The Choice-Based Perspective of Choice-of-Law

by

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Abstract

This study offers the so-called "Choice-Based Perspective" of the choice-of-law question or “CBP”. Drawing on the legal philosophy of Immanuel Kant and through careful evaluation of comprehensive theory of Kant’s follower- Friedrich Carl von Savigny, CBP offers a purely private conception of the subject which rejects the conventional wisdom that choice-of-law has to be grounded on the principle of states’ sovereignty. Furthermore, it will be argued that the proposed approach holds much sway in practice, for the normative underpinnings of CBP are already embedded in many traditional and contemporary choice-of-law rules, doctrines, and concepts.
For my beloved family, Mali, Donna and Michelle- you mean everything to me
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Introduction

Choice of law was one of the easiest subjects because there was really only one rule for all areas of private law: “You apply the law most substantially connected”, he [Professor Walker’s teacher] would say with a subtle accent. As a student, I [Professor Walker] felt that was an unhelpful generalization. On other occasions, when students were troubled by inconsistencies between implications of the established choice of law rule and the outcome of the particular cases, he would observe calmly that the courts routinely manipulated the rules to produce a just result. I found this frustrating: either the decision in question was wrong, or the rule was in need of reformulation, or we had failed to appreciate the consistency between the two. ¹

In the above-quoted passage, contemporary choice-of-law scholar Professor Janet Walker expresses concerns about her former choice-of-law teacher’s vision of the subject. This vision seems to be grounded on a problematic general principle and exception. The general principle refers to the somewhat amorphous and highly flexible so-called most significant relationship principle (the “MSR principle”),² according to which the courts apply the law of the “most significant relationship” to the parties and the event. The exception refers to the so-called “better-law” approach, condemned in choice of law literature no less,³ under which the courts engage in a substantive evaluation of the merits

² See e.g. Albert Ehrenzweig, A Treatise on the Conflict of Laws (St Paul: West Pub Co, 1962) at 351 (mocking the MSR principle as a “meaningless generalization”); Brainerd Currie, “Full Faith and Credit Chiefly to Judgments: A Role for Congress” (1964) Supreme Court Rev 89 at 95 (mocking the MSR principle as showing a “lack of standard”). For further discussion on the unpredictable nature of the MSR principle, see infra notes 368-372, 384-386 and accompanying text.
³ For extensive criticism pointing to the inherently subjective nature of the better-law approach, see e.g. Paul H Neuhaus, “Legal Certainty Versus Equity in the Conflict of Laws” (1963) 28 Law & Contemp Probs 795 at 802; Otto Kahn-Freund, “General Problems of Private International Law” (1974) 143 Rec des Cours 139 at 466. For further discussion of this point, see Part III, Sec 1 (C) (1).
of the applied laws. Furthermore, the combination of the general principle and the exception lacks internal coherency and consistency.

However, in this study it will be argued that Professor Walker’s teacher was right in his comments for the purpose of grasping the normative structure of the subject. Drawing on Kantian legal philosophy⁴ and several neo-Kantian writings,⁵ this study aims to coherently incorporate both: the MSR principle and an exceptional version of the better law approach, which together with the popular “party autonomy” principle constitute the three foundational blocks of a Neo-Kantian conception of choice-of-law,⁶ or what I have labeled the Choice-Based Perspective (“CBP”) on choice-of-law. I shall argue that CBP provides a truly individual rights-based understanding of the subject that is very much lacking in traditional and contemporary choice-of-law literature. While other accounts

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⁴ See generally Immanuel Kant, The Metaphysics of Morals, translated by Mary Gregor (New York: Cambridge University Press, 1996) (Page citations will be of the Prussian Academy edition of Kant’s works) [Kant, Doctrine of Right]; Immanuel Kant, “Perpetual Peace: A Philosophical Sketch”, translated by HB Nisbet in Hans Reiss, ed, Immanuel Kant, Political Writings (Cambridge: Cambridge University Press, 1991) [Kant, Perpetual Peace].


⁶ There are a few comments that should be made here with respect to the theoretical basis and scope of this study. First, the reliance of this study on Kant should not be overestimated. As we will see (see infra note 293), Kant did not say a word about private international law in general or choice-of-law, in particular. Accordingly, the reference to Kantian legal philosophy is of a constructive nature, rather an attempt to provide a direct implementation of this philosophy to the choice-of-law question. Secondly, it should be noted that the argument presented in this study is of limited scope. While relying on Neo-Kantian corrective justice’s conception of private law, CBP offers an approach for grasping choice-of-law rules for the basic structures of private interaction (contract, tort, unjust enrichment and property) and does not extend its scope to the instances of different normative structures (such as criminal law), mixed structures (such as cases of environmental torts or issues related to employers’ compensation), and structures that have not yet been adequately addressed by corrective justice theorists (such as certain family law interactions and fiduciary duties). For corrective justice foundational writings and comments on their departure from Kantian direct metaphysics, see Weinrib, Corrective Justice, supra note 5 at 5-6; Ernest J Weinrib, “Correlativity, Personality, and the Emerging Consensus on Corrective Justice” (2001) 2 Theoretical Inquiries L 107 at 125, n.14 [Weinrib, “Correlativity & Personality”]; Weinrib, The Idea, supra note 5; Julius Coleman, The Practice of Principle (Oxford: Oxford University Press, 2001).
have fundamentally grounded their vision in the principle of states’ sovereignty and states’ relationships,7 CBP presents a purely private conception of choice-of-law as the union of the choices of two persons.

At this point, the notion of the relation between the theory and practice should be raised. One has to be very cautious about private law theoretical approaches that do not reflect courts’ actual practices. To rephrase this point from another angle, courts’ actual practices provide an excellent starting point for the development of a theory. As a means of doing justice in particular cases, the courts intuitively produce a vast body of decisions for scholars’ analysis. One can trace within these decisions some general principles that provide an excellent source for grasping a coherent theory of private law and its categories.8 This explains why empirical studies on the actual operation of the courts are so important for our theorizing.

The same point is perhaps true for an area intimately related to private law – that of choice-of-law. As many choice-of-law commentators have noticed, the presence of one or more foreign elements in the factual matrix of a private law case9 apparently does not change the striking similarity between private law and choice-of-law.10 After all, choice-of-law appears to deal with the same private law categories of contract law, property,

7 For discussion of these issues see text accompanying notes 60-72, 294-296 below.
8 For discussions within contemporary private law theory literature on the internal tendency of judicial systems to move towards their own coherency, see Weinrib, The Idea, supra note 5 at 146-147; Peter Benson, “The Unity of Contract Law”, in Peter Benson, ed, The Theory of Contract Law: New Essays (Cambridge; New York: Cambridge University Press, 2001) 118 at 118-119 [Benson, “Unity”].
9 For further discussion on the contemporary general identification of the subject according to the presence of the foreign element in the factual matrix, see text accompanying notes 116-118, 296-297 below.
unjust enrichment and tort and the pursuit of individual justice in each particular case.\textsuperscript{11}

From here follows the importance of empirical studies in this area.

Fortunately, in recent years we have witnessed a growing body of empirical research on the identity of the laws applied by courts in private law cases involving a foreign jurisdiction element.\textsuperscript{12} This interest in the choice-of-law question is not surprising. With advances in commerce, technological progress, and the frequent mobility of people, the number of choice-of-law cases has grown dramatically both internationally and at federal level in the United States.\textsuperscript{13} In other words, the surge in international private interactions is what has made the choice-of-law question so ripe for empirical investigation.

Let us take a closer look at the above-mentioned MSR principle. An overview of the empirical literature on choice-of-law decisions reveals the clear importance of this principle. As the studies show, this principle has been either directly adopted by several states or incorporated through the various provisions of the most popular choice-of-law

\textsuperscript{11} Indeed, several choice-of-law scholars have identified the nature of the discipline as ultimately rooted in individuals’ justice, see Gerhard Kegel, “The Crisis on Conflict of Laws” (1964) 112 Rec des Cours 95 at 183-185 [Kegel, “Hague Lecture’”] (For further discussion of Kegel’s point, see note 306 below); Stephen GA Pitel & Nicholas S Rafferty, Conflict of Laws (Toronto: Irwin Law, 2010) at 209. Even, Alex Mills, perhaps one of the fiercest opponents of the “individuals’ justice” notion, has frankly admitted the dominance of the “justice” idea in traditional and contemporary choice-of-law thinking. See Alex Mills, The Confluence of Public and Private International Law (Cambridge: Cambridge University Press, 2009) at 3-4.


\textsuperscript{13} Thus, for example, Symeon Symeonides has traced that in past decades, the relative number of choice-of-law cases in American courts was subject to a dramatic increase of 731%. See Symeon C Symeonides, “A New Conflicts Restatement: Why Not?” (2009) 5 J Priv Int L 383 at 418 [Symeonides, “Why Not’”].
method amongst American courts: the Second Restatement. A glance at the specific provisions of the Second Restatement reveals the evident centrality of the MSR principle with respect to tort, contract, movable property, unjust enrichment, and family law choice-of-law rules. Accordingly, the MSR principle has been coined as no less than the “intellectual heart of the Second Restatement”.

Conventional explanations of the popularity of the MSR principle have tended to point to the inherent unpredictability of the principle. It has been argued that the MSR principle actually presents “no rule” and thus equips judges to decide cases however they wish. Stated in these terms, this argument reflects the scepticism of classical legal realism under which legal doctrine may play any role in the judicial decision-making process. This explains why the MSR principle has received so little academic attention. While

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14 Restatement (Second) of Conflict of Laws (1971) [Second Restatement]. For empirical studies indicating the significant popularity of the Second Restatement amongst American courts, see Symeonides, Revolution, supra note 12 at 48-49; Whytock, supra note 12 at 780; Symeonides, “Survey,” supra note 12 at 331; Symeonides, “Why Not,” supra note 13 at 393.
15 Second Restatement, supra note 14 §§ 145 (1), 146 -149, 152.
16 Ibid §§188 (1), 189-197.
17 Ibid §§ 222, 244, 250, 251, 254, 256- 258.
18 Ibid §221.
focusing on Joseph Beale’s version of vested-rights theory and Brainerd Currie’s interest analysis, choice-of-law thinkers have found this principle to be “[t]oo indeterminate to lend itself to theorizing”.

Nonetheless, the realists’ claim has proved to be flawed. As one of the empirical studies has shown, the Second Restatement (underpinned by the MSR principle) has exercised significant influence on choice-of-law decisions. Contrary to the realists’ claim that the MSR principle embodies unlimited judicial discretion, the principle does lead to predictable results. Accordingly, the theoretical vindication of this popular choice-of-law method remains pending.

This is where CBP enters the picture. It purports to provide the normative justification for the MSR principle and to situate it coherently within its unifying Kantian

25 See Kermit Roosevelt, “Resolving Renvoi: The Bewitchment of Our Intelligence By Means of Language” (2004) 80 Notre Dame L Rev 1821 at 1868. Kermit Roosevelt’s comprehensive treatment of Renvoi doctrine provides an illuminative example of this practice. Although focusing on the analysis of this doctrine from the theoretical perspectives of Joseph Beale’s vested rights theory and Brainerd Currie’s interest analysis, Roosevelt overlooks the conceptual understanding of the doctrine from the perspective of the MSR principle. See *ibid* at 1867-1869.
26 Whytock, *supra* note 12 at 770-772. For further discussion of the implications of Whytock’s empirical work and the explanation as to why his methodology seems to presuppose the centrality of the MSR principle vis-à-vis §6 of the Second Restatement, see note 582 below.
27 It should be noted that although this study focuses on the case of American choice-of-law practice, the vast popularity of the MSR principle is not limited to the American landscape and can be clearly traced in many other systems. Accordingly, a similarly mysterious practice has been witnessed in Canada in the area of tort law. Despite the binding precedent of the Supreme Court of Canada in *Tolofson v. Jensen* applying Joseph Beale’s rigid connecting factor of the place of the last event, in reality the lower courts have refused to follow this by adhering instead to what seems to be a version of the MSR principle (For a discussion of these issues, see e.g. Pitel & Rafferty, *supra* note 11 at 252-255). In the European Union, the centrality of the MSR principle is even more straightforward. Thus, the general rule of the Rome II Regulation explicitly adopts this principle (*Commission Regulation (EC) 864/2007, on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 40 (EC), Art. 4 (3)) [Rome II Regulation].
theoretical framework. Moreover, the other central aspects of CBP are also fundamentally evident in practical reality. As we will see throughout this study, the normative underpinnings of CBP are already embedded in many traditional and contemporary choice-of-law rules, doctrines, and concepts of many jurisdictions: (1) the above-mentioned and vastly popular MSR principle;28 (2) the universally recognized party autonomy principle;29 (3) the flexible choice-of-law connecting factors or “starting points” that have been established for each of the private law categories: tort, contract, property, restitution, and family law30; (4) the central concept of “parties’ reasonable expectations”;31 (5) the inherent reference in doctrines that permit sensitivity to the substance of the laws involved, in extraordinary circumstances; (6) the central provisions of the American Second Restatement;32 and (7) the central provisions of the European Rome I,33 II34 and III35 Regulations.

It shall be argued however that the Kantian-inspired conception of choice-of-law does not need to be developed from scratch. To the contrary. In that respect, I shall suggest drawing close attention to the scholarship of one of the most eminent36 19th century German scholars - Friedrich Carl von Savigny. His scholarship presents a complex

28 See Part III, Sec 2 (A) & (B) (2) (c) below.
29 See Part I, Sec 2 (B) (1) & Part II, Sec 2(A) below.
30 See Part I, Sec 2 (B) (2) (c) & Part II, Sec 2 (A) & B (1) (d) below.
31 See infra notes 331-333 and accompanying text.
32 See Part II, Sec 2 below.
33 See infra notes 91, 316 and accompanying text.
34 See infra notes 91, 224, 317, 320, 355, 397, 533 and accompanying text.
35 See infra note 653.
synthesis and interplay between sets of apparently self-contradictory basic ideas and influences of different schools of thought, namely: the constant reference to Roman law sources, the idea regarding the internal coherency of legal concepts, the significance of the history and evolution of a nation’s culture, the adoption of natural rights thinkers’ ideas, and the principal objection to judicial discretion. This complexity explains the great confusion of scholars in grasping the nature of Savigny’s thought, and also explains why Savigny’s scholarship has often been overlooked by Anglo-American scholars. As Richard Posner put it, “Today - in America at any rate - outside of a tiny subset of legal historians, he [Savigny] is barely a name”. The ignorance to Savigny’s general scholarship is evident in the negligence of Savigny’s specific treatment of choice-of-law in his Treatise on the Conflict of Laws. Often overlooked by choice-of-law commentators, Savigny’s comprehensive choice-of-law theory has typically been understood as a reference to the obscure and mysterious “universal seat formula”.

37 See Part I, Sec 2 (A) below.
38 Ibid.
39 See Part I, Sec 3 (A) & Part II, Sec 2 (C) (1) below.
40 See text accompanying notes 165-199 & Part II, Sec 1 (B) below.
41 See Part I, Sec 3 (B) & Part II, Sec 2 (B) (1) below.
42 See Mathias W Reimann, “Nineteenth Century German Legal Science” (1990) 31 BCL Rev 837 (explaining the confusion caused amongst Anglo-American scholars with respect to the concept of “legal science” through the complexity and self-contradictory nature of Savigny’s scholarship).
44 Friedrich Carl Von Savigny, A Treatise on the Conflict of Laws, and the Limits of Their Operation in Respect of Place and Time translated by William Guthrie (Edinburgh: T& T Clark, 1880) [Savigny, System VIII].
My central contention in this study, however, is that although highly complex and reflecting the self-contradictory nature of Savigny’s general scholarship, his theory provides a fundamental step towards the development of CBP. Made by one of the greatest followers of general Kantian thought,46 Savigny’s argument on choice-of-law serves as fertile ground for CBP. Through careful evaluation of the central components of Savigny’s theory, their qualifications and extension, extraction and substitution of elements that are foreign to Kantian legal philosophy, CBP offers a purely neo-Kantian perspective of the choice-of-law question that is already deeply embedded in courts’ practice and therefore reflect courts’ fundamental intuition with respect to the nature of the subject.

This study proceeds as follows. Part I details the central elements of Friedrich Carl von Savigny’s comprehensive theory of choice-of-law through three fundamental steps. Section 1 outlines three of Savigny’s basic ideas on the nature of the subject which serve as a basis for his positive argument; Section 2 presents this argument as grounded on a single organizing principle of “voluntary submission” and elaborates on a complex juridical mechanism for the actual operation of this principle. Lastly, Section 3 discusses Savigny’s two significant deviations from the voluntary submission principle: (1) the “anomalous laws” category as a general exception to his choice-of-law theory; and (2) the inherent tension within the theory as a reflection of Savigny’s principal objection to judicial discretion.

Part II depicts the main contours of the Choice-Based Perspective (“CBP”) on choice-of-law. Section 1 introduces CBP’s organizing principle of “juridical relational

46 See Part II, Sec 1 (B) below.
choice”, traces its theoretical roots in Kantian legal philosophy and delineates its distinctiveness from Savigny’s organizing principle. Section 2 presents the three foundational blocks of CBP—(1) the party autonomy principle; (2) the doctrine of “constructive inference”; and (3) the “two substantive tests of legality” (“TSTL”). Through analysis of the various components of Savigny’s argument, this Section traces the presence of these blocks in Savigny’s choice-of-law theory, qualifies them, and replaces them with truly Kantian elements. Finally, through analyzing several core choice-of-law cases and the notion of international human rights, Section 3 provides several examples of the operational mechanics of CBP.

Part III addresses CBP’s relation to theory and practice. Section 1 discusses its conceptual distinctiveness from competing visions of the subject: interest analysis, vested rights theory, and the better law approach. Section 2 provides a careful review and detailed analysis of the popular Second Restatement and its specific provisions. This Section shows that CBP provides the key to grasping the theoretical underpinnings of the Second Restatement, and its most central element - the MSR principle and discusses the relation and potential contribution of CBP to American practice. Finally, Section 3 discusses the relation between CBP and the substance-procedure distinction, which is important for choice-of-law both practically and theoretically.

While Part IV offers some concluding remarks, the Appendices of this study provide the schematic charts that demonstrate the operational mechanism of Savigny’s theory and CBP.
I. Understanding Savigny’s Theory of Choice-of-Law as a Voluntary Submission

1. Three Basic Ideas on the Nature of the Subject

I will begin the exposition of Savigny’s theory by introducing a set of basic interrelated ideas regarding the nature of the subject. As a first building block of the theory, these ideas do not purport to provide a comprehensive account of choice-of-law rules, but rather offer a solid basis for further development of the argument. Furthermore, as we will see, these ideas are also strong enough to reject several alternative conceptions of the subject, such as the lex-fori solution to the choice-of-law question and common understanding of the terms “comity” and “reciprocity”.

A. Basic Idea (1): The Basic Unit of Inquiry Has to be Related to the Concept of “Legal Relations”

1. Legal Relations

Savigny links his choice-of-law theory fundamentally with the concept of legal relations or jural relations,47 which in modern terminology would perhaps equate to what we call “categories of private law”.48 In very general terms, contemporary private law is

viewed as comprising the law of property, tort law, contract law, unjust enrichment, and fiduciary duties.\textsuperscript{49} Savigny’s classification scheme is different. He introduces the following five types of legal relations:\textsuperscript{50}

1. Property Law
2. Law of Obligations
3. Law of Succession
4. Law of Status
5. Family Law

As Savigny explains, legal relations address a person’s potential acquisition of various objects that are realized in specific legal institutions.\textsuperscript{51} The institution of property law addresses the possibility of a person acquiring a corporeal thing. It represents a relation between a person and thing whereby the person has unlimited control of the thing.\textsuperscript{52} The law of obligations addresses the possibility of a person acquiring another person’s specific act and, therefore, represents a relation between two persons.\textsuperscript{53} The law of succession


\textsuperscript{50} Savigny, \textit{System VIII}, supra note 44 at 140; see also Savigny, \textit{System I}, supra note 31 at 317. It should be noted that this classification scheme has much similarity with that of Joseph Story who classifies private law into categories of marriage, contracts, personal and real property, law of succession and guardianship ((Joseph Story, \textit{Commentaries on the Conflict of Laws}, 4\textsuperscript{th} ed (Boston: Little Brown & Com, 1852)).

\textsuperscript{51} Savigny, \textit{System I}, supra note 47 at 271. As Savigny puts it “[i]n each jural relation two parts may be discerned: first, a matter, that is to say, that relation in itself, and secondly the just determination of this matter.”

\textsuperscript{52} \textit{Ibid} at 275, 299.

\textsuperscript{53} \textit{Ibid} at 275-276. In very general terms, the conception of the law of obligations in Savigny’s time was built on a wide spectrum of categories and sub-categories of private law, which under the contemporary terminology would be identified with modern contract law, tort law, and unjust enrichment. See Peter Birks, “Definition and Division: A Meditation on Institutes 3.13”, in Peter Birks, ed, \textit{The Classification of
represents a special kind of property law: it addresses the possibility of acquiring property through a legal fiction by which the heir steps into the deceased’s shoes with respect to the latter’s property. Family law represents a different type of relation. It addresses a relation between a person and community which, in turn, imposes on the person an imperative to be completed by the other person through the institution of marriage or to be completed through education in the context of parent-child relationships.

Perhaps the most striking feature of legal relations is their private nature. Savigny makes a sharp division between private law relationships and other sorts of interactions related to states’ activity such as civil procedure and criminal law. All legal relations (with the notorious exception of family law) are related to a person’s interactions with
other persons (as in the case of contract law), or a person’s interaction with a corporeal thing (as in the cases of property law and the law of succession).

Savigny’s “private model” of choice-of-law is not trivial, but diverges significantly from that of most writers of both his and contemporary times: Dutch authors, Carl Wächter and Joseph Story,60 and more contemporary writers such as Joseph Beale and Brainerd Currie. In fact, it has become axiomatic that the choice-of-law discipline must somehow be grounded on the organizing principles of the Law of Nations61: states’ sovereignty or states’ relationships.62 This notion appears throughout the development of choice-of-law thought.63 Choice-of-law theorists have invoked the involvement of a foreign element in a private-law case as sufficient grounds for insisting on an inherent link between the case and states’ interests. This explains why the recent provocative argument regarding the entire “public international law” foundation of private international law has seemed so reasonable and convincing.64


61 The term “Law of Nations” used here is preferred to the modern label - “public international law”. The reason for this lies in the fact that under the modern public international law term the issue of “international human rights” is usually regarded as an inherent part of the subject. In continuation of this study I will argue against this classification of international human rights in favour of an alternative conception, according to which this issue is regarded as a part of the “private law model” of choice-of-law question. See the discussion that follows at infra notes 421-431, 448-454 and accompanying text.

62 See e.g. Juenger, MSJ, supra note 10 at 159-161. For a similar argument regarding the centrality of the sovereignty principle for classical and modern choice-of-law methodologies, see Kegel, “Hague Lecture”, supra note 11 at 184; Annelise Riles, “Cultural Conflicts” (2008) 71 Law & Contemp Probs 273 at 278-284.

63 For the most striking example of this type of historical argument, see Alex Mills, “The Private History of International Law” (2006) 55 Int'l & Comp L Q 1.

64 Mills, supra note 11.
Take, for example, Joseph Story’s approach to choice-of-law.\textsuperscript{65} By embracing a conception that views the subject as a conflict of the laws of different states, Story rejects the private law model of private international law.\textsuperscript{66} Story’s solution to the choice-of-law question is derived from the matter of courtesy between the states,\textsuperscript{67} under which private international law regulates international relationships and not private legal relations.

The same point applies with respect to the states’ sovereignty principle. This has been tentatively perceived by academic scholars as a core idea for choice-of-law.\textsuperscript{68} Carl Wächter based his work on choice-of-law primarily around this principle\textsuperscript{69} and Joseph Story attributed a central role to it in his analysis of the subject.\textsuperscript{70} The same is true with respect to Joseph Beale’s approach. Although it uses the terminology of “individual rights”, the central components of this theory are ultimately grounded on the principle of states’ sovereignty.\textsuperscript{71} Finally, Brainerd Currie’s interest analysis is based on the notion that choice-of-law is supposed to serve as a tool for promoting states’ interests.\textsuperscript{72}

Savigny uses a radically different starting point. Following the traditional distinction between public and private international law made by continental European and

\begin{itemize}
\item \textsuperscript{65} Story, \textit{supra} note 50; see also Paul Volken, “How Common are the General Principles of Private International Law? America and Europe Compared” (1999) Yrbk Priv Intl L 85 at 92-101.
\item \textsuperscript{66} See Story, \textit{supra} note 50 at 7.
\item \textsuperscript{67} \textit{Ibid} at 38-40.
\item \textsuperscript{68} See e.g. Juenger, \textit{MSJ}, \textit{supra} note 10 at 3, 159-161.
\item \textsuperscript{69} For a discussion on Wächter’s work, see Kegel, “Story and Savigny”, \textit{supra} note 60 at 52-54; Volken, \textit{supra} note 65 at 98-101.
\item \textsuperscript{70} Story, \textit{supra} note 45 at 33.
\item \textsuperscript{71} For discussion of the incorporation of the sovereignty principle into the fundamentals of Joseph Beale’s version of vested rights theory, see \textit{infra} note 242.
\item \textsuperscript{72} Currie, \textit{supra} note 24 at 64.
\end{itemize}
English commentators, he insists on a strictly “private” conception of choice-of-law. In this way, Savigny refuses to tie the subject to the traditional understanding of the “comity of nations” notion and explicitly rejects the states’ sovereignty principle. From this perspective, Savigny fundamentally disagrees with core traditional and contemporary choice-of-law authorities at the very outset of his analysis of the subject.

2. The rejection of the *lex-fori* solution

Savigny’s rejection of the sovereignty principle has direct implications for the inherent counterpart of this principle - the *lex-fori* solution to the choice-of-law question. Actually this solution is a “natural” outcome of the sovereignty principle. One may argue that despite the existence of the foreign element, domestic courts as a matter of state sovereignty are obliged to apply local law (*lex-fori*) in any private law case that is brought before them. The very possibility of the application of foreign law seems to be a clear infringement of a state’s sovereignty to apply its positive laws in its domestic courts.

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74 For discussion of this point, see Part I, Sec 1 (C) (2) below.


76 See Clarkson & Hill, supra note 73 at 9.
Therefore, under this *lex-fori* solution to the choice-of-law question, the issue of jurisdiction ultimately determines the identity of the applicable law.

This *lex-fori* solution to the choice-of-law question possesses a strong grip on contemporary choice-of-law thought. Walter Wheeler Cook⁷⁷ and Albert Ehrenzweig⁷⁸ explicitly supported *lex-fori* as the ultimate solution to choice-of-law cases. Brainerd Currie also assigns a very central role to *lex-fori* under his approach⁷⁹ and nowadays it is regarded by many scholars as a biased *lex-fori* approach.⁸⁰ Finally, Robert Leflar’s “better rule of law” consideration⁸¹ has usually been interpreted as referring to the application of domestic law.⁸²

Savigny’s thought is clearly at odds with this tendency of choice-of-law scholarship towards the *lex fori* approach. His rejection of this approach follows from his rejection of the sovereignty principle. Although Savigny is aware of the German *lex-fori* tradition of his time, primarily based on Wächter’s writings,⁸³ he explicitly rejects this approach as a

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⁷⁹ For Currie’s adoption of *lex-fori* as a point of departure for his analysis of the subject and “tie-breaker” in resolving so-called “true conflict” and “no-interest pattern” cases, see Currie, *supra* note 24 at 1-77, 152-156, 589-590.
⁸² See e.g. Symeonides, *Revolution, supra* note 12 at 81-87; Perry Dane, “Vested Rights, ‘Vestedness’ and Choice of Law” (1987) 96 Yale L J 1191 at 1273 (labelling the better law approach as a “fig-leaf for the law of the forum”)
legitimate solution to the choice-of-law question and refers to it as no less than “very
dangerous”.

B. Basic Idea (2): Choice-Of-Law Rules Must Be Linked to States’ Territories

The fact that Savigny perceives the choice-of-law question as being of a strictly
private character does not mean that states do not play any role in his account. The
contrary is true. Savigny’s account presupposes a certain conception of political and
international order. This European order, which was finally determined under the Peace
of Westphalia (1648), recognizes the existence of independent states with certain territory
over which they exercise their sovereign power.

This specific structure of political and international order is significant to Savigny’s
private model of choice-of-law in the following manner. For Savigny, the question of
choice-of-law has to be viewed through the lens of interaction between people from
different territories to which positive laws are attached. This exposition of the subject
catches two birds with one stone. On the one hand, as it focuses on the interaction between
people, it remains private. On the other hand, it recognizes that this interaction is not

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84 Savigny, System VIII, supra note 44 at 145. For further discussion on the inconsistency of lex-fori with
Savigny’s theory from the perspective of the phenomenon of “forum shopping”, see note 106 below.
85 See Michaels, “Globalizing Savigny”, supra note 75 at 135 (noting that Savigny “assumes”, rather than
“justifies” the notion of territoriality).
86 Regarding the innovative nature of the Peace of Westphalia for the modern conception of political and
international order, see e.g. Stéphane Beaulac, The Power of Language in the Making of International Law
between people from empty spaces, but from particular territories accompanied by positive laws.\textsuperscript{87}

Indeed, this conception does not yet provide an answer to the question of the identity of the territorial law to be applied in private international law litigation. However, it points to the concepts of territories and positive laws as necessary elements for grasping the nature of the subject.

\textit{C. Basic Idea (3): the Choice-of-Law System Has to Be Universal}

The next idea deals with the conception of the choice-of-law system. In contrast to the national conception of the subject,\textsuperscript{88} Savigny insists that choice-of-law rules must be viewed through a much broader, cosmopolitan lens.\textsuperscript{89} This view (which echoes today in the contemporary choice-of-law landscape as multilateralism\textsuperscript{90}) would guarantee that the same litigated case be decided according to the same substantive law, regardless of the identity

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\textsuperscript{87} Savigny, \textit{System VIII}, supra note 44 at 56-57. C.f. Joseph Beale’s comments defending the view according to which each territory can be governed only by a single positive law. See Beale, \textit{supra} note 23, vol 1 §2.3 at 17-18.

\textsuperscript{88} For a distinction between “national” and “universal” conceptions of the choice-of-law question, see de Nova, \textit{supra} note 83 at 455-477.


\end{flushright}
of the forum. Thus, for example, a contract law case between English and French residents regarding delivery of goods in France has to be governed by one set of contract laws, regardless of whether an English, French or third party court is handling the case. In other words, Savigny calls for universal uniformity of choice-of-law rules.\footnote{91 Savannah, System VIII, supra note 44 at 71-72, 136-137; see also Jan von Hein, “Something Old and Something Borrowed, but Nothing New? Rome II and the European Choice-of-Law Evolution” (2008) 82 Tul L Rev 1663 at 1669 (“The main idea underlying Savigny’s methodology was the goal of international decisional harmony….“). By this Savigny has predicted the current tendency of the European Union towards uniformity of choice-of-law rules. Among the conventions on choice-of-law rules see Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6 (EU) [Rome I Regulation]; Rome II Regulation, supra note 27. In the theoretical landscape of Anglo-American choice-of-law scholarship in years past, it was Professor Perry Dane who provided a sophisticated argument according to which a conceptual distinction can be made between “Norm-Based” and “Decision-Based” conceptions of law (See Dane, supra note 82). Dane’s division is complex, but in general terms he views the “Norm-Based” category as unified by the principle of the commitment to the rule of law and system of norms. Within this category he identifies the philosophies of Hart, Fuller, Dworkin & Kant (Ibid at 1217-1223, n.190). The “Decision-Based” conception of law is the antithesis of a Norm-Based conception. Dane identifies this category mostly with different strains of Legal Realism’s movement (Ibid at 1236-1239). Then, proceeds Dane, the “Norm-Based” conception of law has to be grounded on the universal substantive criteria. Since this conception of law is grounded on what Dane calls the “objective force” of legal norms, the content of substantive legal rights has to be independent. From here follows the rejection of the application of domestic law as a legitimate solution to the choice-of-law question (Ibid at 1250, 1265). It should be noted that Dane’s account is less radical than that of Savigny. Although Dane’s argument undoubtedly has universal aspirations, he talks about universal criteria, rather than universal choice-of-law rules (Ibid at 1207-1209). Thus Dane introduces his organizing principle for the choice-of-law question “the court of any forum should, in selecting the substantive elements in an adjudication, apply choice of law criteria that could be expected to generate the same set of substantive criteria if they were applied by any other forum in an actual adjudication”(Ibid at 1205); see also Volken, supra note 65 at 102 (notably commenting on the apparent similarity between Savigny’s and Dane’s arguments in the following terms “Simply, when reading Dane, I had to ask myself whether he was really unaware of his plagiarizing. Could it be that he really has never heard of Savigny’s para. 348….“).}
Savigny’s first justification in favour of a universal system of choice-of-law rules is based on the principle of legal equality. Under this principle, natives and foreigners have to be treated equally in the domestic courts.\(^92\) This means that foreigners cannot be discriminated against and their legal rights have to be protected in the same way as those of local residents. Thus, for example, a French resident has to be treated equally before the English court, as if he were an English resident.

Savigny strongly supports this principle and demonstrates its general acceptance among the writers, legislators, and judges of his day.\(^93\) The same is true today. The universal acceptance of equality before the courts has transcended to our time and become an important component of contemporary international legal order. As Article 26 of the International Covenant on Civil and Political Rights states, “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law”.\(^94\)

However, Savigny does not merely accept this core principle of international legal community, he takes it a step further. For Savigny, legal equality does not mean simply equality before the courts. It also follows that the whole system of choice-of-law rules has to be universal:

\[\text{[T]he necessary consequence of this equality, in its full development, is not only that in each particular state the foreigner is not postponed to the native (in which equality in the treatment of persons consists), but also that, in cases of} \]


\(^{93}\) *Ibid* at 137, 154; von Bar, *supra* note 73 at 210-214 (defending the principle of equality of foreigners before the law as necessarily following from the need for interaction between nations).

conflict of laws, the same legal relations (cases) have to expect the same
decision, whether the judgment be pronounced in this state or in that.95

In this way Savigny presents an extended version of the legal equality principle.
For him, it is not enough that a foreigner will not experience discrimination in the local
courts. In order for the principle to realize its full form, an extension of the argument is
required. Under this extension, the case of any person, local resident or foreigner, has to be
governed by the same substantive law regardless of the identity of the court that handles
the case. From this perspective the universal conception of choice-of-law rules necessarily
follows from the legal equality principle.

(b) Objection to the Phenomenon of ‘Forum Shopping’

Savigny’s second justification in favour of the universal system of choice-of-law
rules is based on his unequivocal objection to the so-called phenomenon of “forum
shopping”. Crucial to understanding this objection is Savigny’s conception of jurisdictional
rules.

Although most of Savigny’s work deals with the choice-of-law question, he views
the question of jurisdiction as having an “intimate connection” with the choice-of-law
question.96 He divides jurisdictional rules into two categories: “general jurisdiction” and
“specific jurisdiction”.97 General jurisdiction is related to the current place of the
defendant, irrespective of the particular circumstances of the litigated case. Thus, for

95 Savigny, System VIII, supra note 44 at 69-70 (emphasis in original).
96 Ibid at 225, 280.
97 Ibid at 174-175, 179, 201 n. (d).
example, in contract law, the plaintiff can establish general jurisdiction based on the mere fact of the defendant’s current presence in the territory of the court’s authority. This is regardless of the factors related to the particular case, such as the parties’ domicile at the time of the transaction, the place where the contract was signed, or the place of performance. On the contrary, specific jurisdiction is attached entirely to the choice-of-law question. In other words, according to Savigny, the same set of normative considerations applies to questions of specific jurisdiction as to choice-of-law.

Under this two-fold exposition of jurisdictional rules, the plaintiff always has a choice between general and specific jurisdictions. On the one hand, he or she may apply to the current location of the defendant. On the other hand, he may apply the rule that follows from Savigny’s theory of choice-of-law. In both cases, jurisdictional authority should be

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98 Ibid at 194-195, 218, 222.
99 This equalization between choice-of-law and specific jurisdiction stands in opposition to the traditional reluctance of choice-of-law thinkers to make a direct link between choice-of-law and jurisdiction questions. See e.g. Arthur T von Mehren & Donald T Trautman, “Jurisdiction to Adjudicate: A Suggested Analysis” (1966) 79 Harv L Rev 1121 at 1127-1130; Kegel, “Hague Lecture”, supra note 11 at 235. Without attempting to delve into the theoretical foundations of Savigny’s conception of jurisdiction, it seems that this conception is based on the integration of two basic notions: (1) the states’ sovereignty principle, as the ultimate basis for jurisdiction; and (2) the notion of fairness embedded in transactional equality between the litigating parties. While the defendant’s current presence in the territory of the court’s authority represents the starting point for analysis of jurisdictional rules, this point of departure is mitigated and balanced through the notion of transactional fairness embedded in a specific jurisdiction. From this perspective the point of specific jurisdiction is to restore the transactional equality between the parties that has been infringed by general jurisdiction.
100 This exposition of jurisdictional rules is of course considerably different to contemporary American and European conceptions of jurisdiction. See e.g. Arthur von Mehren, Adjudicatory Authority in Private International Law (Leiden, Boston: Martinus Nijhoff Publishers, 2007) at 79-111; Ralf Michaels, “Two Paradigms of Jurisdiction” (2006) 26 Mich J Int’l L 1003 at 1027-1038. However, the contemporary conceptions of jurisdiction also have commonalities with Savigny’s vision. Thus, Joseph Beale, for example, supported a fundamental distinction between jurisdiction over persons and jurisdiction over things (See Beale, supra note 23, vol 1 §§ 47.1-50.1 at 291-293). Contemporary approaches, in contrast to Beale (and in similarity to Savigny) have rejected this artificial distinction. See von Mehren & Trautman, supra note 99 at 1135-1136 (“Things have no rights or duties but are the subjects or objects of rights and duties. An exercise of jurisdiction to adjudicate affects the rights and duties of persons...”).
conferred. This notion also explains the potential divergence between jurisdiction and choice-of-law questions. The situation in which the plaintiff prefers the option of general jurisdiction represents the case in which the identity of the forum and the applied law might be different.

It is important to mention that Savigny does not object to the plaintiff’s ability to choose between general and specific jurisdictions. However, his view dramatically changes when it comes to the question of choice-of-law. The possibility of choice with respect to applicable law has to be unequivocally eliminated. Savigny cannot approve of this unfairness to the defendant and strongly opposes the possibility that the governed law be determined by the “mere will of a single party” or “capricious exercise of free will by one party”.

This principal objection to any plaintiff’s choice of applicable law is fierce and represents an underlying argument throughout the entire work. In modern choice-of-law terminology, this objection is called an objection to the “forum shopping” phenomenon. The terminology of “forum shopping” might be misleading and the term “choice-of-law shopping” would be more accurate to define Savigny’s notion. In accepting dual ‘forum-shopping’, Savigny unequivocally rejects all ‘choice-of-law shopping’. The reason for the possible existence of this extremely negative phenomenon lies in Savigny’s dual

101 Savigny, System VIII, supra note 44 at 145.
102 Ibid at 250.
103 Ibid at 174-175, 210-211.
conception of jurisdictional rules. And his remedy for this phenomenon is a universal
system of choice-of-law rules.  

