

2012

Choice of Law as General Common Law: A Reply to Professor Brilmayer

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Repository Citation

Green, Michael S., "Choice of Law as General Common Law: A Reply to Professor Brilmayer" (2012). *Faculty Publications*. 1366.
<https://scholarship.law.wm.edu/facpubs/1366>

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The Role of Ethics in International Law

Edited by

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CAMBRIDGE
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CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Tokyo, Mexico City

Cambridge University Press

32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org

Information on this title: www.cambridge.org/9781107096554

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First published 2012

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

The role of ethics in international law / [edited by] Donald Earl Childress, III.

p. cm. – (Asil studies in international legal theory)

Includes bibliographical references and index.

ISBN 978-1-107-09655-4 (hardback)

1. International law – Moral and ethical aspects. I. Childress, Donald Earl, 1975–

KZ1256.R65 2011

341 – dc22 2011012816

ISBN 978-1-107-09655-4 Hardback

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1256
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2012

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Michael Steven Green

INTRODUCTION

In the first footnote of her chapter, Lea Brilmayer mentions “significant overlap” with two recent papers of mine. If anyone should be making acknowledgments, I should. She has long argued that the law of choice of law, even in its modern interest-analysis incarnations, is a disguised form of general common law, and that it ought to be reformed in the spirit of *Erie*.¹ In taking up this argument myself, I am in *her* debt.²

To get the basic idea, consider a variation on *Kuchinic v. McCrory*.³ Assume a Georgia pilot invites another Georgian to fly with him to attend a football game in New York. On the way the plane crashes in Pennsylvania. A Georgia statute prohibits guests from suing their hosts for negligence. Pennsylvania law has no such prohibition. Had it entertained the action, the Georgia Supreme Court would have applied Pennsylvania law to the facts. However, the guest chooses to sue the host in Vermont state court instead. May it apply Georgia law?

Under every choice-of-law approach currently used by state courts – from the First Restatement to modern interest analysis – the mere fact that the Georgia Supreme Court would not apply Georgia law does not prohibit the forum from doing so. A state supreme court’s refusal to apply its law to interjurisdictional facts does not bind sister states.

¹ Indeed, she is probably the first to make this argument. Lea Brilmayer, “Methods and Objectives in the Conflict of Laws: A Challenge,” *Mercer Law Review* 35 (1984): 555–563, precedes Larry Kramer, “Return of the Renvoi,” *New York University Law Review* 66 (1991): 979–1044.

² I also owe a debt to Larry Kramer and particularly to Kim Roosevelt, whose article Kermit Roosevelt III, “Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language,” *Notre Dame Law Review* 80 (2005): 1821–1891, started me thinking about these matters.

³ See 422 Pa. 620 (1966).

Erie Railroad v. Tompkins is commonly understood as standing for the proposition that a state supreme court is the authority on that state's law.⁴ Because it is hard to see why this authority would evaporate when the question is the applicability of the state's law to interjurisdictional facts, it looks like the Vermont state court must respect the Georgia Supreme Court's decision not to apply Georgia law. This duty of deference is not merely part of proper conflicts law; it is a constitutional obligation, applicable to the Vermont state court by means of the Full Faith and Credit Clause.⁵ (We can call this obligation "horizontal *Erie*," to distinguish it from its vertical equivalent.)

One terminological quibble: As Professor Brilmayer describes it, respecting a state supreme court's choice-of-law decisions amounts to accepting *renvoi*. I disagree. Under the doctrine of *renvoi*, the Vermont state court should apply *Pennsylvania* law, because that is the law that would be chosen by the Georgia

⁴ See *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

⁵ I argue that federal courts' *Erie* obligations apply horizontally, by means of the Full Faith and Credit Clause, to state courts interpreting sister state law in Part II of Michael Steven Green, "Horizontal *Erie* and the Presumption of Forum Law," *Michigan Law Review* 109 (2011): 1237–1291 (hereinafter Green, "Horizontal"). I further argue that horizontal *Erie* compels a state court to respect sister state choice-of-law decisions when determining whether sister state law applies in Part IV of Michael Steven Green, "*Erie*'s Suppressed Premise," *Minnesota Law Review* 95 (2011): 1111–1169 (hereinafter Green, "Suppressed"). Kim Roosevelt gives a similar argument at Roosevelt, "Resolving *Renvoi*," 1841, 1856–1857. As Professor Brilmayer makes clear in her reply, however, I should not have attributed these views to her. She is agnostic about whether a constitutional duty to defer to a sister state's choice-of-law decisions exists.

