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CONTINUITY, PRECEDENT, AND CHOICE OF LAW: A REFLECTIVE RESPONSE TO PROFESSOR HILL

ROBERT A. SEDLER†

I. PROFESSOR HILL'S THESIS: CONTINUITY AND PRECEDENT IN CHOICE OF LAW

In a long and distinguished career of legal scholarship, Professor Alfred Hill has made very valuable contributions to numerous areas of the law. Among the areas of law that have benefited from Professor Hill's scholarship is the Conflict of Laws.1 Professor Hill was an early critic of the interest analysis approach to choice of law, shortly after it was promulgated by Brainerd Currie.2 More recently, he has presented a thesis as to the significance of continuity and precedent in choice of law.3 He relates continuity and precedent to what he calls the judicial function in resolving choice of law questions.4 As a part of this thesis, he maintains that the traditional choice of law rules, when understood in terms of continuity and precedent, may provide a valuable resource for the courts today as they perform the judicial function of resolving choice of law questions.5

Professor Hill attacks the modern "choice of law revolution" for its seeming disregard of continuity and precedent. As he states:

The view has taken hold that traditional conceptions regarding the resolution of multistate controversies are fundamentally flawed, so that the traditional rules are bad beyond repair. The consequence has been widespread ju-

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1. See Tribute—Professor Alfred Hill, 91 COLUM. L. REV. 227 (1991) (listing of Professor Hill's writings and a tribute by his Columbia colleagues).
4. Id. at 1619-36.
5. Id.
dicial rejection of those rules, root and branch, and the substitution of ad hoc methods for the solution of choice of law problems.6

According to Professor Hill, the traditional rules were the outgrowth of centuries of development of patterns in the localization of the law governing multistate controversies.7 These patterns represented "varied responses to experience," and the traditional rules reflect a "body of complex and sometimes variant ideas, embodied in scholarly comment, judicial practice, and occasional codes."8 This is why they add to the "richness of the materials available for aid in resolving current problems."9 Professor Hill goes to great lengths to separate the traditional rules that were applied in the United States under what has been called the traditional approach to choice of law10 from their conceptual underpinning in the vested rights theory and their incorporation into the First Restatement.11 He notes that the Restatement was not the "fructification of the conflicts wisdom of the ages," but instead was a "highly conceptualistic and rigid body of rules, drafted under the influence of a theory of vested rights that important conflicts scholars had long thought to be ludicrous."12

Professor Hill's thesis puts emphasis on "the judicial function in the face of precedent."13 He says that in other areas of law, courts rely on precedent to "furnish a rule of decision that is at least presumptively dispositive of the case before the court."14 He continues that a precedent should only be disregarded because it turns out to have been unsound when formulated or is unresponsive to current needs, and he submits that "such an approach to precedent is no less appropriate in the case of choice of law."15

A most interesting feature of Professor Hill's thesis is his effort to demonstrate a linkage between the traditional rules and "relevant governmental interests." Professor Hill is critical of the Currie

6. Id. at 1585-86.
7. Id. at 1587.
8. Id.
9. Id.
12. Id. at 1587.
13. Id.
14. Id.
15. Id.
version of interest analysis because of Currie's insistence that choice
of law problems "cannot be solved by general principles or rules
designed to that end" and that it would be detrimental "to resort
to a body of law that purported to prescribe generalized solutions
for choice of law problems."16 At the same time, Professor Hill
makes it clear that he supports the proposition that choice of law
decisions should be based on a consideration of "relevant govern-
mental interests" and that the forum should "decide a multistate
dispute in accordance with its own interests—provided that those
interests are appraised realistically."17

Professor Hill maintains that a consideration of "relevant
governmental interests" has always been a part of choice of law
analysis. He traces this consideration of governmental interests to
the "earliest formulators of the territoriality principle," such as
Huber, who, he contends, believed the basic objective of the
conflict of laws was to advance the governmental interests of the
forum.18 Professor Hill notes that Huber's "Three Canons" were
essentially rationalizations of the conflicts practice followed in the
Netherlands of his day.19 Likewise, Story's comity theory, which
drew its inspiration from Huber, "had no place for foreign law
except on the basis of mutual convenience."20

Professor Hill sees the traditional territorially-based rules as
representing "in the main, rational responses to the felt necessities
of the times in which they were produced."21 Professor Hill
discovers a "universal impulse" to achieve localization from the
onset of the development of conflicts law and asserts that the rules
that emerged were premised on the implementation of the govern-
mental interests of the involved states.22 In this vein, Hill concludes
that a court deciding a conflicts case today should proceed on the
assumption that the traditional rules implement governmental in-
terests and have some utility in resolving the choice of law question
presented to the court. Thus, it is not necessary or desirable for
a court to "decide choice of law problems afresh, with the resulting
outcomes determined on an essentially ad hoc basis."23

16. Id. at 1592.
17. Id. at 1588-89.
18. Reply, supra note 2, at 482.
19. Id.
20. Id.
21. Id. at 483.
22. Id.
Therefore, Professor Hill is advocating an approach to choice of law that is based on continuity and precedent, with the resulting presumptive application in a given case of the traditional choice of law rules. The presumptive application of the traditional rule can be rebutted in a given case by showing that the application of the rule in that case will produce a functionally unsound result. If that showing cannot be made, Hill says that the traditional rule should be applied and should be dispositive of the choice of law issue presented.24

Professor Hill demonstrates this thesis by a consideration of choice of law in the areas of torts, contracts, and property and succession.25 In the area of torts, he notes that the \textit{lex loci delicti} rule has been dominant outside of the United States and within the United States as well until fairly recent times. Hill asserts that "to say that this should count for nothing is to make a breathtaking assertion about the lack of good sense of jurists in most places and times other than the United States today."26 He justifies the rule on the grounds that: (1) The alleged tortfeasor is held to the behavioral standards of the place where the tortfeasor acted or where the conduct foreseeably took effect; (2) the victim’s rights are determined by the law of the same place, just as the burden of that law would be imposed on the victim for the victim’s own conduct there; and (3) under the rule, out-of-state actors or victims are treated no differently than local actors or victims.27 Hill criticizes the operation of the \textit{lex loci delicti} rule under the traditional approach because it is unnecessarily applied to a wide range of collateral issues, such as guest-host immunity.28 He concludes as follows:

\begin{quote}
In sum, the rule of \textit{lex loci delicti} goes far to advance sensible policies of fairness and accommodation in a community of states. It is unnecessary and wasteful to uproot \textit{lex loci delicti} in its entirety, in order to deal with the excesses resulting from uncritical application of the rule to all the collateral issues arising in torts litigation.29
\end{quote}

\begin{itemize}
\item 24. \textit{Id.} at 1647.
\item 25. \textit{Id.} at 1623-30.
\item 26. \textit{Id.} at 1623.
\item 27. \textit{Id.}
\item 28. \textit{Id.} at 1623-24.
\item 29. \textit{Id.} at 1625.
\end{itemize}
In the contracts area, Professor Hill asserts that "in England and in most of the rest of the world, the basic conflicts principle applicable to contracts" is that of party autonomy. Under this principle, a court would recognize the parties' express choice of law and, in the absence of an express choice, would apply the law impliedly intended by the parties. Hill instructs that purported contracts choice of law rules, such as the *lex loci contractus* or the *lex loci solutionis* were developed as presumptions for determining implied intent when the parties had not made an express choice of law. Similarly, this was the early practice in the United States as well, so that the exclusion of party autonomy in favor of the *lex loci contractus* rule in the *First Restatement* represented a break with continuity and precedent.

Professor Hill justifies party autonomy in contracts cases on the same basis as its many other proponents: (1) it enables the parties to achieve predictability in an area where predictability is very important; and (2) the "necessary accommodation" between the interests of "trading states" will be achieved most fairly and effectively by accepting the terms adopted by the parties. Professor Hill claims that the only exception to the principle of party autonomy should be for the "overriding character of laws designed to implement special regulatory or protective policies." Where the parties have not made an express choice of law, as frequently happens, these objectives can be achieved by determining what "law the parties would have intended had they thought about the matter."

Hill says that the "choice of law revolution" has essentially been limited to torts and contracts and that in the property and succession area, "the occasional decisions that surface typically follow traditional practice." I agree with this observation and further maintain that, with the exception of the situs rule to

30. *Id.* at 1625-26. This is the approach that is referred to as the "proper law of the contract" by the English courts and is essentially the approach taken by the *Restatement Second*. See *infra* notes 45-48 and accompanying text for a discussion of this approach.
31. *Id.* at 1626.
32. *Id.*
33. *Id.* at 1620.
34. *Id.* at 1626-27.
35. *Id.*
36. *Id.* at 1628.
37. *Id.* at 1586.
determine succession to land, the application of the traditional rules will generally produce functionally sound results.\textsuperscript{38}

Professor Hill carefully explains how the application of the law of the situs to determine the existence and incidents of property interests in land and movable property reflects both the recognition of the interest of the situs in regulating such matters and the protection of the parties' reliance interests.\textsuperscript{39} However, when it comes to the traditional rule of "split succession,"\textsuperscript{40} Professor Hill notes that "[i]n much of the rest of the world, immovables (like movables) pass in accordance with the domiciliary or national law."\textsuperscript{41} In any event, Hill emphasizes that in the area of property and succession, the traditional rules will frequently operate to implement "relevant governmental interests."

Professor Hill maintains that, among the various modern approaches to choice of law, only the \textit{Restatement Second}\textsuperscript{'s} approach can provide a helpful formulation for a court that is "persuaded that consideration of precedent is a useful starting point in dealing with choice of law issues."\textsuperscript{42} He reiterates that in areas other than torts and contracts, the traditional rules continue to operate, and that these rules are incorporated into the \textit{Restatement Second}, subject to the possibility of alternative solutions in a particular case.\textsuperscript{43} This approach follows Professor Hill's view that the traditional rules should be presumptively applicable, but that they can be set aside where appropriate in the particular case.\textsuperscript{44}

In the contracts area, Professor Hill finds that the \textit{Restatement Second} is generally supportive of the party autonomy rule that he

\textsuperscript{38} Relatively few cases involving choice of law in property matters actually arise in practice and in comparison with other areas of law, choice of law is considered to be fairly well-settled in this area. The courts generally follow the rules of the traditional approach, and for the most part the application of these rules in the property area produces functionally sound results in practice.\textit{Across State Lines, supra} note 10, at 85.

\textsuperscript{39} \textit{Judicial Function, supra} note 3, at 1628-30.

\textsuperscript{40} The traditional rule of split succession is succession to movable property determined by the law of the decedent's last domicile, while succession to land is determined by the law of the situs.

\textsuperscript{41} \textit{Judicial Function, supra} note 3, at 1629 (citing M. \textit{WOLFF, PRIVATE INTERNATIONAL LAW} (2d ed. 1950) at 567-68). In the subsequent discussion, I will work under the assumption that Hill favors a rule under which succession to land, as well as to movables, would presumptively be determined by the law of the domicile.

\textsuperscript{42} \textit{Id.} at 1636.

\textsuperscript{43} \textit{Id.} at 1634.

\textsuperscript{44} \textit{See supra} notes 13-17 and accompanying text.
favors. Most importantly, the Restatement Second calls for recognition of the parties' express choice of law in all but exceptional cases. While Professor Hill believes that the use of the most significant relationship concept to govern choice of law where the parties have not made an effective choice is somewhat too generalized, he is pleased with the Restatement Second's use of particular rules grounded in precedent to govern specific types of contracts. Hill believes that application of factors listed by the Restatement Second to determine the state of the most significant relationship will often lead to the same result that would follow if the court were to apply the law the parties would have intended to apply if they had thought about the matter.

In the torts area, Professor Hill also approves of the Restatement Second's provisions that make the law of the place of injury presumptively applicable on damages questions and the "special provisions, founded on precedent" for some specific torts, such as defamation and invasion of privacy. He asserts that the Restatement Second's issue-by-issue approach is especially useful in the torts area because it allows some issues, such as family immunity, to be decided by a state's law other than the state of injury, "thereby eliminating much of the difficulty occasioned by the excessively broad categorization of the First Restatement."