2. Rejection of the Common Understanding of the “Comity” and “Reciprocity” Terms

The notion of universality of choice-of-law rules sheds lights on Savigny’s usage of
the terms “comity” and “reciprocity”. Throughout his work, Savigny mentions these terms
several times. Since the same terminology served as core concepts for Story and the
Dutch authors, one may easily misunderstand Savigny’s use of these concepts. Take, for
example, Story’s conception of comity and reciprocity. Since Story conceived the subject
as ultimately grounded in international relationships, the application of foreign law in
domestic courts is possible as an act of “courtesy” or “comity” that one state executes
towards another. In other words, the reason for the application of foreign law in a given
state’s court lies in the fact that the foreign state reciprocally is doing the same thing in its

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106 These comments on the universal conception of the subject, the two - fold conception of jurisdictional
rules, and the negative phenomenon of forum shopping provide a clearer understanding of Savigny’s above-
mentioned fierce mocking of the lex-fori solution to the choice-of-law question ((see Part I, Sec 1 (A) (2)).
For him, this solution is at odds with the very idea of the universal conception of the subject. Furthermore,
the lex-fori solution will create forum shopping. By providing the plaintiff with a unilateral option to choose
between general and specific jurisdictions, the lex-fori solution grants the plaintiff the power to determine the
identity of the applied law.

107 Savigny, System VIII, supra note 44 at 70, 138.

108 For a discussion of the centrality of the comity doctrine (alongside the sovereignty principle) within Paul
Voet’s, Johannes Voet’s, and Ulrich Huber’s conceptions of the subject, see Kurt Nadelman, Conflict of
Laws: International and Interstate (The Hague: Nijhoff, 1972) at 13-14; Lipstein, supra note 60 at 120-126;
see also Ernst Lorenzen, Selected Articles on the Conflict of Laws (New Haven: Yale University Pres, 1947)
at 136-180.

109 Story, supra note 65 at 47-48. For overviews of the use of the comity doctrine (albeit primarily within the
context of jurisdiction and recognition of foreign judgment questions), see Donald E Childress III, “Comity as
Lawrence Collins, “Comity in Modern Private International Law”, in James Fawcett, ed, Reform and
Development of Private International Law: Essays in Honor of Sir Peter North (Oxford: Oxford University
courts. In this way, under Story’s account, the concepts of comity and reciprocity provide an ultimate solution to the choice-of-law question.

Savigny’s use of these terms is fundamentally different. This difference follows from Savigny’s rejection of Story’s basic presuppositions. Savigny perceived the subject as having nothing to do with the relationships between independent states, but with interrelations between private individuals from different territories and the positive law attached to these territories. Accordingly, the choice-of-law question is independent from considerations relating to the subject of comity of nations, and Story’s conceptions of comity and reciprocity between states cannot be organizing principles of choice-of-law.

For Savigny, these terms play a much less central role than they do for Story. The reciprocity and comity between people with different residences follows from the universal aspiration of Savigny’s theory. Accordingly, comity and reciprocity do not provide a normative solution to the choice-of-law question, but actually follow from Savigny’s idea under which the choice-of-law system has to be universal. In other words, comity and reciprocity are necessary outcomes of the application of Savigny’s universal conception of choice-of-law. And the true normative solution to choice-of-law, for Savigny, lies elsewhere.

After presenting the three basic ideas regarding the nature of the subject and “clearing the slate” of alternative conceptions of the subject, we shall turn to the affirmative part of Savigny’s theory under which choice-of-law is not fundamentally

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110 See Michaels, “Globalizing Savigny”, supra note 75 at 132; Michaels, “German Views”, supra note 41 at 127 (stressing the differences between Savigny’s and Story’s conceptions of ‘comity’); see also Kegel, “Story & Savigny”, supra note 60 at 58-59.
grounded in the “universal seat” formula (as has been thought in contemporary scholarship\footnote{See note 45 above.}), but rather in the organizing principle of voluntary submission. It will be argued that despite the confusion that the universal seat formula has created among academic scholars, this formula must not be viewed as an organizing rule, but rather as part of a \textit{broader normative framework}. This formula under this understanding of Savigny’s theory is only \textit{one component} of Savigny’s comprehensive juridical mechanism for identifying the organizing “principle of voluntary submission” in particular cases. The ensuing Section elaborates on the nature of the voluntary submission principle and presents the juridical mechanism for its operation.
2. Theory Revealed – Organizing Principle of Voluntary Submission

The central thesis of this Section is that the so-called ‘principle of voluntary submission’ is the central concept of Savigny’s work on choice-of-law and purports to completely explain the operation of Savigny’s choice-of-law theory in terms of connectedness between different legal categories, persons, and territories with their attached positive laws. Briefly stated, the principle of voluntary submission is related to a person’s choice. This choice is not abstract, but is of a very specific character and relates to the identity of a territory to which a person voluntarily chooses to submit him or herself. And since each territory is governed by certain positive law, a person’s choice of territory becomes a choice of positive law.

In this way the principle captures the three basic ideas on the nature of the subject in one unified conceptual whole. The private nature of legal relations sheds light on the idea that the fundamental object of choice-of-law theory must be the person (or in the case of contract law, the persons). Since the person’s choice refers to a particular territory, it explains the idea of states’ territories as an inherent component of the theory. Finally, the principle of voluntary submission has universal aspirations and brings a global perspective on judicial authority. Under this conception, judges are not viewed as the long arm of

112 Accordingly, if anything, the most careful comments of Savigny’s choice-of-law theory have been made by Mathias Reimann who, similarly to the argument presented here, has mentioned the concept of voluntary submission as an organizing principle for understanding this theory. See Mathias Reimann, “Savigny’s Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century” (1999) 39 Va J Int’l L 571 at 594-600 [Reimann, “Triumph”].

113 Perry Dane recently commented on this conception of judicial authority as “deeply attractive as a matter of choice of law theory”. According to this conception the judges in choice-of-law cases “[a]ct as if they
the sovereign (which follows from various sovereign-based accounts of the subject), nor as bureaucrats that enforce previously existing plaintiff rights,\(^{114}\) rather they are acting, as we will see,\(^{115}\) as a normative authority engaged in a complex process of determining the person’s choice from the particular juridical (as opposed to political) circumstances of the case. Accordingly, the voluntary submission principle is also about the operation of judicial authority and juridical mechanism through which the person’s choice of territory is ascertained.

One must not discount the innovative nature (at least to the Anglo-American eye) of the voluntary submission principle. Disconnected entirely from the traditional and contemporary sovereign-based and policy-based conceptions of the subject, this principle insists on the application of a single normative criteria to any private litigation, despite the particular location of the judicial forum. From this perspective, the voluntary submission principle insists that in dealing with private law cases, the judges are always (even in purely domestic private law cases) engaged in the question of choice-of-law. In this way, the voluntary submission principle sheds light on perhaps one of the most theoretically challenging questions on the subject: how do we conceptually distinguish (if at all) purely private law cases from choice-of-law cases?

\(^{114}\) Beale, \textit{supra} note 23, vol 1 §§1.14, 4.6, 8A8 at 12, 38-39, 64. For a related further discussion of this point see \textit{infra} notes 469-478 and accompanying text.

\(^{115}\) See Part I, Sec 2 (B) & Part II, Sec 2 (B) below.
Within the landscape of contemporary choice-of-law thought, two approaches can be delineated in this regard. The approach of Anglo-American text books provides a relatively clear answer to this question. The involvement of a single “foreign element” (such as the domicile of one of the parties, place of transaction, place of injury etc.) is sufficient in order to classify a given factual situation under the “choice-of-law” rubric.\footnote{Lawrence Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* 14th ed (London: Sweet & Maxwell, 2006) at 3 (referring to “foreign element” as “[S]imply a contact with some system of law other than English law” [“Dicey & Morris”]; Eugene F Scoles et al, *Conflict of Laws* 4th ed. (St Paul, MN: Thomson/West, 2004) at 1 (referring to a case that “[I]s connected with more than one country....”).} The other approach is Brainerd Currie’s interest analysis, which seems not to be engaged in this clear-cut process of division between purely private law cases and cases involving a certain foreign element. Since this approach is about the effectuation of statutes’ underlying policies in given situations, conceptually this process does not differ from a purely domestic policy-based process of statutes’ interpretation.\footnote{Currie, supra note 24 at 366 (elaborating on his approach in the following terms “The process is one of construction and interpretation of governmental policy as it has been expressed in statutes and judicial decisions...[A]nd is essentially the same as that employed in a purely domestic case....”). Larry Kramer pushes this point even further in his denial of the distinction between purely private law cases and choice-of-law cases from the theoretical perspective of interest analysis. See Larry Kramer, “Rethinking Choice of Law” (1990) 90 Colum L Rev 277 at 282-283, 290. For further discussion of Kramer’s argument, see infra note 297.}

Savigny’s organizing principle of voluntary submission rejects, however, both approaches. On the one hand, as an inherent stage in the private law litigation process, it is incompatible with those who are claiming that the choice-of-law question can be identified simply through the presence of a single foreign element. On the other hand, it is also at odds with interest analysis’ treatment of the issue. While interest analysis confuses the
choice-of-law question and the adjudication process itself.\textsuperscript{118} Savigny’s organizing principle provides an independent normative criteria of voluntary submission that comes before the adjudication process.

The remaining Sections of this Chapter elaborate on the nature of the voluntary submission principle through the following two focal points: (A) the relation of this principle to two central elements of Savigny’s entire work: Roman law and the idea of single organizing principles; and (B) the exposition of the juridical mechanism for the actual operation of the principle.

\textit{A. The Relation to Roman law and the Scholarship of Organizing Principles}

Savigny’s constant references to Roman law sources\textsuperscript{119} through his entire scholarship have puzzled many commentators.\textsuperscript{120} However, one has to be careful with Savigny’s treatment of this issue. Although a great admirer of Roman law, Savigny did not intend to rely on it exclusively throughout his works. Rather, he viewed Roman texts more as useful tools that have to be reconsidered, modified in light of contemporary reality.\textsuperscript{121}

\textsuperscript{118} For a somewhat related point, see Ralf Michaels, “Economics of Law as Choice-of-law” (2008) 71 Law & Contemp Pros 73 at 94-100 (discussing the collapse of the private model of economic analysis of choice-of-law into a purely private law conception).


\textsuperscript{120} See e.g. Herman Kantorowicz, “Savigny and the Historical School” (1937) 53 LQ Rev 326 at 338-342 (questioning the connection of Roman law to German national law).

\textsuperscript{121} It seems that Savigny’s opposition to the strong calls during his time for the codification of private law in Germany can demonstrate this point. A careful review of Savigny’s writings reveals that his treatment of codification is not as negative as many might think. Through analyzing the valuable content of Roman texts, Savigny seeks to evaluate the relevance of these texts in his time (See Friedrich Carl von Savigny, The Vocation of Our Age for Legislation and Jurisprudence, translated by Abraham Hayward (London: Littlewood and Co., 1831) at 49-50 [Savigny, Vocation]. The idea is not to put Roman law before German
and then, in turn, linked to the theoretical framework of natural rights philosophy.\textsuperscript{122}

Furthermore, the case of the choice-of-law question posed a special challenge for Savigny’s thought. Since Roman law did not say much about the choice-of-law question (as Savigny frankly admitted\textsuperscript{123}), an innovative argument was required. Accordingly, Savigny’s theory develops the principle of voluntary submission without any direct relation to Roman law.\textsuperscript{124}  

The other no less important element of Savigny’s overall thought is the notion of exclusive organizing principles. Referring frequently to Roman law sources and analyzing these sources, Savigny ambitiously insists on the internal coherency of different rules, doctrines and concepts within the categories of private law. “Systematicity”, “coherence of constituent parts”, “organic unity”, “organic whole”, “coherent whole”, and “totality of sources”\textsuperscript{125} represent the terminology Savigny uses to describe the internal unity of law but rather to learn from the Roman texts (See Savigny, \textit{System I, supra} note 47 at iv). Therefore, a code that takes into account the great tradition of Roman law and would be modified at the hands of the German jurists would receive Savigny’s support (Savigny, \textit{Vocation, supra} at 132-139). For support of this understanding of Savigny’s objection to the codification movement, see James Whitman, \textit{The Legacy of Roman Law in the German Romantic Era} (Princeton, N.J.: Princeton University Press, 1990) at 126-129; Joachim Rückert, “Friedrich Carl von Savigny, the Legal Method, and the Modernity of Law” (available at \url{http://www.juridicainternational.eu/public/pdf/ji_2006_1_55.pdf}).

\textsuperscript{122} An illuminative example of this point provides Savigny’s analysis of Roman sources on the law of possession and their linkage to the Kantian conception of the subject. See Friedrich Carl von Savigny, \textit{Von Savigny’s Treatise on Possession; or the Jus Possessionis of the Civil Law}, translated by Erskine Perry (London: R. Sweet, 1848). For discussions on this work of Savigny, see Posner, \textit{supra} note 28; Whitman, \textit{supra} note 121 at 158, 183. For further discussion on the natural rights philosophy roots of Savigny’s scholarship, see text accompanying notes 165-199 & Part II, Sec 1 (B) below.

\textsuperscript{123} Savigny \textit{System VIII, supra} note 44 at 49-50; See also Juenger, “Page of History”, \textit{supra} note 60 at 422 (“Nor did the Romans develop a system of choice of law rules”); Lipstein, \textit{supra} note 60 at 106.

\textsuperscript{124} Part II, Sec 1 will return to discuss the question of possible justification of the voluntary submission principle.

\textsuperscript{125} Savigny, \textit{Vocation, supra} note 121 at 45-46, 125; Savigny, \textit{System I, supra} note 47 at x, xix, 7, 8-9, 212-213, 231-232.
previously apparently disconnected threads within a single unified organizing principle.\textsuperscript{126} From this perspective, Savigny’s treatment of the choice-of-law question does not differ from his works on other areas of law.

A review of Savigny’s discussion of particular choice-of-law rules reveals his orthodox approach with respect to the centrality of the voluntary submission principle. This principle is not just fundamental but is also the only principle that lies at the basis of Savigny’s theory of choice-of-law. All other considerations that are foreign to this principle are simply irrelevant. Savigny mocks these considerations as lacking “internal consistency”,\textsuperscript{127} merely juxtaposed in such a way that they hinder the “true principle” of voluntary submission.\textsuperscript{128}

Thus, the organizing principle of voluntary submission provides a basis for Savigny’s rejection of the traditional division between immovable and movable property choice-of-law rules\textsuperscript{129} and underpins Savigny’s objection to the “technical justification” of the “place of business” choice-of-law rule.\textsuperscript{130} These objections are based on the same underlying notion according to which Savigny disregards previously disconnected justifications and disapproves of the idea (that came to be very popular in contemporary

\textsuperscript{126} See e.g. Savigny, \textit{Vocation}, supra note 121 at 49; Savigny, \textit{System I}, supra note 47 at 7, 14, 43; see also Peter Stein, \textit{Roman Law in European History} (Cambridge: Cambridge University Press, 1999) at 119. For a discussion of the history of German thought on the concept of systematization, see Whitman, \textit{supra} note 121 at 80.

\textsuperscript{127} Savigny, \textit{System VIII}, supra note 44 at 206, 210 (with respect to the contract law category), 273 (with respect to the succession law category).

\textsuperscript{128} \textit{Ibid} at 175, 206, 210-211, 273.

\textsuperscript{129} \textit{Ibid} at 137, 175-179. For further discussion of Savigny’s rejection of the traditional division between movable and immovable property, see Part III, Sec 2 (B) (1) (c) below.

\textsuperscript{130} Savigny, \textit{System VIII}, supra note 44 at 204.
literature\textsuperscript{131} and practice\textsuperscript{132}) that a multiple set of normative considerations can be applied with respect to the choice-of-law question.

B. The Operational Mechanism of the Principle

1. The Case of Explicit Choice

The case in which a person explicitly expresses his or her choice regarding the identity of the territory to which he is willing to submit himself provides the ultimate starting point for Savigny’s exposition of the operational mechanism of his theory. Actually, the case of explicit choice provides both the start and end points of the choice-of-law question. In contrast to the contemporary scholarship that has expressed much concern with respect to the precise borders of this principle,\textsuperscript{133} Savigny unequivocally adopts it without further qualifications. For him, a person’s explicit choice of territory should to be honoured for perfect consistency with the organizing principle of choice-of-law.\textsuperscript{134}

\textsuperscript{131} See e.g. Symeonides, “Why Not?”, supra note 13 at 409-411, 417-418 (defending a proposal for integration of several competing approaches to the choice-of-law process).

\textsuperscript{132} Second Restatement, supra note 14 §6. For a detailed discussion of the multiplicity of principles in §6 of the Second Restatement, see Part III, Sec 2 (B) (1) (a) below.

\textsuperscript{133} In contrast to Savigny, contemporary choice-of-law scholarship has been highly perplexed by this question. The debate regarding the possible limitations of parties’ choice exists primarily around questions of: (1) the degree of required connection of the parties to the chosen law; (2) the special cases involving vulnerable parties (such as consumer and employee agreements); (3) and the possibility of choosing non-state law. For a recent discussion of these issues, see Giesela Rühl, “Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency” in Eckart Gottschalk et al eds, Conflict of Laws in a Globalized World (Cambridge: Cambridge University Press, 2007) 153 at 155-176; Symeon C Symeonides, “Party Autonomy in Rome I and II From a Comparative Perspective”, in Katharina Boele-Woelki et al eds, Convergence and Divergence in Private International Law (The Hague: Eleven International Publishing & Schulthess, 2010) 513. I will return to these issues (as well as other related to the scope of the party autonomy principle) in Part II, Sec 2 (A) below.

\textsuperscript{134} Savigny, System VIII, supra note 44 at 135, 196.
This fundamental point of departure of the operational mechanism of Savigny’s theory reveals its fundamental divergence from Beale’s version of vested rights theory, which some scholars have mistakenly associated with Savigny’s approach. While Savigny’s approach fully embraces the now exceptionally popular party autonomy principle without further inquiries as to the possible limits of such choice, for Beale this principle presents an insurmountable challenge. The very possibility of allowing the litigating parties to agree on the identity of the framework that will govern their dispute stands in direct opposition to Beale’s state-centered conception of law and rights as being created and granted by the positive laws of the states. This explains Beale’s famous rejection of the party autonomy principle, which was expressed in the following terms “The fundamental objection to this [party autonomy principle] in point of theory is that it involves permission to the parties to do a legislative act”. Accordingly, while Beale mocks the party autonomy principle, Savigny fully accepts it as a reflection of the organizing principle of voluntary submission in its purest form.

However what about the vast majority of cases in which the person has not expressed any choice? In such case, a complementary argument is required. Actually most of Savigny’s work deals with this complementary argument of “constructive inference” and its two inherent components: “juridical indicators” and “juridical presumptions”.

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135 See e.g. Symeonides, “Dawn”, supra note 90 at 58. For further comments on the incompatibility of Savigny’s approach with Beale’s version of vested rights theory, see Bernard Audit, “A Continental Lawyer Looks at Contemporary American Choice-of-Law Principles” (1979) 27 Am J Comp L 589 at 590-593. 136 For discussion of Joseph Beale’s state-centered underlying jurisprudence and its relation to choice-of-law, see note 242 below. 137 Beale, supra note 23, vol 2 §60 at 1079; vol 3 §332.1 at 1941-1941.
2. The Complementary Argument of Constructive Inference

(a) Constructive Inference

Savigny recognized that the cases in which a person has explicitly stated his choice are relatively rare. As a reply to this challenge, Savigny develops a juridical mechanism that enables the inference of a person’s choice. In other words, even without an express declaration of a person’s will, voluntary submission to the positive law of a certain territory is still possible. Savigny strikingly calls this mechanism “constructive inference”.

How does the mechanism of constructive inference operate? Savigny suggests inferring a person’s voluntary submission through an analysis of his or her voluntary external acts. What makes the constructive inference possible is the process by which a person’s actions are observed and judicially analyzed. Throughout his work, Savigny refers to this process using different terms, namely: “constructive inference”, “inference from circumstances”, “tacit declaration of the will”, “tacit expression of intention” or even “presumed by a general rule of law”. By using all these terms, Savigny refers to the same underlying idea that links a person’s choice to his or her external voluntary actions.

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138 Savigny, System VIII, supra note 44 at 196.
139 Ibid at 202.
140 Ibid at 196.
141 Ibid at 198.
142 Ibid at 202.
143 Ibid at 135.
By objectively evaluating a person’s actions, constructive inference is disinterested in what a given person might think or wish. In other words, the presumed choice is based on strictly objective criteria. By focusing on external actions, the mechanism of constructive inference provides a juridical meaning to the person’s voluntary acts. This explains why Savigny calls these external acts “juridical facts”. These juridical facts (or, as I shall refer to them, using a slightly different formulation, “juridical indicators”), shed light on the content of Savigny’s organizing principle of voluntary submission. From this perspective, juridical indicators are not an independent concept, but serve only as an accessory tool for grasping Savigny’s organizing principle of voluntary submission.

(b) Domicile and Other Juridical Indicators

Domicile is a primary juridical indicator for Savigny. Although Savigny is well aware of how a person’s domicile might be “changeable” and “unsteady”, he ultimately links a person’s domicile to a person’s choice. As Savigny states, domicile is determined by a “perfectly free choice”. By choosing to live permanently in a certain location, a

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Savigny, System VIII, supra note 44, at 346. Kahn-Freund commented on Savigny’s exposition of juridical indicators in the following terms “Today we call these ‘connecting factors’ or ‘points of contact’. Savigny did not use these words, but our conceptual system goes back to his thought” (Kahn-Freund, supra note 3 at 291).

Savigny, System VIII, supra note 44 at 210.

Ibid at 169-171.

Ibid at 135. In this respect it is worth mentioning the considerable debate that has occurred in choice-of-law literature on the nature of the domicile concept. While a decisive majority of scholars seems to endorse the view that the concept of domicile is fundamentally grounded on a person’s choice (See e.g. von Bar, supra note 73 at 112-115; John Westlake, Treatise on Private International Law (Philadelphia: T & J W
person submits himself to the positive laws of this location. Under this conception, the person’s domicile sheds light on his or her choice with respect to the identity of the territory (and subsequently of the positive law) to which the person chooses to belong.

However, domicile is not the only juridical indicator that may shed light on a person’s choice. Savigny presents a list of the following juridical indicators: 149

1. Domicile of the person;

2. Place of the thing (thus, in property law cases this would be the place of the property);

3. Place of the act (thus, in tort law cases this would be the place of the wrong); and

4. Place of the forum. 150

Legal scholars have rightfully pointed out the apparently territorial nature of the above list of juridical indicators. 151 Indeed, all of them are territorial. However, this is not surprising. The organizing principle of voluntary submission deals with the person’s choice regarding certain territory and subsequently with the authority of particular positive

Johnson & Co, 1859) at 34), other scholars have challenged the claim that this notion of a person’s choice determines exclusively the concept of domicile (See e.g. Kahn-Freund, supra note 3 at 394-396; Willis LM Reese, “Does Domicile Bear a Single Meaning?” (1955) 55 Colum L Rev 589 at 594 (Reese, although challenging the claim of a single conception of domicile, admitted the centrality of the understanding of this concept as a reflection of a person’s choice. Ibid at 594). In particular, intriguing debate with respect to this issue occurred between Joseph Beale and Walter Wheeler Cook. Fiercely attacked by Cook for defending a single conception of domicile (Cook, supra note 77 at 194-211), Beale, in turn, mocked Cook’s claim according to which the courts adopt different conceptions of domiciles for different purposes. For Beale, Cook’s claims “[u]ndoubtedly have been true a century and a half ago” (See Beale, supra note 23, vol 1 at §9.4, 92). Beale’s conception of domicile, on the contrary, was based heavily on a single conception of domicile as strictly related to the person’s choice (Ibid §§9.5, 11.1-16.3, 23.3, at 93-96, 122-139, 183-186).

149 Savigny, System VIII, supra note 44 at 40, 169-171.

150 In continuation of this study, I will question this naming of the place of the forum as an appropriate juridical indicator from the perspective of the internal coherency of Savigny’s own argument (See Part III, Sec 2 (B) (1) (b).

151 See e.g. Michaels, “Globalizing Savigny”, supra note 75 at 134; Reimann, “Triumph”, supra note 112 at 590 (“the closest connection principle is fundamentally territorial, though not in rigid fashion”).
law. And since the juridical indicators serve as tools for grasping this territorial choice, they are naturally territorial too.

Furthermore, the above-presented list is not a closed list. Any voluntary action can be considered a legitimate indicator to the inference of a person’s presumed choice. Savigny is very clear on this point: “Accordingly it seems advisable, with regard to voluntary subjection to any local law, the choice of domicile, and the countless other voluntary actions from which legal consequences flow”. Therefore, the domicile, place of the thing, place of the act, and the place of the forum are only representative examples of juridical indicators that may shed light on the person’s choice. As Savigny emphasises, this list only may come into consideration among other juridical indicators that refer to the territory to which each person chooses to belong.

These comments on the nature of juridical indicators shed light on the terminological name of the choice-of-law discipline. Although the title of Savigny’s work was translated as a Treatise on the Conflict of Laws, his vision of the subject challenges the contemporary relevance of the “conflict” terminology. Savigny seems to use this term in a very particular context. Thus, for example, by discussing the situation in which the place of contracting, the location of the thing, and parties’ domiciles are different, he refers to the “collision in respect to territorial laws”. This exposition of collision does not meet the contemporary interest analysis “conflict” term under which the

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152 Savigny, System VIII, supra note 44 at 136 (emphasis added).
153 Ibid at 140 (emphasis in original).
154 On the terminological debate with respect to the name of the subject, see e.g. Cheshire & North, supra note 73 at 16-17; Dicey & Morris, supra note 116 at 36.
155 See Savigny, System VIII, supra note 44 at at 60.
choice-of-law question involves a conflict between competitive laws. What Savigny means by the term “conflict” is a pool of juridical indicators and the manner in which these juridical factors are reconciled in one decision that would be universal in terms of the choice-of-law system. This conception of the choice-of-law question is reminiscent of a “wise and witty” phrase famously cited by Joseph Beale regarding the location of the term “conflict” in the subject: “The only conflict is among the legal authors who are doing this work.”

(c) Juridical Presumptions and the ‘Universal Seat’ Formula

Let me return to Savigny’s obscure and mysterious formula by which every legal relation has its “universal seat”. As has been mentioned, Savigny’s choice-of-law theory has most often been understood in academic literature as being based on this formula, which has been stated in the following terms: “To discover for every legal relation (case) that legal territory to which, in its proper nature, it belongs or is subject (in which it has its seat)”.

The organizing principle of voluntary submission sheds light on the conceptual location of this formula. By analyzing the structure of each of the legal categories (or

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156 For a discussion of the “interest analysis” approach and its fundamental divergence with CBP, see Part III, Sec 1 (B) below.
157 Beale, supra note 23 at 15; see also Kermit Roosevelt III, “The Myth of Choice of Law: Rethinking Conflicts” (1999) 97 Mich L Rev 2448 at 2463 (stating: “While Beale’s account denies the possibility of conflict- only one law governs the transaction - interest analysis admits it….”).
158 See text accompanying note 45 above.
159 Savigny, System VIII, supra note 44 at 133. Or, as Savigny slightly differently formulated elsewhere “To ascertain for every legal relation (case) that law to which, in its proper nature, it belongs or is subject”. Ibid at 70.
“legal relations”, in Savigny’s language) Savigny seeks to establish for each of them a corresponding starting point that reflects a person’s voluntary submission to a particular territory. Thus, the presumption of a person’s domicile in the status category, the presumption of the place of the property in the property category, the place of fulfillment of the contractual obligation in the contract law category, the deceased’s domicile in the succession law category, and the husband’s domicile in the family law category are all grounded in the same organizing principle. In this way, Savigny predetermines for each legal category a starting point or an “inherent juridical indicator” that necessarily follows from the internal structures of legal categories themselves. I shall refer to these inherent juridical indicators as “juridical presumptions”.

This notion of juridical presumption is complex and requires further clarification. How, through analysing each one of the particular private law categories, is it possible to deduce for each one of them, presuppositions as to a person’s presumed choice? Savigny’s point is not easy to grasp and some commentators have even suggested that this deductive process was executed in an arbitrary, irrational way. However, I believe this view would underestimate the coherency of Savigny’s argument on this matter. Indeed, in his treatise on choice-of-law, Savigny generally did not specify the origins of his argument. However, a close review of the treatise reveals that on several occasions, Savigny does make an

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160 Ibid at 148.
161 Ibid at 174, 188-189.
162 Ibid at 194, 203.
163 Ibid at 277.
164 Ibid at 293, 295.
165 Reimann, “Triumph”, supra note 112 at 595 (“Since Savigny did not wish to leave the result completely indeterminate he provided a set of particular presumptions”).
explicit reference to his early work on legal relations as a key to grasping the nature of juridical presumptions of his choice-of-law theory. Accordingly, the ensuing paragraphs elaborate on the nature of Savigny’s notion of legal relations, analyze their internal structures in light of related concepts in the works of the giants of natural rights philosophy, Immanuel Kant (whose legal philosophy, as we will see in the next Part, served as a fundamental basis for Savigny’s general conception of legal thought) and GWF Hegel (who seemed to exert significant influence over Savigny too), and trace the significance of these structures to the above-presented notion of juridical presumptions.

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166 Savigny, System I, supra note 47 at 269-334.
167 Thus, in his discussion on juridical presumptions in the areas of succession and family law, Savigny explicitly refers to his discussion in System I on the nature of these categories (See respectively, Savigny, System VIII, supra note 44 at 272 & 290, n. (a)).
168 Kant, Doctrine of Right, supra note 4.
169 For discussion of the similarity between Kantian and Savigny’s conceptions of phenomenon called “law”, with further rational deduction of a comprehensive system of rights, see Part II, Sec 1 (B) below.
171 Thus, Savigny accepts Hegel’s central notion of “value” as a normative aspect involved in the transaction of a thing (See Hegel, supra note 170 at [63]; Savigny, System I, supra note 47 at 306-307, n. (k)). For a modern incorporation of the idea of value in Neo-Hegelian writings, see Peter Benson, “Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory” (1989) 10 Carozzo L Rev 1077 at 1187-1196)) and, as we have seen in the following paragraphs, he adopts a much more Hegelian conception of Acquired Rights than that of Kant.
172 William Ewald has formulated this point in terms of a future challenge for academic scholarship: “It would be an interesting and instructive exercise to carry the analysis further back and to compare Kant and Savigny on the foundations of contract law, property and marriage.” (Ewald, supra note 119 at 2035). It should be noted, however, that the objective of these paragraphs is not to provide a comprehensive analysis of the differences between Savigny’s conception of legal relations on the one hand, and Kant’s and Hegel’s related conceptions on the other hand (this must be reserved for a more ambitious project), but rather to point to the clear relation of Savigny’s argument to these conceptions.
Surprisingly but despite the acceptance of the basic premises of the nature of the Kantian related concept of “Acquired Rights”,173 Savigny’s conception of legal relations seems generally to be different from that of Kant. While Kant fundamentally conceives the structure of all Acquired Rights as being of a strictly relational character, between two persons,174 Savigny follows Kant only with respect to the contract law category, which is presented in terms of “necessarily relating to two different persons”.175

Thus, Savigny’s conception of property law diverges from that of Kant and seems to be more consistent with that of Hegel176 who viewed all legal relations through the prism of a person’s unilateral acquisition of a corporeal thing and subsequently conceived all private law categories (including contract law) as a relation between a person and thing.177 Savigny’s conception of property law seems to trace this difference between Kant and Hegel. In contrast to Kant’s relational structure of the property law category as a

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173 For discussion on this point and more generally the intimate relation between the Kantian concept of Acquired Rights and Savigny’s concept of “legal relations”, see Part II, Sec 1 (B) below.
174 For a discussion of the centrality of this point within the Kantian conception of Acquired Rights, see Ripstein, supra note 5 at 57-81; Jacob Weinrib, “What can Kant Teach Us about Legal Classification?” (2010) 23 Can J L & Jurisprudence 203 at 213-219 [Weinrib, “Classification”].
175 See Savigny, System VIII, supra note 44 at 195, 205. For a further discussion of Savigny’s conception of the nature of the contract law category, see text accompanying notes 189-193 below.
176 In this way, this Part follows the contours of one of the most fascinating (albeit not always duly acknowledged) debates in contemporary private law theory: the relation between Hegel’s conceptions of contract and property laws to that of Kant. Very generally, two schools of opinions can be delineated with respect to this matter: (1) scholars who support a somewhat “Kantian inter-personal” understanding of these categories of Hegel ((See Peter Benson, “Philosophy of Property Law” in Jules Coleman & Scott Shapiro eds, The Oxford Handbook of Jurisprudence and Philosophy of Law (Oxford: Oxford University Press, 2002) 752 at 765-767; and also Ernest J Weinrib, “Right and Advantage in Private Law” (1989) 10 Cardozo L. Rev. 1283)); and (2) scholars who endorse a “unilateral” understanding of Hegel’s conceptions of property and contract (See Ripstein, supra note 5 at 22, 92- 93; Weinrib, “Classification”, supra note 174 at 210-235). Without delving into the details of this debate, this study simply joins the latter school of opinion which claims that Hegel’s conception of these categories fundamentally diverges from that of Kant.
177 Hegel, supra note 170 at [40], Weinrib, “Classification”, supra note 174 at 226-230.
relation between an owner and non-owner,\textsuperscript{178} Savigny views this category (in line with Hegel) as the relation of an owner to a thing.\textsuperscript{179}

The structure of the law of succession traces Savigny’s divergence from Kant on the property law category. Kant views this category as a special type of contract in a way that will keep the basic relational structure of the legal categories untouched.\textsuperscript{180} For these purposes, he establishes a legal fiction according to which the transfer of succession to the heir is not grounded on the unilateral will of the deceased but through attribution to the heir of a “tacit” acceptance of the succession.\textsuperscript{181} Savigny, on the contrary, presents the law of succession as an extension of property law also through a legal fiction. Under this fiction, the deceased’s personality is transmitted to the heir, as the moment of the deceased’s death is what grants the heir control over the deceased’s property.\textsuperscript{182} In this way, Savigny’s structure of the law of succession follows the structure of property law as the relation of a person to a particular object.

Finally, the case of the family law category reveals Savigny’s almost complete divergence from Kant. While viewing the family law category as following the general structure of Acquired Rights, Kant conceived this category as ultimately based on the same legal basis of Acquired Rights. Thus, the parent-child relationship addresses the possibility

\textsuperscript{178} Kant, \textit{Doctrine of Right}, supra note 4 at [6:260]. It should be noted that this relational conception of property represents Kant’s most developed views. For commentary on Kant’s early conception of property as a relation between a person and a thing, see Ripstein, \textit{supra} note 5 at 92, n. 10.

\textsuperscript{179} Savigny, \textit{System VIII}, supra note 44 at 135; see also Savigny, \textit{System I}, supra note 47 at 299. This conception by Savigny and Hegel of property law is consistent with the traditional conceptions of property law as the exclusive dominion of a person over a thing. See e.g. Whitman, \textit{supra} note 121 at 166; James Gordley, “The State’s Private Law and Legal Academia” (2008) 56 Am J Comp L 639 at 649.

\textsuperscript{180} Kant, \textit{Doctrine of Right}, supra note 4 at [6:293- 6:294].

\textsuperscript{181} \textit{Ibid} at [6:294].

\textsuperscript{182} See Savigny, \textit{System I}, supra note 47 at 310-311.
of acquisition of an entitlement to act in favour of another person.\textsuperscript{183} And the institution of marriage represented for Kant a sort of “special legal contract” between spouses,\textsuperscript{184} which traces the relational structure of Acquired Rights.

Savigny, however, explicitly rejects Kant on this matter.\textsuperscript{185} While similarly to Kant he rejects Roman law’s conception of family law as grounded on the notion of mastery of a father over the entire household,\textsuperscript{186} he also rejects the Kantian conception of family law as purely grounded on a legal basis. For Savigny, family law represents rather a mixed type of category.\textsuperscript{187} Being only partially legal, this structure is based primarily on an independent moral foundation rooted in the cultural attributions of a particular community.\textsuperscript{188}

The above-presented discussion on the internal structures of various legal relations sheds light on the nature of Savigny’s notion of juridical presumptions. Take, for example, Savigny’s discussion on the contract law category. Similarly to other legal categories, Savigny views this category as ultimately governed by the organizing principle of

\textsuperscript{183} Kant, \textit{Doctrine of Right}, supra note 4 at [6:281-6:282].

\textsuperscript{184} Ibid at [6:277-6:280]. For a further discussion of the Kantian purely legal conception of family law, see Ripstein, \textit{supra} note 5 at 74-76. For a somewhat related conception of the institution of marriage as a form of “special contract” in traditional family law thought, see Janet Halley, “What is Family Law?: A Genealogy” (2011) 23 Yale J L & Human 1 at 12-20.

\textsuperscript{185} Savigny, \textit{System I}, supra note 47 at 283.

\textsuperscript{186} Ibid at 283-284. For a further discussion on the failure of Roman law to identify family law as a distinctive category of private law, see Halley, \textit{supra} note 184 at 66, n.236; Wolfram Müller-Freienfels, “The Emergence of Droit De Famille and Familienrecht in Continental Europe and the Introduction of Family Law in England” (2003) 28 Journal of Family History 31 at 32.

\textsuperscript{187} Savigny, \textit{System I}, supra note 47 at 271, 276-279.

\textsuperscript{188} Ibid. at 277-279, 283-287. For a further discussion of Savigny’s conception of family law, see Duncan Kennedy, “Savigny’s Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought” (2010) 58 Am J Comp L 811 at 833-834; HF Jolowicz, \textit{Roman Foundations of Modern Law} (Oxford: Oxford University Press, 1957) at 68. For the centrality of this family law conception in European and American scholarly thought, see Halley, \textit{supra} note 184 at 36-48; see also BH Bix, “State Interests in Marriage, Interstate Recognition, and Choice of Law” (2005) 38 Creighton L Rev 337. I will return in much greater detail to Savigny’s divergence from Kant with respect to the family law category, and the influence of this divergence on traditional and contemporary choice-of-law rules in family law, in Part III, Sec 2 (B) (2) (b).
voluntary submission and names the place of fulfillment of a contractual obligation as a juridical presumption for this category. A closer look at Savigny’s discussion of the nature of contract law liability sheds light on the underlying rationale for this juridical presumption. Savigny conceives the nature of this liability as inherently focused on the performance of the contract. Under this conception of contract law, the formation of contract itself does not signify the acquisition of a given object, but rather acquires a right merely to the performance of the promised act.

