judges might say, to wait for the Third Restatement and let the courts take care of things in this area that has always been under judicial control. After all, the Third Restatement has already adopted the central insight of the Oregon statutes (the "most appropriate law" standard) that might otherwise provide a model for legislation in other states.

In sum, states have two good choices and one bad choice. Staying with the status quo—the First Restatement, the Second Restatement, or some kind of hybrid method—is the bad option. The First Restatement reflects policy choices for a world that no longer exists, and either the Third Restatement or well-drafted statutes can

[271] *See also* Reese, *supra* note 60, at 403 (asserting that, although statutory choice-of-law rules "do have advantages[,] they pose the risk of stultifying the law").

satisfy any preference for strong presumptions or rules. The Second Restatement is also aging badly. Its almost ad hoc method does not serve rule of law and federalism values, and in many cases its application by courts masks a simple preference for forum law or the law that benefits forum residents. The two good choices, of course, are statutes and the forthcoming Third Restatement. This Article advocates for the binding force of statutes, while also recognizing that the attractiveness of statutes may be waning as the probable benefits of the Third Restatement come into greater focus. More than anything else, therefore, this Article advocates for change, for thoughtful adoption of one or the other of these approaches, and for distilling decades of experimentation and experience into a focused and more determinate methodology for choice of law.