It is important to note that Professor Hill is not advocating an approach to choice of law based on "narrow, policy-based rules," as has been advocated by his colleagues, Professor Reese and Professor Rosenberg, and seemingly adopted by the New York Court of Appeals. As I have discussed more fully elsewhere, under a "rules approach,"—whether the broad, state-

46. Id.
47. Id. at 1634. An example would be the rule that, in the case of a contract for hire, surety, or casualty insurance, the state of the most significant relationship is presumptively the principal location of the insured risk.
48. Id. at 1635.
49. Id. at 1636.
50. Id.
selecting rules of the traditional approach, or narrow, policy-based rules—the rule is formulated a priori, and then applied to the facts of a particular case. The case must be brought within the rule, and no consideration is given to whether the application of the rule in the instant case will produce a functionally sound result. As Professor Reese has put it: "A choice of law rule that works well in the great majority of situations should be applied even in a case where it might not reach ideal results. Good rules, like other advantages, have their price." The approach advocated by Professor Hill is not a "rules approach" in this sense. Rather, it is a "judicial function" approach under which the focus is on precedent and the traditional rules that have emerged from the precedents of the decided cases. These rules are only presumptively applicable to resolve the choice of law issue presented in a particular case and will not be applied where their application would produce a functionally unsound result in that case.

II. A REFLECTIVE RESPONSE: JUDICIAL METHOD AND THE POLICY-CENTERED CONFLICT OF LAWS

A. The Function of a Court in a Conflicts Case

Unlike Professor Hill, I am a strong proponent of Currie’s version of interest analysis. I maintain that interest analysis is the preferred approach to choice of law because it provides functionally sound and fair solutions to the choice of law issues arising in actual cases. Interest analysis simplifies the choice of law process by focusing on what the courts consider to be the most rational consideration in making choice of law decisions: the policies reflected in a state’s rule of substantive law and a state’s interest in


55. Reese, supra note 51, at 334. As he elaborated:
More specifically, the fact that a choice of law rule which has stood the test of experience would lead on some rare occasion to the application of the law of a state which is not that of greatest concern, or would result in the disregard of other multistate or local law policies, is not an adequate reason why the rule should not be applied on that occasion. Perfection is not for this world. The advantages which good rules bring are worth the price of an occasional doubtful result.

Id. at 322 (footnote omitted).
applying its law to implement those policies in the particular case.56 Furthermore, I have demonstrated that, in practice, all the courts that have abandoned the traditional approach to choice of law generally employ interest analysis regardless of which "modern" approach to choice of law they are purportedly following.57

At the same time, I fully agree with Professor Hill in regard to the nature of the judicial function in conflicts cases and the importance of precedent in resolving the choice of law issues. I have always distinguished between the function of a court in a conflicts case and the use of the interest analysis approach by the court in performing that function.58 I relate the function of a court in a conflicts case to what I see to be the purpose of conflicts law, which is to provide functionally sound and fair solutions for those relatively few cases that arise in practice in which a court has to make a choice of law decision.59 Therefore, the court's focus should be on the precise choice of law issue presented for decision, and its objective should be to resolve that issue in such a way that will produce a functionally sound and fair result.

Some years ago, I analyzed the choice of law process in terms of judicial method and the policy-centered conflict of laws.60 In accordance with the common law tradition, courts should apply


57. By this I mean that the results the courts reach in practice are generally consistent with the results that would be reached under the interest analysis approach, as developed by Currie and refined by his followers. See New Critics, supra note 56, at 635-43; Governmental Interest Approach, supra note 54, at 190-220 (discussion of the application of the interest analysis approach in practice).

58. However, it is also my submission that interest analysis is the preferred approach to choice of law because it is the approach that best enables a court to perform the judicial function in a conflicts case.

59. For a discussion of why relatively few conflicts cases arise in practice, see New Critics, supra note 56, at 597-98.

judicial method to the resolution of conflicts problems, as they apply it to other areas of law. Professor Hill also makes this point. Under judicial method, a court should render the choice of law decision with reference to the fact-law pattern presented in the particular case. The decision in that case would serve as a precedent for decisions in other cases, and the decision's rationale would serve as a guide to the resolution of future cases presenting different fact-law patterns. In time, depending on the number and kinds of cases that arose in each state, a body of conflicts law would emerge through the normal workings of binding precedent and stare decisis.

Furthermore, the criteria for the choice of law decision should be based upon considerations of policy and fairness to the parties. The rationale here is that the criteria for the choice of law decision—the decision to displace the forum's own law and to look to the law of another state, in whole or in part, for the rule of decision in the case—should relate to the justification for such displacement. Under the "criteria-justification" rationale, the forum's law should be displaced in a particular case only when policy considerations, such as recognition of the legitimate interest of another state in having its law applied, or a concern for fairness, such as protecting the reasonable expectations of the parties, dictate the displacement of the forum's law in favor of another state's law. In the absence of such considerations, the law of the forum should apply, just as it would in a domestic case.

Under judicial method and the policy-centered conflict of laws, the choice of law process operates in accordance with the following premises: (1) the basic law is the law of the forum, which will be applied in the absence of valid reasons for its displacement; (2)

62. See supra notes 3-16 and accompanying text.
63. Judicial Method, supra note 60, at 82-87.
64. An example of such a situation, using the interest analysis approach, is the "false conflict" brought in the disinterested state. Since the forum does not have a real interest in applying its own law to implement the policy reflected in that law, while the other involved state does, the forum should apply the law of the only interested state. In practice, this is the most common situation where the forum displaces its own law. See Governmental Interest Approach, supra note 54, at 186-87, 222-27. Professor Hill approves of Currie's interest analysis approach to the extent that it identifies the false conflict and calls for the application of the law of the only interested state. See Judicial Function, supra note 3, at 1592.
65. As to the reasons why the law of the forum is the basic law, see B. Currie, Selected Essays in the Conflict of Laws 75-76 (1963); Judicial Method, supra note 60, at 87-95.
the choice of law decision will be made with reference to the fact-law pattern presented in the particular case; and (3) the choice of law decision will be based on considerations of policy and fairness to the parties.

B. Judicial Method in Practice: The Michigan Experience

The operation of judicial method and the policy-centered conflict of laws is illustrated by the practice of the Michigan Supreme Court in conflicts torts cases. That court resolves conflicts torts cases under a *lex fori* approach, as set forth in *Olmstead v. Anderson*. This approach makes use of interest analysis, but only in the context of determining whether Michigan law, as the law of the forum, should be displaced in the circumstances of the particular case. There are three elements to Michigan's *lex fori* approach. First, the basic law is the law of the forum and the question in a conflicts case is whether the case "presents a situation in which reason requires that foreign law supersede the law of this state." Second the question of displacement of Michigan law is determined by the use of interest analysis. The court considers the policies reflected in the laws of the involved states and the interest of each state, in light of those policies, in having its law applied on the point in issue in the particular case. Third, when the state whose law is sought to be applied in preference to Michigan law has no interest in applying its law to implement the policies reflected in that law, the choice of law inquiry proceeds no further, and Michigan law applies as the law of the forum.

The development and application of Michigan's *lex fori* approach demonstrates how precedent can work in choice of law, as it does in other areas. The development of the *lex fori* approach began with *Sexton v. Ryder Truck Rental*, decided in 1982, which presented the familiar fact-law pattern of two Michigan parties involved in an accident in another state where law would deny or limit recovery, while the law of Michigan would not. In that case, the Michigan Supreme Court abandoned the *lex loci delicti* rule, but it limited its decision to the facts and did not adopt any of the "modern" approaches to choice of law.

In *Olmstead v. Anderson*, decided five years later, a different fact-law pattern was presented. A Minnesota victim was involved

67. Id. at 24, 400 N.W.2d at 302.
69. See Choice of Law in Michigan, supra note 60, at 1201-10.
in a fatal accident with a Michigan defendant in Wisconsin. Wisconsin law limited damages recoverable for wrongful death while neither Michigan law nor Minnesota law limited damages.\textsuperscript{70} In the context of resolving the choice of law issue, the Michigan Supreme Court built on the \textit{Sexton} precedent and formulated the specific \textit{lex fori} approach. Chief Justice Riley, writing for the court, found several guides from the \textit{Sexton} holding. First, the court in \textit{Sexton} had clearly abandoned the \textit{lex loci delicti} rule.\textsuperscript{71} Second, in \textit{Sexton}, the court did not adopt a particular choice of law methodology, which the court in \textit{Olmstead} saw as leading to the conclusion that the choice of law decision should be made with reference to the fact-law pattern of the particular case.\textsuperscript{72} Third, since the basis of the decision in \textit{Sexton} was that there was no rational reason to displace Michigan law in favor of the law of the state where the accident occurred,\textsuperscript{73} this would be the criterion to determine whether Michigan law should be displaced in any case.

Hence [in \textit{Sexton}], there was no rational justification for displacing the law of the forum. That same reasoning may be applied to tort cases presenting somewhat different factual scenarios. The question to be resolved is whether . . . reason requires that foreign law supersede the law of [the forum].\textsuperscript{74}

\textsuperscript{70} \textit{Olmstead}, 428 Mich. at 3-7, 400 N.W.2d at 293-94.
\textsuperscript{71} "The reputed benefits of the \textit{lex loci delicti} were no longer tenable, and the precedents for applying the doctrine were either overruled or substantially weakened." \textit{Id.} at 23, 400 N.W.2d at 302.
\textsuperscript{72} There were separate opinions in \textit{Sexton}, but Chief Justice Riley noted that none of them adopted any specific methodology. She noted that the plurality opinion by then-Chief Justice Williams acknowledged this point by saying that the holding was reached in the "normal common-law tradition" and that under the concurring opinion of Justice Kavanagh, "a case would be examined to determine whether the foreign elements are so substantial as to override a presumption that forum law applies." Thus, she concluded that under \textit{Sexton}, "each case must be evaluated on the circumstances presented." \textit{Id.} at 23-24, 400 N.W.2d at 302. \textit{See also Choice of Law in Michigan, supra} note 60, at 1208.
\textsuperscript{73} Since both parties were Michigan residents, the state of injury had no interest in applying its defendant-protecting law to protect a Michigan defendant from liability to a Michigan plaintiff. \textit{Olmstead}, 428 Mich. at 23-24, 400 N.W.2d at 302. The fact-law pattern of two parties from a liability state being involved in an accident in a non-liability state presents the classic "false conflict" and ever since the seminal case of Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963), has been the impetus for the abandonment of the \textit{lex loci delicti} rule.
\textsuperscript{74} 428 Mich. at 24, 400 N.W.2d at 302.
By using these guides from the Sexton precedent, the court was able to formulate the specific lex fori approach to choice of law in Michigan.

In applying that approach to the fact-law pattern presented in Olmstead, the court likewise looked to its disposition of the choice of law issue in Sexton. In Olmstead, two of the facts were the same as in Sexton: The defendant was from Michigan, where recovery for wrongful death was not limited, and the accident occurred in Wisconsin, where recovery was limited. The third fact, the residence of the victim, was different. The victim in Olmstead was from Minnesota, while the victim in Sexton was from Michigan. However, this difference did not justify the displacement of Michigan law in Olmstead, since the defendant was from Michigan, and Wisconsin had no interest in limiting the liability of the Michigan defendant. As the court stated:

In this case, plaintiff is not a Michigan resident. However, that fact does not affect the conclusion reached in Sexton that the chief conceptual underpinnings of lex loci delicti—certainty and predictability—are no longer viable. The Court arrived at that conclusion without reference to the parties' citizenship. Therefore, to apply lex loci delicti in this case would advance those rationales no more than it would have in Sexton.

Since Wisconsin had no interest in applying its defendant-protecting law for the benefit of a Michigan defendant, no justification existed for displacing Michigan law. Thus, Michigan law applied as the law of the forum.

75. Id. at 23-30, 400 N.W.2d at 302-05.
76. Id. at 24-26, 400 N.W.2d at 302-03.
77. Id. at 25, 400 N.W.2d at 303.
78. As the court concluded:

In sum, this case involves a suit brought by a party not a citizen of Michigan, against a Michigan resident, arising out of an accident occurring in a state in which neither party resided. The states in which both plaintiff and defendant were citizens allow for unlimited recovery in wrongful death actions, but the state of the accident does not. Applying the lex loci delicti will not advance the conceptual rationales underlying the doctrine. Furthermore, no unfairness would result to the parties in applying Michigan law. Finally, since no citizen of Wisconsin is involved in the action, it has no interest in seeing its law applied. In light of the above, there is no rational reason to displace Michigan law.