By formulating contract law obligations in terms of “mastery over an individual act of the extraneous person”, Savigny follows Kant on this matter. Since the property transfer occurs not at the time of the contract formation, but rather at the time of actual fulfillment, the focus transfers to the last underlying element of contractual entitlement. This is what Savigny means by the “essence” of contractual obligation. And this is why the place of performance is more central than the place of contracting to understanding a person’s choice with respect to the applicable law.

In a similar way, Savigny establishes the juridical presupposition of the place of property as a central object of inquiry within property law relations. The centrality of the legal fiction within the structure of the law of succession category explains the domicile of the deceased as a juridical presumption for this category. Since the category of status

189 Savigny, System VIII, supra note 44 at 204.
190 Ibid at 198.
191 Savigny, System I, supra note 47 at 275, 301.
192 Kant, Doctrine of Right, supra note 4 at [6:273].
193 Savigny, System VIII, supra note 44 at 198.
194 Ibid at 175.
195 Ibid at 272 (a).
deals with the issue of a single person’s capacity to enter into legal relationships (or as Savigny puts it, the “status of the person in itself”)\textsuperscript{196} the place of a person’s domicile is established for this category as a “pure and simple” presumption to this category.\textsuperscript{197} Finally, the states-based conception of family law enables Savigny to state the domicile of the husband/father as a juridical presumption for this category.\textsuperscript{198} This is based on the general acceptance (in Savigny’s time), in the practices of many jurisdictions, of the notion that attributed paramount significance to the father as the head of the family.\textsuperscript{199}

This reading of Savigny’s choice-of-law theory perceives juridical presumptions \textit{only as indicative starting points for the judicial analysis}, rather than fixed rules. The mysterious formula of universal seat is viewed as establishing a juridical presumption that can be overturned by juridical indicators of particular circumstances. In this process, the juridical presumptions (as an indicative starting point) and all relevant juridical indicators are taken into consideration and systematically analyzed and weighted in accordance with their significance.

Stated in these terms, the universal seat formula under this understanding of Savigny’s theory is only \textit{one component} of Savigny’s affirmative account. This account consists of integration of the following notions: explicit consent, constructive inference, juridical presumptions (to which the universal seat formula belongs) and juridical indicators that altogether constitute a unifying ensemble of indicative components that

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{196} \textit{Ibid} at 140; Savigny, \textit{System II, supra} note 47.
\item \textsuperscript{197} Savigny, \textit{System VIII, supra} note 44 at 148.
\item \textsuperscript{198} \textit{Ibid} at 291, 301.
\item \textsuperscript{199} \textit{Ibid} at 291. For further discussion on juridical presumption for family law category see \textit{infra} notes 642-648 and accompanying text.
\end{itemize}
\end{footnotesize}
shed light on the content of the organizing principle of voluntary submission in particular cases.

In the next Section, we will see however that Savigny’s choice-of-law theory has been presented not without significant qualifications and inherent tensions. Grounded on the single organizing principle of voluntary submission and its inherent constituents, this theory incorporates (1) a significant exceptional category to the operational force of this organizing principle and its inherent constituents and (2) an inherent tension within the theory which casts doubt over the inherent coherency of the voluntary submission principle as a single organizing principle. The ensuing Section elaborates on these two notions in turn.
3. Two Deviations from the Voluntary Submission Principle

A. Deviation I: Savigny’s Exceptional Category of Anomalous Laws

The principal division between “normal” and “anomalous” laws provides the ultimate starting point for analysis of Savigny’s Exceptional Category in choice-of-law process. Labeling this division as “the most difficult part of the subject”,200 Savigny classifies the positive law provisions of each state into two categories: “normal laws” and “anomalous laws”201 (or as he sometimes calls them “strictly positive and absolute laws”202 or “purely positive laws”203). Normal laws represent for Savigny positive law provisions that are grounded in purely legal principles. In contrast, anomalous laws (which have been recently coined by Duncan Kennedy as “complex exceptions”204) are based on considerations of moral, ethical, or political order.

Consider the anomalous laws category, which I shall refer to as Savigny’s “Exceptional Category”. This category is divided into two further sub-categories. The first sub-category relates to positive provisions which are of a “strict imperative nature”. Savigny mentions with respect to this category laws that rest on moral grounds205 or reasons of “public interest” that relate to politics, policy, or political economy.206 Throughout the work, Savigny presents several examples of these strictly imperative positive law provisions. He mentions laws that restrict the acquisition of immovable

200 Savigny, System VIII, supra note 44 at 76; see also Kennedy, supra note 188 at 820.
201 Savigny, System VIII, supra note 44 at 166; see also Savigny, System I, supra note 47 at 45-54.
202 Savigny, System VIII, supra note 44 at 77.
203 Ibid at 155.
204 Kennedy, supra note 188 at 820.
205 Savigny, System VIII, supra note 44 at 78.
206 Ibid at 419.
property by Jews,\textsuperscript{207} French and German laws that restrict the capacity of Jews to take out loans,\textsuperscript{208} positive law provisions that adopt polygamy,\textsuperscript{209} provisions that deal with the capacity to acquire property from religious bodies,\textsuperscript{210} and succession law provisions under which the eldest son always succeeds as the sole heir.\textsuperscript{211}

Special attention is owed to the family law category, the internal structure of which, as we have seen,\textsuperscript{212} is based on mixed moral and legal grounds. Savigny admits that the anomalous positive law provisions most frequently occur in this category.\textsuperscript{213} Among the provisions that Savigny mentions within the family law category are those regarding the prohibition of gifts between spouses (which are related to the “preservation of moral purity”\textsuperscript{214}) and divorce provisions (which are related to the “moral nature of marriage”\textsuperscript{215}).

The second sub-category of anomalous laws is of the “unique legal institutions” of each legal system. Savigny mentions in this respect the legal institution of “civil death” that was recognized in his time solely by Russian and French systems and the institution of slavery that was in his time abolished in European states.\textsuperscript{216}

This two-fold division of positive law provisions provides the basis for the Exceptional Category in choice-of-law process. The positive law provisions of every

\textsuperscript{207} Ibid at 78, 167.
\textsuperscript{208} Ibid at 167.
\textsuperscript{209} Ibid at 166.
\textsuperscript{210} Ibid at 167.
\textsuperscript{211} Ibid at 279, 283-284 (indicating that this positive law provision has a “political purpose that lies beyond the domain of pure law”).
\textsuperscript{212} See supra notes 183-188 and accompanying text.
\textsuperscript{213} Savigny System VIII, supra note 44 at 291; Savigny System I, supra note 47 at 284 (e) (mentioning that the family law category belongs especially to the category of “absolute laws”).
\textsuperscript{214} Savigny System VIII, supra note 44 at 297.
\textsuperscript{215} Ibid at 298.
\textsuperscript{216} Ibid at 79-80, 168.
country have to be divided into two categories. When the organizing principle of voluntary submission applies with respect to normal laws, the category of anomalous laws is immune from the unifying methodology of Savigny’s choice-of-law theory and governed strictly by the domestic law of a particular state (*lex-fori*).217

Thus, for example, a French judge must apply his or her local law relating to the acquisition of immovable property by Jews, regardless of the identity of any choice-of-law rule that Savigny’s theory of choice-law would have applied. Similarly, the issue of capacity of religious bodies has to be governed by *lex-fori*, irrespective of the choice-of-law rule that the voluntary submission principle would impose.218 The same point applies with respect to the “unique legal institution” sub-category. In the same way a foreign judge has to insist on his or her special legal institution, this institution cannot be recognized under any circumstances in the domestic system.219 In other words, Savigny does not express his opinion with respect to the question of whether a given positive provision is “good” or “bad”. What matters is not the substantive merits of the positive law provisions of a given legal system, but rather the underlying basis of this provision: legal, moral, or political.

This apparently neutral treatment of different positive law provisions makes Savigny’s above-presented examples seem less shocking.220 Take for example, the above-mentioned provision that restricts the acquisition of immovable property by Jews. With

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218 *Ibid* at 166.
219 *Ibid* at 80.
220 Regarding the debate on Savigny’s apparent anti-semiticism, see Kennedy, *supra* note 188 at 821, n. 29; Michaels, “Globalizing Savigny”, *supra* note 75 at 119, n 119-120.
respect to this issue the German judge has to apply its discriminative domestic law irrespective of the place of property rule that emanates from Savigny’s choice-of-law theory. However, the same argument has the opposite effect. As Savigny explains, if the same case is handled by a foreign forum that does not have a similarly discriminatory provision, the same lex-fori rule still applies.221 In this case, the German Jewish residents can enjoy immovable property rights in the foreign forum irrespective of the place of the property and the discriminatory provision in Germany.

In the contemporary choice-of-law landscape, this inherent inquiry into the underlying basis of various positive law provisions relates to several doctrines and approaches. Thus, Brainerd Currie’s interest analysis conceptually follows Savigny in its tracing of the underlying policies of the competing laws.222 However, there is a significant difference. While interest analysis goes one step further and purports to promote the laws’ underlying purposes through choice-of-law process, Savigny’s approach insists on a two-dimensional inquiry into the consideration criteria that lies at the core of each positive law provision: normal or anomalous law? Once a given positive law provision is classified as normal law, the ordinary choice-of-law approach of voluntary submission applies. From this perspective, Savigny’s notion of anomalous laws seems to be more conceptually

221 Savigny, *System VIII*, *supra* note 44 at 79.
defined as an exceptional category in the choice-of-law process, rather than as its primary source.

The last point leads to the question of the relation of Savigny’s Exceptional Category of anomalous laws to the established contemporary European doctrine of “mandatory rules” or “rules of immediate application”. The doctrine of mandatory rules, indeed, seems clearly to follow Savigny’s notion of anomalous laws. In bypassing the ordinary choice-of-law process, these rules reflect the absolute priority of certain domestic provisions over any other potential foreign law.

One might be puzzled by the shift in Savigny’s thought involved in the creation of an Exceptional Category of laws that shall be governed exclusively by domestic law (lex- fori). As has been mentioned, Savigny viewed the lex fori solution as no less than a “very dangerous” solution to the choice-of-law question, directly opposed to his universal conception of the subject and to the organizing principle of voluntary submission. Despite Savigny’s apparent deep antagonism towards this solution, this solution underpins precisely the Exceptional Category. From this perspective, the comments of one choice-of-

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223 Accordingly Friedrich Juenger noted that “Savigny’s commitment to universalism was limited because of the ‘strictly positive laws’ wide exception”. See Juenger, “Rate”, supra note 90 at 96.
224 See e.g. Rome II Regulation, supra note 27 Art. 16. For discussion of the European tradition of “mandatory rules”, see e.g. Symeon C Symeonides, General Report, in Symeon C Symeonides ed, Private International Law at the End of the 20th Century: Progress or Regress (Boston: Kluwer Law International, 1998) 1 at 40-41 [Symeonides, “Progress or Regress”].
225 See e.g. Symeonides, “Dawn”, supra note 90 at 33-34 (defining “rules of immediate application” as “[R]ules of law which are intended to apply to multistate cases ‘immediately’ or ‘directly’ in the sense of bypassing the ordinary choice-of-law rules”).
226 An example of such rule is the Swiss provision that instructs the courts in certain situations in the law of damages to bypass the ordinary choice-of-law process and to apply the domestic law directly. For discussion of this provision, see Symeonides, “Progress or Regress”, supra note 224 at 40-41; see also Mathias Reimann, Conflict of Laws in Western Europe (Irvington, NY: Transnational Publishers 1995) at 28-30 (referring to Savigny’s foundation of the doctrine of “mandatory rules”).
227 See Part I, Sec 1 (A) (2) above.
law scholar on the apparent *lex-fori* tendency of Savigny are revealed to be not so frivolous or disconnected from reality.

**B. Deviation II: The Frequent Affixation on Juridical Presumptions**

As we have seen, Savigny perceives the concept of voluntary submission as an organizing principle of his theory of choice-of-law. Cases where the person’s choice is not explicitly stated represent for Savigny cases of constructive inference of choice. voluntary submission is “constructively” inferred in these cases through the operational mechanism of juridical indicators and juridical presumptions according to which the juridical presumptions serve as a starting point for further analysis of an unlimited pool of juridical indicators.

This exposition of the relation between juridical indicators and juridical presumptions provides, in my view, the most correct and plausible reading of Savigny’s theory. However, the operative result of this theory seems to have presented a particular inconvenience for Savigny. Involving inherently a judicial analysis and process of

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228 It should be noted that Savigny’s principal objection to the *lex-fori* solution has been noticed by many commentators and has been regarded as one of the central blocks of his choice-of-law thought. See e.g. Juenger, “Page of History”, *supra* note 60 at 450; de Nova, *supra* note 83 at 457 (stressing Savigny’s fundamental rejection of the *lex fori* solution). Albert Ehrenzweig was perhaps the only one who noticed the *lex-fori* tendency of Savigny’s approach. For his comments and further correspondence with Edwin Briggs on this point, see Ehrenzweig, *supra* note 2 at 322; Edwin Briggs, “An Institutional Approach to Conflict of Laws: ‘Law and Reason’ versus Professor Ehrenzweig” (1964) 12 UCLA L Rev 29 at 39 and Albert Ehrenzweig, “Savigny and the Lex Fori, Story and Jurisdiction: A Reply to Professor Briggs” (1965) 53 Cal L Rev 535 at 535-536.

229 In the continuation of this study we will see that *lex-fori* elements are even more deeply embedded in Savigny’s choice-of-law thought than one may think. These elements go beyond the Exceptional Category of anomalous law and extend to such issues as special accounts of tort law ((see Part III, Sec 2 (B) (2) (a)), incorporation of the place of the forum as a relevant juridical indicator (see *infra* note 583-587 and accompanying text), and adoption of a broad conception of the procedure category within the substance-procedure distinction (see *infra* note 700).

230 See Part I, Sec 2 (B) (2) (c) above.
weighting judicial indicators and judicial presumptions, this theory accords significant
discretion to the courts. Therefore, at the implementation level, a clear tension can be
traced in several places between the fundamental structure of the theory and Savigny’s
unwillingness towards judicial discretion.\footnote{See Reimann, “Triumph”, supra note 112 at 596 (framing Savigny’s relation between juridical
presumptions and juridical indicators as a “struggle between predictability and flexibility”).} In several places, Savigny merely ignores
juridical indicators in a way that juridical presumptions exclusively determine the identity
of the law to be applied.

Thus, for example, Savigny hesitates regarding the appropriate relation between the
juridical presumption of the place of the property and the juridical indicator of the place of
the domicile in the case of property choice-of-law rules. As we have seen,\footnote{See supra note 194.} Savigny
determines the connecting factor of the place of property as a juridical presumption of a
person’s voluntary submission for the property law category. However, the discretionary
power of judicial authority in cases where the location of property is arbitrary, poses a
special problem for Savigny. Savigny starts with the statement according to which both the
place of the property and the owner’s domicile are normatively justifiable connecting
factors, since they “both arise from voluntary submission”.\footnote{Savigny, System VIII, supra note 44 at at 174.} From here follows Savigny’s
reference to the normative significance of the particular circumstances of property law
cases.\footnote{Ibid at 181.} However, Savigny immediately disregards the possibility of this inherently
flexible judicial analysis:
In general, however, we must hold fast to the application of the law of the place where the thing is situated, as the rule; so that a different treatment of the first of the classes of things above considered [the cases where the location of the thing is arbitrary] must be regarded only as a comparatively rare exception.\(^{235}\)

The tension here between the stated commitment to the organizing principle of voluntary submission and the affixation of the juridical presumption is clear. Savigny’s preference is for “simple and exclusive” choice-of-law rules for the sake of normatively justifiable rules. Despite the normative relevance of the place of the domicile factor and the potential dependency on particular circumstances, the fixed rule of the place of the property prevails.

Another example is the relation between the juridical presumption of the place of contractual performance and the juridical indicator of the place of business. As we have seen,\(^{236}\) Savigny perceives the place of fulfillment of contractual obligation as a juridical presumption for the contract law category. Nonetheless, in one place this connecting factor is presented as fixed and exclusively determines contract choice-of-law. Thus, in cases when the place of fulfillment is not specified, Savigny discusses surrounding circumstances (such as a place of business) that are designed to shed light not on the juridical significance of the voluntary submission principle, but rather on the place of fulfillment itself.\(^{237}\) Under this exposition, the juridical presumption, which was originally designed to serve as an accessory tool of the voluntary submission organizing principle, gains control over the principle itself. However, in another place, we witness a different

\(^{235}\) Ibid.

\(^{236}\) See supra notes 189-193 and accompanying text.

\(^{237}\) Savigny, Savigny, System VIII, supra note 44 at 204.
conception of “place of business”. Here Savigny returns to the organizing principle of voluntary submission without the prism of the juridical presumption of place of fulfillment of the obligation: “To the permanent seat of this business, the thoughts, the expectation, the voluntary submission of the parties were directed”.

The tension between the affixation of juridical presumption and the unifying principle of voluntary submission is traced again. On the one hand we have the conception of juridical indicators and juridical presumptions that are coherently situated within Savigny’s choice-of-law theory. Under this exposition of the relationships between juridical presumptions and juridical indicators, juridical presumptions are not “fixed” but rather present “loose” starting positions that can be overturned by the relevant juridical indicators of the particular circumstances. In the adjudicative process, the court not only focuses on the connecting factor of juridical presumption, but also systematically evaluates the parties’ external voluntary acts.

This approach seemed to be mentioned in the footnote by the translator of Savigny’s Treatise of the Conflict of Laws, William Guthrie. He pointed out the conceptual difference between Savigny’s rigid contract law juridical presumption and a more flexible traditional English approach in the following terms: “No doubt there are cases where the place of contracting is of importance, but generally the place of performing is of more”. This statement accepts the place of fulfillment of contractual obligation as a juridical

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238 Ibid at 205 (emphasis not in original).
239 Ibid at 228 (emphasis not original).
presumption, but it does not automatically disqualify the significance of the place of contracting as a relevant juridical indicator.

However, on the other hand, Savigny’s approach frequently becomes an over-rigid approach under which the adjudicative authority must follow fixed juridical presumptions. This affixation of juridical presumptions is at odds with the underlying basis of Savigny’s theory and departs from that of one of the above-mentioned central elements of Savigny’s general thought - the jurisprudence of single organizing principles. Since the affixation of juridical presumptions is inconsistent with the voluntary submission principle, it challenges the very nature of this principle as a single principle for the choice-of-law question.

Furthermore, the affixation of juridical presumptions exposes Savigny’s position towards his own criticism against vested rights theory. Take for example Joseph Beale’s version of vested rights theories. This version rested on a vague understanding of a phenomenon called “law”, its relation to the concept of “rights”, and two further complex assumptions with respect to choice-of-law, the internal logic of which has been heavily

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240 For discussion on the jurisprudence of single organising principles as one of the foundational blocks of Savigny’s thought, see Part I, Sec 2 (A) above.


242 Joseph Beale’s underlying jurisprudence and its relation to the choice-of-law question deserves a separate analysis. However, in a nutshell, it can be stated as follows. Beale conceived the phenomenon of “law” as a system of the positive provisions of each country that aims to protect certain interests such as “human demand or desire” (Beale, supra note 23, §§ 8A1, 8A7 at 58, 63). These interests were completely identified with the concept of Primary Rights. The violation of Primary Rights gives rise to Secondary Rights that had been designated to restore Primary Rights (Ibid §§ 8A1- 8A.28 at 58-86). Under this taxonomy of rights, the function of choice-of-law is to trace where and under which law the plaintiff’s Secondary Right had been created and all forums must recognize this right (Ibid §§1.14, 8A8 at 12, 64 (stating the primary goal of his
shaken by Beale’s opponents. At its most basic level, vested rights theory defends the view according to which the plaintiff’s right does not exist until it has “vested” under the positive law of the country where the “last act” occurred. Thus, analogously to the subject of recognition of foreign judgments, the courts are viewed as “enforcers” of the plaintiff’s existing right, which the plaintiff acquired under foreign law. Thus, for example, the American First Restatement adopted the “last act” of the place of the injury as the choice-of-law rule for tort law cases.

Over the years, legal realists heavily criticized the “metaphysical assumption” of vested rights theory according to which the courts serve as enforcers of pre-existing rights of the plaintiff, and have challenged the last event’s “mechanical method” that often led to arbitrary results. Lea Brilmayer later focused on another aspect of this theory. Since

work in terms of tracking “the time and place in which legal rights come into existence” (Ibid §8A8 at 64)). At this point Beale introduces two complex assumptions. First, it was argued that in dealing with private law cases involving foreign elements, the courts do not apply the foreign law, but recognize under the domestic law the plaintiff’s Secondary Right that has been “vested” under the foreign law. Accordingly the foreign law is applied under this conception not as a law, but rather as a “fact” and as such does not negate the sovereignty of the forum (Ibid §5.4 at 53). Secondly, it was argued that the domestic laws ultimately govern the acts made within a given jurisdiction. Since the Secondary Right is created under the law at the time of the occurrence of the last event that comprised the act, the positive law of the country where the last event took place ultimately determines the question of choice-of-law. For related expositions of the underlying fundamentals of Beale’s version of vested rights theory, see Dane, supra note 44 at 1194-1196; Lea Brilmayer, Conflict of Laws, 2nd ed (Boston: Little Brown, 1995) at 20-25.

243 See e.g. Elliott E Cheatham, “American Theories of Conflict of Laws: Their Role and Utility” (1945) 58 Harv L Rev 361 at 365; Michaels, “Country-Of-Origin Principle”, supra note 241 at 226-234; Roosevelt, supra note 17 at 1830-1841 (questioning the coherency both of Beale’s argument and Beale’s assumptions with respect to choice-of-law).

244 Beale, supra note 23 §§ 4.12, 8A1, 8A6 at 45-47, 58, 62-63.


247 See e.g. Elliott E Cheatham, “American Theories of Conflict of Laws: Their Role and Utility” (1945) 58 Harv L Rev 361 at 365; Michaels, “Country-Of-Origin Principle”, supra note 241 at 226-234; Roosevelt, supra note 17 at 1830-1841 (questioning the coherency both of Beale’s argument and Beale’s assumptions with respect to choice-of-law).

248 Cook, supra note 77 at 21-36.

249 Ibid at 203. For criticism along similar lines, see Currie, supra note 24 at 138-139 (mentioning the “machine” operation of vested rights theory); Symeonides, Revolution, supra note 12 at 10. For further
the states are those who create the plaintiff’s right through their positive laws, she argued that although Beale’s theory purports to present an argument about the content of parties’ rights and duties, it completely fails to delineate this content.

Almost a hundred years before Cook’s attack and 140 years before Brilmayer’s work, Savigny rejected this theory on strikingly similar grounds:

This principle [vested rights theory] is not only arbitrary, because the place of origin in itself, and irrespective of the circumstances in which the legal relation may have been brought into existence, cannot determine the local law to be applied; but it has only the appearance of a substantive principle, while it is in reality of a merely formal nature…This principle leads into a complete circle; for we can only know what are vested rights, if we know beforehand by what local law we are to decide as to their complete acquisition.

Similarly to Cook and Brilmayer, Savigny doubts this theory because of its arbitrariness and circularity. It is unclear why the “last event of private law” ground of liability “in which the legal relation came to existence” (as Savigny refers to it) has exclusively to determine the identity of the applied law. Furthermore, as Savigny explains, prospectively re-paraphrasing Brilmayer, this theory is normatively hollow. While the single territorial rule of the last event determines rights, the content of these rights remains unexplained.

discussion on the criticism raised by legal realists against vested rights theory, see infra notes 470-478 and accompanying text.


250 Lea Brilmayer, “Rights, Fairness, and Choice-of-law” (1989) 98 Yale L J 1277 at 1288. As Brilmayer put it “Note, however, that the concept of ‘rights’ itself did not supply these territorial rules; the territorial rules, instead, defined the rights” (Ibid at 1292) [Brilmayer, “Rights”]. For related discussions of this point, see Michaels, “Country-of-Origin Principle”, supra note 241 at 228- 230; Carswell, supra note 241 at 279-280.

251 Savigny, System VIII, supra note 44 at 147; see also Ralf Michaels, “Globalizing Savigny”, supra note 75 at 131.
Savigny has mocked this theory due to its normative emptiness and arbitrariness. However, the same criticism applies to his own above-mentioned tension between juridical indicators and juridical presumptions. This seems precisely to be the case with respect to Savigny’s affixation of juridical presumptions. Similarly to the rigidity of the “last act” arbitrary rule of vested rights theory, a rigid connecting factor of the “affixation argument” prevails over the normatively justifiable principle of voluntary submission. In this way, Savigny’s regular affixation of juridical presumptions falls into the same trap of vested rights theory. In other words, this affixation is fatal to Savigny’s position from the standpoint of his own criticism of vested right theory.

What led Savigny to this betrayal of his own organizing principle? What is the explanation for this inherent tension between juridical presuppositions and juridical indicators at the theory’s implementation level? It would appear that a reference to Savigny’s general scholarship is useful. One of Savigny’s central contentions addressed the role of judicial authority in society. He viewed the judges as bureaucrats, as applicators of positive law provisions. This conception of judicial authority was not unusual in the tradition of Savigny’s days. Under this tradition, complex cases were even taken away from the competence of the courts, and referred to the evaluation of university professors.252 From this perspective the internal tension of Savigny’s approach at its

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implementation level can be explained by the tension between the inherent flexibility of his choice-of-law theory and his general view on the role of judicial authority, in which he objects to this discretion. This explains why, at the implementation level, Savigny seems to hesitate and retreat from his own theoretical framework in favor of reducing judicial discretion.253

Drawing on Savigny’s theory, the next Part will present a related (albeit not identical) Neo-Kantian conception of choice-of-law or the so-called “Choice-Based Perspective” of choice-of-law (“CBP”). While adopting many of Savigny’s insights on the nature of the subject, CBP distances itself from Savigny’s choice-of-law account in many respects. Although grounded, as we will see, on a shared theoretical basis, CBP in some parts follows and extends Savigny’s argument, in some parts it modifies and qualifies it, and in other parts it completely departs from it and replaces it with an alternative argument. More specifically, and in a nutshell, CBP follows a significantly qualified version of Savigny’s voluntary submission principle. It also accepts and elaborates on an extended and much qualified version of each of Savigny’s notions of the party autonomy principle and constructive inference (together with its two accessory tools: juridical indicators and juridical presumptions). Finally, CBP will reject both of Savigny’s deviations from the organizing principle of voluntary submission and will introduce instead an alternative truly neo-Kantian element for the choice-of-law process.

253 For a somewhat similar point, see Kahn-Freund, supra note 3 at 408 (explaining the tension between what he calls the “hard” and “soft” concepts of Savigny’s theory, in the following terms: “Savigny saw that this doctrine [Savigny’s choice-of-law theory] inevitably involved an accretion to the power of the judge”).
II. The Three Foundational Blocks of CBP

1. The Concept of “Relational Juridical Choice” as an Organizing Principle

   **A. The Origins of Savigny’s Organizing Principle of Voluntary Submission**

   Given that Roman law does not provide the source for choice-of-law,\(^{254}\) what are the origins of Savigny’s voluntary submission principle? The clearest candidate for grasping the normative nature of this principle would probably be the comprehensive legal philosophy of Kant.\(^{255}\) Through the years many scholars have noticed the apparently Kantian foundations of Savigny’s general thought. Thus, Franz Wieacker has identified Savigny as a “firm believer in Kant’s theory of law”\(^{256}\) and NE Simmonds characterized Savigny’s scholarship as “fundamentally informed by Kantian assumptions”.\(^{257}\) These statements are well founded. It is difficult to think of a stronger proponent of Kantian thought than Savigny. Through analyzing and comparing Kantian and Savigny’s conceptions of the phenomenon called “law” with further rational deduction of comprehensive Systems of Rights, the ensuing Section shows how deeply Kant exerted influence on Savigny.

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\(^{254}\) For discussion of the irrelevance of Roman law for grasping the nature of the voluntary submission principle, see text accompanying notes 119-124 above.

\(^{255}\) Kant, *Doctrine of Right*, supra note 4.

\(^{256}\) Wieacker, *supra* note 252 at 306, 315.

B. Kantian and Savigny’s Systems of Rights


The Kantian conception of the phenomenon called “law” can be characterized as a comprehensive system of Rights as a reflection and development of a single foundational block of his legal theory: the Universal Principle of Right (“UPR”), which is stated in the following terms: “any action is right if it can coexist with everyone’s freedom….” This formulation points to the relational aspect of interaction between human beings. The fundamental imperative of this interaction is that one person’s action has to be consistent with the freedom of other persons. Accordingly, the ultimate function of law (if it has to be stated in terms of function) is to address those actions of individuals which infringe the UPR.

The way in which Kant presents the UPR underlies a form of interaction, rather than any content of interaction. Through abstraction from particular wishes and desires, UPR is the only principle that provides a normative manifestation of individuals’ external actions. As Kant explains, behind any given action lies a certain impulse that drives this action. Thus, for example, we can decide to enter into a legal contract in order to make a profit. However, from the perspective of the UPR, what matters is the action itself, rather than the reason that lies behind this action. The subjective reasons that stand behind the interaction are irrelevant to this principle. From this perspective, Kant’s exposition of the UPR is a deontological account, rather than a consequentialist account. Instead of focusing

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258 Kant, Doctrine of Right, supra note 4 at [6:230].
on the consequences that a given action produces, UPR focuses exclusively on the normative significance of the action itself.\(^{259}\)

Crucial to Kant’s argument is that the exposition of the UPR (as his entire legal philosophy) refers strictly to special legal morality (or as Kant labels it, “juridical” morality), rather than to some kind of ethical order.\(^{260}\) This makes the UPR simultaneously rigid and autonomous. It is rigid because the only juridical principle that governs interaction between human beings is that of relational freedom. And it is autonomous, because this principle excludes all other considerations as juridically relevant to the individuals’ interaction. Therefore, considerations of ethical order or considerations that deal with such matters as a fair distribution of benefits and burdens, are simply irrelevant to the Kantian special morality of law.

Kant recognizes three independent stages in the development of the UPR: (1) “Innate Right”; (2) “Acquired Rights”; and (3) “Public Right”. Each of these stages follows from the basic imperative of the UPR and accordingly has to be fully consistent with it.\(^{261}\) First, at the first stage, there is so-called Innate Right as an immediate reflection of UPR from the perspective of a single person, which entails an inherent entitlement that every person has as a birthright.\(^{262}\) Innate equality, the presumption of innocence, freedom

\(^{259}\) For a discussion of the conceptual differences between deontological and consequentialist moralities, see Leo Katz, “Form and Substance in Law and Morality” (1999) 66 U Chi L Rev 566.
\(^{260}\) Kant, Doctrine of Right, supra note 4 at [6:219]. Kant’s clear distinction between ethical and juridical orders follows from the structure of the Kantian Metaphysics of Morals. While the ethical order is discussed in the second part of the book - Doctrine of Virtue, the juridical order is discussed in the first part of the book - Doctrine of Right.
\(^{261}\) Ibid at [6:230].
\(^{262}\) Ibid at [6:237-6:238].
of expression, and freedom of belief are among the constituents of this right that Kant speciﬁes.

Then, at the second stage, Kantian legal philosophy introduces the next set of natural rights - that of Acquired Rights. For Kant, the UPR is not sufﬁcient to address the situations in which the person is willing to acquire external objects that are situated beyond his or her physical possession: a corporeal thing, or an action of another person. Accordingly, a supplementary normative argument is required to address these cases in a way that would be consistent with the imperative of relational freedom.263 Kant presents three types of Acquired Rights: (1) Right to a Thing (Property Right); (2) Right Against a Person (Contractual Right); and (3) what Kant calls Right to a Person Akin to a Thing.264 The Right to a Thing category addresses the possibility of the lasting acquisition of a corporeal thing, such as movable and immovable property. The modern private law category of property law generally correlates with this category.265 The Right Against a Person addresses the possibility of acquiring the performance of another person’s action.


264 Kant, Doctrine of Right, supra note 4 at [6:237-6:238; 6:245-6:257]. Accordingly, the Kantian concept of Acquired Rights should not be confused with the terminologically identical concept of “acquired rights” that is frequently used in choice-of-law literature in the context of rights “acquired” under foreign laws that domestic courts enforce (see supra note 242). Since Kantian Acquired Rights relate to the rights that individuals have with respect to objects external to them in the regime of purely private rights, they have nothing to do with the existence of sovereign states and enforcement of their positive law provisions in domestic courts.

265 For a discussion of the Kantian conception of property law category and its relation to the modern conception of property law, see Weinrib, “Property”, supra note 263 at 801-808; Ripstein, supra note 5 at 86-107.
The modern private law category of contract law generally correlates with this category.266 Finally, *Right to a Person Akin to a Thing* refers to the modern category of family law as comprised of spousal and parent-child relationships. This category is conceived by Kant as a mixture of the first two of the categories. In this category the person acquires not the specific performance of another person’s action but rather the general entitlement to act in favour of the other person. The instances of parent-child relationships, marriage, and employment contracts267 are mentioned by Kant as representative examples of this category of Acquired Rights.268

The above-presented three-fold classification of Acquired Rights is self-exhaustive. Made according to the rational classification of potential objects of acquisition, it insists that private law should be classified into (and only into) the following three categories: property law, contract law and family law. One may notice the absence of the contemporary private law category of tort law from this classification scheme. However, this would be an underestimation of Kantian argument. Contemporary tort law liability is situated within the Kantian account under the concept of *wrongdoing*, according to which persons have to interact with other persons in a way that would be consistent with the UPR

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267 For the purposes of this study I do not delve into the question of the conceptual similarity between modern labour law and family law under the Kantian unifying theoretical basis of the *Right to a Person Akin to a Thing*. Instead, I simply focus on the contemporary vision of family law as comprised of spousal and parent-child relationships. On the historical formation of the contemporary family law category around these relationships, see Janet Halley & Kerry Rittich, “Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism” (2010) 58 Am J Comp L 753 at 755-757.

268 For further discussion of the Kantian category of *Right to a Person Akin to a Thing*, see Weinrib, “Classification”, *supra* note 174 at 210-219, 225-230; Ripstein, *supra* note 5 at 70-81.
and Acquired Rights. In other words, Kantian legal philosophy views tort liability not as absent, but rather as an action that is inconsistent with a previously established system of juridical rights.\(^{269}\)

Finally, the Kantian system of Rights culminated in the third stage of UPR’s progression - that of Public Right. The regime of purely private rights of Innate Right and Acquired Rights is characterized by Kant as the “State of Nature”. In contrast to Innate Right, the normative structures of Acquired Rights are so obscure and indeterminate that they are perceived as provisional, rather than conclusive.\(^{270}\) This provisional nature of Acquired Rights impels individuals to leave the regime of purely private rights in favor of establishing sovereign states and public legal institutions that will guarantee the regime of property entitlements of Public Right (or, as Kant refers to it, the “Rightful Condition”).\(^{271}\) In this way, the public legal institutions that create law (the legislative branch), apply law (the judicial branch), and enforce law (the executive branch) are ultimately justified by the indeterminacy of Acquired Rights in the State of Nature. From this perspective, Kantian justification of public legal institutions is the reverse of traditional thinking. Their existence is not perceived as an effective tool for promotion of certain values, but as necessarily following from the organizing principle of UPR.\(^{272}\)

\(^{269}\) For discussion of this point, see Weinrib, “Classification”, supra note 174 at 212-213.

\(^{270}\) For a debate between contemporary Kantian commentators on this point, see Weinrib, “Property”, supra note 263 at 808; Ripstein, supra note 5 at 177; Sharon Byrd & Joachim Hruschka, Kant’s Doctrine of Right (Cambridge: Cambridge University Press, 2010). Without delving into the details of this debate, this study simply adopts a position that supports the provisional nature of Acquired Rights vis-à-vis Innate Right.

\(^{271}\) Kant, Doctrine of Right, supra note 4 at [6:297, 6:313]; see also Weinrib, “Property” supra note 263 at 808-810. For further discussion of the Kantian notion of the purely private regime and the problem of indeterminacy, see infra notes 322-324 and accompanying text.

\(^{272}\) For discussion of this point, see e.g. Ripstein, supra note 5 at 8-9, 145-181.
2. Savigny’s System of Rights

The first two stages of the Kantian conception of law as a comprehensive system of rights can be clearly traced in Savigny’s scholarship. The similarity between the two is striking. Savigny fully embraces the Kantian UPR as the first building block for grasping the nature of the normative phenomenon called “law”:

“Man stands in the midst of the outer world, and the most important element, to him in this surrounding of his, is the contact with those who are like him, by their nature and destination. If now in such contract free natures are to subsist beside one another mutually assisting, not hindering themselves, this possible only through the recognition of an invisible boundary within which the existence and activity of each individual gains a secure, free space. The rule, by which those boundaries and that free space are determined, is the law....”

Formulated in slightly different terms, this passage seems to be fully consistent with the fundamental notion of Kantian legal philosophy. For Savigny, as for Kant, the phenomenon called “law” is not rooted in the coercive apparatus of the state, but rather in the purely rational concept of UPR that exists prior to any experience, and mandates persons to act in a way that will co-exist with the freedom of other persons.

The evident similarity between Kant and Savigny goes further and extends with respect to the subsequent rational deduction of natural private rights from UPR: Innate Right and Acquired Rights. Thus, Savigny fully accepts Kantian terminology and is

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273 Savigny, System I, supra note 47 at 269; see also Savigny, System II, supra note 47 at 1-2. For a similar comment on Savigny’s direct adoption of Kantian UPR, see Reimann, supra note 42 at 891-892.

274 Savigny, System I, supra note 47 at 270.

275 Ibid at 269-270; Savigny, System II, supra note 47 at 1-2. For a similar comment on Savigny’s direct adoption of Kantian UPR, see Reimann, supra note 42 at 891-892. Something similar to the Kantian UPR appears in Hegel’s work. See Hegel, supra note 170 at [38].

276 Savigny, System I, supra note 47 at 272-274.
content with respect to Kantian Innate Right.\textsuperscript{277} Moreover, Savigny’s central concept of “legal relations”\textsuperscript{278} seems to clearly mirror the Kantian notion of Acquired Rights. In this regard, Savigny seems to follow the Kantian strategy. Thus, he accepts Kantian insights that the juridical world consists of persons and things.\textsuperscript{279} Savigny also accepts the Kantian notion that legal relations (or Acquired Rights in Kantian terms) address the possibility of acquisition of objects external to the person.\textsuperscript{280} And similarly to Kant, Savigny distinguishes legal relations according to matters of acquisition (such as corporeal things or another person’s acts) and form (specifically legal institutions that actualize this relation, such as property law and contract law).\textsuperscript{281} Finally, Savigny seems to take a side in the contemporary debate between Kantian scholars with respect to the question of whether the Innate Right differs sharply from Acquired Rights in the sense that it is not provisional (as Acquired Rights are) but rather conclusive.\textsuperscript{282}

Surprisingly however, despite the acceptance of the basic Kantian premises of the nature of Acquired Rights, Savigny’s conception of legal relations seems generally to be

\textsuperscript{277} \textit{Ibid.} It should be noted, however, that Savigny seems to argue that the Innate Right is not individualization of the UPR from the perspective of a single person (see Ripstein, \textit{supra} note 5 at 35, 161-162) but rather an independent extension of it.

\textsuperscript{277} Savigny, \textit{System I}, \textit{supra} note 47 at 269-271.