Although anyone skeptical about the idea of horizontal *Erie* should examine my argument in Green, "Horizontal," I would like to briefly defend my position in the face of the disanalogies Professor Brilmayer identifies between vertical *Erie* and the Full Faith and Credit Clause. She is quite right that vertical *Erie* obligates a federal court sitting in diversity to use the forum state's statute of limitations (or, more accurately, the limitations that would be used by a forum state court) and no comparable horizontal obligation arises under the Full Faith and Credit Clause. Nonetheless, a distinction should be drawn between the constitutional and the nonconstitutional *Erie* doctrines. Green, "Horizontal," § 1.1; see also Byrd v. *Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 535–537 (1958); Adam N. Steinman, "What is the *Erie* Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)," *Notre Dame Law Review* 84 (2008): 316–327. It is the nonconstitutional *Erie* doctrine that obligates a federal court to use the forum state's statute of limitations, as a means of avoiding forum shopping and the inequitable administration of the laws. See *Hanna v. Plumer*, 380 U.S. 460, 467–468 (1965). My argument in Green, "Horizontal," is that only the constitutional *Erie* doctrine has its horizontal equivalent in the Full Faith and Credit Clause.

Professor Brilmayer is absolutely right, however, that the Full Faith and Credit Clause cannot obligate a state court to respect a sister state's choice-of-law rules if these rules are conceived of as procedural, along the lines of statutes of limitations. Another very important difference between us, therefore, is that, like Larry Kramer and Kim Roosevelt, I think that choice-of-law rules can be substantive. See Green, "Suppressed," Part IV; Kramer, "Return," 1043–1044; Roosevelt, "Resolving *Renvoi*," 1883.

Supreme Court.⁶ However, *renvoi* itself looks incompatible with horizontal *Erie*, because the choice of Pennsylvania law is made without regard for the decisions of the Pennsylvania Supreme Court. Proper deference to the Georgia Supreme Court is shown by concluding not that Pennsylvania law applies, but only that Georgia law does not.

I agree with Professor Brilmayer that horizontal *Erie* compels the forum to defer to a state supreme court's choice-of-law decisions when determining whether the state's law applies.⁷ Nonetheless, I'm not going to defend our position here. My goal is the more modest one of identifying two obstacles that our position must overcome. The first, of which I am sure Professor Brilmayer is aware, is that deference can generate puzzles when two state supreme courts would apply one another's law. The second obstacle is, I think, even more serious: Lack of deference to a state supreme court's choice-of-law decisions might be *compatible* with horizontal *Erie*, for the simple reason that the state supreme court doesn't *want* deference.

After describing these two obstacles, I'll end by making a few observations about two different themes in Professor Brilmayer's chapter: her advocacy of the common law method in choice of law and her worry that choice of law is necessarily committed to some "unidentified Archimedean vantage point."

1. THE PUZZLE OF MUTUAL DEFERENCE

Let us assume that sister states must always respect a state supreme court's decision not to apply its law. So our Vermont state court cannot apply Georgia law if the Georgia Supreme Court would apply Pennsylvania law. But what if the Pennsylvania Supreme Court would apply Georgia law? It looks like the Vermont court is prohibited from applying *both* Pennsylvania and Georgia law. How should it respond to this legal void, given that it probably lacks the power to fill it with Vermont law?

One possibility is that it should dismiss for failure to state a claim.⁸ However, isn't that *still* the application of law (in effect, Georgia law)? After all, doesn't dismissal for failure to state a claim mean that the plaintiff is not *legally entitled* to relief? Perhaps it should instead dismiss on jurisdictional grounds, without getting to the merits.

⁶ Or rather, it should apply Pennsylvania law under the doctrine of *renvoi*, assuming that its choice-of-law rules point to Georgia law.

⁷ Once again, Professor Brilmayer has made it clear that she takes no stand about whether there is such a constitutional duty of deference; see note 5.

⁸ See Roosevelt, "Resolving *Renvoi*," 1884-1886.