Id. at 30-31, 400 N.W.2d at 305.
With regard to the use of a case as precedent, the rationale of
the decision is important. The rationale serves as the basis for the
application of the precedent in other cases. In *Olmstead*, the
rationale of the decision also relates to the specific approach to
choice of law that was adopted in the case. That specific approach
is the *lex fori* approach, not interest analysis. Under the *lex fori*
approach, the focus is on whether there is a rational reason to
displace Michigan law in favor of the law of another state in the
particular case. Interest analysis is employed only to determine
whether the state whose law is sought to be applied in preference
to Michigan law has an interest in applying its law in order to
implement the policy reflected in that law. If the state does not
have such an interest, the choice of law inquiry proceeds no further
and Michigan law applies as the law of the forum. Only where
the other state does have such an interest does the choice of law
inquiry continue to determine whether Michigan has an interest in
applying its law as well.79

If the Michigan Supreme Court were following the interest
analysis approach, *Olmstead* would be identical to *Sexton*. Both
cases presented the false conflict: both the plaintiff and defendant
were from recovery states, albeit different recovery states, and the
accident occurred in a non-recovery state. The plaintiff's home
state had a real interest in applying its law allowing recovery. The
law of the defendant's home state did not protect the defendant,
and the state of injury had no interest in applying its law to
protect the out-of-state defendant. Thus, under interest analysis,
in a case presenting the fact-law pattern of *Olmstead*, Minnesota
law would apply as the law of the only interested
state.80

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79. In *Olmstead*, the court emphasized that where the other involved state
did not have such an interest, any consideration of Michigan's interest was irrelevant
and unnecessary. As the court stated:

Finding as we do that applying the lex loci delicti will not promote the
reputed advantages of that doctrine and that Wisconsin has no interest in
seeing its law applied, we see no rational reason to displace Michigan law
in this case. Since there is no reason to apply Wisconsin law, it is, therefore,
unnecessary to undertake an analysis of the interests of Michigan. . . .
Such an analysis is unnecessary in this case. However, in another case in
which the state of injury does have an interest in having its law applied,
such an analysis might be necessary and proper.

*Ibid.* at 29-30, 400 N.W.2d at 305.

80. *See, e.g.*, Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr.
31 (1967).
Under Michigan’s *lex fori* approach, however, the primary basis for the choice of law decision is not a consideration of the policies and interests of the involved states, but rather the existence of a rational reason to displace Michigan law as the law of the forum. The policy and interest of the other involved state is reviewed to the extent that it bears on the question of a rational reason for the displacement of Michigan law. If that state does not have an interest in applying its law to implement the policy reflected in that law, the choice of law inquiry proceeds no further and Michigan law applies as the law of the forum. Where, as in *Olmstead*, the defendant is a Michigan resident, neither the plaintiff’s home state nor the state where the accident occurred would have an interest in limiting the defendant’s liability for wrongful death. Thus, it is irrelevant under Michigan’s *lex fori* approach whether or not the plaintiff’s home state would limit the defendant’s liability for wrongful death. Whenever a Michigan defendant is involved and Michigan law does not limit liability for wrongful death or otherwise protect the Michigan defendant, the defendant will be held fully liable under Michigan law, which applies as the law of the forum.

The latter point was dispositive in *Mahne v. Ford Motor Co.*

In *Mahne*, the fact-law pattern differed from that in *Olmstead* because the accident occurred in the victim’s home state. *Mahne* was a products liability case, concerning a fuel tank design defect in a 1967 Ford Mustang. The fuel tank exploded upon impact in Florida in 1985, causing horrible burn injuries to the Florida victim. At that time, Florida had a statute of repose, which barred all product actions twelve years after the date of manufacture. Michigan does not have a statute of repose. Under Michigan law, the manufacturer is liable if negligence in the design of the vehicle could be shown, regardless of how long the product had been in use. Ford, a Michigan manufacturer, does not conduct any manufacturing activities in Florida, and all facts relating to the design, testing, and manufacture of the 1967 Ford Mustang took place at Ford’s headquarters in Michigan. Since Ford did not conduct any manufacturing activities in Florida, Florida had no interest in applying its manufacturer-protecting policy in this

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82. *Id.* at 84-85.
83. *Id.*
84. *Id.*
Therefore, as the Sixth Circuit held, under *Olmstead*, the choice of law inquiry would proceed no further, and Michigan law applied as the law of the forum.\(^{85}\)

If Michigan had adopted the interest analysis approach in *Olmstead* instead of the *lex fori* approach, *Mahne* might have been more difficult to decide. Unlike *Olmstead*, which, in terms of interest analysis, presented the false conflict, *Mahne* presented the unprovided-for case. Florida would have no interest in applying its manufacturer-protecting policy for the benefit of a Michigan manufacturer which did not conduct any manufacturing activities in Florida. Likewise, since Michigan products liability law imposes liability only on the basis of negligence and does not permit recovery of punitive damages,\(^{87}\) it is difficult to characterize that law as reflecting an admonitory or regulatory policy that Michigan would be interested in applying to the activity of a Michigan manufacturer in Michigan. Nor would Michigan have any interest in applying the compensatory policy reflected in its products liability law for the benefit of a Florida victim injured in Florida.

Under Michigan's *lex fori* approach, however, no inquiry exists as to Michigan's interest once a determination is made that the other involved state has no interest in applying its law to implement the policy reflected in that law. Once that determination is made, Michigan law applies as the law of the forum. Under Michigan's *lex fori* approach the unprovided-for case in effect is resolved by the application of Michigan law as the law of the forum.

The litigation arising out of the Northwest Airlines Flight 255 crash at Detroit Metropolitan Airport in August, 1987 created two choice of law issues presenting different fact-law patterns from those presented in *Sexton, Olmstead*, and *Mahne*.\(^{88}\) These choice of law issues involved the law applicable to the recovery of punitive damages against Northwest Airlines and against McDonnell-Douglas, the manufacturer of the D-C 9 aircraft involved in the fatal crash.\(^{89}\) McDonnell-Douglas designed and manufactured the air-

\(^{85}\) *Id.*

\(^{86}\) As the Sixth Circuit stated: "Since Florida has no interest in having its statute of repose applied, Michigan law applies without regard to the nature or quality of Michigan's interests," and "Since there is no rational reason to displace Michigan law, the presumptive *lex fori* rule directs that Michigan law governs the case." *Id.* at 88-89. (The author acted of counsel to the lawyers for the plaintiff in *Mahne* and briefed and argued the choice of law issue before the Sixth Circuit).


\(^{89}\) *Id.* at 793-96.
Craft in California. California products liability law is based on strict liability and allows the recovery of punitive damages. Michigan products liability law is based on negligence, and punitive damages are not recoverable. With respect to the claims of Michigan victims against McDonnell-Douglas, the federal court, sitting in diversity, held that under Michigan's lex fori approach, Michigan law would be displaced in favor of California law on this issue. The court reasoned that California products liability law reflected a "producer regulatory policy," so that California had a real interest in applying this policy to all design and manufacturing activity that took place in California. Under the lex fori approach, this meant that the choice of law inquiry would continue and that it would be necessary to consider Michigan's interest. Michigan had no interest in applying the manufacturer-protecting policy reflected in its law for the benefit of a California manufacturer that did not conduct any manufacturing activities in Michigan and that designed the allegedly defective aircraft in California. Since California had a real interest in applying its law to implement the policy reflected in that law and Michigan did not under Michigan's lex fori approach, "reason require[s] that foreign law supersede the law of this state." The court, therefore, held that California law applied on the issue of recovery of punitive damages against McDonnell-Douglas.

90. Id.
91. Id. at 802.
92. Id. at 801, 805.
93. Id. at 802.
94. Id. at 801.
95. Strictly speaking, this refers to the manufacturer-protecting policy as it appeared with respect to the issue on which Michigan and California law differed. Depending on the content of the law of the other state, Michigan products liability law attempts to strike an even balance between the interests of victims and the interests of manufacturers. Therefore, Michigan law will be manufacturer-protecting on one issue and victim-protecting on another issue. See generally Prentis v. Yale Mfg. Co., 421 Mich. 670, 365 N.W.2d 176 (1984). It was manufacturer-protecting in the Flight 255 case, since Michigan follows a negligence standard and does not allow recovery of punitive damages. It was victim-protecting in Mahne, since it does not include a statute of repose and allows recovery for negligence no matter how long the product has been in operation.
96. 750 F. Supp. at 801.
97. Id. at 802, 811-12. In terms of interest analysis, this case presents the false conflict situation, with Michigan as the "disinterested state." It is only in this situation—in conflicts torts cases—that Michigan substantive law can be displaced under Michigan's lex fori approach.
Another issue involved punitive damages claims against Northwest Airlines. Principal place of business is Minnesota. Minnesota law allows recovery of punitive damages in wrongful death cases. However, Detroit Metropolitan Airport is one of Northwest’s “hubs,” and over sixty per cent of the flights originating from Detroit Metropolitan are Northwest flights, including the fatal flight 255. Michigan law, as stated above, does not allow recovery of punitive damages in any case. The court found that Minnesota law allowing recovery of punitive damages as applied to corporations with their principal place of business in Minnesota, reflected a “corporate regulatory policy,” which Minnesota wanted to impose on such corporations. But the court also found that Michigan had a real interest in applying its law, disallowing punitive damages, to protect Northwest Airlines from such liability in an accident arising out of Northwest’s business activity in Michigan. In this true conflict situation, the court concluded that “there is no rational reason to abandon Michigan law.” Therefore, Michigan law applied as the law of the forum.

Under Michigan’s lex fori approach to choice of law, Michigan law applies in all conflicts torts cases brought in Michigan courts except in the false conflict situation where Michigan is the “disinterested state.” This false conflict is the only situation where reason would require a foreign law to supersede the law of the forum because the foreign state has a real interest in applying its law to implement the underlying policy reflected in that law, while Michigan has no such interest. In Michigan, we have seen how a body of conflicts law can emerge in a particular state through the normal workings of binding precedent and stare decisis. This process has resulted in a specific approach to choice of law under which the law of the forum applies unless “reason requires that foreign law supersede the law of this state.”

This operation of judicial method and the policy-centered conflict of laws in Michigan, with the resulting lex fori approach to choice of law, contradicts Professor Hill’s assertion that choice

98. Id. at 804-12.
99. Id. at 806-07.
100. Id. at 807.
101. Id. at 807-08. Also see the discussion of the application of Michigan law in the true conflict situation in Choice of Law in Michigan, supra note 60, at 1212-14.
102. 750 F. Supp. at 802, 811-12.
of law decisions are currently made on an "essentially ad hoc basis." To the contrary, the Michigan experience indicates that courts can perform the judicial function in the manner advocated by Professor Hill and can use precedent to establish a body of conflicts law for the state.

C. Judicial Method in Practice: "Rules of Choice of Law"

The performance of the judicial function by the courts in conflicts cases today may also be demonstrated by the courts' development of what I call "rules of choice of law." I have demonstrated that in the torts area, at least, these "rules of choice of law" have emerged from the practice of the courts in deciding conflicts torts cases. I distinguish these "rules of choice of law" from choice of law rules, such as those that were embodied in the traditional approach. Choice of law rules are formulated a priori and then applied to the facts of a particular case. Any "precedential effect" of a case where the court has simply applied a choice of law rule is dubious, since the court's decision was neither made independently of the rule nor with reference to the precise choice of law issue presented in the particular case.

A "rule of choice of law," by contrast, emerges from the decisions of courts in the actual cases appearing before them for decision. Thus, it may be considered to be a "true precedent." I should add, however, that these tort "rules of choice of law" are based on the results of the decided case. They are not based on the courts' explanations for their decisions or on the particular choice of law approach purportedly applied.

"Rules of choice of law" can be developed from the courts' decisions in actual cases because conflicts cases, particularly in the torts area, tend to fall into certain fact-law patterns. My discussion of Michigan's lex fori approach to choice of law briefly referred to these fact-law patterns. In torts cases, the "fact" of the fact-law pattern relates to the states where the parties reside, the state where the harm is suffered, and if it differs, the state where the act or omission causing the harm took place. The "law" relates

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105. See supra notes 75-97 and accompanying text.
to whether the law in question allows or denies recovery, whether it reflects an admonitory and/or compensatory policy, and whether it involves other considerations, such as those applicable to worker's compensation. From these fact-law patterns "rules of choice of law" emerge. In some fact-law patterns, the results are fairly uniform. In others, the courts are divided, but these divisions can be stated in terms of majority and minority rules.106

In actual practice, the courts that have abandoned the traditional approach are applying judicial method to the resolution of conflicts cases. These courts make the choice of law decision with reference to the fact-law pattern presented in the particular case. Thus, the decision in one case can be applied directly or analogously to another case presenting the same or a similar fact-law pattern. Likewise, in deciding cases and in developing "rules of choice of law," the courts also set forth principles, as they do in other areas of law. These principles can then guide the resolution of future cases presenting different fact-law patterns.