\textsuperscript{278} For a detailed discussion of Savigny’s concept of “legal relations”, see Part I, Sec 1 (A) (1) & Part II, Sec 1 (B) (2) above.

\textsuperscript{279} Savigny, \textit{System I}, \textit{supra} note 47 at 274. For a discussion of this point from the Kantian perspective see Weinrib, “Classification”, \textit{supra} note 174 at 214.

\textsuperscript{280} Savigny, \textit{System I}, \textit{supra} note 47 at 271.

\textsuperscript{281} \textit{Ibid} at 271; Kant, \textit{Doctrine of Right}, \textit{supra} note 4 at [6:259- 6:260].

\textsuperscript{282} Savigny, \textit{System I}, \textit{supra} note 47 at 272. For contemporary debate in Kantian literature with respect to this point, see \textit{infra} note 270. Savigny, for his part, presents the conceptual distinction between Innate Right and Acquired Rights in the following terms: “Man, say some, has a right to his own self which necessarily arises at his birth and can never cease so long as he leaves; for this precise reason it is called an Original Right in contradiction to all other rights, which come upon men first at a later period and accidentally, which are also of a transitory nature and are hence called Acquired Rights”. \textit{Ibid} at 272.
different from that of Kant. While Kant fundamentally conceives the structure of all Acquired Rights as being of a strictly relational character, between two persons, Savigny follows Kant only with respect to the contract law category, which is presented in terms of “necessarily relating to two different persons”. Finally, in line with Kant, Savigny’s account of tort law associates this category with the concept of wrongdoing as a complementary element to the pre-established system of juridical rights.

C. The Organizing Principle of Juridical Relational Choice

We shall now return to Savigny’s organizing principle of voluntary submission. Given the evident influence of Kant on Savigny’s thought, can Savigny’s organizing principle be situated within Kantian legal philosophy? Or, in other words, what is the normative justification of the voluntary submission principle?

The above-mentioned comments on the natural rights origins of Savigny’s conception of law suggest the possible justification of the voluntary submission principle. By providing a person with a choice in the identity of the framework to govern his or her private interaction with others, Savigny’s choice-based conception of choice-of-law epitomizes the ultimate imperative of natural rights’ tradition, which is rooted in the

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283 For a discussion of this point and what seems to be Hegel’s influence on Savigny’s conception of private law categories, see supra notes 170-179 and accompanying text.
284 For a discussion of the centrality of this point within the Kantian conception of Acquired Rights, see Ripstein, supra note 5 at 57-81; Weinrib, “Classification”, supra note 174 at 213-219.
285 See Savigny, System VIII, supra note 44 at 195, 205. For a further discussion of Savigny’s conception of the nature of the contract law category, see text accompanying notes 189-193 above.
286 Ibid at 270.
concept of “choice” as a realization of freedom.\footnote{287} This choice does not relate to the matters addressing the establishment of the state with its public legal institutions, nor does it relate to the normative basis for the political power of the court in its daily operation.\footnote{288}

Rather, stated in natural rights philosophy terms, this choice is provided to the individual (or individuals, in the case of contract law) as part of a larger system of coherent individuals’ freedom, which requires the individuals not to be coerced by the application of a framework that he or she did not choose. This link to natural rights tradition explains why Savigny’s organizing principle has been articulated in terms of an objective analysis of the juridical circumstances related to a persons’ interaction.\footnote{289} Precisely, this consideration of the question of the rightfulness of persons’ private interactions has been the primary focus of the contemporary natural rights tradition in its review of the normative operation of the courts.\footnote{290}

In Kantian terms, the argument can be stated as follows. As we have seen, Kantian legal philosophy recognizes three independent stages in the development of its fundamental principle of relational freedom (or “UPR”): (1) “Innate Right”; (2) “Acquired Right”; and (3) “Public Right”. Each of these stages follows from the basic imperative of the UPR and accordingly has to be fully consistent with it. The argument is that the

\footnote{287} For a discussion on the relation of the concept of “choice” to Kantian UPR, see Ripstein, supra note 5 at 70-71, 107-108.
\footnote{288} For a discussion of the fundamental differences between Kant’s and Locke’s conceptions of property, State of Nature, the normative justifications of the structure of the contemporary international order, see Ibid at 23, 145, 148, 169.
\footnote{289} See supra Part I, Sec 2 (B).
\footnote{290} Kant, Doctrine of Right, supra note 4 at [6:227]. Accordingly, the highly influential Neo-Kantian private law theory of “corrective justice” has been articulated precisely around the question of the rightfulness of persons’ interactions from the normative standpoint of the court. See Weinrib, The Idea, supra note 5.
requirement of “juridical relational choice” of the litigating parties (rather than of a single person, as Savigny has put with respect to most of the legal categories\textsuperscript{291}), with respect to the identity of the framework to adjudicate their interaction, necessarily follows as a matter of consistency with the UPR during the transition between the stage of Acquired Rights to that of Public Right.\textsuperscript{292} In other words, juridical relational choice is necessarily required in order to make the regime of Public Right coherent with UPR. This notion of juridical relational choice provides the basis, and stands at the core, of the rights-based conception of the subject, which I shall refer to as the “Choice-Based Perspective” of choice-of-law (\textit{“CBP”}).\textsuperscript{293}

\textsuperscript{291} One may speculate on the reasons for Savigny's departure from the Neo-Kantian conception of the voluntary submission principle. The primary reason for this departure seems to be grounded in Savigny’s departure from Kant on the strictly relational, inter-personal structure of the private law categories. For a discussion of this point see \textit{supra} note 173-199 and accompanying text.

\textsuperscript{292} For a somewhat related argument regarding the duty that Kantian legal philosophy imposes on the state to sustain poor people as an inherent element of transition from the regime of Acquired Rights to Public Right, see Weinrib, \textit{“Property”}, \textit{supra} note 263.

\textsuperscript{293} This exposition of juridical relational choice as the fundamental principle for Neo-Kantian understanding of the choice-of-law question sheds light on the (few) alternative attempts and suggestions to analyze private international law in general and choice-of-law in particular from a neo-Kantian theoretical perspective. In this respect several opinions can be delineated. \textit{First}, some scholars have tended to extend the Kantian concept of State of Nature to the choice-of-law question. In this respect, Florian Rödl’s work, in particular, deserves special attention. ((See Florian Rödl, \textit{Weltbürgerliches Kollisionsrecht, Über die Form des Kollisionsrechts und seine Gestalt im Recht der Europäischen Union} (EUI, Ph.D Dissertation, 2008)). Rödl defends a mixed structure for the choice-of-law question. By claiming that the “private side” is only one component in this structure, he rejects Savigny’s “purely private” conception of the field (\textit{Ibid} at 80, 120-131, 143). For Rödl, the choice-of-law question is grounded on the syllogism of interpersonal and inter-governmental rights (\textit{Ibid} at 156). However, for our purposes, Rödl’s starting point deserves special attention. Although Rödl does not seem to think that it is possible to derive specific choice-of-law rules based on Kantian legal philosophy (\textit{Ibid} at 24, n.37), the Kantian concept of State of Nature provides a starting point for the whole work (\textit{Ibid} at 147). Rödl extends this concept to private international interaction. For him, in the absence of a uniform system of choice-of-law rules, both interpersonal and interstate relationships shall be viewed as situated in the State of Nature (\textit{Ibid} at 37). From here follows the imperative to leave the State of Nature at the international level and the “legalization” of transnational interaction through the unity of conflict of laws ((\textit{Ibid} at 26-35, 45-46). For a recent re-statement of this argument, see Gian Paolo Romano, “Le Droit International Privé à l’épreuve de la Théorie Kantienne de la Justice” (2012) 1 J.Droit Int'l 59). CBP and Rödl reach the same conclusions about the necessary universality of choice-of-law rules from the theoretical perspective of Kantian legal philosophy. However, their justifications are different. It would
D. A Fresh Start

Grounded in the organizing principle of juridical relational choice, CBP in this way offers a fresh start. By defending a juridical conception of the subject, it joins Savigny and the very few choice-of-law commentators such as Gerhard Kegel\textsuperscript{294} and Friedrich Juenger\textsuperscript{295} who have refused to take the sovereignty’ axiom\textsuperscript{296} for granted and challenged the relevance of states’ sovereignty and states’ interests in grasping the nature of the choice-of-law question.

The normative foundation of CBP follows from the English title of the discipline itself—it is about choice. The aspect of choice is derived from the Kantian justification of the contemporary international order. Kant viewed independent states with public legal

\textsuperscript{294} Kegel, “Hague Lecture”, \textit{supra} note 11 at 180, 198.

\textsuperscript{295} Juenger, \textit{MSJ}, \textit{supra} note 10 at 159-161.

\textsuperscript{296} On the sovereignty axiom in traditional and contemporary choice-of-law literature, see \textit{supra} notes 60-72 and accompanying text.
institutions as a necessary reflection of his organizing principle of individuals’ freedom. Within this order, the question of which framework applies for adjudicating individuals’ private interaction (whether purely domestic or international) cannot be determined by external authority, but rather has to be determined by the individuals themselves. The idea is that only by allowing individuals to choose the framework can the contemporary international order fully embody and cohere with the fundamental Kantian organizing principle of individuals’ freedom.

Consider for example the following set of situations: (1) a contract signed in Ontario between two Ontario businessmen with respect to delivery of goods in Ontario; (2) a contract signed in Ontario between Ontario residents with respect to delivery of goods in France; and (3) a contract signed in Ontario between New York residents with respect to delivery of goods in France. Given that the court of Ontario has jurisdiction in these cases, does it need conceptually to deal with the question of the identity of the applied law in each case? CBP’s answer to this question is “yes”. Although the foreign element grows more significant in each successive case, the CBP regards all three cases as involving the choice-of-law question. The requirement of choice does not depend on the degree of connectedness to the foreign system; rather, it exists as an independent normative requirement that is a conceptual precondition to any private-law litigation. Accordingly, an adjudication of the parties’ contractual claims in the above-mentioned cases has to be subjected to the preliminary choice-of-law question.297

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297 Accordingly, CBP is reminiscent somewhat of the arguments made in choice-of-law literature by Professors Larry Kramer and Gerhard Kegel. Larry Kramer has challenged the conventional wisdom...
The choice is also *relational*. CBP perceives the choice-of-law question as not related to a single person’s choice but rather as related to the *union of two persons’ choices*. This conception of the subject rests on Kantian legal philosophy, which insists on the strictly relational character of private-law interaction as a relation between two persons, rather than as a relation between a person and a thing. Based precisely on this relational character of private law, neo-Kantian scholars have developed the modern private law categories of contract, tort, unjust enrichment, law of property, family law and according to which choice-of-law cases should be distinguished from purely private law cases by the mere presence of a single foreign element. While using interest analysis as a point of departure, Kramer argued that no conceptual difference exists between conflicting plaintiff-defendant arguments regarding the ingredients of say tort law liability and the choice-of-law question. See Kramer, *supra* note 117 at 282-283. By completely equalizing policy-based analyses of domestic and private international law cases, Kramer introduced a purely domestic version of choice-of-law. As he claims “The first - and most important - point to recognize is that moving from wholly domestic cases with multistate contacts does not change the essential nature of the interpretive problem” (*Ibid* at 290). Although, Kramer’s argument regarding the inherent presence of the choice-of-law question in purely domestic cases requires an independent treatment, at first glance, it seems that Kramer confuses the choice-of-law question and the adjudication process itself. In contrast to Kramer’s approach, CBP purports to explain why the choice-of-law question *always* (even in purely domestic private law cases) comes first, before the adjudication process.

In contrast to Kramer, CBP comes very close to Gerhard Kegel’s fascinating comments on the nature of the discipline in his critique of interest analysis (Kegel, “Hague Lecture”, *supra* note 11 at 183-185). According to Kegel the application of foreign law in domestic courts stems from the rightfulness of private relations, and “represents only another answer to the question of justice”- that of “conflict justice” (*Ibid* at 183). While Kegel fundamentally follows CBP in his insistence that choice-of-law deals with private relations, CBP explains the relation between the two forms of Kegel’s justice. According to this relation the so-called “conflict justice” necessarily preconditioned the ordinary adjudicative process. Furthermore, CBP explicitly labels Kegel’s “specific justice” of choice-of-law as the relational juridical choice principle and conceptually places it (similarly to Kegel) *a-priori* to what Kegel calls “substantive justice” – the adjudication process.

298 This conception of private law is fundamentally grounded on the contemporary influential Neo-Kantian theory of private law of corrective justice, which perceives private law as grounded in the bipolar structure between the particular plaintiff and particular defendant. For a note with respect to the theoretical basis and scope of this study, see *supra* note 6.

299 See generally Ripstein, *supra* note 5 at 107-145.

300 See generally Weinrib, *The Idea*, *supra* note 5 at 101-144.


302 See generally Ripstein, *supra* note 5 at 86-107.

303 *Ibid* at 70-81.
fiduciary duties.\textsuperscript{304} Since CBP insists on a strictly ‘private’ conception of choice-of-law, it follows this relational structure of private interaction. The idea of choice becomes the idea of united choice.

Presented in these terms, the notion of juridical relational choice captures Savigny’s three basic ideas about the nature of choice-of-law.\textsuperscript{305} \textit{First}, CBP relies on a private conception of choice-of-law as a reflection of the unity of persons’ choices. \textit{Secondly}, CBP also adopts Savigny’s notion about the inherently global perspective of the subject. Since the transition from the regime of purely private rights to the regime of Rightful Condition of Public Right is a universal requirement for the establishment of contemporary states, this explains the global nature of judicial authority in its dealing with the choice-of-law question.\textsuperscript{306} \textit{Finally}, in line with Savigny, the objective of the parties’ choice to adjudicate their private dispute sheds light on the centrality of states under CBP. This choice is not abstract; it inherently refers to a specific territory and, consequently, the


\textsuperscript{305} See Part I, Sec 1 above.

\textsuperscript{306} Furthermore, CBP is fully consistent with Savigny’s two-fold justifications for the universal choice-of-law model: (1) the principle of “legal equality” and the principal objection to “choice-of-law” forum shopping (see \textit{supra} Part I, Sec 1 (C) (1) & (2) respectively). The “legal equality” principle follows directly from Kantian UPR which focuses on providing juridical significance to human interaction and abstracts from consideration of gender, wealth, citizenship or residence. From this perspective it seems that an inherent condition to the application of this universal principle of legal equality is the understanding that this principle protects generally foreign residents’ negative rights (such as private law categories or constitutional essentials) rather than their positive rights (rights that are based on distributive justice principles). Thus, under this principle, the same tort law rule has to be applied to a foreigner as to a native resident. On the contrary, the foreigner might not enjoy local positive rights such as certain housing and health-care rights. The same point applies with respect to Savigny’s other justification for the universality of choice-of-law rules: “choice-of-law forum shopping”. The very possibility that the plaintiff would choose in a one-sided manner the identity of the substantive applicable law is at odds with the fundamental imperative of Kantian legal philosophy, which situates the particular plaintiff and particular defendant in juridically equal relationships. For further discussion on the incapability of a person’s one-sided choice of law in the context of the relation between CBP and the so called “better-law approach”, see \textit{infra} notes 524-533 and accompanying text.
specific positive law that governs this territory. Accordingly, states do not disappear under CBP.307 The contrary is true. While they do not play a role in the choice-of-law process itself, states’ positive-law provisions serve as the object of the parties’ choice. In this way, CBP recognizes the existence of independent states having specific territory, over which states exercise their sovereign power in the form of the states’ positive laws.308

Furthermore, CBP, with the organizing principle of juridical relational choice at its heart, is also consistent with another central aspect of Savigny’s thought - the notion of single organizing principles.309 Being one of the central elements of Savigny’s general jurisprudence, this notion insists on an internal unity within a broad spectrum of apparently disconnected rules, doctrines and concepts.310 Grounded evidently on Kantian jurisprudence of a system of comprehensive and interrelated rights, this notion has been

307 In contrast to Savigny who simply presupposed the contemporary Westphalian order (see Part I, Sec 1 (B) above), Kantian legal philosophy provides a normative justification for contemporary international order as comprised from a multiplicity of sovereign states. The transition from the regime of individuals’ private rights to the regime of Public Right gives rise to the further establishment of a multiplicity (i.e. more than one) of political units that reject any kind of universal empire governed by one supreme law. For discussion of this justification in the context of the neo-Kantian foundation of the so-called “state equality” principle, see Part III, Sec 1 (C) (1) below.

308 This conception of the subject sheds light on one of the perplexing questions of choice-of-law scholarship: the question of whether there should be a conceptual distinction between interstate cases within federal systems such as the United States and Canada, and international interaction ((See e.g. Whytock, supra note 12 at 729, n.53; Mathias Reimann, “Domestic and International Conflicts Law in the United States and Western Europe” in Patrick J. Borchers & Joachim Zekoll, eds, International Conflict of Laws for the Third Millennium (N.Y., Ardsley: Transnational Publishers, 2001) 109; Kegel, “Hague Lecture”, supra note 10 at 95)). CBP, however, offers an answer to this puzzle: since the subject is conceptually viewed as an interaction between individuals from different territories with positive law attached to them and the states’ sovereignty principle does not play any normative role – there is no conceptual distinction between federal systems and the general rationale of choice-of-law rules.

309 For discussion of this notion as one of the central elements of Savigny’s general scholarship, see Part I, Sec 2 (A) above.

310 Ibid.
adopted in contemporary Kantian literature under the rubric of “coherence”. Since CBP views the notion of “juridical relational choice” as a single normative criteria, it fully follows this notion in its treatment of the choice-of-law question. Furthermore, in contrast to Savigny’s argument, the principle of ‘juridical relational choice’ serves for CBP as a truly organizing principle. While Savigny’s choice-of-law theory in its *Two Deviations* (i.e. the creation of the exceptional category of “anomalous laws” and the frequent “affixation” of juridical presumptions) departs from its organizing principle of voluntary submission and its Kantian underpinnings), CBP’s central idea is to capture the nature of the choice-of-law question, its doctrines, concepts and rules, completely under the single organizing principle and within a single unifying theoretical framework of Kantian legal philosophy. This explains why, as we will see, CBP rejects Savigny’s *Two Deviations*.

The remaining sections of this Part presents the three foundational blocks of CBP: (1) the party autonomy principle; (2) the doctrine of constructive inference; and (3) the “two substantive tests of legality” and trace their relation to the organizing principle of juridical relational choice and CBP’s theoretical basis of Kantian legal philosophy.

311 For the centrality of the notion of coherence within contemporary Kantian literature, see e.g. Ernest J Weinrib, “Legal Formalism: On the Immanent Rationality of Law” (1988) 97 Yale L J 949 at 966-975; Weinrib, *Corrective Justice*, *supra* note 5 at 38-80; Benson, “Unity”, *supra* note 8.
312 For discussions of these issues see Part I, Sec 3 above and *infra* notes 336-339, 397-410 and accompanying text.
313 For further detailed discussions on CBP’s inconsistency with both of Savigny’s deviations from his voluntary submission principle, see respectively *infra* notes 327-330, 399-412 and accompanying text.
2. The Three Foundational Blocks of CBP

A. Party Autonomy Principle

As for Savigny, the so-called party autonomy principle provides a starting point for CBP analysis of the choice-of-law question. This principle holds that litigating parties have the ability to establish the identity of the law applicable for determining their private rights and duties. Approaching universal recognition and in a rare consensus among legal scholars and judicial decisions, the party autonomy principle has long been accepted in the area of contract law.\(^{314}\) Section 187 of the Restatement (Second) of Conflict of Laws\(^ {315}\) and Article 3 of the European Rome I Regulation\(^ {316}\) have explicitly incorporated this principle. Furthermore, the party autonomy principle has most recently also received significant recognition in the areas of tort law and the law of unjust enrichment under Article 14(a) of the Rome II Regulation.\(^ {317}\)

Despite the general acceptance of the party autonomy principle in practice, its theoretical underpinnings remain obscured. More specifically, the principle has created at


\(^{315}\) Restatement (Second) of Conflict of Laws §187. Accordingly, by limiting the scope of this principle to the contract law category, the Second Restatement follows on this point Savigny’s approach (in contrast to CBP and the European Rome II Regulation), which viewed this category as the only category that reflected the relation between two persons. For discussion of this point, see supra notes 173-199 and accompanying text.

\(^{316}\) Rome I Regulation, supra note 91, Art. 3.

\(^{317}\) Rome II Regulation, supra note 27, Art. 14; Mo Zhang, “Party Autonomy in Non-Contractual Obligations: Rome II and Its Impacts on Choice of Law” (2009) 39 Seton Hall L Rev 861 at 864 (calling the party autonomy principle as the “most innovative part of the Rome II Regulation”). For further discussion on the possibility of extension of the party autonomy principle to the entire range of private law categories, see infra notes 320-321 and accompanying text.
least two riddles for traditional positivistic thought.\textsuperscript{318} First, what is the normative justification of the principle? The very concept of the sovereign state, whose legislative body enacts positive law, seems to be at odds with the idea of enabling the parties to determine for themselves the framework that will govern their dispute. As we have seen,\textsuperscript{319} Joseph Beale famously mocked this possibility as no less than “permission to the parties to do a legislative act”. Secondly, why should parties be permitted to choose a framework that is not the positive law of any single state, such as the UNIDROIT Principles of International Commercial Contracts? The possibility of the application of a non-state norm seems to entail an even deeper problem for traditional legal positivism, which by its nature is limited to state-made law.

For CBP, however, the two riddles of legal positivism pose no difficulty. The first is the question of the normative justification of the party autonomy principle. The very nature of this principle embodies CBP’s fundamental idea about the nature of the subject according to which the united choice is always required in private-law cases. Thus, the party autonomy principle is a paradigmatic case for CBP. Furthermore, the relational structure of private-law categories which is presupposed by CBP is consistent with the contemporary tendency to further extend the party autonomy principle to other private-law categories, such as tort law, unjust enrichment,\textsuperscript{320} and family law.\textsuperscript{321}

\textsuperscript{318} See e.g. Lehmann, \textit{supra} note 249 at 383 (mentioning the “theoretical headaches to any serious positivist” that the party autonomy principle has caused).
\textsuperscript{319} See \textit{supra} note 137.
\textsuperscript{320} See Rome II Regulation, \textit{supra} note 27; see also Kathrin Kroll-Ludwigs, \textit{Die Rolle der Parteiautonomie im europäischen Kollisionsrecht} (Tübingen: Mohr Siebeck, 2013).
\textsuperscript{321} For further discussion on the required extension of the party autonomy principle to family law from CBP’s theoretical perspective, see Part III, Sec 2 (B) (2) (b) below.
CBP’s reliance on Kantian legal philosophy also solves the second riddle - that of private parties selecting non-state law. As we have seen, Kantian philosophy justifies the legislative branch as addressing the problem of indeterminacy in a hypothetical regime of purely private rights lacking public legal institutions. Since under the party autonomy principle the parties explicitly replace the legislative provision with an alternative framework, the possibility of adopting non-state provisions exists. In this way, CBP is doing both: it objects to the contemporary general tendency to disqualify in advance the possibility of choice of non-state law, but at the same time it also imposes a significant restriction on such choice. Since the party autonomy principle addresses the problem of indeterminacy in the regime of absence of public legal institutions, a similar determinacy requirement applies with respect to the alternative framework. Accordingly, for CBP, this alternative framework has to be just as determinative as a comprehensive state regime. Candidates appearing to meet this “specificity” requirement include the above-mentioned UNIDROIT Principles of International Commercial Contracts and the Muslim and Jewish comprehensive private-law traditions that have addressed in great detail a wide range of private interactions.

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322 See Part II, Sec 1 (B) (1) above.
324 For further elaboration on the “specificity requirement” within a concrete example of Jewish law, see infra notes 432-441 and accompanying text. This is not, however, to say that the “specificity requirement” is
While the party autonomy principle is a reflection of choice-of-law in its purest form, one may inquire as to the relevance of the organizing principle of ‘juridical relational choice’ in the vast majority of cases which lack explicit choice of the parties. The next Section of this Part addresses these cases. Following Savigny’s notion of constructive inference and its two accessory tools: (a) “juridical indicators”, and (b) “juridical presumptions” —this Section will demonstrate how united choice is still possible in such cases.

B. The Doctrine of Constructive Inference

1. Juridical Imposition

Stated in Kantian terms, Savigny’s doctrine of constructive inference can be linked to one of the central notions of Kantian legal philosophy: *juridical imposition*. Since Kantian legal philosophy focuses on the parties’ external actions rather than on subjective beliefs and wishes, the role of judicial impartiality is paramount. For Kant, the judge represents a “person that is authorized to impute with rightful force”. Accordingly, contemporary neo-Kantian accounts have emphasized the normative necessity of impartial authority, which provides an external juridical analysis of parties’ interactions.

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325  Kant, *Doctrine of Right*, supra note 4 at [6:227].
The notion of juridical imposition explains why CBP eliminates the *affixation problem* of Savigny’s argument.\(^{327}\) Whilst both Savigny’s choice-of-law theory and CBP accept the normative primacy of the unifying principle of voluntary submission (or “juridical relational choice” in the CBP’s formulation, with further qualifications\(^ {328}\) ), only the latter fully follows it. By frequently ignoring the normative significance of juridical indicators and by focusing solely on the juridical presuppositions, Savigny disconnects his choice-of-law theory from its stated underlying principle – the principle of voluntary submission. Because of the fear of broad judicial discretion, Savigny’s theory becomes an over-rigid theory under which the adjudicative authority must follow fixed juridical presuppositions.\(^ {329}\)

For CBP, however, Savigny’s frequent affixation of juridical presuppositions as the ultimate connecting factor in choice-of-law process is too stringent. The neo-Kantian understanding of judicial authority underlies its central role in the adjudicative process. In this process the “sole of justice”- the judge, analyzes the parties’ external voluntary acts and gives their juridical meaning through the notion of juridical imposition. As we will see,\(^ {330}\) CBP’s vision of the doctrine of constructive inference is based on a flexible analysis of juridical presumptions in combination with juridical indicators and, therefore is incompatible with Savigny’s frequent affixation of juridical presumptions.

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\(^{327}\) See Part I, Sec 3 (B) above.

\(^{328}\) See Part II, Sec 1 (C) above.

\(^{329}\) For discussion of these issues see supra notes 241-253 and accompanying text.

\(^{330}\) See *infra* Part II, Sec 2 (B) below.
In the context of CBP’s notion of juridical imposition, the role of judicial authority can be stated as follows: by providing juridical meaning to the parties’ actions, the judge imposes on the parties a constructive united choice with respect to the positive law governing their private law interaction. In choice-of-law literature, the central concept of “reasonable expectations of the parties”\(^{331}\) illuminates this notion. For example, in the absence of explicit agreement in the area of contract law, English courts have traditionally imposed on the parties a liability provision that could be objectively presumed to have been intended by the parties to govern the contract.\(^{332}\) CBP, however, does not restrict this concept to the contract-law category. Objectively imposing “reasonable expectations” on both sides of private-law litigation, CBP favors the relational structure of private-law categories as a nexus between the particular plaintiff and defendant. Accordingly, the reasonable expectations concept flows to the other categories of private law:\(^{333}\) property, tort, unjust enrichment, fiduciary duties, and family law.

This parties’ reasonable expectations concept holds much more sway in the choice-of-law landscape than one might think. In particular, it bears clear conceptual similarity to the extremely popular MSR principle. Under the MSR principle, the courts should seek the

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\(^{331}\) For an argument regarding the primary centrality of this concept in choice-of-law thought, see Clarkson & Hill, \textit{supra} note 73 at 6-7; Peter Nygh, “The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort” (1995) 251 Rec des Cours 273 at 294-296.

\(^{332}\) See \textit{Vita Food Products Inc v Unus Shipping Co} [1939] AC 277. As Lord Wright states “[T]he proper law of the contract is the law ‘which the parties intended to apply’. That intention is objectively ascertained, and, if not expressed will be presumed from the terms of the contract and the relevant surrounding circumstances” (\textit{Ibid} at 290-291); see also Adrian Briggs, \textit{Agreement on Jurisdiction and Choice of Law} (Oxford: Oxford University Press, 2008) at 429-440.

\(^{333}\) For an argument in this direction, \textit{see Nygh, supra} note 331.
law that reflects the most significant relationship to the litigating parties and the event.\textsuperscript{334} Thus, this principle is stated in the popular\textsuperscript{335} Second Restatement with respect to the choice-of-law rule for torts:

\begin{quote}
The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.\textsuperscript{336}
\end{quote}

Similarly, the Second Restatement’s choice-of-law rules for contract,\textsuperscript{337} unjust enrichment,\textsuperscript{338} movable property,\textsuperscript{339} and family law\textsuperscript{340} are formulated in a substantially identical way. While CBP generally rejects the subordination to section 6’s organizing principles, such as Brainerd Currie’s interest analysis\textsuperscript{341} as well other considerations,\textsuperscript{342} it willingly adopts the general tort, contract, unjust enrichment, family law, and property choice-of-law rules which are underpinned by the MSR principle.

The MSR principle consists of two elements: “litigating parties” and “event” (or “occurrence” or “transaction” as it has been more specifically referred to in the context of the tort and contract law categories\textsuperscript{343}). For CBP, these elements are not isolated but intimately interconnected, and signify the relation of the MSR principle to the doctrine of

\textsuperscript{334} See supra notes 2, 14-27 and accompanying texts.
\textsuperscript{335} On the centrality of the Second Restatement in United States daily choice-of-law practice, see supra note 14.
\textsuperscript{336} Second Restatement, supra note 14 §145 (1) (emphasis added).
\textsuperscript{337} Ibid §188 (1), 189-197.
\textsuperscript{338} Ibid § 221 (1).
\textsuperscript{339} Ibid § 222, 244, 250-251.
\textsuperscript{340} Ibid §154, 283 (1), 284, 287 (1), 288.
\textsuperscript{341} Ibid §6 (2) (b) (referring to “relevant policies of the forum”) and § 6 (2) (c) (referring to the “relevant policies of other interested states”); Kurt G Sier, “Domestic Relations in Europe” (1982) 30 Am J Comp L 37 at 40-46 (discussing the similarity between §6 and Currie’s interest analysis).
\textsuperscript{342} Second Restatement, supra note 14 § 6 (2). For further detailed discussion on the CBP’s inconsistency with most of section 6’s organizing principles, see Part III, Sec 2 (B) (1) (a) below.
\textsuperscript{343} See respectively Second Restatement, supra note 14 §§145 (1); 188.
constructive inference as a reflection of parties’ inferred united choice of framework for adjudicating their private law dispute. First, consider the “litigating parties” element. The very location in certain territory, or doing business in this territory, frequently sheds light on parties’ relational juridical choice with respect to the identity of the territory to which they choose to be attached and subsequently the positive law which governs that territory. In some cases, the parties’ location in certain territory is arbitrary and indicates little with respect to their choice. A representative example of such situation is injury which occurs during short trips abroad.\(^\text{344}\) In other cases, the connection to certain territory is evident. In this way, the quest for the “most significant relationship to the parties” articulates the notion of constructive inference, under which the united choice is imposed on the parties through analysis of their external voluntary acts.

The second element of the MSR principle - the “event” (or, as I shall call it, the “private law structure of liability”) closely relates to the litigating parties too. Because of the strictly relational structure of private-law categories,\(^\text{345}\) the various components of liability structures trace this relational structure and link themselves to the litigating parties. Thus, the components of “injury” and “wrong” in the tort law category, and the components of “contract formation” and “contract performance” in the contract law category trace the bipolar structure between the particular plaintiff and particular

\(^{344}\) For discussion of this factual situation from the perspective of MSR principle, see infra notes 442-447 and accompanying text.

\(^{345}\) As has been mentioned, CBP presupposes the corrective justice theory as an appropriate normative framework for grasping the nature of private law and private law categories (supra note 6). The relational structure of the private law categories as a relation between the particular plaintiff and particular defendant, in addition to the relational structure of the liability components, doctrines, principles and concepts of these categories, are one of the fundamental essentials of this theory. See e.g. Weinrib, The Idea, supra note 5 at 145-171.
defendant, and link themselves to the litigating parties. As with respect to circumstances
surrounding the “litigating parties”, the circumstances surrounding the “event” may shed
little light on the parties’ united choice. Thus, in some cases the fact that the injury
occurred in a given place is quite frivolous and sheds little light on the parties’ constructive
choice. In other circumstances, the parties’ arrival and location in certain territory and
subsequent tort may play a greater role in the judicial analysis process. In other words, the
“litigating parties” and “event” elements of the MSR principle are conceptually unified346
and both signify for CBP juridical circumstances for inferring parties’ united choice.347

Consider the following example. I make a contract with my neighbor to buy his or
her old lawnmower for $100. I pay the money, but my neighbor is not delivering the
lawnmower. Given that there is no explicit agreement between us on the identity of the
applied law it would be hard to claim that Malaysian contract law should govern the
dispute because of the mere fact that the engine of the lawnmower had been produced in
Malaysia. Nor will it be reasonable to claim that Malaysian contract law should govern the
dispute if my neighbor had in the past been a Malaysian resident. However, were the same
situation to occur during my stay at France with respect to a French resident, it seems it
would be problematic to apply a system of contract law, other than the French law.

346 For further discussion of this point in the context of CBP's rejection of the conceptual distinction between
so-called “personality” and “territoriality” connecting factors, see infra notes 364-367 and accompanying
text.
347 It should be noted that the position defended here on the choice-based basis of MSR is not innovative and
has been explicitly stated in recent years by Professor Mathias Reimann. See Reimann, “Triumph”, supra
note 112 at 594-598 (linking Savigny’s argument, the party autonomy principle and the MSR principle under
the single normative criteria of “freedom of choice”. Ibid at 595).
This example demonstrates the operation of the MSR principle. Starting with what seems to be a purely domestic situation; the surrounding circumstances gradually add a degree of foreign element to the factual matrix of the case. The French law is invoked not because of the sovereignty or territoriality principles, but because of the operation of the doctrine of constructive inference and addition of the circumstances that point to the French law as a reflection of litigating parties’ united choice. Thus, in the case of a tort committed between two Canadian residents during their temporary stay abroad, the MSR principle would point to Canadian tort law.\footnote{For further analysis of this situation from the perspective of the MSR principle, see infra notes 442-447 and accompanying text.} Perhaps in the majority of private law cases the judicial analysis will clearly point to certain law\footnote{C.f. Professor Twersky’s comments favouring the MSR principle according to which people tend to orient their lives towards central focal points. See Aaron Twerski, “Neumeier v. Kuehner: Where are the Emperor’s Clothes?” (1973) 1 Hofstra L Rev 104 at 120.} and therefore it will appear obvious to the court to apply that law. However, as it has been argued in this study,\footnote{For discussion of CBP’s rejection of the traditional distinction between private international law cases and purely private law cases in the context of choice-of-law and the point regarding the conceptual extension of the choice-of-law question to the entire scope of private law litigation, see text accompanying notes 296-297 above.} this does not mean that the courts do not conceptually apply the MSR principle on a daily basis in every private law litigation. CBP takes all potentially relevant juridical circumstances into consideration: the place of the wrong, the place of the injury, the residents of the parties, the place of business, contract formation, contract performance etc. Although in most cases the identity of the law with the “most significant relationship” to the parties can be relatively easy to ascertain, in some cases the juridical analysis of the entire pool of
“relevant” juridical circumstances will point to more than one law, and in this case the notion of juridical presumptions will be raised.

It should be noted that the MSR principle is not restricted to the American legal system, but also has a solid basis in other jurisdictions’ choice-of-law traditions. For example, the default rule of Article 12 (2) of the now-abolished Private International Law Act referred to the “significance of factors” in tort law. Similarly, the general rule of Article 4(3) of the Rome II Regulation refers to “all the circumstances of the case [indicating] that the tort/delict is manifestly more closely connected” with respect to the tort law and unjust enrichment categories.

What is, however, the operational mechanism of the doctrine of constructive inference? As for Savigny, the notions of juridical indicators and juridical presumptions serve for CBP as accessory tools of the doctrine that facilitate its operation.

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351 For further discussion on which juridical circumstances CBP conceives as “relevant”, see Part III, Sec 2 (B) (1) (b) & (2) (c) below.
352 For further discussion on the notion of juridical presumptions as an inherent component of the constructive inference doctrine, see Part II, Sec 2 (B) (3) above.
354 The unlimited list of these factors included “[F]actors relating to the parties, to any of the events which constitute the tort or delict in question or any of the circumstances or consequences of those events”. Ibid §12 (2).
2. Juridical Indicators

Any external action of the parties can be considered a legitimate indicator of the parties’ united choice. Connecting factors such as the parties’ habitual residence,\textsuperscript{356} the place of injury,\textsuperscript{357} the place of wrongful conduct,\textsuperscript{358} the place of contracting,\textsuperscript{359} the place of performance,\textsuperscript{360} the place of the business,\textsuperscript{361} the place of enrichment,\textsuperscript{362} or even nationality,\textsuperscript{363} are all potentially relevant to the parties’ united choice with respect to the law to be applied to their dispute. By always referring to the factors that affect both the plaintiff and the defendant, the Second Restatement incorporates a strictly interpersonal conception of the private-law categories: tort, contract, movable property, unjust enrichment, and family law. CBP follows Savigny’s argument and labels these connecting factors “juridical indicators”. The contemporary international order comprised of sovereign states with defined territories explains the territorial nature of juridical indicators. Since each territory is governed by its respective positive laws, the choice of a territory becomes a choice of positive law.

The inherent territorial nature of juridical indicators explains why CBP unequivocally rejects the conceptual distinction in choice-of-law literature and judicial

\textsuperscript{356} Rome II Regulation, supra note 27, Arts. 4 (2), 10 (2). For views supporting the concept of domicile as ultimately grounded on a person’s choice, see e.g. Bar, supra note 73 at 112-115; Westlake, supra note 148 at 34; see also sources cited at supra note 148.

\textsuperscript{357} Rome II Regulation, supra note 27, Art. 4 (1); Second Restatement, supra note 14 §145 (2) (a); PIL Act, supra note 354, Art. 11(2) (a).

\textsuperscript{358} Second Restatement, supra note 14 §145 (2) (b); PIL Act, supra note 354, Art. 11 (2) (a); Rome II Regulation, supra note 27, Art. 4 (1).

\textsuperscript{359} Second Restatement, supra note 14 §188 (2) (a).

\textsuperscript{360} Ibid §188 (2) (c).

\textsuperscript{361} Ibid §§145 (2) (c); 188(2)(e).

\textsuperscript{362} Ibid § 221 (2) (2) (c); Rome II Regulation, supra note 27 Art. 10 (3).

\textsuperscript{363} Ibid § 145 (2) (c), 188 (2) (e). For further discussion on the incorporation of the juridical indicator of “nationality” under CBP, see Part III, Sec 2 (B) (2) (c) below.
decisions between so-called “territoriality factors” (which refer to such factors as place of transaction and place of injury) and “personality factors” (which refer to such factors as domicile and place of business). The events comprising the structures of private-law categories (such as injury, wrong, transaction, or enrichment) mimic the strictly relational character of private-law interaction. In this way, the connecting factors from the “territoriality” category link themselves to the parties, and together with connecting factors from the ‘personality’ category, they constitute the pool of juridical indicators. These juridical indicators enable judicial authority to ascertain the parties’ united choice with respect to a specific territory and its positive law. In other words, both categories—“territorial” and “personality”—are in fact territorial; they simply represent different sides of the same coin of the normative structure of choice-of-law.