Is it really true, however, that the supreme courts of Georgia and Pennsylvania have decided that their laws do not apply to the facts? Weren't their decisions predicated on an error (indeed, a constitutionally prohibited error), namely that the law of the other state *could* be applied? If, however, each state supreme court has not yet decided the matter, how is the Vermont court to determine how they *will* decide it, given that the decision of each depends crucially on what the other will do?

It may be because of the puzzle of mutual deference that Professor Brilmayer says that *renvoi* is a "useful tool," rather than an infallible guide, to the scope of sister state law. Like Larry Kramer and Kim Roosevelt, she may be arguing that a state supreme court's choice-of-law decisions only *sometimes* bind sister states. As Kramer and Roosevelt understand it, choice-of-law rules come in two flavors: rules of priority and rules of scope.⁹ If a state supreme court chooses not to apply its own law, its decision binds sister states only if it was based on a rule of scope.

Consider a state supreme court employing interest analysis. If it concludes that no forum interest would be advanced by applying its law, it employs a rule of scope. It is saying, in effect, that the facts do not fall under its law. Because, under horizontal *Erie*, it is the authority on the matter, its decision binds sister states. However, Kramer and Roosevelt argue, when it chooses another state's law because it thinks that state's interests are *greater* than its own, its decision does not bind sister states.¹⁰ It has not held that its law does not apply to the facts, only that its law, despite applying, should not be given priority to the law of the other state. Sister states are entitled to have their own views on *that* question.

Kramer and Roosevelt disagree about whether the traditional approach, as exemplified in the First Restatement, consists of rules of priority or rules of scope. Kramer thinks the traditional approach assumes that the facts are within the scope of the competing states' laws simply by undertaking the choice-of-law inquiry. As a result, the First Restatement consists of rules of priority and a state supreme court's adoption of the First Restatement does not bind sister states.¹¹

⁹ The terms are Roosevelt's. *Ibid.*, 1871.

¹⁰ Although it was influenced by interest analysis, they both argue that the Second Restatement consists only of rules of priority, because it does not have an explicit two-step inquiry in which state interests are first identified and then conflicts between those interests are resolved. It instead adopts a one-step approach that takes into account both state interests and means of resolving conflicts of interests. See *Restatement (Second) of Conflict of Laws* (St. Paul: American Law Institute, 1971), §6; Kramer, "Return," 1041–1043; Roosevelt, "Resolving *Renvoi*," 1877, 1886.

¹¹ Kramer, "Return," 1042–1043.

In contrast, Roosevelt argues that historically the traditional approach saw choice-of-law rules as enforcing preexisting limits on states' law-making power.¹² If a First Restatement court refuses to apply its tort law to an accident because it occurred out of state, it has concluded that its law cannot apply (even though it might in fact have law-making power as a constitutional matter). Because the First Restatement consists of rules of scope, a state supreme court's decision to adopt it binds sister states.¹³

Kramer and Roosevelt's approach would solve our puzzle of mutual deference if the Georgia Supreme Court and the Pennsylvania Supreme Court applied one another's law as a result of rules of priority, not rules of scope. In such a case, the Vermont court would be free to use its own rules of priority to choose between Pennsylvania and Georgia law. Indeed, it could choose Georgia law even if the Pennsylvania and Georgia Supreme Courts' rules of priority agreed that Pennsylvania law should be applied.

Nonetheless, Kramer and Roosevelt's approach cannot solve the problem of two state supreme courts that refuse to apply their own law as a result of rules of scope. Assume that the Georgia Supreme Court wouldn't apply Georgia law because it accepts the First Restatement; further assume that the Pennsylvania Supreme Court, employing interest analysis, wouldn't apply Pennsylvania law because it thinks Pennsylvania has no interest. If Roosevelt is right about the First Restatement consisting of rules of scope, then the Vermont state court is once again faced with a legal void.¹⁴

II. IS THE GENERAL COMMON LAW INCOMPATIBLE WITH *ERIE*?

The puzzle of mutual deference is not the only obstacle that must be overcome by any approach that demands deference for state supreme courts' choice-of-law decisions. There is another obstacle that is even more serious.

As Professor Brilmayer accurately describes it, prevailing choice-of-law approaches are surreptitiously committed to the *general common law*. A Vermont state court can ignore what the Georgia Supreme Court says about the

¹² Roosevelt, "Resolving Renvoi," 1878–1879. ¹³ *Ibid.*, 1882–1884.