Therefore, I strongly disagree with Professor Hill's assertion that current choice of law decisions are being made on an "essentially ad hoc basis." Professor Hill bases this assertion largely on the application of Currie's interest analysis approach, on his criticisms of the reasoning, and sometimes on the results of particular choice of law decisions applying the "new learning." The results of court decisions, however, indicate that judicial method is being used in the resolution of conflicts cases. Thus, in practice precedent operates in conflicts cases as it does in other areas of the law.

III. A REFLECTIVE RESPONSE CONTINUED: PROFESSOR HILL'S TRADITIONAL RULES

My submission that the courts are in fact following judicial method and relying on precedent in conflicts cases does not answer the continuity part of Professor Hill's thesis. Professor Hill contends that the traditional rules were the outgrowth of centuries of development of patterns in the localization of the law governing multistate controversies.107 Further, he contends that a consideration of relevant governmental interests has always been a part of choice of law analysis and that the implementation of these interests provided the basis for traditional rules.108 He argues, therefore,

106. For a discussion of the tort "rules of choice of law," see Rules of Choice of Law, supra note 104, at 1032-41. See also Across State Lines, supra note 10, at 47-68 (Chapter 4).
107. See supra notes 7-12 and accompanying text.
108. See supra notes 18-20 and accompanying text.
that the traditional rules should be presumptively applicable to resolve the conflicts issues that arise today and should be followed except where the application of the rule would produce a functionally unsound result.\textsuperscript{109}

In responding to Professor Hill’s argument, I find it necessary to differentiate among the traditional rules that he discusses. I believe that some traditional rules, particularly in the property and succession area, will produce functionally sound results in most of their applications. Therefore, some traditional rules may be presumptively applicable today. Other rules, however, will not produce functionally sound results at all and should have no place in modern choice of law analysis.

\textbf{A. The Lex Loci Delicti Rule in Torts Cases}

My strongest disagreement with Professor Hill is over his claim that the \textit{lex loci delicti} rule has utility and should be presumptively applicable in conflicts torts cases.\textsuperscript{110} I think that the \textit{lex loci delicti} rule has no utility at all. Its purported application, even presumptively, distorts the analysis of the real interests of the involved states and may lead to functionally unsound results.

As discussed previously, Professor Hill justifies the \textit{lex loci delicti} rule on the grounds that (1) the alleged tortfeasor is held to the behavioral standards of the place where the tortfeasor acted or where the conduct foreseeably took effect; (2) the victim’s rights are determined by the law of the same place, just as the burden of that law would be imposed on the victim for the victim’s own conduct there; and (3) out-of-state actors or victims are treated no differently than local actors or victims.\textsuperscript{111} Professor Hill argues that the rule “goes far to advance sensible policies of fairness and accommodation in a community of states.”\textsuperscript{112}

None of these justifications, however, goes to advancing the interests of involved states in having their laws applied to implement the policies reflected in those laws. In the ordinary accident situation, the situs of the accident is completely irrelevant with respect to the consequences of the accident. The consequences of the accident and of allowing or denying recovery will be felt by the parties in their home states, regardless of where the accident

\textsuperscript{109} See supra notes 21-23 and accompanying text.
\textsuperscript{110} Judicial Function, supra note 3, at 1623.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 1625.
occurs. Therefore, it is only the parties' home states that, depending on the content of their respective laws, may have a real interest in having their law applied to determine liability arising from the accident.

The fundamental criticism of the *lex loci delicti* rule advanced by Currie—and not answered by Hill—is that it completely ignores the policies and interests of the involved states. In the false conflict situation, it frequently would require the application of the law of the state that did not have any interest in applying its law to the detriment of the state that had an interest. In the true conflict situation, it would require sacrificing the forum's real interests simply on the ground that the accident happened in another state.

When Hill asserts that the *lex loci delicti* rule is premised on the implementation of "governmental interests," he is referring only to the "generalized" interest of a state in applying its law to determine the consequences of a tort occurring there, not the interest of a state in applying its law to implement the policy reflected in that law. The presumptive applicability of the *lex loci delicti* rule, as advocated by Hill, is essentially a rejection of interest analysis as a basic approach to choice of law in torts cases. To the extent that a consideration of policies and interests would be relevant under Hill's thesis, it would only be to displace the presumptively applicable *lex loci delicti* rule in a particular case.

Hill claims that the presumptively applicable *lex loci delicti* rule "should not be applied unnecessarily to a wide range of collateral issues." Hill illustrates this point by referring to Judge Fuld's opinion in *Babcock v. Jackson*, where Fuld asserted that, while New York law should apply on the issue of host-guest immunity, Ontario law should apply on the question of the "rightness or wrongness" of the driver's conduct in Ontario. Hill continues that the "Neumeier rules" subsequently formulated by Fuld, "assigned a wide scope for application of the *lex loci delicti* rule.

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113. See Governmental Interest Approach, supra note 54, at 186-87.
114. Id. at 188-89.
115. See Reply, supra note 2, at 483.
116. While this "generalized" interest is sufficient to justify the application of a state's law for constitutional purposes, it is not the kind of interest that is the basis of the interest analysis approach to choice of law. Sedler, Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism, 10 Hofstra L. Rev. 59, 71-72 (1981) [hereinafter Constitutional Limitations].
This statement is certainly true. Indeed, under the "Neumeier rules," the *lex loci delicti* generally controls in interstate accident cases where the parties reside in different states.\(^\text{122}\)

Hill does not fully endorse the proposition embodied in the first *Neumeier* rule, which is that when the parties are from the same state, the law of their home state should control. However, when discussing the "reverse Babcock" situation—two parties from a non-liability state involved in an accident in a liability state—Hill asserts that the state of injury does not have a real interest in applying its law to allow the non-resident injured there to recover. He suggests that the state of injury "might do well to exercise restraint in the interest of avoiding conflict with another concerned jurisdiction."\(^\text{123}\) Essentially, Hill argues that in this situation, the law of the parties' home state, which denies recovery, should apply because it is the only state that has a real interest in applying its law to implement the policy reflected in that law. I fully agree.\(^\text{124}\)

If, as Hill apparently concedes, the law of the parties' home state should apply on some issues when the parties are from the same state, it should not matter whether the laws of the involved states differ on a "collateral issue," such as family immunity, or on the issue of underlying liability. Suppose that two parties from a comparative negligence state are involved in an accident in a state in which contributory negligence is still an absolute bar to recovery. The consequences of the accident and of allowing or denying recovery will be felt by the parties in their home state. Therefore, whether the point on which the laws of the involved states differ relates to underlying liability or to a "collateral issue," the interest of the parties' home state in applying its law to implement the policy reflected in that law is exactly the same. In either case, the application of the *lex loci delicti* rule would require the sacrifice of the real interests of the parties' home state without

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123. *Judicial Function*, supra note 3, at 1639-40. This was exactly what the New York Court of Appeals did shortly after the publication of Professor Hill's article. In Schultz v. Boy Scouts of Am., Inc., 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985), that court held that where the tort involving a New Jersey victim and a New Jersey charity occurred in New York, New Jersey law, which recognized charitable immunity, applied to bar the suit.
124. *See* e.g., *Choice of Law in Michigan*, supra note 60, at 1214-16.
advancing any corresponding interest of the state where the accident occurred.

In any event, Hill may be conceding that the *lex loci delicti* rule should not be applied in accident cases where both parties are from the same state. The examples he gives of cases that call for the application of the *lex loci delicti* rule are all cases where the parties reside in different states.\(^{125}\) I will consider the utility of the *lex loci delicti* rule to resolve the choice of law issues presented in these kinds of cases.

Regarding interest analysis, one set of examples Hill uses involves the unprovided for case—the situation where neither state has a real interest in applying its law to implement the policy reflected in that law. In the context of an interstate accident, this occurs when the defendant is from a non-liability state and the plaintiff is from a liability state. Based on the assumption that the state of injury has no real interest in applying its law to allow a non-resident injured there to recover, the unprovided-for case is presented when an accident occurs both in the plaintiff’s home state\(^ {126}\) and in the defendant’s home state.\(^ {127}\)

In the case where the accident occurs in the plaintiff’s home state, Hill asserts that the concept of the unprovided-for case is “pure fantasy” because it cannot be assumed that the legislature of the defendant’s home state, when enacting the law imposing liability,\(^ {128}\) had no “intent” with respect to the applicability of the law in this situation.\(^ {129}\) To the contrary, Hill claims its probable “intent” was that the law should not be applied to benefit out of state residents injured in their home state.\(^ {130}\) Here, like other interest analysis critics,\(^ {131}\) Professor Hill confuses “legislative intent” with a state’s interest in applying its law to implement the

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\(^{125}\) It is in this context that Hill endorses the second and third “Neumeier” rules.


\(^{128}\) In Erwin v. Thomas, 264 Or. 454, 506 P.2d 494 (1973), the defendant’s home state had enacted legislation creating a cause of action for loss of consortium for the wife. However, in Labree v. Major, 111 R.I. 657, 306 A.2d 808 (1973), another case Hill discusses, the defendant’s home state had retained the common-law rule which imposed liability for ordinary negligence in guest passenger cases.

\(^{129}\) Judicial Function, supra note 3, at 1603-04.

\(^{130}\) Id.

policy reflected in that law. Interest analysis is not premised on effectuating a non-existent legislative intent. If the legislature had an "intent" with respect to the applicability of a law to a situation containing a foreign element, it would have expressed its "intent" by including a legislative directive specifically dealing with the law's applicability to that situation. It is only because the legislature did not express its "intent," that the courts must resolve the question of the law's applicability by making a choice of law decision. Under interest analysis, the court makes the choice of law decision by considering whether the policies reflected in the differing laws of the involved states would be advanced by applying them to the situation containing a foreign element.\textsuperscript{132}

Where the plaintiff is from a non-liability state, that state has a policy of protecting defendants from liability to plaintiffs. However, that state has no interest in applying this policy to enable a non-resident defendant to avoid liability to a resident plaintiff. Conversely, the law of the defendant's home state would enable the plaintiff to recover. Yet, that state has no interest in applying that law for the benefit of a non-resident plaintiff, since the consequences of the accident and of allowing or denying recovery will be felt by the plaintiff in the plaintiff's home state. In the unprovided-for case, as regards the policies and interests of the involved states, it is indeed true, contrary to Hill's assertion that "neither state cares what happens."\textsuperscript{133} In any event, the place where the accident occurred is irrelevant to the matter of the policies and interests of the involved states in the unprovided-for case, where the parties are from different states, as it is in the false conflict situation, where the parties are from the same state.

The resolution of the unprovided-for case has given the courts some difficulty in practice. This is in no small part because interest analysis can only \textit{identify} the unprovided-for case, but cannot provide the means for its resolution. By definition, the means of resolution must depend on something other than a consideration of the advancement of the policies and interests of the involved states.\textsuperscript{134} My own view of the means of resolution of the unprovided-for case refers to the common policies of the states involved, which will usually result in the application of the law of the

\begin{footnotesize}
\begin{enumerate}
\item[132.] See \textit{New Critics}, \textit{supra} note 56, at 606-10.
\item[133.] \textit{Judicial Function}, \textit{supra} note 3, at 1605.
\item[134.] See \textit{Governmental Interest Approach}, \textit{supra} note 54, at 233-36.
\end{enumerate}
\end{footnotesize}
defendant's home state, imposing liability.\textsuperscript{135} In practice, the suit in the unprovided-for case is usually brought in the defendant's home state. The majority of the courts dealing with this situation have applied their own law and imposed liability, although some have applied the law of the plaintiff's home state and denied recovery.\textsuperscript{136}

The point I want to make now, however, is not whether the more appropriate solution to the unprovided-for case is to apply the law of the defendant's home state to impose liability, or the law of the plaintiff's home state to deny recovery. Rather, my point is that the place where the accident occurred is irrelevant in arriving at this solution. In arguing for the presumptive applicability of the \textit{lex loci delicti} rule here, Professor Hill discusses the \textit{Hurtado} case,\textsuperscript{137} where a Mexican victim was killed in California due to the negligence of a California driver. The victim's survivors brought suit in California, seeking to recover unlimited damages for wrongful death under California law. The defendant contended that Mexican law, which limited damages to a minimal amount in American dollars, should apply. The California court applied California law, allowing unlimited recovery.\textsuperscript{138} Professor Hill agrees with the result but faults the California court for engaging in an unnecessary discussion of the policies and interests of the involved states.\textsuperscript{139} According to Hill, California law should have been applied under the \textit{lex loci delicti} rule. He argues: "The issue before the court—the right of the stranger injured within the gates—was covered by a body of precedent which was striking in its universality, and the wisdom of which, as applied to such a case, had never been seriously doubted."\textsuperscript{140}

Suppose, however, that the fatal accident had occurred in Mexico rather than in California. Under the \textit{lex loci delicti} rule, a court would apply Mexican law and limit recovery to a pittance.\textsuperscript{141}

\begin{itemize}
\item \textsuperscript{135} \textit{Id.} The non-liability rule of the plaintiff's home state will usually be an exception to the common policy of both states, which would impose tort liability.
\item \textsuperscript{136} See the discussion and review of cases in \textit{Across State Lines}, \textit{supra} note 10, at 57-58.
\item \textsuperscript{138} 11 Cal. 3d at 582-83, 522 P.2d at 671.
\item \textsuperscript{139} \textit{Id.} at 1605.
\item \textsuperscript{140} \textit{Id.} at 1610.
\item \textsuperscript{141} In Hernandez v. Burger, 102 Cal. App. 3d 795, 162 Cal. Rptr. 564 (1980), a California intermediate appellate court reached this result, on the quite dubious
\end{itemize}
In this situation, the *lex loci delicti* rule turns out to be nothing more than a "tiebreaker." Where the parties are from different states and neither state has an interest in applying its law in order to implement the policy reflected in its law, the place where the accident occurs becomes dispositive. This is an "easy" solution, but it is one that is difficult to justify in terms of producing a functionally sound result. The California driver and insurer will feel the consequences of imposing liability in California, and it is irrelevant, as regards to those consequences, whether the accident occurred in California or in Mexico. It is difficult to see why the result should differ depending on where the accident occurred, and Professor Hill never attempts to explain why it should.