This unified normative basis of connecting factors also answers the criticism of the MSR principle’s excessive flexibility. Since this principle counts and weighs connecting


365 For discussion on the inherent link between the “territoriality” category of connecting factors and the litigating parties from the theoretical perspective of corrective justice’s conception of private law, see supra notes 343-347 and accompanying text.

366 For somewhat related comments on the “territoriality”-“personality” distinction, see Michaels, “Globalizing Savigny”, supra note 75 at 134; Reimann, supra note 30 at 590.

367 Accordingly, CBP is at odds with Professor William Reppy’s principal objection to different combinations between methods of (1) “territoriality”, (2) “personality” and (2) “better law”. Reppy labels this combination of methods as “eclecticism”. See William A Reppy Jr, “Eclecticism in Methods for Resolving Tort and Contract Conflict of Laws: The United States and the European Union” (2008) 82 Tul L Rev 2053. Ironically, but as a combination of the three methods, CBP generally supports this “eclecticism”. Under this approach the “territoriality” and “personality” categories are normatively unified. Furthermore, as we will see in the next Section of this Part, under the notion of the Two Substantive Tests of Legality, a restricted version of the better law approach is integrated into the normative structure of the choice-of-law question.
factors, it has been accused of causing the great unpredictability of the Second Restatement in its implementation.\textsuperscript{368} The MSR principle has been mocked as being a “no rules approach”\textsuperscript{369} or “unabashedly open-ended”.\textsuperscript{370} As Friedrich Juenger sarcastically put it, “But even a juggler, not to mention a trial judge, can only cope with a finite number of balls in the air”.\textsuperscript{371} The above-presented account of juridical indicators sheds light on this objection. Any external action of the parties can be considered a legitimate indicator with respect to the juridical meaning of the interaction. Accordingly, the flexibility of the MSR principle reflects its normative significance, rather than any doctrinal deficiency.

Furthermore, the matter of the flexibility of the MSR principle deserves special attention for CBP. Although this perspective does not restrict the potential pool of juridical indicators, it is crucial for CBP that all indicators be directly related to the private law structures of liability. This requirement is based on the very relational nature of the notion of united choice as a fundamental principle of the choice-of-law question. This choice is about a framework that will determine parties’ rights and duties with respect to certain private-law categories: contract, tort, unjust enrichment, and property. Accordingly, choice has to be related to these categories. Thus, for example, in the case of tort law, the

\textsuperscript{368} See e.g. Weintraub, supra note 20 at 1288-1289; Roosevelt, supra note 157 at 2466. For a recent objection to the alleged unpredictability of the Second Restatement see Whytock, supra note 12 at 745-776.
\textsuperscript{369} Albert A Ehrenzweig, “A Counter-Revolution in Conflicts of Laws” (1966) 80 Harv L Rev 377 at 381.
indicators of the parties’ domicile, the place of permanent business, and so on, have to be assessed at the time of the tort.\textsuperscript{372}

This exposition of juridical indicators pre-empts the possibility of challenging CBP based on the objections that have been raised with respect to Locke’s notion of “tacit consent”. The latter was presented by Locke as an extension of the moral justification of the power of political authority to the dynamic and changing nature of the identity of political authority and citizens.\textsuperscript{373} Referring precisely to this notion of Locke, Professor Lea Brilmayer has launched her attack against any choice-based conception of choice-of-law by arguing that a person’s accidental physical presence in a state’s territory cannot be perceived as a consensual submission.\textsuperscript{374} Accordingly, Brilmayer mocks the doctrine of tacit consent as “purely fictional” and declares it not to be applicable to the choice-of-law question.\textsuperscript{375}

There are several problems with this type of argument. \textit{First}, the very resort to Locke’s thought, as a key for grasping the nature of CBP’s argument, is flawed. For Locke, person’s consent provides the underlying reason for the establishment of independent political units in the form of states with further division of political powers through three branches: the legislative branch, the executive branch, and the judiciary branch.\textsuperscript{376} In this way, the notion of consent provides the moral justification for people’s obligation to obey

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{372}] For further elaboration of this point in the context of the Second Restatement’s treatment of the so-called “timing issue”, see Part II, Sec 2 (B) (1) (b) below.
\item[\textsuperscript{374}] Lea Brilmayer, “Consent, Contract, and Territory” (1989) 74 Minn L Rev 1 [Brilmayer, “Territory”] at 6-10; Brilmayer, “Rights”, \textit{supra} note 250 at 1304.
\item[\textsuperscript{375}] Brilmayer, “Rights”, \textit{supra} note 250 at 1303.
\item[\textsuperscript{376}] Locke, \textit{supra} note 373 §§89-91 at 50-51.
\end{itemize}
\end{footnotesize}
certain legitimate political authority. However one may challenge the relevance of this notion to the choice-of-law question. Addressing the question of legitimacy of political authority, Locke’s notion of personal consent was supposed to apply with respect to another question in the private international law universe: that of jurisdiction. The jurisdiction question is the question that deals with the authority of the court to adjudicate the given private law dispute. However, once the question of jurisdiction is resolved, and given the irrelevance of the sovereignty principle, Locke’s justification of political authority appears to contribute nothing to the identity of the framework that shall be applied by CBP’s universal judge to the private law case. In this way, the application of Locke’s notion of personal consent to CBP goes awry because of the somewhat unexplained transformation of the discussion from the question of jurisdiction to that of choice-of-law.

377 Ibid §§95-96 at 54-55.
378 An illuminative example of such transformation can indeed be found in Professor Lea Brilmayer’s works. Starting with the principal objection to the choice-based understanding of the jurisdictional question (See Brilmayer, “Territory”, supra note 374), Brilmayer extended this objection in her later work to the question of choice-of-law (Brilmayer, “Rights”, supra note 250 at 1298-1308). Brilmayer’s basic claim is that the questions of jurisdiction and choice-of-law can be grounded exclusively on the principle of states’ sovereignty (Brilmayer, “Territory”, supra at 4-10, 24-30; Brilmayer, “Rights”, supra at 1303-1308). She points to the complexity involved in the operation of the potentially choice-based approach (Brilmayer, “Territory”, supra at 5-10; Brilmayer, “Rights”, supra at 1303-1308) and argues that by presupposing a certain conception of states’ sovereignty, any choice-based approach is highly deficient (Brilmayer, “Territory”, supra at 3, 11-12). In other words, this approach is merely “superfluous” to the sovereignty principle (Ibid at 28). However, CBP is immune from the scope of these objections. First, Brilmayer seems to confuse the questions of choice-of-law and jurisdiction. The original formulation of her objection was executed in terms of the question of jurisdiction (with further reference to Locke’s notion of personal consent), and CBP, in line with Savigny (see text accompanying notes 96-99 above), indeed views the question of jurisdiction as related to states’ sovereignty. Secondly, CBP indeed relies on the existence of certain international orders as comprising independent states with territories governed by positive laws. However state sovereignty itself is fundamentally excluded from the choice-of-law process. Accordingly, the organizing principle of relational juridical choice is not “superfluous”, but rather provides the ultimate normative basis for the subject. As we have seen in this Section with respect to the notion of juridical indicators, the territorial nature of connecting factors is not explained through the sovereignty principle, but
Secondly, the following set of more specific objections may be raised with respect to the possibility of the application of Locke’s complementary notion of tacit consent to CBP. Locke has articulated this notion in the following terms:

[e]very man that has any possessions or enjoyment of any part of the dominions of any government does thereby give his tacit consent and is as far forth obliged to obedience to the laws of that government, during such enjoyment, as anyone under it; whether this his possession be of land to him and his heirs forever, or a lodging only for a week, or whether it be barely travelling freely on the highway..... 379

In the above-mentioned passage Locke’s notion of tacit consent seems to be more linked to the benefits that each person receives as a part of his or her citizenship within the borders of a particular state. This points more to matters of fairness and reciprocal relationships between the citizen and political community towards mutual benefits, rather than to CBP’s notion of juridical analysis of persons’ rightful interactions. Indeed Brilmayer’s point on the difficulty of inferring consent in the circumstances of an arbitrary person’s residence is indeed convincing, and is along the lines of a similar criticism raised against Locke’s tacit consent notion by figures such as David Hume381 and John Simmons.382 However, this objection fails to undermine CBP’s argument. Indeed, the circumstances in which a person’s domicile does not shed light on a person’s choice do

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379 Locke, supra note 373 §119 at 68.
380 For a similar point, see John A. Simmons, Moral Principles and Political Obligation (New Jersey: Princeton University Press, 1979) at 83-95.
382 Simmons, supra note 380 at 95-100.
exist, but they are simply irrelevant for CBP’s notion of juridical indicators, which by its nature integrates a broad spectrum of relevant factors that are evaluated according to their relative significance. Finally, CBP’s notion of juridical indicators is also immune from the “fiction” charge. In fact, this is exactly CBP’s understanding of the above-presented doctrine of constructive inference according to which the judge imposes on the parties the juridical meaning of their voluntary external actions. This is indeed fiction, but as Brilmayer herself admits elsewhere, this is a legal fiction.\textsuperscript{383}

Indeed, due to the potential multiplicity of relevant juridical indicators, the process of providing juridical meaning to the parties’ external actions is not an easy one.\textsuperscript{384} The era of the Internet and people’s increased mobility add much complexity to this task. However, hard cases will always remain hard cases.\textsuperscript{385} All relevant juridical indicators must be taken into consideration and systematically evaluated in accordance with their juridical significance. As the Second Restatement states: “These contacts [juridical indicators] are to be evaluated according to their relative importance with respect to the particular issue.”\textsuperscript{386}

Furthermore, as for Savigny, for the CBP of choice-of-law, juridical indicators are not the beginning of the story. The next section presents the other accessory tool in the

\textsuperscript{383} See Brilmayer, “Territory”, supra note 374 at 7 (emphasis added). For the central role of the notion of “legal fictions” under Neo-Kantian theory of private law, see Weinrib, The Idea supra note 5 at 177-196.

\textsuperscript{384} For examples of the operational mechanics of juridical indicators, see Weinrib, supra note 144 at 34-43; Peari, supra note 301 at 154-161.

\textsuperscript{385} Savigny many years ago recognized the great complexity of certain situations. Thus, he calls the case of a contract concluded by correspondence as a “most doubtful and disputed case”. See Savigny, System VIII, supra note 44 at 230.

\textsuperscript{386} Second Restatement, supra note 14 §§145 (2) (c), §188 (2) (e), 221 (2). For further detailed analysis of the notion of juridical indicators within the provisions of the Second Restatement, see Part III, Sec 2 (A) below.
operational mechanism of the doctrine of constructive inference—the notion of ‘juridical presumptions’.

3. Juridical Presumptions

By analyzing the internal structures of each of the private-law categories, CBP purports to deduce a connecting factor that is presumed to reflect the parties’ united choice for determining the framework for adjudicating their private law interaction. This connecting factor serves for CBP as a starting point for further evaluation of juridical indicators. Following Savigny’s theory, CBP labels these categories’ structural points of departure “juridical presumptions.”

Similarly to our exposition of Savigny’s argument on this point, a reference to contract law category can be made. As with other private-law categories, the Kantian legal philosophy conceives of this category as strictly relational, that is, as a relation between two persons. Within this relation, the Kantian conception of the nature of contractual entitlement inherently focuses on the performance of the contract. Under this conception, by signing a contract, a person does not acquire a right to the thing, but rather acquires a right merely to the performance of the promised act. Thus, for example, if I agree with my neighbor to buy his or her horse, the signing of the contract itself does not mean that

387 See Part I, Sec 2 (B) (2) (c) above.
388 For an alternative conception of contractual entitlement as a relation between a person and thing, see the Hegelian conception of contract law as a relation between the person and thing, see Hegel, supra note 170 at §40; see also supra note 176.
389 Kant, Doctrine of Right, supra note 4 at [6:273]. For a detailed discussion of the Kantian exposition of contractual entitlement with further important implications for the nature of contractual damages, see Weinrib, “Contract”, supra note 266 at 65-70; Ripstein, supra note 5 at 69-70.
the horse is already mine. By making a contract with my neighbor I acquire merely a right to require my neighbor to perform his or her obligation—to deliver the horse. However, the horse continues to belong to my neighbor until the actual performance of the obligation—the actual transfer of the horse to me.390

Since the property transfer occurs not at the time of signing a contract, but rather at the time of performance itself, this concept of contractual entitlement shifts the focus from the act of signing the contract, to performance of the contract itself, as the essential element of this private-law category. In this way, the place of performance, situated at the heart of contractual obligation, establishes a juridical presumption for ascertaining the parties’ united choice. However, the place of performance provides only the starting point for judicial analysis, and other juridical indicators such as place of business, domicile, place of contracting, the contract validity doctrine as a reflection of parties’ presumed choice391 and so forth, have to be considered and balanced.

The same point follows from a neo-Kantian analysis of other private law categories. Thus, by focusing on the concept of transition of value, the neo-Kantian understanding of the law of unjust enrichment points to the place of enrichment as the juridical presumption of this category.392 Similar analyses of the property and tort law categories establish the juridical presumptions of the place of property and the place of the

390 As Weinrib explains “[W]hat the promisee acquires through a contract is not a right to a thing but a right against the specific person obligated to perform the requisite act” (Weinrib, “Contract”, supra note 266 at 67, reference omitted).
391 For a discussion on the incorporation of Contract Validity doctrine under CBP’s notion of juridical indicators see Part III, Sec 1 (C) (3) below.
392 Weinrib, supra note 144; Peari, supra note 301.
wrongful conduct, respectively, as the most central elements in the internal structures of these private law categories. Under this exposition of the relationships between juridical presumptions and juridical indicators, juridical presumptions are not fixed, but rather present loose starting positions that can be overturned by the relevant juridical indicators of the particular circumstances.

The relation proposed here between juridical presumptions and juridical indicators can also be traced in contemporary choice-of-law provisions and judicial decisions. Among them the following examples can be mentioned: the traditional common law approach that has viewed the place of enrichment as a point of departure for choice-of-law analysis of the law of unjust enrichment, the preliminary tort choice-of-law rule under the abolished PIL Act, the preliminary tort and unjust enrichment choice-of-law rules of the Rome II Regulation, and various provisions of the Second Restatement.

\[393\] CBP supports the juridical presumption of the place of wrongful conduct (rather than the place of injury) as the most central element of the structure of tort law. For the central role of the wrongful conduct element within Neo-Kantian conceptions of tort law structures of liability, see Arthur Ripstein, “Civil Recourse and Separation of Wrongs and Remedies” (2012) 39 Fla St U L Rev 163; Weinrib, The Idea, supra note 5 at 38-40, 143-203.

\[394\] This was precisely Professor Joachim Zekoll’s response to Friedrich Juenger’s criticism of the apparently inherent flexibility of the MSR principle. Zekoll argues that Juenger’s argument ignores the rooted European and American tradition of so-called “soft connecting factors” that can be overturned by other connecting factors. See Joachim Zekoll, “A Review of Choice of Law and Multistate Justice”, in Patrick J. Borchers & Joachim Zekoll eds, International Conflict of Laws for the Third Millennium (Ardsley, New York: Transnational Publishers, 2001) 9 at 14.


\[396\] PIL Act, supra note 353, Art. 11 (1).

\[397\] Rome II Regulation, supra note 27, Arts.4 (1); 10 (3).

\[398\] See e.g. Second Restatement, supra note 14 §146 (establishing a preliminary point of departure in the area of tort law), §191 (establishing a preliminary point of departure in the area of contract law). For further detailed analysis of the notion of juridical presumptions within the provisions of the Second Restatement, see Part III, Sec 2 (B) (1) (d) below.
C. The Rejection of Savigny’s ‘Anomalous’ Category of Laws and Two Substantive Tests of Legality

1. The Rejection of Savigny’s ‘Anomalous’ Category of Laws

Let us return to Savigny’s first deviation from his organizing principle of voluntary submission: the Exceptional Category of “anomalous laws”.\textsuperscript{399} One might inquire into the theoretical basis of this category. Does it relate (if at all) to the Kantian underpinnings of Savigny’s general thought in general, and choice-of-law, in particular? And if not, what then are the theoretical foundations of the Exceptional Category?

I think that the answer to these questions lies in the tension inherent in Savigny’s entire scholarship. The division of positive laws’ provisions according to the criteria that underpins each provision seems to follow Savigny’s inherent tension between the normative foundations of Kantian legal philosophy\textsuperscript{400} and the so-called “historical school of jurisprudence”. As we have seen, for Kant the positive provisions of a given legal system is an inherent component within the comprehensive juridical structure of Rights.\textsuperscript{401} Accordingly, the very possibility that a given positive law can have any basis other than legal is simply incompatible with Kantian legal philosophy.

The Exceptional Category of anomalous laws seems to reflect the influence of the alternative, a rival to Kant’s conception of law. Savigny, more than any other scholar, has been associated with the historical school of jurisprudence and is considered no less as its

\textsuperscript{399} See Part I, Sec 3 (A) above.
\textsuperscript{400} See Part II, Sec 1 (B) above.
\textsuperscript{401} See Part II, Sec 1 (B) (1) above.
According to this jurisprudence, the nature and origin of law is rooted in the concept of the “spirit” (“Volksgeist”) of the relevant nation. This spirit is conceived as something that exists in the consciousness of the people. Accordingly, Savigny’s favorite synonym for law is a nation’s language that has been developing over time. As he states:

Law has its root in the common consciousness of the nation. This is, on the one hand, entirely different from the easily and quickly changing, accidental and momentary consciousness of the individual man; but, on the other hand, it is subject to the law of progressive development, and cannot therefore be conceived as fixed and immoveable.

Every nation has a “spirit” that is embedded in its cultural traditions, language, actual practices, and beliefs. Accordingly, a nation is not perceived as a political unit, but rather as a cultural unit of the community. Furthermore, this conception of law is also linked to a progression argument. Throughout the evolution of history, different nations underpinned by different spirits have adopted different legal rules. And since the positivity of laws is explained entirely through the changing spirit of a given nation, Savigny has been labelled by contemporary legal scholars as an “historical positivist.”

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402 See e.g. Hoeflich, supra note 36 at 27, 35; Vinogradoff, supra note 119, vol 1, at 128-130 (“The Historical School of Jurisprudence was initiated by Savigny”. Ibid at 128).
403 On the origins of this concept see Wieacker, supra note 252 at 285, 305; Ewald, supra note 119 at 2016, n. 251; see also Anna Di Ribilant, “Genealogies of Soft Law” (2006) 54 Am J Comp L 499 at 528-532.
404 See Savigny, Vocation, supra note 121 at 25, 27; Savigny, System I, supra note 47 at 12, 14, 36-37 ("law is like language, there is no moment of absolute cessation”. Ibid at 14).
405 Savigny, System VIII, supra note 44 at 428; see also Savigny, System I, supra note 47 at 12-15.
406 Vinogradoff, supra note 119 at 128 (“Savigny conceived law much as part of national inheritance as language or religion”).
407 See Ewald, supra note 119 at 2006.
408 For the significance of an historical inquiry into Savigny’s scholarship, see Savigny, Vocation, supra note 121 at 132-133, 147.
409 See Ewald, supra note 119 at 2023, with further references; see also Reimann, “Triumph” supra note 112 at 1879-1880 (stressing Savigny’s strictly positivist conception of law).
This historical conception of law seems to directly contradict the Kantian legal philosophy. On the one hand, we have a positivist conception of law that is relative to the historical development of the spirit of a nation. On the other hand, we have the Kantian universalistic conception of law based on the purely a-priori deduced principle of UPR, which aims to create the entire system of juridical rights. This dichotomy between the two conceptions of law explains Duncan Kennedy’s striking observation of the link between Savigny’s thought and Kantian legal philosophy: “Kant is both a major influence on, and a major opponent of Savigny.”

The dichotomy between these rival conceptions of law transcends to Savigny’s principal division between normal and anomalous laws. While the category of normal laws follows Kantian fundamentals, the category of anomalous laws belongs to the influence of this historical school of jurisprudence on Savigny’s thought. Since the positivity of laws is entirely related to concepts of language, custom and other cultural attributes of a nation as a whole, this conception is strongly positivistic and relativistic. This is indeed the idea

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410 See Kennedy, supra note 188 at 833. Nigel Simmonds put it in slightly different terms: “Savigny endeavoured to marry his historical concerns to an essentially formalistic Kantian Jurisprudence”. See Simmonds, supra note 257 at 132. This inherent tension between Kantian legal philosophy and the historical school of jurisprudence has been consistently noted by Savigny’s commentators, see Wieacker, supra note 252 at 306, 315; Gordley, supra note 179 at 647-648.

411 Duncan Kennedy seems to accept this explanation of the anomalous laws category as a reflection of the influence of the historical school of jurisprudence (see Kennedy, supra note 188 at 816-817). It should be noted that Savigny, on his side, drew a somewhat unclear parallel between the anomalous category of laws and the so-called Roman law conception of jus singulare laws, which traditionally referred to laws designated for a specific category of people (such as soldiers or minors). See Savigny, System I, supra note 47 at 45-53. For discussion of the Roman jus singulare category of laws, see A. Berger, Encyclopedic Dictionary of Roman Law (Philadelphia: American Philosophical Society, 1953) at 533; Jolowicz, supra note 188 at 17. It should be noted however, that in its rejection of the anomalous laws category, the Kantian legal philosophy would not adopt laws of a public nature, which are still “legally-based”, such as laws dealing with the distribution of benefits (footnote 306 above) or more generally laws that enable the state to sustain the Rightful Condition (see text accompanying notes 413-422 below). However, these laws and cases are beyond the scope of CBP, which strictly addresses the cases of persons’ basic interaction (see footnote 6 above).
that underpins anomalous laws. Related to particular attributes of particular nations, these laws are fundamentally grounded in the spirit (Volksgeist) of their nation and as such to be governed by the *lex-fori* rule.\(^\text{412}\) This underlying basis of Savigny’s anomalous laws category explains their inconsistency with CBP. Grounded on the historical school of jurisprudence, this category of laws reflects an element in Savigny’s choice-of-law theory that is foreign to Kantian legal philosophy.

2. Two Substantive Tests of Legality

Is there an alternative, truly Kantian argument which can provide a normative justification to the broad range of traditional doctrines that have served as exceptional rules to ordinary choice-of-law process? In other words, can Savigny’s anomalous laws category be substituted by alternative elements that would be coherently situated within Kantian legal philosophy alongside the other foundational blocks of CBP? Indeed, CBP’s third (and final) foundational block of “two substantive tests of legality” (“TSTL”) presents this alternative element.

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\(^\text{412}\) One may argue that the historical school of jurisprudence exercises much more influence on Savigny’s thought than this work suggests. According to this view, the notion of Volksgeist explains the very divergence between the positive provisions of different states. While I do not deny the possibility of explaining this divergence through Savigny’s concept of Volksgeist, my point here is about normative foundation. Once again, the reference to Kantian legal philosophy is suggested. For Kant, the factual divergence between the positive provisions of different countries stems from historical and social contingencies, rather than any independent normative justification. Accordingly, there is a continuing *internal duty* on the legislative branches of the states to better their laws towards the ideal laws of Kantian natural rights theory ((See Kant, *Doctrine of Right*, supra note 4 at [6:340-6:341])). For further discussion on the incompatibility of this duty with the so-called better-law approach of choice-of-law, see *infra* note 506. Savigny’s notion of normal laws follows this conception. By accepting the Kantian natural rights normative basis of these laws, Savigny envisages the constant improvement of these laws towards a certain ideal (See Savigny, *System VIII*, supra note 44 at 59). On the contrary, the anomalous category of laws is fundamentally rooted in the concept of Volksgeist, which itself provides an independent normative basis for this category of laws as related to the particular spirit of a particular nation.
This block addresses the Kantian justification for the positivity of laws and the resulting two substantive restrictions on that positivity. As we have seen, because the imperative to leave the State of Nature in favor of the Rightful Condition is imperative, Kant supports a minimal model of the states’ order.\(^{413}\) In this model, all states with their public institutions have to be viewed equally, regardless of their approximation towards the Kantian ideal of a republican state.\(^{414}\) Therefore, no normative distinction is made between western liberal democracies and corrupted states, without a clear separation of powers like the former Soviet Muslim Republics of Kirgizstan, Uzbekistan and Kazakhstan.\(^{415}\) Since for Kant all positive laws are normatively equal, no additional inquiry is needed.\(^{416}\)

Had it stopped at this point, this account would have collapsed into the classical positivist approach according to which legality is grounded solely on the authoritative act of appropriate authority. However, this is not the Kantian view. In fundamental contrast to the classical positivist approach, Kant provides a normative justification for the laws’ positivity. The motivation behind the imperative to establish modern states with their legal public institutions was driven by the defects in the State of Nature. Accordingly, Kant does not take the state’s authority for granted, unless the state is situated in the Rightful

\(^{413}\) For discussion of these issues see supra notes 270-272 and accompanying text.


\(^{415}\) C.f. Rawls’ imaginary state of “Kazanistan” (John Rawls, The Law of Peoples (Cambridge: Harvard University Press, 1999) at 64); see also Whytock, supra note 12 at 762, 777 (demonstrating empirical findings indicating that in choice-of-law, the courts generally do not prefer to apply the laws of liberal democratic states).

\(^{416}\) For further elaboration of this point, in the context of the Kantian foundation of the so-called “state equality” principle, see infra notes 483-506 and accompanying text.
Condition.\textsuperscript{417} The most horrible and barbaric regimes\textsuperscript{418} seem to represent, according to Kant’s view, situations in which the individuals \textit{did not even enter into the} Rightful Condition and these states cannot even be called “states” in Kantian terms. We might think about such regimes of the last century as the Nazi regime in Germany\textsuperscript{419} and the Taliban regime in Afghanistan as representative examples of “barbaric regimes”. Since these regimes do not meet the minimal requirements of the Rightful Condition, \textit{any} legislative act of such regimes, although legislated in the appropriate way, is not binding upon their citizens.\textsuperscript{420}

Furthermore, Kantian legal philosophy imposes an additional substantive test for laws’ positivity, that of Innate Right. As we have seen, the defects in the State of Nature are related to Acquired Rights, not to Innate Right.\textsuperscript{421} This explains why Innate Right survives the transition to the Rightful Condition and why a legislative provision that does not respect Innate Right is not a positive provision at all.\textsuperscript{422} In other words, for Kant, all

\begin{footnotes}
\footnotetext[417]{Immanuel Kant, \textit{Anthropology from a Pragmatic Point of View}, translated by Robert Louden (Cambridge: Cambridge University Press, 2006) at [7:330].}
\footnotetext[419]{For a recent study on the somewhat inconsistency of the courts’ position with respect to the application of Nazi Law in domestic systems, see David Fraser, “This is not Likely Any Other Legal Question: A Brief History of Nazi Law Before U.K. and U.S.” (2003) 19 Conn J Int’l L 59; see also Monrad G. Palsun & Michael I Sovern, “Public Policy in the Conflict of Laws” (1956) 56 Colum L Rev 969 at 979-980.}
\footnotetext[420]{For further discussion of this point, see Ripstein, \textit{supra} note 5 at 339-352. This overall rejection of \textit{any} positive law provision of the barbaric state, provides an answer as to why the famous Hart-Fuller debate on Nazi’s legality arose around the “uninteresting” \textit{Grudge Informer} case rather anti-Jewish discriminative provisions (See Fraser, \textit{supra} note 419 at 61-62).}
\footnotetext[421]{See \textit{supra} notes 270-272 and accompanying text.}
\footnotetext[422]{For a natural law tradition that supports this position under which highly unjust positive provisions cannot be counted as “law”, see Gustav Radbruch, “Statutory Lawlessness and Supra-Statutory Law” & Gustav Radbruch, “Five Minutes of Legal Philosophy” (2006) 26 Oxford J Legal Stud 13, both translated by Bonnie}
\end{footnotes}
positive laws are normatively equal, provided they pass the two fold substantive tests of
legality: (1) “Innate Right test of legality” [“IRTL”] and (2) barbaric regimes exception
(“BRE”) which together constitute the two inherent components of CBP’s third
foundational block: “two substantive tests of legality” (“TSTL”).

In modern choice-of-law terminology, the TSTL (which underpins the traditionally
important notion for private international law of “equal treatment”) can be traced across
a spectrum of subjects, doctrines, and concepts appearing in choice-of-law literature under
different names: “limitations on the party autonomy principle,” the “public policy
exception,” the “fundamental public policy exception,” “human rights,”

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Litschewski Paulson & Stanley L Paulson; Robert Alexy, *The Argument from Injustice: A Reply to Legal

423 The argument is drawn from my interpretation of Kantian legal positivism. This understanding differs
from the well-known Jeremy Waldron treatment of this issue ((Jeremy Waldron, “Kant’s Legal Positivism”
1999)), where Waldron attributes to Kant the classical positivist position according to which the fundamental
test of legality is solely grounded on the authoritative act of appropriate authority. My view is different. If
anything, this view relates to Perry Dane’s recent comments regarding the possible relation between
normativity, positivity and choice-of-law, where Dane seems to argue that natural law provides at the same
time a basis for both: (1) justification of legal positivism; and (2) an exception to legal positivism in radically
“unjust” cases. See Dane, *supra* note 113 at 170-175.

424 See e.g. RH Graveson, “Philosophical Aspects of the English Conflict of Laws” (1962) 78 LQ Rev 337 at
361; Elliott E Cheatham & Willis LM Reese, *Choice of the Applicable Law* (1952) 52 Colum L Rev 959 at
963; Roosevelt, *supra* note 157 at 2517 (“equality of treatment under conflict rules is clearly
fundamental....”). Accordingly the whole methodology of interest analysis seems to be ruled out by CBP as
inherently discriminatory against non-residents. For discussion on this feature of interest analysis, see
Roosevelt, *supra* note 71 at 2481, 2500; Brilmayer, “Rights”, *supra* note 250 at 1315. For further discussion
of CBP’s inconsistency with interest analysis, see Part III, Sec 1 (A) below.

425 Both American and European systems tend to intervene in the parties’ choice under the party autonomy
principle in the case of inherently asymmetrical relationships between the parties. Among these special
provisions are mandatory consumer, employment and insurance contract requirements (See Rühl, *supra* note
323 at 167-175; Borchers, *supra* note 314 at 1657-1659) and the weaker party protection provisions of ex-
ante agreements in the area of tort law under the Rome II Regulation ((See Rome II Regulation, *supra* note
27, Art. 14 (b)). For further related discussion on the consistency of CBP with plaintiff a-priori favouring
rules in the cases of inherently asymmetrical relationships, see infra notes 528-533 and accompanying text.

426 Accordingly, CBP denies the ordinary terminological meaning of the doctrine of public policy in private
international law ((C.f. Professor Briggs’ recent comment on the disjunction between the essence of certain
“supranational human rights,” or “constitutional constraints.” Despite the myriad of names, the CBP insists on a unifying basis for understanding these subjects, doctrines, and concepts. Under this understanding, the TSTL adheres to the choice-of-law process itself and provides the ultimate normative justification for the wide range of exceptions to the application of choice-of-law rules. The authoritative acts of those states that do not meet the two substantive requirements of Kantian legal philosophy are disqualified from this process and cannot in principle serve as an object of persons’ united choice. In this way, the notion of TSTL challenges the traditional understanding of the discipline, which makes a claim about the irrelevance of choice-of-law rules to the substantive merits of the laws applied. The TSTL do not just allow the judges to “pick” the content of the applied laws, but rather these tests instruct them to do so in any case of private (international) law litigation. The fact that in the vast majority of the cases the TSTL are not explicitly

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427 See e.g. Borchers, supra note 314 at 1652.
428 See e.g. Briggs, supra note 10 at 232.
429 Michaels, “German Views”, supra note 57 at 131. For further discussion on the notion of human rights as a reflection of TSTL, see infra notes 448-454 and accompanying text.
430 Roosevelt, supra note 157 at 2507-2534.
431 See e.g. Borchers, supra note 314 at 1651-1652 (substantially equating the American use of the term “public policy” and the European term “mandatory rules”). A somewhat related argument regarding a substantive universal test of “minimum standard” as an inherent part of ordinary choice-of-law process has been articulated by Charles T Kotuby Jr in his “General Principles of Law, International Due Process, and The Modern Role of Private International law” (Duke Law School Conference on the nature of PIL, November 2012).
invoked does not undermine the conceptual necessity of these tests as an inherent part of every choice-of-law process.
3. The Operational Force of CBP: Several Examples

I would like to demonstrate the operational force of CBP through several examples. Consider the following situation. If my neighbor and I were to have a dispute about whether I should compensate him or her for the full cost of our shared fence that he or she just built, could we agree that the dispute between us would be governed by the applicable Jewish law provision of unjust enrichment rather than the alternative state law provision? In other words, can we, in contract law, tort law, unjust enrichment, or property law cases, provide our own, autonomous and non-state substantive framework for deciding our disputes?

CBP would treat the case in the following manner. In contrast to Savigny, who took the party autonomy principle as a starting point of his argument and then quickly moved to the doctrine of constructive inference, CBP treats this principle more seriously. Through tracing the Kantian foundations of party autonomy, CBP sheds light on the question of the normative justification of this principle and imposes the requirement of “specificity” with respect to the possibility of application of non-state law. In this respect, Jewish law offers coherent and comprehensive conceptions of the law of unjust enrichment in general, and the matter of shared fences in particular, which in some ways relates to, and in other ways departs from, the contemporary common law understanding of the subject.

432 For discussion of this point, see Part I, Sec 2 (B) (1) above.
433 For discussion of these issues, see supra notes 322-324 and accompanying text.
Accordingly, it meets the “specificity requirement” that CBP imposes on the party autonomy principle.435

This is not, however, to say that the “specificity requirement” is the *only* limitation that CBP imposes on parties’ potential choice within the party autonomy principle. In contrast to Savigny’s exposition of the party autonomy principle, which was articulated in strictly subjective terms,436 CBP offers a mixed objective-subjective conception of this principle. The three foundational blocks of CBP together always influence the choice-of-law process and operate to different degrees and on different levels depending on the particular circumstances of the case. Accordingly, CBP imposes several additional restrictions on the parties’ potential choice that reflect the influence of the doctrine of constructive inference and the TSTL on the potential scope of the party autonomy principle.

*First,* I shall suggest that the American requirement of the so-called “reasonable connection” should be understood as a reflection of the influence that the doctrine of constructive inference exercised on the party autonomy principle. According to this requirement, a certain minimum connection shall be proven between the parties and the chosen law.437 Although this requirement does not directly reflect the MSR principle, it seems to represent to the flip side of the same coin: through the requirement of “reasonableness” the MSR serves in this case not as a primary rule but rather as a

435 See *supra* notes 322-324 and accompanying text.
436 For discussion of these issues, see Part I, Sec 2 (B) (1) above.
437 For discussion of the “reasonable connection” requirement within American law, see e.g. Rühl, *supra* note 323 at 155-176; Symeonides, *supra* note 323.
subsidiary doctrine that limits the pool of potential provisions. Accordingly, back to the fence case, my neighbour and I shall demonstrate to the court some minimum connection to Jewish law.438

Secondly, the other foundational block of CBP- the TSTL gives rise to an additional limitation on the parties’ potential choice. Thus its component of IRTL (Innate Right Test of Legality) imposes on the choice-of-law process the value of “equality” according to which individuals are treated equally before the law regardless of race, gender, religion, and so on.439 As we have seen, the choice-of-law literature and judicial decisions incorporate this requirement in the form of frequent intervention in parties’ choice in inherently asymmetrical relationships, such as choice-of-law clauses in consumer and employee contracts.440 Accordingly, back to the fence case, CBP would disqualify the application of a Jewish law provision of unjust enrichment that would grant a certain advantage to my neighbor merely because he or she is not Jewish or because of his or her gender.441

438 For the tendency to mitigate the required minimum connection to the potential chosen law within the party autonomy principle, see see Rühl, supra note 323 at 155-176; Symeonides, supra note 323.

439 For discussion of the IRTL component of TSTL’s foundational block of CBP, see supra notes 421-431 and accompanying text.

440 See supra note 425 & infra notes 528-533 and accompanying texts.

441 On the discriminatory nature of many Jewish private law provisions against foreigners, see e.g. David Wermuth, “Human Rights in Jewish Law: Contemporary Juristic and Rabbinic Conceptions” (2011) 32 U Pa J Int’l L 1101; see also Haim H Cohn, Human Rights in Jewish Law (New York: KTAV Publishing House, 1984) (suggesting to reconcile Jewish law discriminatory provisions in light of contemporary reality). One may argue that in the contemporary constitutional law landscape these issues transcend within the debate on the relationship between the constitutional values of human rights of secular courts and the constitutional value of freedom of religion. The point here is not just that in the confrontation between the religious values and the value of equality, equality always “wins”, but more generally that the party autonomy principle is always subjected to the value of transactional equality despite the particular context. For two recent Canadian decisions which apparently underlie this point, see Stephanie Bruker v Jessel Marcovitz [2007] 3 R.C.S. 606 (considering the inequality inherent in the power of one of the spouses in religious divorce agreements used
The other two examples are from perhaps the most significant tort law choice-of-law decisions of the last century: the American *Babcock v. Jackson*[^442] and English *Chaplin v Boys*[^443]. *Babcock v Jackson* involved a tort between two New York residents. The parties were involved in an accident while in Ontario. Despite CBP’s juridical presumption to apply the law of the place of wrongful conduct, an analysis of all the other juridical indicators pointed to the juridical imposition of New York’s negligence law as reflecting the parties’ united choice with respect to the framework for determination of their rights and duties. At this point, the question of the so-called *reverse-Babcock* case arises, in which an accident occurs in New York between Ontario residents. Apparently, a similar MSR analysis purports to support the application of Ontario’s negligence law. However, this would ignore the TSTL. Since Ontario’s negligence law at that time discriminated against foreign residents in favor of local residents[^444], this law infringed the equality of the parties and consequently was inconsistent with the TSTL. Therefore, despite the fact that juridical indicators pointed to Ontario’s law, the substantive evaluation of this law disqualifies it from the pool of legitimate provisions from which the parties’ united choice can be inferred. From this perspective, the application of the New York negligence law remains in the *reverse-Babcock* case.