¹⁴ One might argue that if the Pennsylvania Supreme Court used interest analysis, it would not conclude that Pennsylvania law does not apply at all, but only that it does not apply concerning the question of whether there is an affirmative defense on the basis of the guest-host relationship. See Larry Kramer, "The Myth of the 'Unprovided-For' Case," *Virginia Law Review* 75 (1989): 1056–1060. After all, Pennsylvania does have an interest in applying the *rest* of its tort law, as a means of discouraging plane crashes in Pennsylvania. Even if that is true, though, there remains the legal void concerning the affirmative defense. One cannot say that the affirmative defense is or is not available without applying law – and there is no law to apply.

applicability of Georgia law to interjurisdictional facts because Georgia law (at least in its territorial scope) is treated like the general common law was in *Swift v. Tyson*.

The obstacle is this: The Swiftian conception of the general common law was probably *compatible* with respect for state supreme court decisions concerning the common law applicable in the state – if such respect is understood as giving these decisions the binding effect their creators wanted them to have. The same thing is also true of the Swiftian general common law of choice of law.

Swift concerned the appropriate common law rule to apply to a bill of exchange that had been accepted in New York. As we all know, Justice Story did not consider himself bound by the decisions of New York state courts on the matter. One reason, however, was that New York state courts *did not think their decisions bound federal (or sister state) courts*. As Story put it, “It is observable, that the courts of New York do not found their decisions upon this point, upon any local statute, or positive, fixed or ancient local usage; but they deduce the doctrine from the general principles of commercial law.”¹⁵ Story thought he was treating New York decisions exactly the way that their creators *wanted* them to be treated. How can that be incompatible with *Erie*?

I think that Story was right that New York state courts did not expect their general common law decisions to bind sister state and federal courts. The best evidence is the way they would have decided a general common law case arising in a sister state, such as Pennsylvania. Like the federal court in *Swift*, they would have ignored the decisions of Pennsylvania state courts.¹⁶ This suggests that they thought their own decisions on the general common law were not binding on federal or sister state courts either.¹⁷

The same point applies to the general common law of choice of law. All state supreme courts ignore the choice-of-law decisions of sister states when deciding whether sister state law can be applied. That suggests that they think their own choice-of-law decisions can be ignored by sister state courts.¹⁸ By ignoring

¹⁵ See *Swift v. Tyson*, 41 U.S. 1, 18 (1842).

¹⁶ Green, “Suppressed,” §§I.2–I.3.

¹⁷ Even stronger evidence emerged after *Swift* was decided. New York courts favorably cited *Swift* as allowing them to ignore the general common law decisions of sister states – even though in *Swift*, of course, it was New York decisions that were ignored. See *Faulkner v. Hart*, 82 N.Y. 413 (1880); *St. Nicholas Bank v. State Nat’l Bank*, 27 N.E. 849, 851 (N.Y. 1891).

¹⁸ Professor Brilmayer suggests that a state supreme court, thinking that it has gotten the principles of the common law *right*, might demand that sister states follow its decisions, even though it ignores the decisions of sister states. I think it is entirely possible that a state supreme court might hold such a view. Indeed in Green, “Suppressed,” §I.2, I argue that the proper method of showing deference to state supreme court decisions is a *state-by-state* approach, in which

the choice-of-law decisions of a state supreme court, prevailing approaches to choice of law give these decisions exactly the deference that their creator *intends* them to have (namely none).¹⁹

III. THE COMMON LAW METHOD

Let us set aside these two obstacles to consider two other important themes in Professor Brilmayer's chapter. The first is her endorsement of what she calls "the common law method" in choice of law. (I'll call it "the method" for short.) As I understand her, the method describes how a state court determines the applicability of *domestic* law. Rather than answering the question by reference to a priori principles of legislative jurisdiction (as the First Restatement does) or to essentially unanswerable questions of legislative intent (per interest analysis), it should decide whether its law applies on the basis of precisely the same sort of ethical concerns that it uses when making domestic common law in other areas. Here I think she has, with one possible exception, gotten things exactly right.