My own suspicion is that in the case where the accident occurred in Mexico, Professor Hill would find a good reason for displacing the presumptively applicable *lex loci delicti* rule. He might emphasize the unreasonableness of the Mexican rule, limiting recovery for wrongful death to a pittance and the absence of an unfair result in holding the California defendant and insurer to the California standard of wrongful death liability. If my suspicion is correct, this suggests that the presumptive applicability of the *lex loci delicti* rule, as advocated by Professor Hill, would give a grounds that Mexico had a policy of promoting tourism by Americans and that this policy would be advanced by limiting the liability of an American tourist who killed a Mexican victim in Mexico. *Id.* at 802, 162 Cal. Rptr. at 568. Professor Hill sees this result as following from the California Supreme Court's discussion of policies and interests in *Hurtado*, and says that in *Hernandez*, "[t]he court made no attempt to explain how it reached this conclusion regarding Mexican policy." *Judicial Function, supra* note 3, at 1610.

What happened in *Hernandez*, of course, was that the court either misunderstood or misapplied the interest analysis approach, for it did not properly identify the policy reflected in the Mexican rule limiting damages recoverable for wrongful death. The policy of the rule was to protect defendants generally from liability; it was not to promote tourism by Americans as it applied to all wrongful death actions and not merely to ones brought against American tourists. The policy, therefore, would be advanced only by its application in favor of a Mexican defendant and would not be advanced by its application in favor of a California defendant, because the consequences of imposing unlimited liability would be felt by the California defendant and insurer in California.

After criticizing the California court for its assumed misanalysis of Mexico's policy and interest in this case, Professor Hill leaves *Hernandez*. He fails to point out that under the *lex loci delicti* rule, Mexican law would apply here, just as California law would apply in *Hurtado*.

142. In commenting on the third *Neumeier* rule, Professor Hill asserts that it is "open-ended" and "invites explorations of different outcomes." *Judicial Function, supra* note 3, at 1625 n.198.
court the opportunity to avoid such application when it did not like the substantive result produced—much in the way that courts following the traditional approach would sometimes employ "manipulative techniques" to avoid reaching what they considered to be a functionally unsound result. In any event, in the unprovided-for case, the application of the *lex loci delicti* rule turns out to be a "tiebreaker," making the resolution of that situation depend on where the accident happened to occur.

The same is true of the application of the *lex loci delicti* rule to resolve the true conflict. Here, Hill uses a set of examples "allowing the plaintiff to recover under the higher standard of his domiciliary state," where the accident occurred in the defendant's home state. He notes that in some of these cases "courts have given the plaintiff the benefit of the more favorable recovery rule of his own state in circumstances where the defendant could have had no idea of the identity, let alone domicile, of the person whom he injured." One of the cases that Hill uses to illustrate this situation is *Schwartz v. Consolidated Freightways Corp.* A Minnesota driver was involved in an accident in Ohio with a vehicle driven by an employee of an Ohio interstate trucking company. Due to the extensive business the company conducted in Minnesota, it was subject to general jurisdiction on the basis of forum-defendant contacts. Under Ohio law, the plaintiff's contributory negligence would be a complete bar to recovery. Minnesota followed comparative negligence. In the suit in Minnesota, the Minnesota court held that Minnesota law applied on the issue of contributory fault and allowed partial recovery.

This case illustrates the irrelevance of the place of injury in providing a functionally sound solution to the true conflict situation. In the interstate accident context, a true conflict is presented whenever the plaintiff is from a recovery state and the defendant is from a non-recovery state because each party will feel the consequences of the accident and of allowing or denying recovery in their respective home states. The place where the accident occurred is completely irrelevant. Under the forum preference solution to the true conflict, advocated by Currie and myself, the forum should apply its own law in order to implement the policy

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143. See *Across State Lines*, supra note 10, at 32-33.
145. Id. at 1607.
147. 300 Minn. at 493, 221 N.W.2d at 669.
reflected in that law, so long as the application of that law is not fundamentally unfair to the other party. Thus, in a case like Schwartz where a suit can be brought in the plaintiff’s home state, that state should apply its own law and allow recovery, notwithstanding that the accident occurred in the defendant’s home state.148 In practice, courts generally reach this result.149

148. See Governmental Interest Approach, supra note 54, at 227-33.

The Supreme Court has made it clear that, in the absence of fundamental unfairness, there is no constitutional objection to the plaintiff’s home state applying its law to impose liability against an out-of-state defendant for an accident occurring in the defendant’s home state. Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981). As Justice Brennan stated: “An automobile accident need not occur within a particular jurisdiction for that jurisdiction to be connected with the occurrence.” Id. at 314. The injury or death of a resident of State A in State B is a contact of State A with the occurrence in State B.” Id. at 315 n.20. See also Constitutional Limitations, supra note 116, at 72-73.

In Schwartz, the Minnesota court was not acting unfairly in applying its own law on the issue of contributory fault, as the defendant’s driver did not rely on the Ohio contributory negligence rule before becoming involved in the accident and the defendant’s automobile liability policy covered the vehicle in any state in which it was driven.

Where the defendant acted entirely within the confines of its home state, justifiably relied on the law of that state, and conformed conduct to the requirements of that state’s law, it could be fundamentally unfair to hold the defendant liable under the law of the plaintiff’s home state. In cases where the issue related to the liability of a landowner for harm suffered by persons on the land, the courts of the plaintiff’s home state (where the defendant was subject to general jurisdiction on the basis of “doing business”) have applied the law of the defendant’s home state, which did not impose liability in the circumstances presented. See Barrett v. Foster Grant Co., 450 F.2d 1146 (1st Cir. 1971) (applying New Hampshire law); Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 583 P.2d 721 (1978). See also Levin v. Desert Palace Inc., 318 Pa. Super. 606, 465 A.2d 1019 (1983), which held that the Nevada standard of care governed the liability of a Nevada innkeeper for the theft of property from the room of a Pennsylvania guest. Id. at 612-13, 465 A.2d at 1022.

The law of the defendant’s home state was applied because the defendant was justifiably entitled to rely on that state law and conform its conduct to the requirements of that law in Blakesley v. Wolford, 789 F.2d 236 (3rd Cir. 1986) (applying Pennsylvania law) as well. Here, a Pennsylvania patient, through arrangements made by her physicians, had consulted with a prominent Texas oral surgeon who was visiting the area in Pennsylvania where she lived. She went to Texas to have the surgery performed by the defendant. In a malpractice action brought in Pennsylvania (the defendant apparently made no objection to the exercise of judicial jurisdiction in Pennsylvania), the Third Circuit, sitting as a Pennsylvania court, held that the Texas law of “informed consent,” which was more favorable to the physician, and the Texas “cap” on malpractice damages should apply. Id. at 243.

149. See the discussion and review of cases in Across State Lines, supra note 10, at 53-57.
Again, my point is not whether or not forum preference is the most appropriate solution to the true conflict in interstate accident cases. Rather, it is that, just as in regard to the resolution of the unprovided-for case, the application of the *lex loci delicti* rule to resolve the true conflict, as advocated by Hill, is nothing more than a “tiebreaker.” As such, the *lex loci delicti* rule makes the resolution of the situation dependent on where the accident occurred. Again, Hill never explains why this proposed resolution of the true conflict will lead to functionally sound results.

Thus far I have dealt with Hill’s proposed application of the *lex loci delicti* rule to the situation where both the allegedly wrongful act and the harm occurred in the same state. Hill’s examples do not include the classic “multi-state tort,” where an allegedly wrongful act in one state produces the harm in another state. Under the *lex loci delicti* rule, as it operated under the traditional approach, the “place of the wrong” was the place where the harm occurred.\footnote{150}{See *Restatement of Conflict of Laws* § 377 (1934); Alabama Great S. Ry. v. Carroll, 97 Ala. 126, 11 So. 803 (1892).}

Consider the result that this application of the *lex loci delicti* rule would produce in a case where the plaintiff and the defendant were residents of the same state, the law of which imposes liability, and the act of the defendant in the home state caused injury to the plaintiff in another state, the law of which does not impose liability. The *lex loci delicti* rule would displace the law of the parties’ home state in favor of the law of the state of injury, denying recovery.\footnote{151}{Perhaps in such a case Professor Hill might say that the law of the parties’ home state should displace the presumptively applicable *lex loci delicti* rule. Why should this occur? The answer, I submit, is that the parties’ home state has a real interest in applying its law to implement the compensatory policy embodied in that law, and if the law in question reflects an admonitory or regulatory policy, that policy as well. Conversely, the state of injury has no interest in applying its law to protect a non-resident actor from liability that is imposed by the law of the actor’s home state.}

Perhaps in such a case Professor Hill might say that the law of the parties’ home state should displace the presumptively applicable *lex loci delicti* rule. Why should this occur? The answer, I submit, is that the parties’ home state has a real interest in applying its law to implement the compensatory policy embodied in that law, and if the law in question reflects an admonitory or regulatory policy, that policy as well. Conversely, the state of injury has no interest in applying its law to protect a non-resident actor from liability that is imposed by the law of the actor’s home state.
Continuing with the "multi-state tort," whenever the policy behind a state's substantive rule of tort law is admonitory or regulatory, and the conduct occurred in that state, it has a real interest in applying its law to implement the policy. This interest is totally apart from its interest in implementing any compensatory policy reflected in that law. Thus, it would not matter, with respect to implementing this admonitory or regulatory policy, that the injury occurred in another state, injuring a resident of that state. Assuming that the law of the state of injury would not impose liability for the conduct in question, in terms of interest analysis, this is a false conflict. In practice, suit will usually be brought in the defendant's home state, and that state will apply its own law imposing liability.\textsuperscript{152} By the same token, where an act done in one state foreseeably could produce harm in another state and in fact injures a resident of that state, the state where the injury occurs will apply its own law allowing recovery.\textsuperscript{153} This is not because the


\textsuperscript{153} See, e.g., Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976), cert. denied, 429 U.S. 859 (1976). The defendant was a Nevada liquor establishment doing business near the California border and advertising extensively in California. It served liquor to an intoxicated patron, who later was involved in an accident injuring a California plaintiff. Plaintiff filed suit in California, where the Nevada liquor establishment could constitutionally be subject to jurisdiction because of its extensive advertising in California, directed toward California residents. California applied its law allowing recovery. \textit{Id.} at 318-19, 546 P.2d at 725-26, 128 Cal. Rptr. at 217-18.

In Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974), the putative father, a resident of Pennsylvania, sued for a declaration of paternity against the child's mother, a resident of Wisconsin. The mother counterclaimed to recover for seduction, an action which was recognized at that time under Wisconsin law, but had been abolished in Pennsylvania and in New Jersey, where the sexual acts had taken place. The Wisconsin court applied Wisconsin law, granting recovery, on the ground that the harm from the seduction was suffered by the mother in Wisconsin. \textit{Id.} at 311-13, 215 N.W.2d at 19. Professor Hill includes this case in the series of examples "allowing the plaintiff to recover under the higher standard of his domiciliary state" and criticizes the result on the grounds that, "[t]here was no suggestion in the court's opinion that the defendant was in any way chargeable with knowledge that his conduct might ultimately be governed by Wisconsin law." \textit{Judicial Function}, \textit{supra} note 3, at 1608. But the defendant was indeed "chargeable with knowledge that his conduct might ultimately be governed by Wisconsin law," because he knew that the woman was a resident of Wisconsin and could foresee that any harm
accident occurred there, but because that state has a real interest in applying its law to promote its compensatory policy reflected in that law.