[^443]: Chaplin v Boys [1971] AC 356. For a discussion on the significance of this case for English tort choice-of-law rules, see e.g. see Clarkson & Hill, *supra* note 73 at 292 (viewing the decision as the “undeniably leading authority for common law tort choice-of-law rules”).  
On the other hand, *Chaplin v Boys* represents a case where the content of the applied law passes the TSTL. In this case, a tort occurred between two English soldiers during their military service in Malta. Despite the juridical presumption of the place of wrongful conduct, the juridical indicators of the parties’ permanent domiciles and the arbitrary nature of the place of military service\(^{445}\) point to the application of English negligence law. However, in contrast to *Babcock v Jackson*, both of the relevant positive provisions in this case pass the TSTL. Although, according to the House of Lords’ opinion, the Maltese law clearly undercompensated the plaintiff,\(^{446}\) this fact is irrelevant for the TSTL. As long as the Maltese law would have undercompensated the plaintiff regardless of that plaintiff’s identity, the CBP treats both positive law provisions equally, regardless of their approximation to Kantian natural law philosophy. Accordingly, in the reverse-*Chaplin* case (where a tort had been committed between two Maltese servants during their service in England) the Maltese tort law would apply.\(^{447}\)

The last example I would like to refer to is the well-known notion of international human rights as a reflection of TSTL. The TSTL sheds light on the conceptual location of this notion. Recognized in a series of international conventions,\(^{448}\) the universalistic

\(^{445}\) For eliminating the discussion on the arbitrary nature of military service as vitiating a person’s choice with respect to the identity of the applied law, see Savigny, *System VIII, supra* note 44 at 103-104, n.d.

\(^{446}\) *Chaplin*, [1971] AC 356 at 380 (Lord Guest), 373 (Lord Hodson), 384 (Lord Wilberforce), 393 (Lord Pearson).

\(^{447}\) This point demonstrates the conceptual differences between CBP and a purely better-law methodology. While better-law methodology is based purely on the substantive evaluation of the content of relevant positive provisions, the CBP rejects an overall appeal to the notion of substantive justice and restricts this evaluation to the IRTL.

aspirations of human rights have acquired a significant role in contemporary legal scholarship. Through the notion of the TSTL and its independence from Law of Nations considerations, CBP rejects any relation to public international law or international relationships. Therefore, despite the current tendency of academic literature, CBP perceives international human rights as an inherently internal component of the choice-of-law process itself. This “private international law” classification of international human rights has a direct influence on several related matters. First, CBP denies the common view that private international law and public international law are linked through the subject of international human rights. Second, it rejects the instrumentalist conception of the choice-of-law question according to which choice-of-law serves as a tool for promoting human rights. On the contrary, CBP defends an internal justification of the choice-of-law question and as such it is purely non-instrumental. Finally, CBP rejects the notion that the choice-of-law question can be grounded solely on international human rights. This would dislocate the TSTL from other foundational blocks of CBP. Although the TSTL is


450 See supra Part I, Sec 1 (A).

451 For an example of public international law’s location of international human rights, see John H Curries, Public International Law, 2d ed (Toronto: Irwin Law, 2008) at 412-448; see also Michaels, “German Views”, supra note 57 at 133 (“today, the site of human rights is usually sought in treaties between nations; this is what justifies their character as public international law”).

452 See e.g. Michaels, “German Views”, supra note 57 at 131.


454 See e.g. Michaels, “European Revolution”, supra note 57 at 1634 (“fundamental (or human) rights are sometimes viewed as the basis of classical conflict of laws”).
not a normatively disconnected exception to the choice-of-law process (as it is viewed in current choice-of-law literature), it also is not the sole organizing principle of choice-of-law. Rather, under CBP, the subject of international human rights (as the actualization of the TSTL) is an indispensable part of the normative ensemble that consists of: (1) the party autonomy principle; (2) the doctrine of constructive inference; and (3) TSTL.

Armed with these foundational insights on CBP, its theoretical basis, its organizing principle, its three foundational blocks and its distinctiveness from Savigny’s theory, we are now in a position to take a closer look at its relation to theory and practice. As we have seen, empirical studies have suggested that only a minority of American states’ courts follow a pure version of Brainerd Currie’s interest analysis, the better law approach, or Joseph Beale’s version of vested-rights theory. The most popular method adopted by the courts for dealing with the choice-of-law question has been the Second Restatement.455 Since the Second Restatement appears to be the framework that dominates the intuition of the courts’ practices, it appears to be the most obvious object of inquiry for understanding a coherent theory on the nature of the discipline.456 Furthermore, as we will see, the historical link between the Second Restatement and Savigny’s work on choice-of-law,457 makes the Restatement particular intriguing for CBP’s inquiry.

Accordingly, the next Part is structured around the following three focal points: 

First it addresses CBP’s relation to interest analysis, vested rights theory and the better-law approach. Then it provides a careful review and detailed analysis of the Second

455 See note 14 above.
456 For a discussion of this point, see text accompanying notes 8-35 above.
457 See text accompanying notes 537-539 below.
Restatement and its specific provisions. Finally, it discusses the relation between CBP and the substance-procedure distinction, which is important for choice-of-law both practically and theoretically.
III. The Relation to Theory and Practice

1. The Relation to Interest Analysis, Vested Right, Better Law Approach

A. Interest Analysis

The relation between CBP and Brainerd Currie’s interest analysis seems to be straightforward. While Savigny’s exceptional category of “anomalous laws” to some degree conceptually follows interest analysis, CBP represents a complete antithesis to this sort of analysis. Fundamentally grounded on the notion of juridical relational choice, CBP is at odds with the basic premise of interest analysis according to which law is conceived of as “an instrument of social control”. By defending a purely private conception of the choice-of-law question and rejecting the state sovereignty principle as a normatively relevant principle of the subject, CBP has nothing to do with the ultimate practice of interest analysis, which aims to “ascertain and declare the governmental policy as it has been expressed in statutes and judicial decisions….”.

B. Vested Rights

Apparently, there are many similarities between CBP and Joseph Beale’s version of vested rights theory. Both theories have universal aspirations and seem to be founded on a similar conception of the subject according to which the choice-of-law question

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458 For a discussion of this point, see supra notes 222-223 and accompanying text.
459 Currie, supra note 24 at 64.
460 Ibid at 366. For further discussion on interest analysis’ inherent practical and theoretical complexity, see infra notes 730-738 and accompanying text.
461 For a discussion of this point in the context of Savigny’s basic idea on the necessary universality of choice-of-law rules, see Part I, Sec 1 (C) above.
addresses certain entitlements that private individuals have. Thus, focusing on the right “vested” to the plaintiff,\textsuperscript{462} Beale’s theory has been conceived in academic literature as the individuals’ rights-based theory.\textsuperscript{463} Furthermore, the practice of referring to connecting factors also seems to be similar. While vested rights theory dwells on the single connecting factor of the place of the last event, CBP introduces a range of connecting factors through various juridical indicators and juridical presuppositions. Accordingly, the MSR principle (which, as we have seen,\textsuperscript{464} ultimately reflects CBP) has been classified by some scholars as a mere variation of vested rights theory. Under this conception, both Beale’s theory and CBP conceptually belong to the same choice-of-law tradition of referring to connecting factors.\textsuperscript{465}

However, the apparent conceptual similarity between the two approaches is flawed. The divergence between the two goes to the very conception of law. When Beale’s work relies on a state-centered conception of law as protecting certain interests through the positive law of the states,\textsuperscript{466} CBP belongs to a diametrically opposite school of law and rights. Closely associated with natural rights tradition, this school of law has been coined in academic literature as the “will-based theories of rights”.\textsuperscript{467} Accordingly, CBP’s and

\begin{footnotesize}
\textsuperscript{462} For discussion of this point, see supra note 242.  
\textsuperscript{463} See e.g. Brilmayer, “Rights”, supra note 250 at 1281-1285.  
\textsuperscript{464} See Part II, Sec 2 (B) above.  
\textsuperscript{465} Thus, Symeon Symeonides claims that the MSR principle is fully consistent with the so-called “classical” choice-of-law methodology of reference to connecting factors. Instead of focusing on one contact, this principle simply offers a multiple number of contacts. See Symeonides, “Dawn”, supra note 90 at 58.  
\textsuperscript{466} For an exposition of Beale’s version of vested rights theories, see note 242 above.  
\textsuperscript{467} See also Reimann, supra note 42 at 840, n.15 (mentioning the conceptual difference between Savigny’s scholarship and the jurisprudence of “interests”).
\end{footnotesize}
Beale’s conceptions of law and rights can be re-stated as a fundamental contradiction between the so-called “will-based” and “interest-based” theories of rights.\textsuperscript{468}

This fundamental divergence at the very outset of their thought on the nature of law directly affects their further exposition of the choice-of-law question. While Beale’s rights-based theory relies on the assumption according to which the plaintiff’s right is granted by the state of the place of the last event’s occurrence, CBP presents a purely private conception of rights-based analysis that focuses on the persons’ united choice.\textsuperscript{469}

Furthermore, the fundamental difference between the two approaches can be traced through the careful analysis of the objections raised by legal realists against the vested rights theory which eventually destroyed it.\textsuperscript{470} CBP seems to obstruct at least two (out of three\textsuperscript{471}) of the realists’ principal objections. \textit{First}, CBP is immune from the so-called “mechanical” or “arbitrary” claim of Beale’s theory. The legal realists criticized the “mechanical method” of this theory under which choice-of-law follows strictly the application of the single connecting factor of the last event.\textsuperscript{472} On the contrary, there is nothing mechanical or arbitrary in CBP. It does not follow strictly the application of a pre-determined (and often arbitrary) connecting factor, but rather it involves a complex

\textsuperscript{468} For literature discussing the conceptual differences between “interest-based” and “will-based” theories of rights, see Leif Wenar, “The Nature of Rights” (2005) 33 Phil & Pub Aff 223 at 238-246; Simmonds et al, supra note 101.

\textsuperscript{469} For a related discussion of this point in the context of comparison between Savigny’s and Beale’s conceptual treatment of the party autonomy principle, see supra notes 135-137 and accompanying text.

\textsuperscript{470} For a discussion of the realists’ exceptionally successful attack on Beale’s version of vested rights theory, see e.g. Symeonides, \textit{Revolution}, supra note 12 at 11-13; Brilmayer, “Rights”, supra note 250 at 1281-1291.

\textsuperscript{471} The legal realists’ third objection challenged in principle any conceptual understanding of the choice-of-law question. See Cook, supra note 77 at 4, 8, 15; see also Lorenzen, supra note 108.

\textsuperscript{472} Thus, Cook coined Beale’s last event connecting factor as a “practical rule” (Cook, supra note 77, at 45) and mocked the arbitrary connecting factor of the place of injury in the tort law category (Ibid at 17, 203). For related objections to vested rights theory, see Currie, supra note 24 at 138-139 (mentioning the “machinery” operation of this theory).
The adjudicative process of analyzing and weighing the relevant juridical presumption and juridical indicators. Indeed, Savigny’s frequent affixation of juridical presumptions, exposes his theory to a line of objections that are similar to Beale regarding the inherent rigidity of choice-of-law rules. However this is not the case with CBP. Because of its rejection of Savigny’s *Second Deviation*, CBP is immune from the realists’ criticism.

Second, CBP is also immune from the legal realists’ other claim, which challenged the coherency of Beale’s argument. The realists have demonstrated the flawed internal logic in the vested rights theory’s view of the court as a mere enforcer of a pre-existing right of the plaintiff. CBP’s conception of the choice-of-law question, on the contrary, actually follows the realists in holding that the plaintiff’s right does not exist until it is promulgated by the court. As we have seen, the state does not disappear under CBP. CBP inherently assigns to the state’s public institution, judicial authority, a crucial role through which the court systematically evaluates persons’ external voluntary acts and gives them juridical meaning. In contrast to Beale, who viewed judges as bureaucrats enforcing the law of the last event, for CBP, the plaintiff’s right cannot exist without public judicial authority.

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473 For discussion of these issues, see supra notes 241-253 and accompanying text.
474 For discussion on CBP’s unequal rejection of Savigny’s second deviation from the voluntary submission principle through frequent affixation of juridical presumptions, see supra notes 327-333 and accompanying text.
475 See Cook, supra note 77 at 20-25. For a recent restatement of this argument, see Roosevelt, supra note 25 at 1830-1836.
476 Cook, supra note 77 at 29-33.
477 See supra notes 305-308 and accompanying text.
478 Beale, supra note 23, §4.6 at 38-39. As Perry Dane commented on the role of judicial authority under Beale’s theory “the distinctiveness of Beale’s approach according to which rights are created under the time of the occurrence of facts rather than the rights created at the time of litigation”. See Dane, supra note 82 at
C. Better Law Approach

Perhaps most intriguing is the relation CBP’s individuals’ rights-based conception to that of the so-called “better-law” approach. According to this approach in private law cases involving a foreign element, the court must apply the law of the state that is “better”. Take for example a tort law dispute involving drivers who are from New York and California, which took place in Ontario. According to this approach, the Ontario court must apply the substantive tort law of the state which it considers to be the “better” or the “most just” among the respective tort law provisions of New York, California and Ontario.479 In this way, through purporting to achieve justice in particular cases,480 the better law approach follows CBP in its vision of the discipline as individuals’-based approach.

The following Sections trace the relation between the two approaches through the following interrelated three focal points. (1) They explain why CBP incongruously rejects an overall appeal to a full blown version of better law approach. In this respect it will be argued that CBP rejects better law approach based on a different type of objection typically raised against this approach by its opponents; (2) they explain why a limited version of the

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479 This presentation of the better law approach is, of course, an oversimplification for the purposes of the argument defended in this Section. Thus, Robert Leflar’s “better rule of law” consideration has been presented as merely one of five “choice-influencing considerations” and Friedrich Juenger has often defended in his writings the so-called “constructive version” of the better-law approach according to which a special non-state law must be constructed from the involved laws in the particular case. See respectively, Leflar, “Considerations”, supra note 81 at 282; Juenger, MSJ, supra note 10 at 197, 236.

480 For this presentation of better law approach, see especially Juenger, MSJ, supra note 10 at 159-163; Friedrich K Juenger, “A Third Conflicts Restatement” (2000) 75 Ind LJ 403 at 410.
better law approach shall be coherently incorporated under CBP and situated within its third foundational block of TSTL; and (3) they explain why several traditional choice-of-law doctrines and rules that are commonly associated with the better law approach, shall in fact be conceptually situated within CBP and its three foundational blocks. The ensuing paragraphs discuss each of these points in turn.

1. The Rejection of an Overall Appeal to the Better Law Approach

From the very beginning, the better law approach has been accused of so-called unpredictable “khadi justice” whereby the judges decide cases based on their subjective opinions, rather than on certain objective criteria.481 This subjectivism challenge can be traced throughout the literature as the main flaw of the better-law approach. Almost every commentator has expressed doubt regarding the ability of judges comparatively to evaluate on an ad-hoc basis the merits of the involved private law provisions.482

However, CBP cannot join to this line of objections. Heavily influenced by Kantian legal philosophy and its particular structures of the private law categories of contract, property, and so on, CBP (as well as Savigny’s theory) lies in a strong position to provide a normative objective criteria for substantive evaluation of the different private law


provisions of various states. However, CBP still rejects a full-blown appeal to the better law approach. The real reason, however, for the incompatibility of CBP with better law is based on the notion of “state equality” that follows from the Kantian conception of the international order as comprising normatively equal states. In other words, the rejection of the better-law approach is not because of the judges’ inability to comparatively evaluate the merits of the involved laws, but because of the infringement of the state equality principle discussed below.

For an exposition of the state equality principle, I shall suggest drawing special attention to Professor Douglas Laycock’s work, which discusses the constitutional limitations of the choice-of-law question. More than 20 years ago he argued that the better law approach in its essence violates the United States Constitution. As Laycock explained, the Constitution imposes certain restrictions on choice-of-law process based on the Due Process Clause of the Fourteenth Amendment and on the Full Faith and Credit Clause of Article IV. Since according to the Full Faith and Credit Clause, each state has equal authority to the other 49 states, the laws of all American states are of equal status.

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483 Douglas Laycock, “Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law” (1992) 92 Colum L Rev 249. For the purposes of this study, I focus exclusively on the argument that Laycock makes with respect to better-law methodology. For more recent related constitutional analysis of the choice-of-law question, see Roosevelt, supra note 157 at 2503-2534.

484 Somewhat similar commentary can be found at Terry S Kogan, “Toward a Jurisprudence of Choice of Law: the Priority of Fairness over Comity” (1987) 62 NYUL Rev 651 at 698 (“The Constitution cannot allow a choice between the two laws based on a determination that one law is inherently better than the other”).

485 U.S. Const. Amend. 14, §1 (“No State….deprive any person of life, liberty, or property, without due process of law...”)

486 U.S. Const. Art. IV, §1 (“Full Faith and Credit shall be given to each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof”).

487 Laycock, supra note 483 at 310.
From here follows the argument according to which no court of a given state can decide that its law is better or worse than that of another state.\textsuperscript{488} Thus, if we follow Laycock’s example, Texas’s court cannot insist that its law is better than California’s.\textsuperscript{489} In other words, the very nature of the better-law approach (and its variations\textsuperscript{490}) is unconstitutional \textit{per se}.

Although Laycock’s argument explicitly addressed choice-of-law cases within the United States,\textsuperscript{491} I shall suggest extending it to the global arena and to what has been termed the “state equality” principle (or as it is also sometimes called, the “sovereign equality” principle\textsuperscript{492}). The significance of this principle must not be underestimated. Nowadays this principle is considered to be no less “canonical”,\textsuperscript{493} as a direct extension of the domestic Rule of Law to the international law arena,\textsuperscript{494} and as a “foundational principle of the international legal order”.\textsuperscript{495} The UN Charter has explicitly stated that it\textsuperscript{496} and the

\textsuperscript{488} Ibid at 312.
\textsuperscript{489} Ibid at 312-313.
\textsuperscript{490} Ibid.
\textsuperscript{491} Ibid at 258 (“It is a serious mistake to discuss domestic and international choice-of-law cases interchangeably, even though that practice is nearly universal in conflicts literature”).
\textsuperscript{492} For a discussion of the substantive similarity between these terminologically different terms, see RP Anand, “Sovereign Equality of States in International Law” (1986) 197 Rec des Cours 9 at 103-105.
\textsuperscript{495} Brad R Roth, \textit{Sovereign Equality and Moral Disagreement} (Oxford: Oxford University Press, 2011) at 54; Beaulac, supra note 494 at 8.
\textsuperscript{496} U.N. Charter art. 2, § 1.
United Nations re-emphasized it in its General Assembly Resolution as a core principle of contemporary international order.  

The intellectual roots of the state equality principle go the 18th century work of Emmerich de Vattel. As Vattel states:

Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature. Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. Strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.

As Vattel explains, the principle of state equality is not about inequality in terms of territorial size, natural resources power or other distributive considerations. Rather in similarity to private individuals, this inequality ultimately relates to the legal status of the states themselves. The similarity between the above-mentioned constitutional principle of Full Faith and Credit Clause is clear, but not surprising. As has been shown, Vattel’s works had indeed a significant influence on the American Founders. Furthermore, this conception of equal legal status of states lay at the basis of the contemporary international order that was established in the Westphalian Peace Treaties of 1648. This order

499 See also Ulrich K. Preuß, “Equality of States - Its Meaning in a Constitutionalized Global Order” (2008) 9 Chi J Int’l L. 17 at 24-25 (framing the state equality principle in the following terms “[L]egal equality of states has the meaning of legal capacity - in other words, the non-existence of legal distinctions between legal persons”. Ibid at 25).
500 Lee, supra note 485 at 151 (“Vattel was particular attractive to the American founding generation who eagerly embraced his vision of sovereign equality…”.)
recognizes multiplicity myriad of states (i.e. more than one state) as independent and legally equal political entities.\textsuperscript{501}

The normative argument regarding the conceptual analogy between private individuals and states was taken up and extended by Kant in his \textit{Doctrine of Right} and \textit{Perpetual Peace}.\textsuperscript{502} Kant insists that only through abstraction from such considerations as wealth, gender or the desires that lie at the root of actions, is it possible to conceive the interaction between individuals in a purely juridical manner. Since this argument is extended to the international arena, it explains why Vattel’s “dwarf” and “giant” states are equal. Through abstraction from particular features of given states such as territorial size or even internal structure, Kant juridically equalizes the states. Similarly to private individuals, states, under this conception, are situated in juridically equal relation to each other.\textsuperscript{503}

This argument has further implications. Since states are juridically equally situated, the three constituents of the state (i.e. legislative, judicial and executive branches) follow this equality too. The classic example of this institutional equality can be seen with respect to the “recognition question” in private international law. Since the courts of different states are equally related to each other, the operative product of the adjudicative process -

\textsuperscript{501} See e.g. Roth, \textit{supra} note 495 at 54. For discussion of the innovative nature of the Westphalian international order, see Lee, \textit{supra} note 493 at 152.
\textsuperscript{503} See also Lee, \textit{supra} note 493 at 153-154; UN Resolution, \textit{supra} note 497.
the judgment, bears the same normative content. This is indeed the traditional and
contemporary courts’ position with respect to foreign judgments. According to this
position, the judgment of the foreign court is as good as a judgment of the domestic court,
and has to be recognized as a rule of thumb. 504

The same point applies with respect to the choice-of-law question. Since states are
situated in equal juridical relation to each other, this equality applies to their legislative
provisions. Because of the state equality challenge, the very essence of better-law approach
is at odds with the fundamental principle of international order –state equality. 505 This
notion explains why better law approach is incompatible with CBP’s (as well as Savigny’s)
*formal* organizing principle of juridical relational choice. For CBP the fact that particular
law is bad or good has nothing to do with the choice-of-law question. In other words,
choice-of-law is about persons’ relational choice rather than substantive evaluation of the
positive laws of different systems. 506 While CBP purports to provide an argument with

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504 See, e.g. Alan Reed, “A New Model of Jurisdictional Propriety for Anglo-American Foreign Judgment
Recognition and Enforcement: Something Old, Something Borrowed, Something New?” 25 Loy LA Int’l &
Comp L. Rev 243 at 244 (2003); see also *Proposed Foreign Judgments Recognition and Enforcement Act*
(2005).

505 There are some comments in choice-of-law literature in this direction. See e.g. Kegel, “Dream Home”,
supra note 481 at 632 (describing the better-law methodology as “[I]t is awkward because it awards
grades”); Kramer, supra note 117 at 339 (“Each state is free to define its own version of the “just” result, and
it is axiomatic that there is no perspective from which to judge one version ‘better’ or more ‘just’”);
Symeonides, ‘Dawn’, supra note 90 at 62 (“[T]he choice of the applicable law cannot afford to be motivated
by whether it will produce a ‘good’ or ‘just’ resolution of the actual dispute”).

506 In this respect one may be tempted to offer the Kantian so-called “approximation thesis” for this
reconciliation of Kantian legal philosophy with a pure version of the better law approach (Kant, *Doctrine of
Right*, supra note 4 at [340-341] see also *supra* note 412). According to this thesis the courts shall “strive” in
each case toward a certain ideal that would best reflect the normative structure of the Kantian system of
natural rights. However, this argument would be flawed for three reasons. First, the Kantian approximation
thesis addresses the *internal duty* of the legislative branch constantly to improve its laws rather than oblige
CBP’s universal judge in his or her dealing with the question of the identity of the framework to adjudicate
private law disputes. The conceptual transition of the approximation thesis from the legislative branch to the
judicial branch would be highly problematic even within the bounds of normative literature. See, e.g. Robert
respect to the normative content and nature of choice-of-law process, the state equality principle provides a negative part of this argument: why should the better law approach be excluded from the choice-of-law process?

2. Incorporation of a limited Version of Better Law

At this point, one might say “hold on”. What about the various types of a more limited version of the better law approach, such as public policy doctrine, which throughout the years have been applied in the courts and served as an inherent companion of the choice-of-law process? The question is this: if the state equality challenge denies better-law approach as a primary source, why accept it as a subsidiary source of choice-of-law process? This was indeed Professor Laycock’s answer. According to his view, because public policy doctrine is incompatible with constitutional principles, it must be eliminated altogether with other versions of better-law methodology.\(^{507}\)

For CBP however, Laycock was too hasty in his disposal of the limited versions of the better-law approach. In contrast to the traditional courts’ reluctance to adhere to better-law approach on a theoretical level, this has not been the case with limited version of this approach. Thus, for example, the doctrine of public policy has always played an important

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507 Laycock, supra note 483 at 314 (acknowledging that public policy exception is “[N]arrower than most better-law approaches, and to that extent less objectionable. But it is just as unconstitutional in the cases where it applies”).
role in common law reasoning\textsuperscript{508} and continues to remain significant.\textsuperscript{509} The limited version of better law approach seems to be too important to be eliminated completely.

It would appear that the clue lies in Laycock’s argument itself. A close examination reveals that the proposed elimination of limited version of better law approach was restricted to the inter-American scene. By mentioning the slavery cases as a notable exception,\textsuperscript{510} Laycock argued that American states’ legal systems do not differ dramatically. On the international level, however, the picture is different. At this level, Laycock suggested adopting a “more flexible approach that will be responsive to cases of totalitarian states”\textsuperscript{511} From this perspective Laycock seems to be very careful in marking the limits of the scope of his argument.

Laycock’s comments on the exceptional nature of (1) “slavery”; and (2)”totalitarian regimes” cases provide a starting point for an argument regarding a possible integration of a limited version of better law approach with the state equality principle. The striking similarity between his examples and CBP’s third foundational block (i.e the twofold substantive tests of legality -the TSTL)\textsuperscript{512} is evident. In fact, the “slavery” and “totalitarian regime” examples fully follow both of the components of TSTL: (1) the Innate Right Test of Legality [“IRTL”] and (2) the Barbaric Regime Exception (“BRE”). The state equality principle perceives all states with their public institutions as being situated in equal

\textsuperscript{508} For the traditional significance of the public policy doctrine, see Kahn-Freund, supra note 3 at 428-429.
\textsuperscript{509} For further discussion of the incorporation of public policy doctrine in the Second Restatement and its centrality in contemporary choice-of-law thought, see Part III, Sec 3 (B) (3) below; see also Cheshire & North, supra note 73 at 139, 142.
\textsuperscript{510} Laycock, supra note 483 at 314 (“[I]t would be a serious error to design choice-of-law rules around slavery cases….Slavery was the great uncompromised exception, but slavery has been abolished”).
\textsuperscript{511} Ibid at 260.
\textsuperscript{512} For discussion on the third foundational block of CBP see Part II, Sec 2 (C) (2) above.
juridical relation to each other. However, are all regimes we call “states” truly states from a legal standpoint? Based on BRE, one may argue that extreme regimes of last century such as the Nazi regime in Germany and the Taliban regime in Afghanistan were so barbaric that they are not states at all. Accordingly, authoritative acts of these regimes cannot be considered “laws” in the context of the choice-of-law process. Furthermore, following IRTL another exception to legal positivity applies with respect to particular authoritative positive law provisions. One may argue that in highly extraordinary cases where the positive law provision is so highly “unjust”, it cannot also be considered “law”.

The traditional conception of public policy doctrine as an exception to laws’ positivity sheds light on the very unique status that this doctrine has received in choice-of-law literature and judicial decisions. It has been formulated in highly exceptional terms and was tentatively coined as a doctrine of “last resort”, as related to provisions that “drag on the coat tails of civilization”, to be applied to “obsolete laws”, as cases of “gross injustice”, and positive provisions that “shock the morals”. Tied with TSTL, this conception of public policy doctrine provides an explanation for the radical formulation of this doctrine in the literature and offers a way of explaining how this doctrine can be reconciled with the state equality principle.

513 Juenger, MSJ, supra note 10 at 199.
514 See also Cheatham & Reese, supra note 424 at 980; Leflar, “Considerations”, supra note 81 at 299.
515 Kramer, supra note 117 at 316, 334-336.
516 Kegel, “Dream Home”, supra note 481 at 632.
517 See infra note 728. For further discussion on the radical formulation of the public policy doctrine in traditional choice-of-law literature, see infra notes 725-729 and accompanying text.
518 Accordingly, this conception of public policy rejects the recently presented argument regarding a mixed foundation of the doctrine, related to several considerations, such as “proximity”, “relativity” and “seriousness of the breach”. See Alex Mills, “The Dimensions of Public Policy in Private International Law” (2008) 4 J Priv Int L 201 at 231.
3. Challenging the Better Law Classification Scheme

The last point I would like to make with respect to the better law approach addresses the conceptual classification of a broad spectrum of traditional and contemporary doctrines, concepts and rules that have commonly been associated by choice-of-law commentators as conceptually belonging to this approach. As we have seen in the previous Section, some of these doctrines are fully consistent with CBP. Thus, CBP wholeheartedly incorporates in its third foundational block of TSTL those doctrines that reflect a limited version of the better-law approach and serve as an exceptional substantive category for ordinary choice-of-law process. Formulated in exceptional terms, the doctrine of public policy doctrine is a representative example of such doctrines.

This Section focuses however, on the following set of doctrines and rules which have been argued as belonging to the better law approach: 1) the very popular party autonomy principle; (2) the Validation Rule; and (3) certain variations of choice-of-law rules that a-priori favor one of the litigating parties.

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519 These classification projects can be in particular traced in the works of Friedrich Juenger and Symeon Symeonides. See Juenger, MSJ, supra note 10 & Symeonides, supra note 12.

520 For support of the conceptual classification of public policy doctrine within the better law approach, see Juenger, MSJ, supra note 10 at 214-215; Robert A Leflar, American Conflicts Law (Indianapolis: IndBobbs-Merrill Company, 1968) at 255-256.


522 For support of classification of Validation Rule under better law approach, see Juenger, MSJ, supra note 10 at 178, 195, 216; Juenger, “Rate”, supra note 90 at 97; see also Ehrenzweig, surpa note 2 at 211, 213
I shall start with various variations of choice-of-law rules that a-priori favors one of the litigating parties. First, there are choice-of-law rules that favor one of the litigating parties. Thus, for example Professor Russell Weintraub in early versions of his *Commentary* supported a plaintiff-favoring tort rule. Secondly, there are one-party choice rules providing one of the litigating parties with the option to choose the applicable law. Amongst them are well-known European tort rule that enables the plaintiff to choose between the laws of the place of the injury and place of the wrong. Professor Symeon Symeonides has recently suggested importing into the American system this European plaintiff-favoring tort choice-of-law rule. Finally, there are specially designed protective rules for cases of inherently asymmetrical relationships between the parties. The cases of consumer and employee contracts are representative examples of such cases.

These rules are indeed variations of better-law approach. By executing an evaluation of the substantive merits of the involved provisions, they follow the path of better law approach. In contrast to other variations of this approach, they do provide the criteria of what is considered the “better-law”. For example, the tort plaintiff-favoring rule (viewing the *Validation Rule* as a general principle for the choice-of-law question); Kramer, *supra* note 117 at 331-332 (supporting the *Validation Rule* based on a broad spectrum of policy considerations); see also Symeonides, “Material Justice”, *supra* note 521; Leflar, “Considerations”, *supra* note 81 at 297.

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524 See Weintraub, *supra* note 523 at 345-347; see also Juenger, *MSJ*, *supra* note 10 at 184, 199, 207.

525 For a survey of these provisions in the European context, see Symeonides, “Result-Selectivism”, *supra* note 521 at 21-23; Symeonides, “Cross-Border Torts”, *supra* note 246 at 399-403; see also Juenger, *MSJ*, *supra* note 10 at 178, 184, 199, 196-197, 207.

526 Symeonides, “Cross-Border Torts”, *supra* note 246 at 408-411; see also *supra* note 423.

527 For a detailed overview of these rules, see Symeonides, “Result-Selectivism”, *supra* note 521 at 25-26; Symeonides, “Material Justice”, *supra* note 521 at 138; see also Juenger, *MSJ*, *supra* note 10 at 207.

528 See e.g. von Hein, *supra* note 91 at 1682 (coining the plaintiff’s choice rule as a “cousin of the better law approach”).
offers the criterion according to which the “better-law” is the law that would better serve the plaintiff. The one-party choice rule has substantially the same structure. By providing one of the litigating parties with the option to choose between the involved laws, the court allows him or her to adopt a provision that would be most favorable to him or her.529

Finally, the vulnerable-party protective rules intervene in the ordinary choice-of-law process by protecting the rights of initially unequally positioned groups, such as consumers and employees.

Generally, CBP is at odds with those favoring _a-priori_ one of the litigating parties choice-of-law rules. Such rule seems to be greatly unjust. Recall Savigny’s principal rejection of the phenomenon of forum shopping precisely because of the possibility that one of the litigating parties’ will in a one-sided way determine the identity of the applied law530 or as he put it the “capricious exercise of free will by one party”.531 In a similar way, Professor J.H.C. Morris cynically challenged these types of rules by asking “[B]ut why not choose whichever law is most favorable to the defendant?”532 Since Kantian legal philosophy situates the litigating parties in juridically equal relation to each other, the adoption of such rules would be no less than an abuse of the adjudication process itself. On the contrary, the preference of one of the litigating parties would be normatively justifiable in cases where the initial equality between the parties is infringed _a-priori_. Accordingly,

529 See also Symeonides, “Material Justice”, _supra_ note 521 at 135 (“rules that allow one party the right to select the applicable law are par excellence result-oriented since that party is likely to choose the law that he or she considers best”, reference omitted).

530 For discussion of this point in Savigny’s argument, see _supra_ notes 101-106 and accompanying text.

531 See _supra_ note 102.

CBP would be fully consistent with the plaintiff’s preference in inherently asymmetrical relationships. This indeed seems to be the regime adopted in the European Rome II Regulation, which limits the plaintiff’s preference to cases of torts against insurers.533

The next pair of doctrines addresses the very popular party autonomy principle (according to which the parties may agree on the identity of the applied law) and the traditional Validation Rule (which instructs the courts to select from the involved laws, the law that validates a certain institution, such as validity of contract or validity of marriage). For CBP the very classification of these doctrines under the better law approach is flawed. The party autonomy principle serves as a first foundational block of CBP and is grounded on a very unique theoretical basis – the parties’ united choice. By explicitly agreeing on the identity of the framework that will determine their rights and duties, the parties are united in their choices with respect to the question of rightfulness of their interaction. What is at stake here is not the question of which law is “better” according to certain subjective or objective criterion, but rather a reflection of the independent normative principle that fundamentally honors the parties’ choice.

The same point applies with respect to the Validation Rule. This doctrine seems to be related to the nature of particular legal institutions (such as contract or marriage) and to the parties’ presumed objective choice with respect to the validity of this institution. Thus,

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533 Rome II Regulation, supra note 27, Art. 18. For related discussion on the inherently asymmetrical relationships between parties in the context of the mandatory limitations imposed by different systems of the party autonomy principle, see supra note 423. The other cases that are mentioned in the Rome Regulation with respect to the plaintiff’s apparent preference, such as environmental torts or antitrust restrictions (Ibid, Arts. 6 (3) (b) & 7, respectively) are of a different public nature and therefore excluded from the operational force of CBP’s argument (see footnote 6 above).
the contracting parties’ are objectively regarded by the court as having intended to subject themselves to positive laws of the state under which the contract would be valid. In this way this doctrine fundamentally relates to the parties’ presumed choice and therefore is fully consistent with CBP and its indicative component of juridical indicators. In this way, CBP challenges the traditional classification scheme of better-law supporters, and attributes many choice-of-law doctrines, rules and concepts to its CBP’s theoretical framework.

534 For somewhat related understanding of the Validation Rule, see e.g. Nygh, supra note 331 at 338-340 (“It is obvious that the rule of validation in general accords with the reasonable expectations of the parties.” Ibid at 340). This understanding of the doctrine also explains why Professor Symeon Symeonides was simply not correct in his comments on the inconsistency of the Validation Rule with classical choice-of-law methodology in general and Savigny’s approach in particular (See Symeonides, “Dawn”, supra note 79 at 61, 65). As we have seen, Savigny has viewed both party autonomy principle and Validation Rule as inherent constituents of the juridical mechanism of his choice-of-law theory (see supra notes 133-134, 389, Savigny, System VIII, supra note 24 at 223-224, 252).
2. Second Restatement

While CBP fundamentally departs from vested rights theory, interest analysis and the better law approach, this is not the case with respect to the most popular (albeit theoretically baseless\textsuperscript{535}) method of the American courts - that of the Second Restatement. The Second Restatement deserves special attention for CBP. Since CBP follows the contemporary Kantian literature claim regarding the inherent normative link between theory and practice,\textsuperscript{536} the Second Restatement provides CBP with the most fertile ground for careful analysis and examination. Furthermore, the Second Restatement, with the MSR principle at its heart, is particularly intriguing from CBP’s standpoint and that is because of the historical connection between the Restatement and Savigny’s work on choice-of-law. As historical sources have shown, this work has a profound impact on John Westlake’s “most real connection” concept,\textsuperscript{537} which in turn inspired the English conception of the subject.\textsuperscript{538} This conception and Westlake’s work, in turn, directly influenced Willes Reese (the reporter of the Second Restatement) who incorporated the MSR principle in the Second Restatement.\textsuperscript{539} Accordingly, this Section focuses exclusively on the Second

\textsuperscript{535} On the empirical studies indicating the predominant popularity of the Second Restatement, see supra note 14.

\textsuperscript{536} For a discussion of the remarkable popularity of the Second Restatement on the one hand, and the failure of choice-of-law commentators to provide a normative justification to it on the other hand, see supra notes 12-27 and accompanying text.

\textsuperscript{537} Westlake, supra note 148; Kurt H Nadelman, “Private International Law Lord Fraser and the Savigny (Guthrie) and Bar (Gillespie) Editions” (1971) 20 ICLQ 213 at 214; Lipstein, supra note 60 at 135 (mentioning the considerable influence that “Savigny exercised on Westlake”); Martin Wolf, Private International Law, 2nd ed (Oxford: Oxford University Press, 1951) at 37 (discussing the direct connection between Savigny and Westlake).

\textsuperscript{538} Juenger, “Page of History”, supra note 60 at 453-454; see also Nygh, supra note 331 at 331.

\textsuperscript{539} Reimann, “Triumph”, supra note 112 at 593 (“Willis Reese, the principal reporter, was influenced by English law, particularly with regard to the most-significant-relationship principle”); Sier, supra note 341 at
Restatement. Through this, it traces the Restatement’s relation to CBP and its theoretical foundation, delineates its distinctiveness from Savigny’s argument and also provides some tentative thoughts on the possible suggestions for the improvement of the Restatement.

A. General Overview

The Second Restatement has been regarded in academic literature as a product of great compromise between a wide range of different approaches on the subject.\(^\text{540}\) The reason for this seems to lie in the subordination of most of the Restatement’s specific provisions to the multiplicity of general principles stated in §6.\(^\text{541}\) Almost all of the specific provisions contain an imperative according to which the actual application of the provisions must be done in a manner consistent with “the principles stated in §6”.\(^\text{542}\)

Besides §6, however, one can see a striking similarity between the provisions of the Second Restatement and CBP. First, there is an adoption in the area of contract law of CBP’s first foundational block: the party autonomy principle.\(^\text{543}\) Secondly, since the MSR principle serves as the organizing principle of its specific provisions, the Second Restatement seems to fundamentally follow the other foundational block of CBP: that of constructive inference. The MSR principle that instructs the courts to seek the law that


\(^{541}\) Second Restatement, supra note 14 §6.

\(^{542}\) Ibid §§ 145 (1); 188 (1); 222. The next Section of this Part discusses §6 in details.