As Brilmayer herself recognizes, the method is more of a description of what courts are doing, rather than what they ought to do. Because the method has room for "vested rights and state interests," all state courts have arguably already been using the method, despite themselves. However, that does not mean that accepting the method would have no consequences, for it gives state

deference is tailored to what the relevant state supreme court wants. That the Pennsylvania Supreme Court refuses to defer to sister states' decisions does not mean that its decisions can be ignored, for it may demand deference. Nevertheless, I think that it is clear that states committed to the general common law did not hold such a view. The reason is that the very idea of the general common law was of a standard that could *not* be fixed by state (or federal) court decisions. In the example Professor Brilmayer envisions, in which the Pennsylvania Supreme Court demands deference to its decisions, it is denying that the general common law applies in Pennsylvania.

The evidence that state courts did not consider their decisions binding on sister states is particularly strong with respect to choice of law. As Professor Brilmayer persuasively demonstrates, under both the First Restatement and interest analysis, a sister state's choice-of-law decisions are not binding on the forum when it decides whether sister state law applies. States that adopt the First Restatement or interest analysis – without some caveat that this lack of deference should not apply to their own choice-of-law decisions – must have licensed sister states to ignore their decisions. It is particularly revealing that no state court using the First Restatement or interest analysis has, to my knowledge, *ever* complained that sister states were ignoring its choice-of-law decisions.

¹⁹ I believe that this obstacle can be overcome only by arguing that *Erie* limits a state supreme court's ability to free sister state (and federal) courts of the duty to defer to its decisions. For a discussion, see Green, "Suppressed," Part II.

courts greater freedom in the choice-of-law arena than they currently think they have. They *could* continue their adherence to the First Restatement or orthodox interest analysis, but they do not *have* to.

Because she describes the method as taking into account, *inter alia*, “the substantive policy (actual or presumed) of the laws vying for application,” it might appear as if it is used by the forum to determine the applicability of *sister state* law as well. However, when assessing sister state law, the forum has none of the freedom that it has in connection with domestic law. It can apply sister state law only if the sister state’s supreme court (using its own version of the method) would say that sister state law applies. The point is merely that the forum, in deciding whether its own law should be used, can take into account sister state interests.

I think Brilmayer herself may have slipped, however, when describing how the forum should determine the existence and strength of these sister state interests, for she appears to think that conceiving of them *objectively* – that is, in a manner independent of the decisions of the sister state’s courts – is contrary to the lesson of *Erie*. Here is how she puts it:

When considering the interests of other states under the common law method, however, a judge acts with the awareness that a state’s law is nothing more than what the state courts say it is. She or he should not assess the other state’s definition of its interests for objective validity, but instead accept that definition on the grounds that each state formulates and interprets its own laws.

I think this is a mistake. There is nothing wrong with an objective determination of sister state interests, provided that it is being used to determine whether *domestic* law should be applied.

To see why this is the case, consider the actual facts in *Kuchinic v. McCrory*.²⁰ One Pennsylvanian invited another to fly with him to a football game in Florida.²¹ The plane crashed in Georgia.²² Once again, a Georgia guest statute would have barred the plaintiff’s action, and Pennsylvania law would have allowed it.²³ In *Kuchinic*, the negligence suit against the pilot was being entertained by a Pennsylvania state court, which used interest analysis to apply Pennsylvania law to the facts.²⁴

The court’s decision was defended by Peter Westen on the basis of an objective conception of sister state interests. The fact that a Georgia court

²⁰ See 422 Pa. 620 (1966).

²² *Ibid.*, 621.

²⁴ *Ibid.*, 623.

²¹ *Ibid.*, 622.

²³ *Ibid.*, 622.

would employ Georgia law to the facts, he argued, does not mean that Georgia is really interested:

[I]f the forum decides that a foreign state is interested in a case by looking to that state's conflicts law, it subordinates its own choice of law to that of a foreign state, however archaic the latter may be. To do so frustrates the very goals of governmental-interest analysis. Instead, as Currie himself admitted, the forum should assume final responsibility for deciding whether another state is properly interested in the facts at issue. The forum ultimately makes such a finding not by asking whether the foreign state declares itself to be interested, but rather by asking whether – in light of forum policy – that declared interest seems reasonable. Ultimately, the forum imputes those policies to a foreign law which it could conceive a rational foreign court adopting, were that foreign court deciding the case at hand.²⁵

Both Kramer and Roosevelt have criticized Westen here,²⁶ and it appears that Brilmayer would as well. Nonetheless, in the context of a Pennsylvania court's decision about whether it should apply *Pennsylvania* law, Westen's comments are correct. The court is not bound by what Georgia courts might say about Georgia interests. It is free to conclude that Georgia has no real interest and thus that Pennsylvania law should be applied.