Professor Hill does not discuss the application of the *lex loci delicti* rule to resolve conflicts questions arising with respect to the "multi-state tort." I have demonstrated, however, that with regard to both the implementation of admonitory/regulatory and compensatory policies, the place where the accident occurred is completely irrelevant in such cases.

The irrelevance of the place of injury also appears in the context of product liability cases. Here, the primarily interested states are the victim's home state, if its products law favors victims, and the manufacturer's home state, if its products law favors manufacturers. Ordinarily, the victim will be injured in the victim's home state. Where that state's law favors victims, the victim will bring suit there and will, of course, get the benefit of its victim-favoring law. However, the interest of that state in applying its victim-favoring law would be the same if the actual injury occurred in another state. Provided that the manufacturer ships products into the victim's home state, the manufacturer can be sued there, and that state may be expected to apply its victim-favoring law regardless of where the accident occurred. By the same token, if the law of the manufacturer's home state favors manufacturers, that state will apply its own law in the event that the suit is brought there.

The more difficult case in practice is the one where the law of the victim's home state is manufacturer-favoring while the law of the manufacturer's home state is victim-favoring. Where the law of the manufacturer's home state is found to reflect an admonitory or regulatory policy, that state has a real interest in applying its

caused to her by his "seduction" would be suffered by her in Wisconsin. Thus, the application of Wisconsin law on the issue of liability for "seduction" was fully foreseeable to the defendant at the time he "seduced" the woman in New Jersey. Even more interesting, as regards Hill's criticism of the result, is that because the harm was suffered by the woman in Wisconsin, Wisconsin would be the "place of the wrong" within the meaning of the *lex loci delicti* rule.


155. *See* Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071 (Ind. 1987), where both the victim and the manufacturer were Indiana residents and the product was manufactured there. The accident occurred in Illinois. The Indiana court applied its own law, which favored the manufacturer. *Id.* at 1704.

156. Such as where it both imposes strict liability and allows recovery of punitive damages.
own law in order to implement that policy and will do so notwithstanding that the accident occurred in another state, injuring a resident of that state. Where the law of the manufacturer's home state does not reflect an admonitory or regulatory policy, in terms of interest analysis, the unprovided-for case is presented. Here, contrary to the more typical disposition of the unprovided-for case, the courts tend to look to the law of the victim's home state and limit the victim to the lower standard of protection provided by that law.

Again, in the products liability context, the place where the accident occurred turns out to be completely irrelevant. The court approaches the issue in terms of whether it should apply the law of the victim's home state or the law of the manufacturer's home state. While the accident usually occurs in the victim's home state, the justification for applying the law of that state is not that the accident occurred there, but that the victim resides there and will feel the consequences of the accident in that state. Where a court applies the law of the manufacturer's home state, it is, of course, irrelevant that the accident occurred in another state.

As the above discussion demonstrates, the lex loci delicti rule is not useful, even presumptively, to resolve the choice of law issues presented in conflicts torts cases. Most significantly, it neglects to consider the real interests of the involved states, and is not designed to do so. In the false conflict situation, it could require the application of the law of the state that had no interest to the detriment of the state that did. In the true conflict and unprovided-for case it is nothing more than a "tiebreaker." I have shown that it is completely irrelevant in the "multi-state tort" context, where the focus is on the admonitory or regulatory policy of the state of acting or the compensatory policy of the victim's home state. It is also irrelevant in the products liability context, where the focus is on the states where the victim resides and where


158. As in Michigan, where liability is imposed only on the basis of negligence and recovery of punitive damages is not allowed.

the product was manufactured. With all due respect, Professor Hill is just plain wrong when he says that the *lex loci delicti* rule "goes far to advance sensible policies of fairness and accommodation in a community of states." Its application distorts the analysis of the real interests of the involved states and could lead to functionally unsound results. Despite its "hoary antecedents," it has no place whatsoever in the resolution of the conflicts torts problems that arise in the modern world.

B. *Party Autonomy in Contracts Cases*

Hill asserts that the basic conflicts principle applicable to contracts is party autonomy. Under this principle, a court would recognize the parties' express choice of law and, in the absence of an express choice of law, the court would look to the law impliedly intended by the parties. Hill's traditional rule is not the *lex loci contractus*, which Hill claims was a break with continuity and precedent, but the rule of party autonomy. Hill finds that the Restatement Second is generally supportive of this rule, both in regard to its emphasis on recognition of the parties' express choice of law and to its use of the "state of the most significant relationship" concept. Hill argues that the latter will often lead to the same result as looking to the "implied intention" of the parties.

Hill's justification for the rule of party autonomy is the familiar one that recognition of party autonomy enables the parties to achieve predictability in an area where predictability is very important. Furthermore, the "necessary accommodation" between the interests of "trading states" will be achieved most fairly and effectively by accepting the terms upon which the parties agreed. As a general proposition, this point cannot be disputed, and I agree for the same reasons Hill provides—that in at least some circumstances, application of the rule of party autonomy will produce functionally sound results.

The clearest example of such a circumstance is where the matter in issue is one of construction and interpretation. Such a matter

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161. *Id.* at 1625-27.
162. See *supra* notes 30-36 and accompanying text.
163. See *supra* notes 45-48 and accompanying text.
is within the parties' contractual capacity and the governing instrument could have covered it. The substantive law of contract construction and interpretation serves merely to "fill in the gaps" left in the parties' contract. When the parties have provided that the law of a particular state "governs" their contract, they have essentially incorporated by reference that state's contract construction and interpretation law into the terms of their contract. Since there is no reason to limit the parties' ability to incorporate the law of a state by reference in this way, the so-called "choice of law" with respect to matters of construction and interpretation will always be recognized, as it should be.\(^6\)

I also agree that, with respect to such matters, the courts should look to the law "impliedly intended" by the parties where no express choice was made. The Restatement Second's localizing concept of the state of the most significant relationship may be useful to determine this "implied intent." When it is possible to localize the contract in a particular state on the basis of factual contacts that the contract had with that state, it can be asserted that this is the law that the parties would have intended to apply if they had thought about the matter. It is sound to look to the law of that state on questions of construction and interpretation because these questions could have been covered by the parties in their contract. Looking to the law of that state on these questions serves the predictability objective of party autonomy.\(^6\)

However, Hill's party autonomy rule runs into difficulty when it is relied upon to determine questions of validity and enforceability, which are questions beyond the contractual capacity of the party. Like the Restatement Second, Hill advocates application of the party autonomy rule with respect to validity and enforceability questions, except for the "overriding character of laws designed to implement special regulatory or protective policies."\(^6\) Hill does not discuss this point in detail, but implicit in his position, and explicit in the position taken by the Restatement Second, is that "policy" exceptions to the party autonomy rule should be rare. According to the Restatement Second, party autonomy should control questions going to validity unless application of the law of the chosen state would be contrary to a "fundamental policy" of the state whose law would otherwise apply, and the latter state


\(^{167}\) Judicial Function, supra note 3, at 1627.
had a "materially greater" interest than the chosen state in the determination of the particular issue.  

My own view regarding party autonomy distinguishes between matters that, while analytically addressing validity, do not involve a strong policy of the forum or the state whose law would be applied in the absence of party autonomy, and those matters that involve a strong policy. I would recognize party autonomy only with respect to validity questions that do not involve a strong policy, such as whether the contract satisfies the requirement of consideration. Otherwise, I maintain that the courts should reject party autonomy to resolve validity questions. A court should make the choice of law decision in contract cases, as in any other, with reference to considerations of policy and fairness to the parties, including implementation of the forum's own policy and interest.  

The operation of the party autonomy rule in practice is analyzed best by reviewing the cases that involve recognition of the parties' express choice of law as to matters of validity and enforceability. In practice, there are a large number of cases where the courts frequently cite the Restatement Second in support of recognition of the parties' express choice of law with respect to such matters. However, in many of these cases, the law chosen by the parties is the law that the court would have applied even in the absence of an express choice. In a number of these cases, it does not appear that a conflict of laws even existed. The "true" recognition of an express choice of law case is where the court is asked to recognize an express choice of law that would displace the law that the court otherwise would apply.  

It is fair to say that in practice the court usually will not recognize the parties' express choice of law if the matter at issue involves a strong policy of either the forum or the state whose law the forum would apply in the absence of an express choice. Most of the invalidating rules that are at issue in the cases that arise in practice do involve strong policies. For this reason, recognition is frequently refused in the "true" recognition of express choice of law case. Recognition has been refused in cases involving

169. The Contracts Provisions, supra note 165, at 302-15. In contract cases, of course, there is a greater possibility that the parties may have relied on the law of a particular state, such as the state whose law was expressly chosen, so that the refusal to apply the law of that state could give rise to a problem of fundamental unfairness.
the validity of covenants not to compete,\textsuperscript{170} solicitation and sales of securities in violation of the forum's securities regulation law,\textsuperscript{171} the automatic change of beneficiary in a life insurance contract following the divorce of the insured and the beneficiary,\textsuperscript{172} franchise revocation,\textsuperscript{173} and the validity of "built-in" contractual limitation periods.\textsuperscript{174} Sometimes a court will recognize the express choice of law even in these situations, especially if the court expressly follows the \textit{Restatement Second}'s approach.\textsuperscript{175} Yet, for the most part, in the "true" recognition case involving a strong policy of the forum or the state whose law would otherwise be applied,\textsuperscript{176} the express choice of law will not be recognized.\textsuperscript{177}

In the absence of an effective choice of law, many courts in practice invoke the \textit{Restatement Second}'s localizing concept of the state of the most significant relationship, which Hill regards as useful to determine the "implied intention" of the parties. Hill also makes the point that "an approach in terms of likely intent may be more fruitful on its negative than on its positive side" in that it prevents application of a law that the parties would not have intended to apply.\textsuperscript{178}

It is my submission that, with respect to issues of validity and enforceability, the courts generally make the choice of law decision


\textsuperscript{172} See Travelers Ins. Co. v. Field, 451 F.2d 1292 (6th Cir. 1971) (applying Kentucky law).


\textsuperscript{175} See, e.g., Tele-Save Merchandising Co. v. Consumers Distrib. Co., 814 F.2d 1120 (6th Cir. 1987) (applying Ohio law). In \textit{Tele-Save}, the choice of law provision in favor of New Jersey law in the supply agreement between an Ohio corporation and a Canadian corporation with an office in New Jersey was recognized to preclude the application of Ohio law regulating sale of business opportunity plans. \textit{Id.} at 1123.

\textsuperscript{176} For a case where the forum refused to recognize an express choice of its own law, see Winer Motors, Inc. v. Jaguar Rover Triumph, 208 N.J. Super. 666, 506 A.2d 817 (1986). New Jersey, the franchisor's home state, refused to recognize an express choice of New Jersey law to govern the rights of the parties to a franchise agreement. Instead, the court looked to the law of the franchisor's home state, Connecticut. \textit{Id.} at 672-73, 506 A.2d at 821.

\textsuperscript{177} See \textsl{Across State Lines}, \textit{supra} note 10, at 73-75.

\textsuperscript{178} \textsl{Judicial Function}, \textit{supra} note 3, at 1635.
with reference to considerations of policy and fairness to the parties. This includes those courts that invoke the Restatement Second's state of the most significant relationship concept. Courts will apply their own law, when they have a real interest in doing so, to implement the policy reflected in that law, provided that the application is not unfair to the other party.  

It is with respect to the matter of fairness where Professor Hill's point about "implied intention" on the negative side becomes important. In contract cases, precisely because the parties have planned their transaction in advance, there must be greater concern with justifiable reliance on the law of a particular state and the resulting unfairness if the law of that state is not applied. At the same time, when a contract is connected with more than one state, and it is not disputed that the contract exists, the parties could foresee the application of either state's law to determine their rights and liabilities under the contract at the time of contracting. In practice, unfairness in the application of a particular state's law in a contract case is most likely to occur when that state's interest in applying its law is predicated on events that have occurred subsequent to the time of the original transaction. In that circumstance, what was initially a purely domestic case has now become a conflicts case, and Hill's point about "implied intention" on the negative side becomes well taken. To apply the law of the state with the "subsequent interest," so to speak, may be fundamentally unfair because the parties may not have foreseen the application of that state's law at the time the parties entered into the transaction.