\(^{543}\) Ibid §187 (1). For further discussion on the limitation of the party autonomy principle to the contract law category and CBP’s proposal (in line with European legislation) to extend this principle to other private law categories, see Part II, Sec 2 (A) above.
reflects the most significant relationship to the given factual situation lies at the heart of the Restatement’s provisions with respect to tort, contract, movable property, restitution, and family law choice-of-law rules. 544

In fact, one might talk about a disjunction between the rhetoric of the commentaries to the Second Restatement and its actual provisions. The commentaries insist in a somewhat orthodox way on the incorporation of a multiple policy-based analysis as an inherent part of the choice-of-law process. 545 Since, as claimed in the commentaries, 546 different policies apply in various ways and dimensions to various categories and sub-categories of private law, this would appear to result in a wide variety of choice-of-law rules.

However, the actual specific provisions of the Second Restatement prove the opposite and generally point towards a single organizing principle of MSR. Thus, this principle has been stated in the Second Restatement with respect to the tort choice-of-law rule as follows “The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties...”. 547 Crucially the choice-of-

544 For a list of the multiple Second Restatement provisions that explicitly adopt the MSR principle, see supra notes 15-19.
545 See e.g. Second Restatement, supra note 14 ch. 7, topic 1, intro. note; §145 cmts. b&c, e; §186 cmts. a&b; §188 cmts. b&c; §222 cmts. b&c; §236 cmt. a.
546 Thus, the Second Restatement suggests an internal sub-division of tort and contract choice-of-law rules based on the “multiplicity of policies and values” underlying each one of the particular sub-categories. (Ibid ch. 7, topic 1, intro. note; §145 cmt. e; ch. 8, topic 1, intro. note). C.f. Hegel’s replica of the Roman “superficial juxtaposition” of the contract law sub-categories. See Hegel, supra note 170 at [77R].
547 Second Restatement, supra note 14 §145 (1) (emphases added).
law rules of tort, unjust enrichment, movable property, and contract categories essentially follow this formulation.548

This exposition of choice-of-law rules seems to be clearly related to CBP. While the expressed choice is taken as a starting point, the Second Restatement proceeds to CBP’s notion of constructive inference and its accessory tool of juridical indicators. Thus, the persons’ domicile,550 the place of wrongful conduct,551 the place of contracting,552 the place of injury,553 the place of performance,554 the place of the thing,555 the place of the business,556 the place of enrichment557 or even nationality,558 are all potentially relevant juridical indicators that serve as a tool for inferring their presumed choice. Furthermore, the Second Restatement’s provisions according to which “These contacts are to be evaluated according to their relative importance with respect to the particular issue”,559 clearly point to a complex adjudicative process of analyzing and weighting relevant juridical indicators, which is fundamental to CBP’s foundational block of constructive inference. These indicators are not necessarily territorial. However, since they purport to

548 See supra notes 15-19.
549 For a discussion on the strictly relational character (contrary to Savigny’s approach) of all legal categories of the Second Restatement, see supra notes 356-367 and accompanying text.
550 Second Restatement, supra note 14 §§145 (2) (c), 188 (2) (e).
551 Ibid §145 (2) (b).
552 Ibid §188 (2) (a).
553 Ibid §145 (2) (a).
554 Ibid §188 (2) (c).
555 Ibid §188 (2) (d).
556 Ibid §§145 (2) (c), 188 (2) (e).
557 Ibid §221 (2) (b).
558 Ibid §§145 (2) (c), 188 (2) (e). For a discussion of the possibility of incorporation of the connecting factor of “nationality” within the operational mechanics of CBP’s notion of juridical indicators, see Part II, Sec 2 (B) (2) (c) below.
559 Ibid §§145 (2) (c), 188 (2) (e), 221 (2) (emphases added).
indicate the person’s choice regarding certain territory - they will almost always be territorial.

Finally, the Second Restatement adopts the second part of the juridical mechanism of the constructive inference doctrine - that of juridical presuppositions. Similarly to CBP, the Second Restatement adopts the notion of juridical presuppositions as an inherent component of the operational mechanics of the MSR principle, such as the place of the injury/damage for tort law cases,\textsuperscript{560} the place of contractual performance for contract law cases,\textsuperscript{561} and so on. Having often been overlooked by critics of the MSR principle, pointing to its unpredictable nature,\textsuperscript{562} these juridical presuppositions establish the ultimate starting point for further analysis of juridical indicators.

**B. Some Tentative Thoughts on Reciprocal Contribution**

What can CBP contribute to the Second Restatement from the standpoint of the internal coherency of its provisions and underlying theoretical basis? What are the lessons that CBP can teach the Second Restatement in a way that would coherently reflect CBP’s vision of the subject? Furthermore, I would suggest that the lessons do not need to be one-sided. As we will see, despite the clear historical link to Savigny’s choice-of-law theory,\textsuperscript{563} the drafters of the Second Restatement did not completely follow it and on many important points departed from it. Instead, and quite surprisingly, the Restatement seems to

\textsuperscript{560} Ibid §§146, 147, 159.
\textsuperscript{561} Ibid §§191, 195. For further discussion on the Restatement’s juridical presumptions see Part III, Sec 2 (B) (1) (d) below.
\textsuperscript{562} See supra notes 2, 368-372 and accompanying text.
\textsuperscript{563} See supra notes 537-539 and accompanying text.
incorporate the provisions that are more consistent with *CBP’s vision* of the subject rather than Savigny’s argument. In this way, the Restatement marks the conceptual distinctiveness between CBP and Savigny’s theory. Accordingly, one more question remains to be asked: are there any lessons that *Savigny’s theory* can learn from the Second Restatement and CBP taken together? The following Sections provide several tentative thoughts on the potential for such mutual contribution.564

1. What can the Second Restatement learn from CBP?

   (a) *Lesson 1: The Substantial Elimination of §6.*

   §6 states a wide spectrum of often self-contradictory organizing principles that reflect many approaches. In fact, besides Joseph Beale’s version of vested rights theory which has been expressly rejected by the commentaries to the Second Restatement,565 §6 seems to seek to incorporate as much as possible the principles and doctrines of choice-of-law: the sovereignty principle,566 the comity doctrine,567 interest analysis568 and other policy-based analysis of particular categories,569 the protection of “parties’ justified

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564 It should be noted that the purpose of the following paragraphs is to consider several possible means of reciprocal contribution between the Second Restatement and CBP on the one hand and CBP, the Second Restatement, and Savigny’s theory, on the other hand. A full overview of the Restatement’s provisions in light of CBP and Savigny’s theory must be reserved for a much more ambitious project.

565 Second Restatement, *supra* note 14 ch. 7, topic 1, intro. note; ch. 8, topic 1, intro. note.

566 *Ibid* §6 (2) (b).

567 *Ibid* §6 (2) (a).

568 *Ibid* §6 (2) (b) (referring to the “relevant policies of the forum”) and §6 (2) (c) (referring to the “relevant policies of other interested states”). These provisions of the Second Restatement have been portrayed in the choice-of-law literature as a direct reference to Currie’s interest analysis. See e.g. Dodge, *supra* note 45 at 119, n. 106 (with further references); Sier, *supra* note 341 at 40-46.

569 Second Restatement, *supra* note 14 §6 (2) (e).
expectations”, and the predictability and uniformity of results. While some of these principles are consistent with or follow from CBP’s conception of choice-of-law, others are not. Thus, based on a single organizing principle of juridical relational choice, CBP, at the level of its implementation, promotes parties’ justified expectations and consistent with the ‘certainty and uniformity of results’ goal. However, the relational juridical choice principle rejects principles related to sovereignty, comity, states’ interests, and other policy-based analyses of particular categories.

 Furthermore, in addition to the multiplicity of unrelated principles stated in §6, the very vague nature of the policy-based analysis is what led to this section being coined as an “indigestive straw”. Take for example, the policy-based analysis that is suggested in the Restatement’s commentaries with respect to tort choice-of-law rules. Following the New York courts’ experience, the commentaries suggest drawing a distinction between

\[\text{570} \quad \text{Ibid} \ §6 \ (2) \ (d). \]
\[\text{571} \quad \text{Ibid} \ §6 \ (2) \ (f) \ & \ (g). \]
\[\text{572} \quad \text{The word “justified” in the phrase “justified expectations” suggests a reference to the objective standard of individuals’ interaction and therefore links itself to CBP’s juridical conception of the choice-of-law question.} \]
\[\text{573} \quad \text{One may question the actual implementation of the above-mentioned principles in the actual daily operation of the courts. While acknowledging the self-contradictory nature of these principles, the courts seem to attribute either a more dominant role to the specific provisions of the Second Restatement ((See e.g. Jacob Townsend et al. v Sears, Roebuck and Company 227 Ill. 2d 147, 879 N.E. 2d 893, 900-903 (2007) (mentioning the Section’s 6 “laundry list of approaches” before turning to analyzing the case based on the specific provisions of the Second Restatement)) or simply try to submerge and reconcile the principles in a way that would be consistent with CBP ((see e.g. Clark Equipment Company v Liberty Mutual Insurance Company et al. Del. Super. Lexis 338, 14 (1994)) (offering the principles of “certainty” and “protection of justified expectations” as the underlying policies of a particular contract law case). For further doubts regarding the implementation of Section 6 in the daily operation of the courts, see infra note 582.} \]
\[\text{574} \quad \text{Roosevelt, supra note 157 at 2466; see also Weintraub, supra note 20 at 1288-1289; Whytock, supra note 12 at 757, n.197.} \]
\[\text{575} \quad \text{Babcock v Jackson 191 NE 2d 279 (NY 1963); Schultz v Boy Scouts of America, Inc 480 NE 2nd 679 (NY 1985).} \]
so-called “conduct regulating” and “loss-distributing” torts, a distinction that is supposed to serve as a basis for further establishing choice-of-law rules for different torts.\textsuperscript{576}

Several possible objections to this distinction show, however, the difficulty in applying this policy-based analysis to tort choice-of-law rules. \textit{First}, the distinction seems to mimic economic analysis’ rationales of “compensation” and “deterrence” for tort law, and as such it exposes itself to the fierce attack launched by tort law theorists targeting the internal failure of economic analysis to spell out a coherent relation between the two rationales.\textsuperscript{577} \textit{Secondly}, since the “compensation” and “deterrence” rationales are policies that are internal to tort law rather than choice-of-law, this invokes the above-stated argument\textsuperscript{578} about the collapse of this distinction into a purely private law model of economic analysis. \textit{Finally}, the distinction itself seems to be highly problematic and artificial. The notion according to which one can distinguish between torts that aim to deter the defendant’s misconduct and torts that aim to compensate the victim for his or her injuries, seems to be untenable from the standpoint of economic analysis itself\textsuperscript{579} and it is


\textsuperscript{577} On the criticism of the self-contradictory nature of the two underlying rationales of the economic analysis of tort law, see Coleman, \textit{supra} note 6 at 13-40; Ernest J Weinrib, “Understanding Tort Law” (1989) 23 Val U L Rev 485 at 498-510.

\textsuperscript{578} For a discussion of this point, see text accompanying notes 116-118, 297 above.

the normative structure of tort liability itself that insists on a continuous normative link between the tort liability and remedy.\textsuperscript{580}

Through introducing a single unifying principle, CBP suggests a \textit{panacea} to the multiplicity and self-contradictory nature of the principles of §6 in general, and to the inherent difficulty involved in policy-based analysis in particular. By introducing a coherent juridical mechanism for the systematic grasping of persons’ choice through the MSR principle, CBP will liberate §6 from the clutch of those approaches that are inconsistent with the juridical relational choice principle.\textsuperscript{581} This suggests a substantial elimination of §6 of the Restatement from the choice-of-law process.\textsuperscript{582}

\textsuperscript{580} For a recent exposition of this central argument for tort law theory, see Ernest J Weinrib, “Civil Recourse and Corrective Justice” (2012) 39 Fla St U L Rev 273 [Weinrib, “Civil Recourse”]. Surprisingly, but elsewhere, by applying the same set of choice-of-law rules with respect to the law of damages to tort liability itself (Second Restatement, \textit{supra} note 14 §171), the Second Restatement seems to support the position regarding the inherent normative link between tort liability and tort remedies. For further discussion in the context of the substance-procedure distinction regarding the intimate normative link between right and remedy from the theoretical perspective of CBP, see Part III, Sec 3 (B) (1) below.

\textsuperscript{581} Thus, ironically, this suggestion stands in diachronic opposition to the proposal made by Bernard Audit (see Audit \textit{supra} note 135 at 598-603) to incorporate policy-based thinking into continental choice-of-law process. See also Symeonides, “Lessons”, \textit{supra} note 576 at 1782-1798. For somewhat related comments on the distinctive nature of §6 of the Restatement, comparative to continental choice-of-law thinking, see Sier, \textit{supra} note 341 at 40-42.

\textsuperscript{582} It should be noted that the present popularity of §6 amongst the American courts is unclear. On the one hand, Patrick Borchers’ study from 1997 has indicated the relative popularity of §6 amongst American judges. See Borchers, \textit{supra} note 540 at 1242 (indicating that in approximately one third of the cases the judges resorted to the pure application of §6 or its combination with specific provisions of the MSR principle). However, on the other hand, recently two leading choice-of-law scholars have commented on the courts’ apparent ignorance of §6 ((See Symeonides, “Why Not” \textit{supra} note 13 at 391; Louise Weinberg, “A Structural Revision of the Conflicts Restatement” (2000) 75 Ind L J 475 at 488 (stating that the biggest problem with §6 is that ‘too many judges never actually get to it’)). Christopher Whytock’s recent empirical work is a missed opportunity to test the question of whether the courts actually resort to §6, or (as choice-of-law scholars suspect) they predominantly ignore it. Whytock’s methodology, however, seems to support the latter. By presupposing a negative correlation between the application of the Second Restatement and the application of the \textit{lex-fori} rule (Whytock, \textit{supra} note 12 at 758, n. 202), Whytock seems to exclude the possibility of applying the interest analysis that is so central to §6, and which, as we have seen, is a \textit{lex-fori} biased approach ((See texts accompanying notes 79-80. For further discussion of the inherent \textit{lex-fori} bias of §6, see Symeonides, \textit{Revolution, supra} note 12 at 40; Courtland H Peterson, “United States”, in Symeon C Symeonides, ed, \textit{Private International Law at the End of the 20th Century: Progress or Regress?} (Hague:}
(b) Lesson 2: The Timing Issue

As we have seen, the notion of juridical presupposition shields the MSR principle from the criticism raised by many scholars against this principle regarding the unlimited pool of its potential juridical indicators. Furthermore, CBP imposes a limitation on the potential identity of these indicators. Because of the fundamental conception of the subject as a connection between a persons’ choice and a particular legal category, it seems to be crucial to CBP that all indicators be directly related to the private law categories. Thus, for example, in the case of a contractual transaction, the indicators of the parties’ domicile, the place of contracting, the place of performance, the place of business, and so on, have to be evaluated at the time when each one of the constitutive elements of contractual liability took place. From this perspective, an indicator such as the place of the forum offered by some writers (and surprisingly mentioned by Savigny, clearly in contradiction with his own examples) would be at odds with CBP. I shall refer to this link between the
juridical relational choice principle and particular structures of legal categories as the *timing issue*.

The Second Restatement’s position in this respect is somewhat ambiguous. The commentaries to the Restatement acknowledge that the *timing issue* is “a problem which runs through the entire area of choice of law”.

However, they hesitate. While acknowledging the “sparse authorities” on this matter, they state that “presumably” the answer to the *timing issue* should be negative with respect to the question of whether subsequent changes in domicile should affect the choice-of-law process. This answer is consistent with CBP according to which the systematic evaluation of juridical indicators must be executed at the time when each one of the constitutive elements of the private law categories arises. Accordingly, any changes in the territorial factors after the completion of these elements (such as changes in domicile) cannot normatively affect the nature of the choice-of-law process.

Furthermore, the “juridical relational choice” principle also sheds light on the nature of the juridical indicator of the “previous relationships” between the parties, which appears in several provisions of the Restatement. This juridical indicator mirrors the other side of the same coin of the *timing issue*. As long as the previous relationship between the litigating parties is not related to particular legal categories, they do not *per se*

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589 *Ibid*.
590 *Ibid*. The Restatement formulates this juridical indicator as ‘where the relationship, if any, between the parties is centered’. *Ibid* §§ 145 (2) (d); 221 (2) (a).
play any normative role for the juridical relational choice principle. So, when the plaintiff is injured while riding as a guest passenger in the defendant’s automobile,\textsuperscript{591} the fact that the plaintiff and the defendant have been doing business together before the accident through a series contracts or have shared a trip before, does not affect the identity of the parties’ presumed territorial choice at the time of the accident.\textsuperscript{592}

(c) Lesson 3: Re-considering the land taboo doctrine

Over recent years many scholars have expressed their opposition towards the so-called “land-taboo” doctrine\textsuperscript{593} according to which the choice-of-law rules with respect to immovable property shall be governed exclusively by the place of the property (\textit{lex situs}). The Second Restatement indeed incorporates this doctrine. Thus, while the provisions addressing immovable property adopt a strict \textit{lex-situs} rule,\textsuperscript{594} the provisions addressing movable property follow the various juridical indicators of the MSR principle with the juridical presupposition of the place of property.\textsuperscript{595} The law of succession too seems to...

\textsuperscript{591} \textit{C.f.} Restatement’s commentaries example according to which the plaintiff purchases a train ticket from a train company to travel to a certain place and afterwards is injured as a result of the train operator’s negligence. The place where the ticket was purchased is irrelevant to the liability structure of tort law and therefore cannot play the role of a legitimate juridical indicator (\textit{Ibid} §145 cmt. e).

\textsuperscript{592} It would appear that the commentaries’ own examples of a ‘centered relationship’ seem to point to the juridical indicators that actually prove the territorial attachment of the defendant and the plaintiff to certain territory \textit{at the time} when the constitutive elements of the grounds of liability arose (\textit{Ibid} §145 cmt e, illus. 1& 2).

\textsuperscript{593} See Symeonides,”Why Not”, \textit{supra} note 13 at 26: “The time for rebuking the ‘situs taboo’ is long overdue…” (with further extensive references at n.123). For an illuminative discussion of the land taboo doctrine within the Anglo-American tradition, see Janeen M Carruthers, \textit{The Transfer of property in the Conflict of Laws} (Oxford: Oxford University Press, 2005) at 18-19, 32-38, 194-200; see also Pitel & Rafferty, \textit{supra} note 11 at 326-327.

\textsuperscript{594} Second Restatement, \textit{supra} note 14 §§ 223-243.

\textsuperscript{595} \textit{Ibid} §§ 244 & 251.
adopt this doctrine by sharply distinguishing between succession in immovable and movable property.\(^{596}\)

While the traditional criticism against the “land-taboo” doctrine has usually been stated in policy-based terms,\(^{597}\) CBP joins the opponents of the doctrine from its own theoretical perspective. The traditional *lex situs* choice-of-law rule has typically been explained through the lens of the state sovereignty principle according to which the sovereign has exclusive authority over things that are situated within the bounds of its territory.\(^{598}\) However, for CBP, the principle of the state’s sovereignty has nothing to do with the choice-of-law question.\(^{599}\) Accordingly, it unequivocally rejects this principle as a legitimate justification for property choice-of-law rules. For CBP, the ultimate justification for the choice-of-law question was and remains the juridical relational choice principle. Therefore, property choice-of-law rules (as well as other legal categories’ rules), being

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\(^{596}\) *Ibid* §§ 236& 260. For a discussion of the tradition of this distinction within the law of succession, see David H Sellar “Succession Law in Scotland --A Historical Perspective” in Kenneth Reid at al, eds, *Exploring the Law of Succession* (Edinburgh: Edinburgh University Press, 2007) 49. This distinction seems to adopt Savigny’s conception of the subject that viewed the law of succession as an extension of property law (see texts accompanying notes 54, 180-182 above).

\(^{597}\) See e.g. Carruthers, *supra* note 593 at 200-230.

\(^{598}\) See e.g. Rödl, *supra* note 293 at 37-38, 41; Second Restatement, *supra* note 14 ch. 9, intro. note; §236 cmt. a (mentioning “historical reasons” and “states’ interests’ as a justification for the doctrine). See also William Guthrie, the translator of Savigny’s treatise on choice-of-law, who in a footnote mentions English and German writers who are “[r]eferring the authority of the *lex situs* simply to the intention of the local legislator, without assigning any deeper reasons” (See Savigny, *System VIII, supra* note 44 at 174, n.1).

\(^{599}\) See Part II, Sec 1 (C) & (D) above. CBP’s rejection of the “land- taboo” doctrine can also be paraphrased in terms of its incompatibility of the old distinction made by Italian statutists between the so-called *statuta realia* (law concerning things) and *statuta personalia* (law concerning persons) categories of laws: see e.g. Lipstein, *supra* note 60 at 106-133). Since CBP conceives of property law as being similarly to other private law categories, of a strictly interpersonal nature, it is at odds with the *statuta realia* category.
inherently grounded on the Kantian relational normative structure between the particular defendant and particular plaintiff600 have to be based solely on this organizing principle.

A similar line of reasoning can be traced in Savigny’s work. The organizing principle of voluntary submission sheds light on Savigny’s rejection of the conceptual distinction between movable and immovable property,601 which was defended by some writers during his time. Savigny finds this distinction, as well as a related distinction within the law of succession,602 to be artificial.603 Since both movable and immovable property are grounded on the unifying principle of voluntary submission, all cases of property rights shall be governed by the same operational juridical mechanism of Savigny’s choice-of-law approach: the combination of the flexible juridical presupposition of the place of property with other juridical indicators.604

600 For discussion on the Kantian relational inter-personal structure of property law, see supra notes 173-182 and accompanying text.
601 Ironically however, Kantian legal philosophy conceptually adopts this distinction in the context of discussion on the justification of property law in the regime of purely private rights (“State of Nature”) and the possibility of first-time acquisition of property within this regime (Kant, Doctrine of Right, supra note 4 at [6:261-6:270]). In this context, Kant makes a distinction between immovable and movable property by focusing on the immovable property as a representation of a right that every person has in the State of Nature for physical possession of an unspecified piece of land ((For discussion of these issues, see Ripstein, supra note 5, at 96-105, 243-252 and especially Sharon Byrd & Joachim Hruschka, “Duty to Recognize Private Property Ownership: Kant’s Theory of Property in His Doctrine of Right” (2006) 56 U Toronto L J 217 at 262-271)). However, this distinction is irrelevant for the Kantian strictly relational, interpersonal structure of the property law category itself as a relation of property owner to non-owner. This explains why the immovable-movable distinction is irrelevant in the context of the choice-of-law question and why CBP’s organizing principle of juridical relational choice is extended to property law category.
602 Savigny, System VIII, supra note 44 at 272-281 (rejecting the possibility that different parts of succession can be governed by different laws).
603 Ibid at 137-138, 141-143, 175.
604 Ibid at 175-179. For a somewhat related proposal on property choice-of-law rules, see Carruthers, supra note 593 at 229-248.
(d) Lesson 4: The Normative Structure of Juridical Presuppositions

As we have seen, the Second Restatement follows CBP on the notion of juridical presuppositions, under which the juridical presuppositions are viewed as indicative starting points for further judicial analysis of juridical indicators.\(^{605}\) Thus, for example, §§146 & 147 of the Restatement combine the juridical presuppositions of the place of injury/damage with other juridical indicators in the area of tort law.\(^{606}\) And §196 establishes the juridical presupposition of the place of performance for contracts for the provision of services.\(^{607}\) However, in contrast to CBP, which ultimately links the notion of juridical presuppositions to the internal normative structures of each one of the private law categories,\(^{608}\) the Restatement’s justification of the identity of the juridical presuppositions seems to be rather arbitrary.

Take, for example, the Restatement’s commentaries’ justification for choosing the place of injury over the place of conduct as a juridical presupposition for several tort law categories in cases where the defendant’s conduct and the plaintiff’s resulting injury have occurred in different states.\(^{609}\) While acknowledging the difficulty in making such choice,\(^{610}\) the commentaries resort to the following two rationales in justifying the juridical presupposition of the place of injury: (1)”persons who cause injury in a state should not

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\(^{605}\) See Part II, Sec 2 (B) (3) above.
\(^{606}\) Second Restatement, \textit{supra} note 14 §§146 & 147.
\(^{607}\) \textit{Ibid} §196.
\(^{608}\) For the centrality of this point to Savigny’s argument, see Part I, Sec 2 (B) (2) (c) above.
\(^{609}\) For a discussion of the conceptual difficulty within the traditional and contemporary choice-of-law literature to distinguish between the place of injury and place of conduct, see Perry Dane “Conflict of Laws”, in Dennis Patterson, ed, \textit{A Companion to Philosophy of Law and Legal Theory}, 2\textsuperscript{nd} ed (Malden: Wiley – Blackwell, 2010) 197 at 200. As we will see in Part III, Sec 2 (B) (2) (a) below, CBP supports the place of the wrongful conduct as a juridical presumption for the tort law category.
\(^{610}\) Second Restatement, \textit{supra} note 14 §145 cmt. e.
ordinarily escape liability imposed by the local law of that state on account of the injury”;
and (2) “[t]he place of injury is readily ascertainable. Hence, the rule is easy to apply and
leads to certainty of results”. 611

Both justifications given in the Restatement’s commentaries seem plainly
unconvincing as an explanation of the preference of the place of injury over the place of
conduct. First, it is not clear why the place of injury should generally determine the
identity of the choice-of-law rule. Secondly, one may challenge the claim according to
which it is “easier” to ascertain the place of injury over the place of conduct. Furthermore,
both justifications seem somewhat related to the vested rights theory that was previously
mocked by the commentaries,612 which gives normative significance to the “last act”
structure of liability and praises the mechanical predictability of results. From this
perspective, CBP’s normative structures of the private law categories suggest replacing the
Restatement’s arbitrary choice as the key to grasping the identity of the juridical
presuppositions for each of the private law categories. 613

2. What Can CBP and the Second Restatement Teach Savigny’s Theory?

(a) Lesson 1: The Redemption of Tort law as a Private Law Category

I shall start with the Restatement’s rejection of Savigny’s conception of the tort law
category and subsequent incorporation of lex-fori rule for this category. This, which many

611 Ibid §146 cmt. e; §147 cmts. c-e.
612 See supra note 557.
613 C.f. however the Restatement’s commentaries’ justification for the juridical presumption for services
contracts according to which “The rendition of the services is the principle objective of the
contract….“(Second Restatement, supra note 14 §196 cmt. c) with CBP’s somewhat similar vision of the
structure of the contract law category (see supra notes 387-391 and accompanying text).
years after Savigny would come to be called “an excellent vehicle for re-examining the methodological and philosophical foundations of American choice of law in general”, was discussed very briefly by Savigny. Savigny’s solution to this category is brutally simple. Since he conceived this category as belonging conceptually to states’ activity, similarly to criminal and civil procedure laws, the organizing principle of voluntary submission does not apply with respect to this category. Therefore, the tort law category has always to be governed by the law of the forum - the lex fori.

Savigny’s brief comments on the tort law category deserve, however, special attention. Their significance for understanding the historical basis of traditional English tort choice-of-law rules cannot be underestimated. In 1868, Savigny’s concept of tort law had a profound influence on the Privy Council’s decision in The Halley, which in turn provided a basis for Willes J.’s famous obiter dictum statement in Phillips v. Eyre.

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614 Symeonides, Revolution, supra note 12 at 2.
615 Savigny, System VIII, supra note 44 at 194, 217-221, 253. It should be noted that in his almost complete ignorance of this category, Savigny does not differ to other thinkers of his times. Story, for example, does not mention the tort law category at all. See Story, supra note 45.
616 See infra note 701.
617 Savigny, System VIII, supra note 44 at 194, 218, 253; see also von Hein, supra note 91 at 1669 (commenting on Savigny’s public law conception of the tort law category); Kennedy, supra note 188 at 828-829.
618 Thus, Albert Ehrenzweig, in his comments on the lex fori understanding of Savigny’s choice-of-law thought, mentioned Savigny’s conception of tort law. See Ehrenzweig, supra note 2 at 322, n. 65. For further discussion on the lex fori tendency of Savigny’s argument see infra notes 739-740 and accompanying text.
619 Liverpool, Brazil, and River Plate Steam Navigation Co Ltd v Benham; The Halley (1868) LR 2 PC 193 at 204. Savigny’s conception of tort choice-of-law rule seemed to have at that time a decisive influence on the Privy Council’s decision. Thus, Phillimore J in the first instance explicitly mentioned Savigny’s tort choice-of-law rule, as follows “The authority of Savigny, which it was truly said would have great weight with me….”. See The Halley (1867) LR 2 Adm & Eccl 3 at 17. For further support of the argument regarding Savigny’s decisive influence on The Halley, see Hessel E Yntema, “The Historic Bases of Private International Law” (1953) 2 Am J Comp L 297 at 311; Ehrenzweig, supra note 2 at 541-542.
620 Phillips v Eyre [1870] LR 6 QB 1. For discussions on the direct influence of The Halley on Willes J.’s statement, see Peter Handford, “Edward John Eyre and the Conflict of Laws” (2008) 32 Melb ULR 822 at
delivered two years later in 1870. This statement became the foundation of English choice-of-law rules in tort. Viewed as a binding precedent and approved as such (albeit with certain reservations) in the comprehensive judicial analysis of *Chaplin v. Boys*, the *lex-fori* based tort choice-of-law rule was abolished in England only in 1995. For over a century, the English courts, which had been perplexed by the underlying rationale of the *lex-fori* based rule, simply overlooked Savigny’s “public law” foundation of tort law. As Professor Kahn-Freund put it:

One can *a posteriori* construct all sorts of analytical explanations for phenomenon [*lex-fori* based tort choice-of-law English tradition], but the fact is that the only true explanation is historical, and it is to be found in the influence of Savigny, more particularly in a decision of the Privy Council of 1868 [*The Halley*].

For CBP however, Savigny’s exclusion of the tort law category from the universal grasp of his theory deserves re-consideration. The “public foundation” of tort law seems to stand in opposition to Savigny’s own conception of *wrongdoing* which had been presented by Savigny as the actualization of an inconsistency with the pre-existing system of natural rights, and as such shall be viewed as an inherent and complementary part of a rational, inherently private law conception of the private law categories. Precisely this strictly “private” conception of tort law is what stands at the heart of many contemporary Neo-Kantian tort law theories which fundamentally view tort law as a normative structure of

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621 *Chaplin v. Boys* [1971] AC 356. For further discussion of this case in the context of the substance-procedure distinction, see *infra* notes 682-685 and accompanying text.
622 See *supra* notes 353-354.
624 Kahn-Freund, *supra* note 3 at 287 (emphasis in original, reference omitted).
625 Savigny, *System VIII*, *supra* note 44 at 270; see also texts accompanying notes 269, 286 above.
interaction between two persons. Accordingly, one may call for a re-examination of Savigny’s approach with respect to the tort law category. This is indeed the approach of the Second Restatement, which similarly to other private law categories, regards the tort law category as ultimately based on the MSR principle and its two constituents: juridical

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626 For a discussion on this unifying basis of several leading tort law theories, see Weinrib, “Correlativity & Personality”, supra note 6. Because of the distinctive nature of tort law, one might question at this point the very possibility of application of CBP’s general principle of relational juridical choice with respect to this category. Indeed, tort law cases seem to be different from other private law categories in the sense that they often lack pre-existing relationships between the parties. Furthermore, tort law lacks an independent normative basis and is parasitic to other private law categories (text accompanying footnotes 268-269). However, for CBP, the general requirement of parties’ relational choice is what creates the inherent inquiry with respect to such choice for any tort law litigation. In other words, any tort law litigation has to be preconditioned to such united choice in order to put it coherently in conformity with the Kantian regime of equal freedom (text accompanying footnotes 287-293). Given that there is no post-tort agreement between the parties with respect to the identity of the framework to adjudicate their dispute (which itself would be subject to the principles of reasonableness and transactional equality that follow from other building blocks of CBP) - the notion of juridical imposition or the MSR principle will apply to the question of choice-of-law. Within the judicial analysis under the MSR principle, the crucial question would be this: what is the juridical significance of various relevant territorial factors and how can they shed light on parties’ united choice with respect to the territory and positive law for adjudicating their dispute? While taking the place of the wrong as a point of departure (text accompanying footnote 393), in this process the judge should take into account the entirety of factors: the territorial location of various components of the tort law structure of liability (which are, based on corrective justice, fully relational and always address both parties), the actual territorial location of the parties and their permanent residence, as well as other territorial factors such as the location of their business (text accompanying footnotes 343-367).

627 For further criticism of Savigny’s “public” conception of tort law, on somewhat similar lines, see von Hein, supra note 91 at 1668-1671; Jan Kropholler & Jan Von Hein, “From Approach to Rule-Orientation in American Tort Conflicts” in Law and Justice in a Multistate World, in James Nafziger & Symeon C Symeonides eds, (Ardsley, N.Y: Transnational Publishers, 2002)317 at 330. This call for the re-examination of Savigny’s conception of the tort law category diverges also from a related call made by Savigny’s 19th century opponent, -Carl Ludwig von Bar. Von Bar criticized Savigny’s tort law lex-fori position because of its ignorance of the sovereignty principle embedded in the plaintiff’s commission of a tortious act on certain territory. For him, the very commission of this act leads to the state’s inherent interest in governing the tort law dispute that has arisen from the plaintiff’s tortious act. Support for the connecting factor of the place of the wrong (lex loci actus) follows (see supra note 73 at 634-637). While von Bar grounds his position in the sovereignty principle, CBP bases its rejection of Savigny’s position on very different grounds. CBP rejects Savigny’s position because of its very conception of tort law as a part of the unifying framework of private law, to be governed as such by the organizing principle of juridical united choice, irrespective of the notion of states’ sovereignty.
presuppositions\textsuperscript{628} and juridical indicators. From this perspective, CBP joins the Second Restatement in its rejection of Savigny’s vision of tort law.

\textit{(b) Lesson 2: Re-Conceptualization of Family Law Category}

A somewhat similar point applies with respect to Savigny’s treatment of the family law category and family law choice-of-law rules. Despite the evident similarity between the Kantian concept of Acquired Rights and Savigny’s concept of “legal relations,”\textsuperscript{629} the category of family law reveals Savigny’s fundamental divergence from Kant. On this matter, Savigny clearly and explicitly rejects the Kantian vision of the subject.\textsuperscript{630}

Situated within Right to a Person Akin to a Thing sub-category of Acquired Rights,\textsuperscript{631} the Kantian conception of family law seems to be innovative in nature compared to the common European and American understanding of the subject in Kantian times. The common understanding of family law, based primarily on Roman law sources, viewed the subject as ultimately grounded on the idea of an unlimited authority of the father as head of the household.\textsuperscript{632} The Kantian vision of family law is different. In similarity to the other two categories of property law and contract, it is conceived as being of a strictly “private

\textsuperscript{628} As we have seen, CBP supports the juridical presumption of the place of wrongful conduct (rather than the place of injury) as the most central element of the structure of tort law. See \textit{supra} note 393.

\textsuperscript{629} For discussion of this point, see \textit{supra} notes 278-285 and accompanying text.

\textsuperscript{630} As Savigny put it “In this matter Kant has erred in wishing to make the purely natural constituent in marriage, the sexual instinct, the object-matter of an obligatory jural [legal] relation; by this the nature of marriage is necessarily entirely misunderstood and degraded.” Savigny, \textit{System I}, \textit{supra} note 47 at 283 (footnote omitted).

\textsuperscript{631} For discussion on Kantian three-fold division of Acquired Rights, see \textit{supra} note 263-269 and accompanying text.

\textsuperscript{632} For discussion of this point, see Halley, \textit{supra} 184 at 66, n.236. It should be noted, however, that this Roman law traditional conception of family law has not been accepted in other legal traditions, such as Jewish law. See e.g. YS Kaplan, “A Father’s Consent to the Marriage of his Minor Daughter: Feminism and Multiculturalism in Jewish Law” (2009) 18 S Cal Rev L & Social Justice 393 at 419-420. I would like to thank Ram Rivlin for raising this point.
nature” and in this way it follows the juridical structure of other categories as a relation between persons.

In contrast to Kant, Savigny conceives family law as based on a mixed structure. In this structure, family law is based to a certain degree on purely legal considerations, however, it also has a strong moral element that is external to Kant. In other words, while rejecting (similarly to Kant) the Roman law conception of the family law category as fundamentally grounded on the father as head of the household, Savigny does not follow Kantian thought with respect to the juridical purity of this category. Thus, for example, Savigny insists on the non-Kantian legal morality element in relationships between parents and children with respect to children’s education.

Furthermore, with respect to the institution of marriage, the divergence between the two goes even deeper. While Kant conceived marriage as a strictly private institution in the form of a ‘special contract’ between two private parties, Savigny grounds marriage only very sparingly on purely legal grounds. For him, each individual has a moral necessity to be completed by the other person through the institution of marriage. This imperative follows from the status of a given individual as a member of the “organic whole” of the collective community to be completed by the other person through the

633 Savigny, System I, supra note 47 at 271, 279.
634 Ibid at 277-279, 283-284; see also Jolowicz, supra note 188 at 68.
635 Savigny, System I, supra note 47 at 278, n. e, 283-284. For discussion of Roman law’s refusal to recognise family law as a distinctive category of private law (in contrast to Savigny), see Müller-Freienfels, supra note 186 at 32. For a more general argument regarding Savigny’s careful and selective reading of Roman law sources, see Whitman, supra note 121 at 126-129.
636 Savigny, System I, supra note 47 at 287-288.
637 For this conception of family law within traditional and contemporary literature see Halley, supra note 184 at 6-33.
638 Savigny, System I, supra note 47 at 271.
in institution of marriage.639 In Savigny’s words, the institution of marriage is “[d]estined to the completion of its incomplete self”.640

By this conception of family law, Savigny breaks apart the strictly relational Kantian structure of private law interaction. While Kant fundamentally views all private law categories as being of a strictly relational character between two individuals, Savigny introduces the institution of marriage as a relation between the individual and collective community. Under this vision, family law is conceived as a fundamental institution for social order and in this way it intimately links itself to the operational apparatus of the state.641

This link sheds light on the conceptual location of family law within Savigny’s exceptional category of anomalous laws as a reflection of the influence of the so-called historical school of jurisprudence’ on his thinking.642 As we have seen, he explicitly named the major part of family law as a primary object of the exceptional anomalous laws category.643 Grounded in community consideration, family law seems to reflect Savigny’s idea of the relation between law and the particular spirit of the community.644 And because of the centrality of the special, non-legal moral element that grounds the internal structure

639 Ibid at 276-279. For further discussion of Savigny’s family law category, see Kennedy, supra note 188 at 811; Halley & Rittich, supra note 267 at 757-758.
640 Savigny, System I, supra note 47 at 279.
641 For development of this conception of marriage in European and American scholarly thought, see Halley, supra note 184 at 36-48. See also BH Bix, “State Interests in Marriage, Interstate Recognition, and Choice of Law” (2005) 38 Creighton L Rev 307.
642 For a discussion of the historical school of jurisprudence’s roots as a possible explanation for Savigny’s Second Deviation (i.e. creation of the exceptional category of anomalous laws) see Part II, Sec 2 (C) (1) above.
643 See supra note 213 and accompanying text.
644 On a somewhat similar argument regarding the historical school of jurisprudence basis of Savigny’s conception of the family law category, see Kennedy, supra note 188 at 816-817.
of this category,\textsuperscript{645} Savigny disqualified significant parts of family law from the operational force of the voluntary submission principle and subordinated these to the \textit{lex-fori} solution.\textsuperscript{646} Furthermore, the historical school of jurisprudence foundation of family law category also explains why Savigny named the connecting factor of “father/husband domicile” as juridical presumption for this category.\textsuperscript{647} Linked to the historical circumstances of his days of the father as a head of family, Savigny attributed to these circumstances a normative significance because of the historical school of jurisprudence.\textsuperscript{648}

Historically, Savigny’s conception of family law has exercised significance influence on the traditional and contemporary choice-of-law rules.\textsuperscript{649} The “community” character of family law explains the conception of this category as comprising a web of mandatory provisions of the relevant country. Further, the historical school of jurisprudence’s foundation of family law explains its incompatibility with the party autonomy principle.\textsuperscript{650} Fully consistent with the organizing principle of voluntary submission and grounded in the relational aspect of private law categories, this principle has nothing to do with the “spirit” of a particular community.