Of course, if the question is whether it is permitted to apply Georgia law, a reliance on objective interests is misguided. A Pennsylvania court may not point to Georgia's objective interest as a reason to apply Georgia law when the Georgia Supreme Court has said Georgia law does not apply. In such a case, however, the mistake is not really claiming that Georgia has an *interest* when it does not, but applying Georgia law when the Georgia Supreme Court has said its law does not apply.

Now as an advocate of a *particular* version of the method, with its own distinctive conception of sister state interests, Brilmayer is free to insist that the forum should defer to a sister state supreme court's decisions when determining whether the sister state has an interest. However, she cannot claim that this conception of sister state interests follows from horizontal *Erie*.

IV. THE UNAVOIDABLE METAPHYSICS OF CHOICE

The next theme is in curious tension with the lesson of horizontal *Erie* in choice of law. Brilmayer suggests that "recourse to norms or concepts that are

²⁵ Peter Kay Westen, Comment, "False Conflicts," *California Law Review* 55 (1967): 85.

²⁶ Kramer, "Return," 1003; Roosevelt, "Resolving Renvoi," 1856.

not grounded in positive law may be an unavoidable fact of life for choice-of-law decision making.” Choice-of-law doctrine seeks to provide a “meaningful choice” between two competing states’ laws – one that does not beg the question to be decided – and that requires some “unidentified Archimedean vantage point.” The law of choice of law starts looking like general common law after all. Or, at the very least, it cannot be solely positive law. Here I’d like to defend Professor Brilmayer against herself.

Consider, once again, our Vermont state court’s choosing between Georgia and Pennsylvania law. Let us assume, however, that the Georgia Supreme Court would have applied Georgia law and the Pennsylvania Supreme Court would have applied Pennsylvania law. Under horizontal *Erie*, the Vermont court is free to *choose* which law applies. Brilmayer claims that in making a choice between two states’ laws, “[t]he only positive law sources to turn to . . . are the two states whose domestic substantive laws are under consideration.” However, that is clearly false here. The relevant principles on the basis of which the court would choose are part of the positive law of *Vermont*.

Of course, in creating and employing this law, the Vermont court hopes to track independent norms. For example, it might seek to apply the law of the state that has the greater interest – and whether Georgia or Pennsylvania has a greater interest is not something over which Vermont has authority. But *any* law worth its salt seeks to track independent norms. Law is created for reasons and its creators hope that they have gotten the reasons right. Vermont’s law of choice of law is no more metaphysically committed than any other Vermont law is.

Perhaps the problem bothering Brilmayer arises when a court chooses between *its own* law and the law of a sister state. Let us return to *Kuchinic*, in which the Pennsylvania Supreme Court is considering whether to apply Pennsylvania or Georgia law. To the extent that it is *choosing* in this case, it appears that it must be standing outside the very law over which it has authority.

The puzzle might be put this way. The Pennsylvania Supreme Court is the authority concerning the territorial scope of Pennsylvania law. However, when engaging in choice-of-law reasoning, it arguably seeks to occupy a perspective other than that of the expositor of the scope of Pennsylvania law. It seeks to choose between Pennsylvania law and Georgia law.

On the one hand, even if it does seek to occupy this perspective, I do not see why that means that there is some unavoidable metaphysics of choice. Under Kramer and Roosevelt’s approach, for example, if the Pennsylvania Supreme Court concludes that the facts fall under the scope of Pennsylvania law (and it predicts that the Georgia Supreme Court would say the same about Georgia law), it is free to choose, on the basis of a rule of priority, between

the two. Like the Vermont state court's, its rule of priority has a source in *domestic* law.

On the other hand, assume that Kramer and Roosevelt are wrong and the Pennsylvania Supreme Court's reasoning does not involve a two-step approach. That would mean denying that it can occupy a standpoint independent of Pennsylvania law to choose between Pennsylvania and Georgia law. In choosing whether to use Pennsylvania law, it is inescapably deciding whether Pennsylvania law applies. If this is the case, then once again its decision would be guided by principles that are part of the positive law of Pennsylvania. Of course, in relying on these principles, it probably hopes to track considerations existing independently of its authority. As we have seen, though, that is true of all law.