This situation is illustrated by the following two cases. In the first case, Roesgen v. American Home Products Corp., a New York resident, employed by a corporation at its New York headquarters, was supposed to receive contingent stock credits in each of the ten years following the termination of his employment with the corporation as part of his employment compensation. One of the conditions was that the employee refrain from engaging in employment with the corporation's competitors. If the employee violated the condition, he would forfeit all the contingent stock credits. In this case, the employee left the corporation to accept employment with a competitor in California. When the employee was notified that his stock payments would be discontinued, he brought suit against his former employer in California, where the

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179. See generally the discussion and review of cases in Across State Lines, supra note 10, at 75-83. The exception is in regard to claims of usury, where the courts frequently apply a lender-favoring "rule of validity." Id. at 83-85.
180. 719 F.2d 319 (9th Cir. 1983).
corporation also conducted business. He contended that the forfeiture provision, which was admittedly valid under New York law, constituted an illegal restriction on employment under California law. The California court applied New York law in upholding the provision because the employment relationship was centered in New York at the time the employee resided there and the only legitimate expectation of the parties at the time they entered into the employment contract was that New York law would apply to any disputes under the contingent stock credit plan.181

In the second case, Pacific Gamble Robinson Co. v. Lapp,182 the parties were domiciled in Colorado, a separate property state, when the husband entered into a loan transaction with a Colorado corporation. The husband used the loan in connection with his Colorado business, and executed a promissory note making him personally liable for the entire amount of the loan. Under Colorado law, marital property was available to satisfy the debt of either spouse.183 After the husband defaulted on the loan, the parties moved to Washington, a community property state. Under Washington law, the marital community would not be liable for the debt of a spouse unless both spouses agreed to encumber marital property in payment of the debt.184 In the creditor’s suit against the husband and the marital community in Washington, the court held that Colorado law applied and that the marital community was liable on the note. The court explained that because the parties were domiciled in Colorado at the time they executed the contract, the Colorado creditor was entitled to expect that the marital property would be available to satisfy the husband’s debt.185 Although Washington had an interest in applying its law to protect

181. Id. A comparable situation was presented in Freeze v. American Home Prod. Corp., 839 F.2d 415 (8th Cir. 1988) (applying Iowa law). Here, the employee performed the work in Iowa, but each year the letter informing the employee that he was entitled to contingent stock awards was sent from the corporation’s home office in New York. The letter stated that any legal questions arising under the incentive program would be determined by New York law. The court held that Iowa would apply New York law, under which the forfeiture provision was valid. 719 F.2d at 321. It was significant here that the incentive program was available to all of the corporation’s employees, working in different states, so that the corporation and the employees were able to look to the law of a single state with respect to rights and obligations under the program. Id.
182. 95 Wash. 2d 341, 622 P.2d 850 (1980).
183. Id. at 344, 622 P.2d at 854.
184. Id.
185. Id. at 348-50, 622 P.2d at 856-57.
the current marital community, its application in this case would be fundamentally unfair to the Colorado creditor, who was entitled to rely on Colorado law which makes all marital property available to satisfy the husband’s debt.\footnote{Potlatch No.1 Fed. Credit Union v. Kennedy, 76 Wash. 2d 806, 459 P.2d 32 (1969). There the spouses were domiciled in Washington at all times. The husband encumbered community property in a transaction with an Idaho creditor in Idaho. The marital community would not be liable for the debt under Washington law because it did not receive any benefit from the transaction, but would be liable under Idaho law. \textit{Id.} at 808, 459 P.2d at 34. Since the Idaho creditor knew that he was dealing with a Washington community at the time he entered into the transaction, no unfairness would result from the application of Washington law. Thus the Washington court applied Washington law to protect the Washington marital community. \textit{Id.} at 812-13, 459 P.2d at 37.}

Where the application of either state’s law to determine rights and liabilities under the contract is fully fair to both parties, and the matter as to which the law differs involves a strong policy of the forum or other involved state, “implied intention” or “localization” is no longer relevant in the choice of law decision. The forum can be expected to apply its own law to implement the policy reflected in that law whenever it has a real interest in doing so. Similarly, when the forum does not have a real interest in doing so, but the other state does, the forum can be expected to recognize the other state’s interest. As I have said, this is the general result in practice.\footnote{Across State Lines, supra note 10, at 75-85.}

In assessing the utility of Professor Hill’s party autonomy rule to achieve functionally sound results in the contracts area, I have concluded that Hill’s rule is very useful with respect to matters of construction and interpretation. It is also useful in matters that, while analytically going to validity, do not involve a strong policy of the forum or other involved state, such as the requirements of consideration. I have also concluded that looking to the law “impliedly intended” by the parties may be helpful in determining whether the parties were justified in relying on that law at the time they executed the contract, so that the application of the law of another state to determine rights and liabilities under the contract would be fundamentally unfair.

Professor Hill’s advocacy of the party autonomy rule, however, goes further; he would apply it to determine most questions of validity and enforceability, including those that implicate a strong policy of the forum or other involved state. While he does not elaborate on his exception for the “overriding character of laws
designed to implement special regulatory or protective policies.\textsuperscript{188} I think implicit in his position is that "policy" exceptions to the party autonomy rule should be fairly rare.\textsuperscript{189} In this regard, as with Hill's proposed presumptive applicability of the \textit{lex loci delicti} rule in torts cases, Hill's proposed party autonomy rule in contract cases is in essence a rejection of interest analysis as a basic approach to choice of law in this area as well.

It is my submission, of course, that interest analysis as a basic approach to choice of law leads to functionally sound results in contract cases as well as in the torts area. The only difference is that in the contracts area, because the parties have planned their transaction in advance, there must be greater concern with justifiable reliance on the law of a particular state and the resulting unfairness if a court applies the law of another state in its stead. However, experience indicates that the concern for fairness can be accommodated within the framework of interest analysis,\textsuperscript{190} and this is no less true in the contracts area than in the torts area.

Unlike the presumptive applicability of the \textit{lex loci delicti} rule in torts cases, however, the presumptive applicability of the party autonomy rule to issues of validity and enforceability in contracts cases should not be harmful to the objective of achieving functionally sound results. The rule can be applied to resolve the choice of law issue in cases where the issue does not implicate a strong policy of the forum or other involved state. Looking to the law "impliedly intended" by the parties may be helpful in resolving any question of "fundamental unfairness." However, most questions of validity and enforceability do implicate a strong policy of either the forum or the other involved state. The party autonomy rule should not be used to supplant interest analysis as the preferred means of resolving those questions. To the extent that this view represents a break with "continuity and precedent," it is because interest analysis itself makes such a break. And if, as I believe I have demonstrated, interest analysis produces functionally sound results in contracts cases, that break is fully justified.

\textsuperscript{188} Judicial Function, supra note 3, at 627.
\textsuperscript{189} See supra notes 167-68 and accompanying text.
\textsuperscript{190} As I have emphasized many times, fairness to the parties is an independent choice of law consideration. A state will not—and constitutionally cannot—apply its own law in any situation in which to do so would be fundamentally unfair to the party against whom the law is sought to be applied. Moreover, the same factors that would produce possible unfairness in the application of a state's law often will also indicate the lack of a real interest in applying that law. See, e.g., New Critics, supra note 56, at 611-15.
C. The Traditional Property and Succession Rules

It is in the area of property and succession that the traditional rules will produce functionally sound results in most of their applications. Hill notes that in this area, "the occasional decisions that surface typically follow traditional practice." 191 I agree and have said that "in this area the courts generally follow the rules of the traditional approach, and for the most part the application of these rules produces functionally sound results in practice." 192

This is true because, regardless of the conceptual premises of the traditional rules, they usually do serve to implement considerations of policy and fairness to the parties in the area of property and succession. Nowhere is this more clear than with respect to the use of the situs rule to determine the existence and incidents of property interests in land and movable property. Professor Hill carefully explains how the situs rule reflects both the recognition of the interest of the situs in regulating such matters and the protection of the parties' reliance interests. 193 I take the identical position:

The situs has a real interest in applying its law to determine the validity and effect of transfers of property there. In addition, where there is a consensual transfer of property, the parties must be able to look to the law of a particular state so that they can know whether a valid transfer was effected and the nature of the interest that was created by the transfer. The law of the situs is the most logical one for the parties to look to in the case of tangible property, and they can be expected to conform their behavior to the requirements of that law. 194

Professor Hill maintains that in some situations, "the application of situs law is not readily justifiable, and may even be

192. See Across State Lines, supra note 10, at 85.
194. Across State Lines, supra note 10, at 88-89. There are special rules to determine the situs of different kinds of intangible property. For example, the situs of a debt is the domicile of the debtor, and the situs of corporate stock, as regards the shareholder and the corporation, is the state of incorporation. Id.

The Uniform Commercial Code specifically governs rights of parties to a security agreement. It sets forth rules "governing the perfection of security interests in multiple state transactions." Id. at 90-93.
indefensible.'  

He uses as an example a claim involving the underlying contract rather than the validity and effect of the transfer itself; he asserts that the law applicable to the contract should determine such a claim.  

Beyond this example, the way I would put it is that where the matter in issue involves considerations other than validity and effect of the transfer, another state may have a real interest in applying its law to determine this matter, while the situs may not have such an interest. Thus, where a conveyance of land between family members would give rise to a constructive trust under the law of the domicile, but not under the law of the situs, the court should look to the law of the domicile to determine whether a constructive trust was created.  

Similarly, where the situs of movable property at the time of the transfer was not the intended state of principal use, and the intended state of principal use was known to both parties, the court should apply the law of the state of principal use to determine the validity and effect of the transfer.  

The law of the state of principal use should also apply to determine the validity of an action with respect to the property, such as repossession, occurring in another state.  

The above examples clearly indicate the difference between Professor Hill's view that the traditional rules should only be presumptively applicable and the rigid application of the rules of the traditional approach. Under Hill's view, in any case involving the validity and effect of a transfer of property, the law of the situs of the land or the situs of the movable at the time of transfer is presumptively applicable. But, as Hill says, "[e]xceptions can be grafted on the rule as needed," and, as in the above examples, these exceptions are "needed" when the application of the situs rule would produce a functionally unsound result by failing to give effect to another state's real interest or by defeating the parties' legitimate expectations.  

Hill impliedly criticizes the traditional rule of "split succession"—succession to movable property is determined by the law

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196. *Id.*


198. *See*, e.g., Shanahan v. George B. Landers Constr. Co., 266 F.2d 400 (1st Cir. 1959) (applying Massachusetts law).


of the decedent's last domicile, while succession to land is determined by the law of the situs—when he notes that, "[i]n much of the rest of the world, immovables (like movables) pass in accordance with the domiciliary or national law [of the decedent]."

Let us assume then that the presumptively applicable rule that Hill would favor is that the law of the decedent's last domicile determines succession to property, including both land and movables.

Such a rule would produce functionally sound results in most cases. The domicile has a real interest in determining succession to the property of its domiciliary, and under this rule the decedent could look to the law of the domicile to determine the validity and effect of any proposed testamentary disposition. Moreover, such a rule would ensure that ordinarily all of the decedent's property would descend under a single law. The situs is interested in applying its law to determine succession to situs land only when the matter in issue involves a land utilization policy of the situs, such as that reflected in its "mortmain" law or its rule against perpetuities. The situs has no interest in applying its law to determine other questions relating to succession, and, as in the case of movables, these questions should be determined by the law of the decedent's domicile. In practice, sometimes the courts of the situs have employed "manipulative techniques," such as the "equitable conversion" fiction, to displace situs law with respect to such matters and to effectively apply the law of the domicile.

I have suggested that if a court squarely faced the question today, it might well hold that, except as to matters involving a land utilization policy of the situs, the law of the decedent's domicile should govern the succession to land, as it does the succession to movables.

The rule that we have arrived at, which I think Professor Hill would favor, is that succession to property is presumptively governed by the law of the decedent's last domicile. The exception to

201. Id. at 1629.
202. See ACROSS STATE LINES, supra note 10, at 87.
203. Id. As a practical matter, the situs courts usually would have to render this decision because the estate will be administered there with respect to situs land. Compare In re Estate of Janney, 498 Pa. 398, 446 A.2d 1265 (1982). The decedent died domiciled in Pennsylvania, owning land in New Jersey. Under New Jersey law, as it stood at the time of the execution of the decedent's will, the will would be invalid. The land was sold, and the proceeds formed part of the estate, which was being administered in Pennsylvania. The Pennsylvania court held that Pennsylvania law was applicable and upheld the will. Id. at 402-03, 446 A.2d at 1267.
that rule occurs in the case of succession to land; the situs will apply its own law when this is necessary to implement a land utilization policy of the situs.

The other exception, which I think Professor Hill would also favor, is suggested by two "casebook favorites" used to illustrate general principles of domicile, White v. Tennant\(^{204}\) and In re Estate of Jones.\(^{205}\) In both of these cases, the courts applied the traditional rule that succession to movables is determined by the law of the decedent's domicile at the time of death. The issue in both of these cases related to where the decedent was domiciled at that time for purposes of the rule. In White v. Tennant, the decedent, who had previously lived on the West Virginia side of a West Virginia-Pennsylvania family owned tract of land, moved to the Pennsylvania side about a month before his unanticipated death. He died intestate, and under West Virginia law, his wife would inherit the entire estate.\(^{206}\) Under Pennsylvania law, she would share the estate with his surviving siblings.\(^{207}\) The decedent was technically domiciled in Pennsylvania at the time of his death;\(^{208}\) thus, the court held that Pennsylvania law applied.\(^{209}\) In Estate of Jones, the decedent was between domiciles at the time of death. He left his Iowa domicile and perished when a German submarine sank the vessel on which he was sailing back to his native Wales. The court held that he retained his Iowa domicile until he acquired a new one,\(^{210}\) so that Iowa law determined the succession to his estate.\(^{211}\)

In both cases, the rigid application of the domiciliary rule produced functionally unsound results. Although Hill does not discuss these cases as such, they are examples of the situations coming within his proposed exceptions to the application of the domiciliary rule. White v. Tennant comes within the situation

\(\text{\textsuperscript{204}}\) 31 W. Va. 790, 8 S.E. 596 (1888).
\(\text{\textsuperscript{205}}\) 192 Iowa 78, 182 N.W. 227 (1921).
\(\text{\textsuperscript{206}}\) 31 W. Va. at 795, 8 S.E. at 598.
\(\text{\textsuperscript{207}}\) Id.
\(\text{\textsuperscript{208}}\) The case is used to illustrate the proposition that physical presence in the state, no matter how brief, coupled with the intention to remain there indefinitely, is sufficient to create a new domicile of choice.
\(\text{\textsuperscript{209}}\) 31 W. Va. at 797, 8 S.E. at 599.
\(\text{\textsuperscript{210}}\) The case is used to illustrate the proposition that a party retains the party's former domicile, even if it has been abandoned, until the party has physically reached the intended new domicile.
\(\text{\textsuperscript{211}}\) 192 Iowa at 95, 182 N.W. at 234.
where "regulatory authority may be conferred upon a state having only a tenuous connection with a person, to the exclusion of a state having a more meaningful connection—and all without regard to the nature of the particular issue before the court."212 In the typical situation, the application of the law of the domicile to determine succession to property produces a functionally sound result: the domicile has a real interest in applying its law to determine succession to the domiciliary’s property, and to the extent that the decedent relied on any state’s law in planning succession, it would have been the law of the domicile. Here, however, the court was presented with an atypical situation—the decedent acquired a new domicile shortly before his unanticipated death—and the factors that cause the domiciliary rule to produce a functionally sound result in the typical situation will cause it to produce a functionally unsound result in the atypical situation. The decedent lived practically all of his life in West Virginia and all of the claimants, including the widow, were domiciled in West Virginia at the time of his death. If the decedent had consulted a lawyer about his estate, it probably would have been a West Virginia lawyer. Perhaps the reason that he never made a will was that he was advised that, under West Virginia law, his widow would get the entire estate. Clearly, West Virginia had a real interest in applying its law to determine succession to the estate of this decedent, and if the decedent had relied on any law at all, it was West Virginia law. For all of these reasons, West Virginia law should have determined succession to his estate. A presumptive law of the domicile rule, as advocated by Hill, would permit this result, while the traditional approach’s rigid law of the domicile rule would not.

_Estate of Jones_ fits neatly, except for the time factor, into the situation discussed by Hill where "the decedent had long ceased to have any significant connection with the place of his domicile."213 At the time of his death, the decedent had left Iowa to return to Wales, from which he had emigrated many years before to avoid a paternity proceeding concerning a putative daughter, who was now claiming a share in his estate. Under English law, applicable in Wales, the putative daughter would not inherit anything; the decedent’s siblings, also Wales residents, would inherit the estate. At the time of his death, Wales would seemingly have

212. _Judicial Function_, supra note 3, at 1631.
213. _Id._ at 1630.
an interest in determining succession to his estate, while Iowa would not. Thus, a functionally sound result in this case would have been to refer to English law to determine succession to this decedent's estate.

With respect to succession, the presumptive applicability of the law of the decedent’s domicile to determine succession to movable property and land will ordinarily produce functionally sound results. A court should apply the law of the situs to determine succession to land instead of the law of the domicile only in those relatively few cases where the matter in issue involves a land utilization policy of the situs. In cases like *White v. Tenant* and *Estate of Jones*, a court can refer to the law of a state other than the decedent’s domicile when that state, and not the domiciliary state, has a real interest in applying its law. Again, the difference between an approach based on the presumptive validity of traditional rules, as advocated by Hill, and the rigid application of those rules under the traditional approach, is the difference between an approach that ensures functionally sound results and one that does not.

Professor Hill does not discuss choice of law with respect to trusts and future interests or marital property; however, the presumptive applicability of the traditional rules generally will produce functionally sound results here. In regard to trusts and future interests, the traditional rule is based on party autonomy, which Professor Hill would endorse. The courts will generally recognize an express choice of law and, in the absence of an express choice, will apply the law of the state where the trust is being administered. The only exception to this rule is that the state of administration will not recognize an express choice of law that displaces the law of the domicile where the matter in issue involves a very strong policy of the domicile, such as the right of the surviving spouse to take against the will.

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214. See Across State Lines, supra note 10, at 93-94. Usually the settlor will choose the law of the state where an institutional trustee is administering the trust; however, state courts where the trust is being administered will also recognize the choice of the law of the settlor's domicile.

215. See *Estate of Clark*, 21 N.Y.2d 478, 236 N.E.2d 152, 288 N.Y.S.2d 993 (1968). The New York court refused to recognize an express choice of New York law by the Virginia decedent, who had established a trust with a New York bank, because the decedent's wife would not have been able to exercise her right to take against the will under Virginia law. Id. at 487, 236 N.E.2d at 156, 288 N.Y.S.2d at 999-1000.
The traditional rule regarding marital property generally looks to the law of the domicile to determine spousal rights. The character of movable property acquired by the married couple as separate or community property is determined by the law of the marital domicile at the time of acquisition, rather than by the law of the situs.\footnote{216} However, like the "split succession" rule, the traditional rule looks to the law of the situs to determine the character of land acquired by a married couple. Like the "split succession" rule, this produces a functionally unsound result in most cases. Absent an issue involving its land utilization policy, the situs has no interest in applying its law to determine the character of property acquired by non-residents. However, there is some indication that the courts are now prepared to abandon this part of the rule.\footnote{217} What is more important as a practical matter is that, in most cases, the law of the situs will not determine the character of land acquired there by a non-resident spouse because of the tracing rule. Under this rule, the use of marital property to purchase other property does not affect marital property rights. As a consequence, if a spouse domiciled in a common law state uses his or her separate property to purchase land in a community property state, the land retains its character as separate property under the tracing rule.\footnote{218}

The tracing rule also applies where one spouse uses marital property improperly. Under the rule, the law of the domicile determines the other spouse's rights. However, the law of the situs determines an innocent third party's rights in the sense that the third party is entitled to rely on the law of the situs and is not required to "search for" possible rights of the other spouse with respect to that property. To illustrate, suppose that the spouses are domiciled in State X, a community property state. One spouse wrongfully takes community property and purchases land in State Y from a resident of State Y. Assume that under State X law the other spouse could petition to have the sale set aside. The sale is valid under State Y law in the sense that, under State Y law, there would be no constraints on the spouse's purchase of the land. As

\footnote{217. See Williams v. Williams, 390 A.2d 4 (D.C. App. 1978). The court applied the law of the situs to determine the spouse's interest in land for purposes of divorce, but only because this was the last marital domicile in addition to the husband's present domicile. \textit{Id.} at 6.}
\footnote{218. See, e.g., Hughes v. Hughes, 91 N.M. 339, 573 P.2d 1194 (1978).}
between the innocent spouse and the innocent State Y seller, State Y law applies and the sale is valid. However, as between the spouses domiciled in state X, the funds will be traced and the land will belong to the community rather than to the spouse in whose name it was purchased.\textsuperscript{219}

In the area of property and succession, as has been demonstrated, the presumptive applicability of the traditional rules—as slightly modified here—will produce functionally sound results. Therefore, it is in this area that Professors Hill’s thesis has the strongest empirical support and the most validity.

IV. Conclusion

Professor Alfred Hill has presented an important thesis about the judicial function in conflicts cases and the significance of precedent and continuity in choice of law. As part of his thesis, Professor Hill maintains that the traditional choice of law rules, when understood in terms of continuity and precedent, may provide a valuable resource for the courts when resolving choice of law questions. He attacks the modern “choice of law revolution” for its seeming disregard of continuity and precedent and for what he sees as “widespread judicial rejection” of the traditional rules and the “substitution of ad hoc methods for the solution of choice of law problems.”\textsuperscript{220} He argues that courts should presumptively apply the traditional rules to resolve the choice of law questions that arise today and that the rules should be applied, except where their application in a particular case would not produce a functionally sound result.\textsuperscript{221}

In this Article, I have evaluated and responded to the propositions set forth in Professor Hill’s thesis. I agree with Professor Hill’s propositions concerning the judicial function in conflicts cases and the significance of precedent and continuity in choice of law. However, I do not agree with his contention that the modern “choice of law revolution” has brought with it the “substitution of ad hoc methods for the solution of choice of law problems.”\textsuperscript{222} To the contrary, I maintain that the courts that have abandoned the traditional approach to choice of law do apply judicial method to the resolution of the choice of law issues that arise in practice.
today. I have demonstrated this proposition by an illustrative
discussion of the practice of courts in one state and by a
discussion of the "rules of choice of law" that have emerged from
the decisions of the courts in conflicts torts cases.

I responded to the continuity part of Professor Hill's thesis by
discussing the utility of the traditional rules that he proposes in
the torts, contracts, and property and succession areas. I concluded
that the lex loci delicti rule has no utility in resolving the choice
of law issues that arise in conflicts torts cases and that its purported
application, even presumptively, distorts the analysis of the real
interests of the involved states and may lead to functionally
unsound results.

In the contracts area, I concluded that Professor Hill's pro-
posed party autonomy rule is useful in determining questions of
construction and interpretation. Additionally, the rule applies to
questions that, although analytically go to validity, do not involve
a strong policy of the forum or state whose law would be applied
in the absence of party autonomy. Looking to the law "intended
by the parties" may be helpful in resolving any question of
"fundamental unfairness." However, most questions of validity
implicate a strong policy of the forum or other involved state, and
I rejected party autonomy as a means of determining the choice
of law issue, even presumptively, in these kinds of cases.

In the area of property and succession, I concluded that the
traditional rules produce functionally sound results in most appli-
cations. This is because, regardless of the conceptual premises of
the traditional rules, the rules usually serve to implement consider-
ations of policy and fairness in this area. I used the traditional
rules in this area to illustrate the difference between Professor
Hill's view that the traditional rules should be presumptively
applicable and the rigid applicability of the rules under the tradi-
tional approach to choice of law that courts followed in this
country. Thus, I believe that Professor Hill's thesis has the strong-
est empirical support and, thus, the most validity in this area.

Professor Hill's thesis regarding the judicial function in con-
flicts cases and the significance of continuity and precedent in
choice of law is one with which I fully agree. Courts have preserved

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223. See supra notes 66-103 and accompanying text.
224. See supra notes 104-06 and accompanying text.
225. See supra notes 110-60 and accompanying text.
226. See supra notes 161-90 and accompanying text.
227. See supra notes 191-219 and accompanying text.
continuity and precedent by the application of judicial method to
the resolution of the conflicts cases that arise in practice. The only
difference between myself and Professor Hill in this regard is that
I see continuity and precedent today as beginning with the modern
"choice of law revolution." This "revolution" has been going on
for about a quarter-century, and the significance of continuity and
precedent in choice of law is not lessened by the break with much
of what has preceded the "revolution." At the same time, as we
have seen with the traditional rules in the property and succession
area, the valuable part of the past—the traditional rules that are
likely to produce functionally sound results in practice—has been
maintained. To this extent, modern choice of law is an amalgam
of "traditional and modern learning." Most importantly, this
amalgam is likely to lead to functionally sound results in practice
which, in the final analysis, is what choice of law is all about.