\textsuperscript{645} See \textit{supra} notes 183-188 and accompanying text.
\textsuperscript{646} Savigny, \textit{System VIII}, \textit{supra} note 29 at 291; Savigny, \textit{System I}, \textit{supra} note 31 284, n. (e). For a discussion of Savigny’s exceptional category of laws to the choice-of-law process, see Part I, Sec 3 (A) below.
\textsuperscript{647} For discussion of this point, see \textit{supra} note 198 and accompanying text.
\textsuperscript{648} Accordingly, this juridical presumption for the family law category is not based on Savigny’s sexism, rather it is based on mere historical facts that have normative significance for Savigny’s conception of this category as a reflection of the so-called “historical school of jurisprudence”. In this way, Savigny’s previously rejected Roman law conception of the father as the firm master of the household re-enters through the back-door.
\textsuperscript{649} On the influence of Savigny's conception of family, see Müller-Freienfels, \textit{supra} note 186 at 37-38; see also Clarkson & Hill, \textit{supra} note 73 at 357 (explicitly referring to Savigny’s work as an historical source for English connecting factors of the place of husband’s domicile).
\textsuperscript{650} For recent discussion of the traditional ignorance of the party autonomy principle in the area of family law, see e.g. Eric Jayme, “Parties Autonomy Principle in International Family Law and Succession Law: New Tendencies” (2009) 11 Yrbk Priv Intl L 1.
CBP rejects however Savigny’s inspired traditional vision of the subject and willingly adopts the recent changes on this matter. Amongst these changes one may mention the recent European movement towards the adoption of the party autonomy principle with respect to family law in the European context.\(^{651}\) And the Second Restatement’s position, which generally incorporates the MSR principle into the family law category,\(^{652}\) similarly to other categories, suggests a movement towards such direction of a re-consideration of Savigny’s family law choice-of-law rules.\(^{653}\) By going back to its theoretical underpinnings, CBP reveals Savigny’s fundamental divergence from Kant with respect to the family law category. From this perspective, the contemporary tendency to adopt the party autonomy principle in the area of family law and the Restatement’s adoption of the MSR principle in this category reflect the reversion of Savigny’s choice-of-law theory to its Kantian roots.

\(^{651}\) For a recent discussion of these issues, see *Ibid*.

\(^{652}\) See *supra* note 19.

\(^{653}\) These explanations for recent changes that occurred within the family law category equip CBP with further insights on the related changes that recently occurred within the succession law category choice-of-law rules. The conventional wisdom of the law of succession has viewed the law of succession as ultimately linked, similarly to family law (and in contrast to Savigny’s & Kant’s conceptions of succession law, see *supra* notes 54, 180-182 and accompanying text on these matters) to the cultural attributions of a particular nation. See e.g. Marius J De Waal, “Comparative Succession Law” in Mathias Reimann & Reinhard Zimmermann, eds, *Oxford Handbook of Comparative Law* (New York: Oxford University Press, 2006) 1071 at 1073. However, in recent years we have witnessed a significant change in this direction which has defended a set of principles of the law of succession, which seems to be of universal character without reference to particular social, cultural, or religious contingencies. See Kenneth GC Reid et al, “Testamentary Formalities in Historical and Comparative Perspective” in Kenneth GC Reid et al, eds, *Testamentary Formalities*, vol. 1 (Oxford: Oxford University Press, 2011) 432 (examining the testamentary formalities of various jurisdictions). See also the recent *Commission Regulation (EC) 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions in matters of succession, July 2012, L 2012/107* ((adopting to a certain extent CBP’s conception of succession law choice-of-law rules as a reflection of the relational juridical choice and its indicative elements - express choice, juridical presumption of the deceased’s domicile at the time of death, and juridical indicators. See *Ibid* Arts. 21-22(1)))
(c) Lesson 3: The Incorporation of the Juridical Indicator of Nationality

CBP’s final joinder to the Second Restatement in its rejection of Savigny’s approach lies in its treatment of the juridical indicator of “nationality”. Savigny’s unequal rejection of the nationality connecting factor with extensive reference to Roman law sources\(^{654}\) was somewhat unclear.\(^{655}\) Savigny’s organizing principle of voluntary submission, however, sheds light on the apparent incompatibility of this connecting factor to serve as a legitimate juridical indicator for the choice-of-law process. The rejection follows from the voluntary submission notion as ultimately addressing the question of a person’s territorial choice within a specific structure of a given legal relation.\(^{656}\)

Nationality is a political concept which inherently relates to states’ activity and the notion of citizenship and as such it appears simply to be too remote to serve as an indicator for understanding a person’s territorial choice.

For CBP however, it seems to be too harsh to eliminate nationality in advance as a potentially relevant juridical indicator and this is clear from the internal coherency of Savigny’s argument itself. As we have seen, the “unlimited list” of juridical indicators does not have to be conceptually limited to strictly territorial connecting factors.\(^{657}\) Accordingly, one might suggest incorporating the nationality factor into the operational juridical mechanism of the voluntary submission principle (or relational juridical choice in CBP’s formulation with further qualifications), and in this way to follow those provisions of the

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\(^{655}\) For a discussion of this point, see Michaels, “Globalizing Savigny”, *supra* note 75 at 135-137.
\(^{656}\) See text accompanying notes 112-118 above.
\(^{657}\) For a discussion of these issues, see Part II, Sec 2 (B) (2) above.
Second Restatement that list nationality as a potentially relevant juridical indicator.\textsuperscript{658}

Under this conception, the nationality factor would, perhaps, be playing a less central role than other territorial connecting factors and would be normatively relevant only to the extent it indicates the territory (and subsequently the positive law) to which the parties choose to submit themselves.

These several tentative suggestions on reciprocal lessons demonstrate the significance of CBP for grasping the normative nature of the Second Restatement. It is not only CBP that can contribute to the internal coherency of the Restatement, but the Restatement’s provisions, in their adoption of CBP’s underpinnings and frequent departure from Savigny’s argument, also delineate CBP’s distinctiveness from Savigny’s theory.

\textsuperscript{658} Second Restatement, \textit{supra} note 14 §§145 (2) (c); 188 (2) (e); 221 (2) (d).
3. What CBP is not about: the Substance-Procedure Distinction

A. Three Matters

The last issue to be discussed in our exposition of the relation between CBP and choice-of-law theory and practice addresses the fundamental distinction between matters of substance and procedure. This distinction is crucial to choice-of-law question, both practically and theoretically. Theoretically, this distinction goes to the intellectual heart of the discipline: why apply a foreign law in domestic courts in the first place? Curiously, in private international law, this question refers to matters of substance, rather than procedure. Almost universally recognised, the so-called lex fori regit processum doctrine has provided for centuries that procedural matters shall be governed almost exclusively by the domestic law of the forum (lex fori). What is so special about procedure that makes it immune to the application of foreign law? Furthermore, the lex fori solution to matters of procedure sheds light on the practical centrality of the substance-procedure distinction. As the most preliminary phase of judicial analysis in private transnational litigation, the substance-procedure distinction plays a key role in determining the identity of the law to be applied. From this point arises the significance of substance-distinction for choice-of-law question.

The ensuing Sections support the lex- fori regit processum doctrine with respect to the issues of procedure. It will be argued that the view developed in the previous Parts of this study is that the rights-based conception of CBP of choice-of-law applies strictly to
matters of substance, rather procedure. In other words, in contrast to other Parts of this study, this Section is of an exclusive character and elaborates on what CBP is not about.

The argument with respect to substance-procedure distinction shall be elaborated through the discussion of the following three matters. First, it discusses the recent developments in Canadian and Australian jurisdictions which has challenged the traditional English right-remedy distinction as a key to the conceptual distinction between matters of substance and procedure in private international law;\(^{659}\) Secondly, it discusses two recent proposals on the nature of the distinction made recently by Professor Richard Garnett in his the comprehensive work on the subject:\(^{660}\) (1) the first proposal challenges the above-mentioned universal principle *lex fori regit processum*, alongside a suggestion to expand the cases in which foreign procedural rules are applied;\(^{661}\) and (2) the second proposal offers to incorporate public policy doctrine as an appropriate basis for the substance-procedure distinction, alongside the rejection of the traditional view under which this doctrine is to be invoked only in extraordinary circumstances.\(^{662}\)

Accordingly, this Section proceeds as follows. First, it makes some brief comments on the nature of the substance-procedure distinction. It then addresses each of the above-mentioned matters. Briefly stated, I freely accept the recent elimination in Canadian and Australian jurisdictions of English right-remedy traditional rule, but with all due respect have to disagree with both of Professor Garnett’s proposals.

\(^{659}\) See Part III, Sec 3 (B) (1) below.
\(^{661}\) *Ibid* at 7, 36-37, 43.
B. Some Thoughts on the Substance-Procedure Distinction

The interaction between private persons often gives rise to various categories of private law: contract law, tort law, unjust enrichment and fiduciary duties. Different legal systems have different rules of private law. While some jurisdictions have incorporated punitive damages in the area of tort law, others have refused to do so. While some systems have adopted a strictly objective test for the concepts of “offer” and “acceptance” in the area of contract law, other systems have grounded this test in subjective elements as well. Some systems have remained loyal to the fault liability regime of traffic accidents. Others have converted their system to the non-fault scheme. Because of the state equality principle no normative distinction shall made between various positive provisions regardless of their approximation to certain ideal. This is what we refer to as “substance”. The CBP conception of choice-of-law rules presented in previous Parts of this study applies exclusively to matters of “substance”.

Procedural rules are however of a different order. Legal systems have developed these rules for proper application of the specific substantive rules to their facts. This is what underpins the fundamental distinction between the categories of “substance” and “procedure”. Issues like rules of proceedings, admissibility of evidence, witnesses,

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663 For discussion on CBP’s, Savigny’s and Kant’s classification of private law categories, see respectively supra notes 49, 50-56, 263-269, 278-286.
664 For discussion of these issues, see e.g. Catherine Valcke, “Convergence and Divergence between the English, French, and German Conceptions of Contract” (2008) 16 Euro Rev of Priv L 29.
666 For discussion of the state equality principle, see Part III, Sec 1 (C) (1) above.
667 As Michael Bayles put it “Procedural justice is contrasted with substantive justice. Most people have a common-sense grasp of the difference. Procedure concerns the process or steps taken in arriving at a
functions of the judge, burden of proof, pleading, discovery, trial, mode of argumentation, joinder, rules of jurisdiction, appeal, and preclusion shall be treated as procedural issues. Viewed as a “technical part” of litigation, procedural issues are related to the manner in which the court regulates its proceedings rather than to the litigating parties’ substantive rights and duties. In other words, procedural rules are the means by which the courts apply their substantive rules to the particular circumstances of the case.

One can speak in terms of a tripartite structure of procedural rules, based on the following three interrelated notions: (1) the Accuracy Notion; (2) the Cost Notion; and (3) the Transactional Equality Notion. A certain balance between the first two notions lies at the basis of procedural rules. The primary function of the procedure system is the achievement of a proper balance between an accurate application of particular facts to the substantive rules of a particular system, and the cost involved in such process. Various systems have reached different equilibrium points in balancing and weighing these two
decision; substance concerns the content of the decision. The two are conceptually distinct ….” See Michael D Bayles, Procedural Justice (The Netherlands: Kluwer Academic Publishers, 1990) 3. For further discussion of the fundamental distinction between matters of substance and procedure in traditional and contemporary private international law literature, see e.g. Dicey & Morris, supra note 116 at 177. George Panagopoulos has called the distinction between matters of substance and procedure an “unquestioned principle of private international law”. See George Panagopoulos, “Substance and Procedure in Private International Law” (2005) 1 J Priv Int L 69 at 69. For the related American tradition of the “substance-procedure” classification, see Scholes et al, supra note 116 at 127-129.

668 See e.g. Dicey & Morris, supra note 116 at 183-190; Cheshire & North, supra note 73 at 80-109.
669 See, e.g. Dicey & Morris, supra note 116 at 177; Cheshire & North, supra note 73 at 76 (“The field of procedure constitutes perhaps the most technical part of any legal system…….”).
670 The tripartite structure of procedural rules presented in this and the following paragraphs reflects my tentative understanding of the subject. The three components of this structure (especially the Accuracy & Cost Notions) however are not innovative. Appearing under identical or related terminology, these notions can be traced in a wide spectrum of judicial decisions and related theoretical literature on the nature of procedural rules. For discussion of these issues see Lawrence B Solum, “Procedural Justice” (2005) 78 S Cal L Rev 181, 181-192, 237-273; Martin H Redish and Lawrence C Marshall, “Adjudicatory Independence and the Values of Procedural Due Process” (1986) Yale L J 455, 470-491; Bayles, supra note 667 at 115-139.
notions. Some systems have implemented efficient clear-cut litigation cost rules, giving rise to the danger that the outcome might not be accurate relative to the substantive private law provision of that system. Others have adopted a comprehensive system of civil procedure rules that are significantly costly, but are designed to give the most accurate results. No system can guarantee that its procedural rules will fully approximate a given case to the system’s substantive rules. And almost every equilibrium point between the Accuracy and Cost notions can be considered reasonable.

Furthermore, and in order to add a degree of complexity, one may invoke the third element in the structure of procedural rules, that of Transactional Equality, which runs as we have seen,671 through all of private international law. While the appropriate balance between the Accuracy and Cost notions may vary between systems, this seems to be a universal requirement that within this balance sustains the transactional equality between the particular plaintiff and defendant.672 In other words, while different systems may adopt a different balance between the aspiration to achieve accurate outcomes and the costs imposed by the procedural rules, every system has to guarantee the incorporation of the value of Transactional Equality as an indispensible part of procedural rules.673

671 As we have seen throughout the study, the notion of parties transactional equality plays a decisive role with respect to a broad spectrum of matters: the structure of jurisdictional rules (supra note 99), the TSTL (supra note 424-431), favoring a-priori one of the litigating parties choice-of-law rules (supra notes 524-533) and recognition of foreign judgments (infra note 673).

672 For further discussion of the notion of transactional equality within the structure of procedural rules, see Redish & Marshall, supra note 670 at 484-485; Bayles, supra note 667 at 131-132.

673 This notion of necessary Transactional Equality of procedural rules sheds light on the exceptional cases in which common law courts have not recognized foreign judgments. Despite the multiplicity of doctrines such as “natural justice” and “public policy”, one may argue that the courts tend to refer to the deficiencies related to the transactional inequality embedded in foreign decisions rather than viewing foreign judgments as an invitation to evaluate the substantive provisions of foreign systems. Thus, for example, cases in which the
These comments on the nature of the substance-procedure distinction have several further implications. First, I reject the assertion that it is not possible to make any coherent distinction between matters of substance and procedure. While it would be a mistake to draw an absolute, clear-cut line for all varieties of cases, it would be an even more serious mistake to reject any coherent distinction between the two as some scholars and judges have suggested. As with respect to other classifications made in this study (such as the classification into various private law categories), the point here is of a conceptual distinctiveness rather than an argument about the possibility of the absolute and clear-cut application of this classification to the entire spectrum of possible human interaction.

Secondly, these comments reject the so-called “outcome-determinative” test whereby all issues that might affect the outcome of litigation shall be classified under the “substance” hat. Of course, the procedural rules of evidence, proceeding, and so on, often influence the outcome of civil litigation and may play a central role in setting the reasonable ex ante expectations of the litigating parties. Furthermore, as with many sociological factors, they may have an even greater effect than substantive rules in determining the outcome of the case. No one can deny that. However, to base the distinction between substance and defendant has proved that he had no proper opportunity to present his case before a foreign court or had not received due notice of the proceedings, were considered representative examples of the “natural justice” exception for the recognition of foreign judgments. For discussion of these issues, see e.g. Cheshire & North, supra note 73 at 563-564.

674 For cases in which the possibility of a coherent distinction has been rejected see e.g. Erie RR v Tompkins, 304 U.S. 64 (1938) 92 (Reed, J, concurring) (“The line between procedure and substance is hazy….”), Walter Wheeler Cook, “Substance and Procedure in the Conflict of Laws” (1933) 42 Yale L J 333 at 335-336.
procedure on the “outcome-determinative” test would be a fallacy. The classification of substance and procedure categories is conceptual and goes to the very nature of the categories themselves rather than being outcome-based.

1. Matter I: Challenging the Traditional Right-Remedy Distinction

The seeds of the abovementioned model of the substance-procedure distinction can be clearly traced in the recent decisions of the Australian High Court in *John Pfeiffer Pty Ltd v Rogerson*, the Supreme Court of Canada in *Tolofson v Jensen*, and the popular American Second Restatement. According to this distinction, procedural rules are related to the operation of the judicial machinery. Rules related to court room conduct, pleading requirements, pre-trial evidence collections, administration of evidence, are all issues that fall within the scope of the court’s conduct and therefore shall be classified as procedural. Accordingly, while procedural matters deal with the machinery of proceedings, the substantive matters address the rights and duties of the litigating parties.

This understanding of the substance-procedure distinction is at odds with the traditional position of English law which has classified the matters of substance and procedure according to the right-remedy test. According to this test, the procedure...
category has been interpreted broadly and the entire scope of possible remedies (such as monetary reliefs or various types of injunctions) or related issues (such as heads and quantification of damages) falls within the scope of this category. In line with the decisions of the Supreme Court of Canada and the Australian High Court, I wholeheartedly concur with their rejection of the traditional English position. The disjunction between right and remedy is artificial and normatively reflects the other side of the same coin. Take, for example the well-known English case Boys v Chaplin. Although viewed by all judges as a paradigmatic case for torts committed outside of England, paradoxically Boys v Chaplin has never been a liability case. This case involved a car accident between English residents that took place in Malta. It was agreed between the parties that the plaintiff negligently drove his scooter, which led to its collision with the defendant’s motor car. The question of damages is what lay at the core of this case. Under the Maltese law, the remedies for personal injuries were strictly limited to special damages. Thus, while the defendant was entitled to past and future financial loss, the Maltese provision rejected compensation for “pain and suffering” or “loss of amenities”. Had the heads of damages been classified under the “procedure” hat, the English law would have been applied, regardless of the identity of the law that would have been applied under private international law rules.

procedure distinction broadly in favor of the procedure category. Thus, for example, he situates the matter of damages within procedure category. See Savigny, System VIII, supra note 44 at 146-147, 186-187.

681 For a detailed overview of the traditional English position see Garnett, supra note 660 at 7-10, 261-360.
684 Ibid at 269.
Shall “pain and suffering” and “loss of amenities” be classified under the “procedural” hat? Under the proposed model of the substance-procedure distinction, the answer to this question is “no”. The issue of heads of damages should be viewed as a part of tort liability itself and therefore should be classified in the ‘substance’ category. It simply does not relate to the procedural day-to-day court operations of pleading, the serving process, preserving objections to appeal, and so on. The normative structure of tort law itself is what insists on a continuous normative link between tort liability and remedy. Under this structure, the remedy constitutes an inherent part of the defendant’s substantive right that has been infringed by the plaintiff’s negligent act. In other words, the remedy mirrors the right685 and therefore lies within the operational force of CBP.

2. Matter II: Challenging the lex- fori regit processum Doctrine- the State-Based Foundation of Procedural Rules

In his recent comprehensive work on the substance-procedure distinction686 Professor Richard Garnett has challenged the universal doctrine by which issues related to procedure are to be governed almost exclusively by lex fori. Intriguingly, however, Garnett does not deny the centrality of this doctrine in traditional and contemporary private international law thought, and frankly admits that the vast majority of procedural issues...

685 For a recent discussion on the unbreakable normative link between the plaintiff’s right and remedy, see Weinrib, “Civil Recourse”, supra note 580; Arthur Ripstein, “As If It Had Never Happened” (2007) 48 Wm & Mary L Rev 1957; see also Russell J Weintraub, “Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule Worse” (2007) 42 Tex Int’l L J 311 at 312 (claiming that the issue of heads of damages is “universally regarded as substantive”).

686 See supra note 660.
have indeed been governed by the domestic law of the forum. However, he suggests amending this well-established doctrine. As he claims, “A major contention of this work is that the scope and operation of the law of the forum in procedural matters should be reduced…..”. Accordingly, a suggestion follows to greatly expand the operational scope of foreign procedural law in domestic courts.

With all due respect, this suggestion cannot be accepted. The primary aim of procedural rules is to provide the basis for the functional operation of the judicial authority of the relevant system. As such, these rules are closely concerned with the machinery of the courts as states’ agents. In this way, while dealing with the appropriate balance between the Accuracy and Cost notions (and subject to transactional equality), the procedural rules intimately link themselves to the operational apparatus of the state and to the notions of states’ sovereignty and territoriality. In this respect, the comments made long ago by John Westlake on this matter may be helpful:

“……..and if we examine the matter fundamentally, the laws of civil process are not like those which originated the rights….they are commands addressed to the judge at the time of suit and by his own sovereign, as the conditions under which his justice is to be administered”.

Westlake, supra note 148 at 241. Willis Reese and Elliott Cheatham justified this distinction in slightly different terms:

This is a wise distinction. It would be well-nigh impossible for a court to adopt wholesale the trial machinery of another state, including rules of evidence and methods for service of process and for enforcement of judgment. Furthermore, matters of this sort are unlikely to affect the actual outcome of the suit. See Cheatham & Reese, supra note 424 at 963.
Westlake’s comments follow the above-mentioned conceptual distinction between matters of substance and procedure. According to his view, the issue of procedure is not related to the primary function of the judicial authority: the manifestation of the litigating parties’ rights and duties. Rather, the procedure is about the mode of operation of the judicial authority, and is therefore fundamentally grounded in the notions of states’ territoriality and sovereignty. In contrast with the litigating parties’ substantive rights in choice-of-law, which have nothing to do with the sovereignty principle,\(^{691}\) the notion of procedure is fundamentally grounded in the operational apparatus of the state. This explains why procedural matters are conceived of as purely domestic matters and why the application of the local procedural law (\textit{lex-fori}) follows.

Garnett, however, rejects this link between the procedural rules and the notions of states’ sovereignty and territoriality.\(^{692}\) Frequently referring to Kahn-Freund’s amorphous notion of “enlightened” \textit{lex fori}\(^{693}\) (which offers the creation of a special \textit{ad-hoc} procedural rule for private international law litigation\(^{694}\)) Garnett takes a positive view of Stephen

\(^{691}\) For CBP’s fundamental rejection of the sovereignty principle as a relevant principle for the choice-of-law question see Part II, Sec 1 (D) above.

\(^{692}\) Garnett, \textit{supra} note 660 at 1, 13-15. Garnett doubts the state-based foundation of procedural rules because of its alleged ignorance of the litigating parties’ interests (\textit{Ibid} at 13) and because of the inability to explain the exceptional cases where foreign procedure does play a role in the domestic courts’ operation (\textit{Ibid} at 14). The proposed procedural rule model is however not completely disconnected from parties’ interests. While the procedural rules are designated to regulate the operational activity of the courts as states’ agents, the equilibrium between \textit{Accuracy} and \textit{Cost} notions is mitigated and subjected to the minimal threshold of the \textit{Transactional Equality} notion that directly relates to the parties (see \textit{supra} notes 670-675 and accompanying text). Furthermore, as we will see, the exceptional cases where foreign procedural law has been incorporated to a certain degree into the domestic system does not challenge the state-based foundation of procedural rules but rather underlie the centrality of the sovereignty principle for grasping the nature of the procedural rules (For discussion of these issues see \textit{infra} notes 702-706 and accompanying text).

\(^{693}\) \textit{Ibid} at 52, 187, 213, 236.

\(^{694}\) Kahn-Freund, \textit{supra} note 3 at 373-382.
Szazy’s suggestion,\textsuperscript{695} which is to apply Savigny’s (and CBP’s) MSR principle to matters of procedure.\textsuperscript{696} According to this suggestion, the basic principle applied with respect to the procedure category shall be the procedural law of the country that has the most significant relationship to the litigating parties and the event.\textsuperscript{697}

The reference to Savigny, in this context, is however striking. Indeed, as we have seen in Part I of this study, Savigny has developed a highly complex and comprehensive choice-of-law theory with the MSR principle as one of its central elements.\textsuperscript{698} However, this theory addresses the substance of parties’ rights and duties. Although Savigny acknowledges the difficulty in making an exact demarcation between matters of substance and procedure,\textsuperscript{699} for him the distinction is conceptually fundamental.\textsuperscript{700} Similarly to Westlake’s above-mentioned comments, Savigny makes a sharp distinction between private relationships and other sorts of interactions that he considered as being related to states’ activity, such as civil procedure and criminal law.\textsuperscript{701} Savigny is very explicit on this matter. While his theory of choice-of-law applies with respect to matters of substance, he (as well as CBP) excluded from its scope matters related to procedure, which have to be governed exclusively by \textit{lex fori}.

Richard Garnett appears to have invested considerable effort in underlining those rare cases in which the foreign procedural law has been incorporated to a certain degree

\textsuperscript{696} Garnett, \textit{supra} note 660 at 36–7.
\textsuperscript{697} \textit{Ibid}; Szászy, \textit{supra} note 695 at 452.
\textsuperscript{698} See Part I, Sec 2 ((b) (2) above.
\textsuperscript{699} Savigny, \textit{System VIII, supra} note 44 at 146.
\textsuperscript{700} \textit{Ibid} at 146-147, 186-187, 249-250.
\textsuperscript{701} Savigny, \textit{System I, supra} note 47 at 17-22.
into the domestic system. However, these cases do not prove his point regarding the desirability of the extended application of the foreign procedural law. These are exceptional cases in which the operational mechanism of the domestic courts invoked the sovereignty interest of other states. The cases of acquiring evidence abroad\textsuperscript{702} and the service out-of-jurisdiction where the control of the service is “vested” to the country of service\textsuperscript{703} are representative examples of such cases.

Indeed, in these cases, foreign procedural law has been recognized. However, the forum court does not operate as an isolated unit but rather as a constituent part of a certain international system comprised of a multiplicity of equal sovereigns.\textsuperscript{704} It is precisely the centrality of the notions of states’ sovereignty and territoriality to the nature of procedural rules that explains the rare recognition of foreign procedural law, and that explains why in certain cases the forum applying its own procedural rules has to be “mindful” of the foreign procedural law.\textsuperscript{705} In other words, the admission of foreign procedural law into a domestic system is the other side of the same coin of the sovereignty principle in cases involving the infringement of the sovereignty of another state. And it is precisely the notion of sovereignty that explains why the concerns of comity between nations are so important for these exceptional procedure cases.\textsuperscript{706}

\textsuperscript{702} Garnett, \textit{supra} note 660 at 223-234.
\textsuperscript{703} \textit{Ibid} at 72-85.
\textsuperscript{704} On the centrality of the state equality principle under CBP, see Part III, Sec 1 (C) (1) above.
\textsuperscript{705} Garnett, \textit{supra} note 660 at 52.
\textsuperscript{706} \textit{Ibid} at 85, 216.
3. Matter III: Widening the Scope of Public Policy Doctrine

Professor Garnett’s other claim challenges another broadly accepted principle of private international law – that of public policy doctrine. According to this principle the doctrine of public policy has a very limited scope of application and has typically been invoked in very exceptional cases. Similarly to the *lex fori regit processum* doctrine, Garnett frankly acknowledges the revolutionary nature of his proposal. 707 As he states, the doctrine of public policy: “…has typically been reserved in common law rules of private international law for serious cases...” 708 His proposal is, however, to assign a much greater role to this doctrine in a way that it will provide a conceptual basis for the substance-procedure distinction and will play a decisive role for the questions of inclusion and exclusion of foreign laws in the procedure category. 709 This position explains Garnett’s further thesis according to which the substance-procedure distinction is greatly context dependent. For him, the substance-procedure categories must be classified differently in private international law cases compared to purely domestic cases. 710

Once again, I shall argue that none of Garnett’s abovementioned innovative claims shall be accepted. The classification into categories of substance and procedure goes conceptually to the very nature of the categories themselves, and therefore cannot be affected by the presence of one or more foreign elements in the factual matrix of the case. Furthermore, the reference itself to public policy doctrine as a key to grasping the nature of

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708 *Ibid* at 338.
710 *Ibid* at 2-3.
the distinction is fundamentally flawed. For years common law jurisdictions have resisted the broad application of this doctrine. Because of its unpredictable and self-contradictory nature, they mocked it as no less an “unruly horse”\textsuperscript{711} and have traditionally refused to assign to it a central role in common law reasoning.\textsuperscript{712}

The same is true to no lesser degree for private international law. Throughout Professor Garnett’s work, one may trace a wide spectrum of possible policy considerations. The majority of these considerations relate to the notion of predictability of results. In many places the author mentions the notions of “uniformity of results”, “simplicity and consistency”, “predictability and deterrence of forum shopping” as representing the underlying internal policy values of private international law.\textsuperscript{713} These values are supposed to have a direct effect on the substance-procedure distinction. Thus, according to Garnett’s view, the considerations of “simplicity and consistency” in certain cases are supposed to support the application of a single procedural law of the forum.\textsuperscript{714} However, at other points in his work, the author also names additional policy-based considerations that should be taken into account. Thus, he mentions the consideration of a “need to protect local residents from alien proceedings”\textsuperscript{715} and the consideration of serving as a shield for local forum interests against so-called “offensive foreign laws”.\textsuperscript{716}

\textsuperscript{711} Richardson v Mellish 2 Bing. 229 (1824).
\textsuperscript{712} See e.g. Fender v Mildmay (1937) 3 All ER 402; GHL Fridman, The Law of Contracts in Canada 6\textsuperscript{th} ed (Toronto: Carswell, 2011) 392 (discussing the traditional limiting scope of the doctrine of public policy in the area of contract law).
\textsuperscript{713} Garnett, supra note 660 at 8-9, 17, 35, 175, 262.
\textsuperscript{714} Ibid at 175.
\textsuperscript{715} Ibid at 35.
\textsuperscript{716} Ibid at 61.
Let us take a closer look at the above-mentioned list of policy considerations, which demonstrates the problematic nature of the policy-based analysis offered by Richard Garnett. The consideration of predictability of results as a primary normative rule\textsuperscript{717} was a consideration that stood behind the once almost universally adopted United States *First Restatement*.\textsuperscript{718} However, the lessons of reality have proved the fallacy of Joseph Beale’s approach,\textsuperscript{719} which underpinned the provisions of the Second Restatement. Its vague foundations and arbitrary results have been strongly shaken by legal realists,\textsuperscript{720} it is nowadays barely followed by American courts,\textsuperscript{721} and has never been followed in Europe.\textsuperscript{722}

The same point applies with Garnett’s other policy consideration – the “need to protect local residents from alien proceedings”. This notion seems to be even less acceptable in private international law and seems to be at odds with the mentioned in Part I of this study rooted principle of “equal treatment”.\textsuperscript{723} According to this principle of private international law, no distinction shall be made before the courts between local and foreign

\textsuperscript{717} As we have seen, the consideration of predictability follows from application to choice-of-law of CBP’s single unifying theoretical framework. For discussion of this point, see supra note 565-573 and accompanying text.


\textsuperscript{720} For discussion on the legal realists’ successful attack on vested rights-theory, see supra note 470-478 and accompanying text.

\textsuperscript{721} See e.g. Symeonides, *Revolution*, supra note 12 at 37-62; see also supra note 14.


\textsuperscript{723} See Part I, Sec 1 (C) (1) (a) above.
residents. The case in which the local residents will receive certain preference over foreigners seems to be a clear infringement of this well-established principle of the discipline.

Finally, the consideration of foreign “offensive laws” is not innovative but actually follows the traditional location of public policy doctrine in private international law in general, and in choice-of-law in particular. Under this conception, the doctrine has served as an exceptional tool for the ordinary choice-of-law process of connecting factors. As we have seen, CBP explains the traditional highly exceptional nature of this doctrine through its third foundational block: TSTL. According to this notion, if the judge thinks that the foreign law provision is incompatible with “some prevalent conception of good morals”, some “deep-rooted tradition of the common weal” or when the foreign private law provision “shocks the morals of the forum”, the public policy doctrine serves as a “superimposition tool” for disqualification of foreign law from choice-of-law process.

In this way, the acceptance of Professor Garnett’s suggestion regarding extending the scope of public policy doctrine will not only challenge the conceptual distinction between the matters of substance and procedure, but will also mean challenging the locus classicus of choice-of-law jurisprudence as a jurisprudence of connecting factors. By denying the location of public policy doctrine as a subsidiary source and supporting its

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724 Ibid.
725 On the classical conception of choice-of-law process as a jurisprudence of connecting factors, see e.g. Briggs, supra note 10 at 20-28; Dicey & Morris, supra note 116 at 33-34.
726 For discussion of these issues, see Part III, Sec 1 (C) (2) above.
727 As stated famously by Cardozo J in Loucks v Standard Oil Co., 224 NY 99 at 110 (N.Y.1918).
728 See Paulsun & Sovern, supra note 419 at 970. For further citations on the highly exceptional nature of public policy doctrine in traditional choice-of-law thought, see supra note 512-518 and accompanying text.
729 See Briggs, supra note 10 at 51.
implementation as a primary source of choice-of-law process, the author suggests a full-blown re-orientation of the discipline towards a policy-based analysis.

In fact, there exists a choice-of-law approach that would welcome this suggestion: the CBP’s complete antithesis discussed in this work - the American interest analysis.\(^{730}\) This sort of analysis rests on the basic presupposition by which the courts in general and the choice-of-law question in particular are supposed to serve as means for promoting and effectuating states’ policies.\(^{731}\) Since states in certain situations are interested in the application of their laws in private international law cases, choice-of-law methodology necessarily has to take these interests into account. This inherent embodiment of policy-based analysis explains why interest analysis supporters have warmly adopted the public policy doctrine as an integral component of choice-of-law process.\(^{732}\) The interest analysis is all about policy-based considerations, which follows Professor Garnett’s suggestion exactly.

It is certain however that the basic fundamentals of interest analysis remain highly questionable. The inherent complexity involved in the process of tracking the underlying and often self-contradictory policies of the involved states has raised serious doubts by academic scholars against interest analysis both at the theoretical\(^{733}\) and implementation.

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\(^{730}\) For CBP’s complete rejection of interest analysis, see Part III, Sec 1 (A) above.

\(^{731}\) Currie, *supra* note 24 at 64.

\(^{732}\) See e.g. Kramer, *supra* note 117 at 339. More generally, the point of the vague and often self-contradictory nature of policy-based analysis inherently embedded in the interest analysis approach has been pressed over the years by Professor Lea Brilmayer. See e.g. Lea Brilmayer, “Governmental Interest Analysis: A House Without Foundations” (1985) 46 Ohio St L J 459.

\(^{733}\) See generally Kegel, “Hague Lecture”, *supra* note 11 at 112-207.
levels.\textsuperscript{734} And despite the support of several American scholars,\textsuperscript{735} it has never been widely accepted in American courts\textsuperscript{736} and it has never been seriously considered by European authorities.\textsuperscript{737} However, this is precisely what Garnett offers in his suggestion to widen the scope of public policy doctrine in general and as a key to grasping the nature of the substance-procedure classification. Although on the one hand he seems to be clearly against interest analysis by stating: “The interest analysis model, however, provides little certainty and guidance for courts and litigants in choosing the applicable law and for this reason has not generally been embraced outside the United States”,\textsuperscript{738} in his suggestion, the interest analysis \textit{de-facto} re-enters through the back door.

CBP’s absolute support of the traditional \textit{lex fori regit processum} doctrine accompanied by the \textit{lex-fori} rule shall not be overestimated. Ironically however, this support only underlies CBP’s deep antagonism towards the \textit{lex-fori} solution to the choice-of-law question. In contrast to the strong grasp of this solution by traditional and contemporary choice-of-law thought,\textsuperscript{739} CBP entirely rejects \textit{lex-fori} for matters of substance. In other words, CBP supports the \textit{lex-fori} solution for matters of procedure precisely because this category does not belong to the operational force of CBP and is grounded on the element that is foreign to CBP - states’ sovereignty.

\textsuperscript{734} See generally Brilmayer, \textit{supra} note 80; Roosevelt, \textit{supra} note 157 at 2477-2479.
\textsuperscript{736} Symeonides, \textit{Revolution, supra} note 12 at 37-62.
\textsuperscript{737} Cheshire & North, \textit{supra} note 73 at 29-30; Clarkson & Hill, \textit{supra} note 73 at 12-18.
\textsuperscript{738} Garnett, \textit{supra} note 660 at 42.
\textsuperscript{739} For discussion of these issues see \textit{supra} notes 77-82 and accompanying text.
Furthermore, CBP’s disjunction with the *lex-fori* solution also underlies its distinctiveness from its sister theory and the ultimate platform for its foundation and development - Savigny’s comprehensive and often-self-contradictory theory of choice-of-law law. While Savigny’s theory at the level of its implementation often betrays its stated incongruity with *lex-fori*, CBP offers a *lex-fori*-free path for the ultimate object of its operational force - the matters of substance.

740 Throughout this study, our discussions on Savigny’s theory have revealed the significant centrality of *lex-fori* elements to this theory. Ironically, but while Savigny’s own universal conception of choice-of-law and considerations of fairness fundamentally exclude the *lex fori* solution as a “dangerous solution” to the choice-of-law question (see *supra* note 84), on the implementation level his theory frequently follows this solution. Through the principal division between “regular” and “anomalous” laws, the special “public law” treatment of the tort law category, the adoption of the place of the forum as a relevant juridical indicator, and the broad interpretation of the “procedure” category (see respectively *supra* notes 150, 227-229, 614-618 & 700), Savigny’s choice-of-law theory is collapsed in significant parts into the previously mocked *lex-fori* solution. In this way and in contrast to CBP, Savigny’s theory of choice-of-law turns out to be very much a forum-centered theory.
Conclusion

This study has presented the Choice-Based Perspective (“CBP”) on choice-of-law and has elaborated on its relation to courts’ actual practices. The exposition of the argument has been delivered through three interrelated stages. In the First Stage, the study has elaborated on the central elements of Savigny’s comprehensive theory of choice-of-law. After presenting Savigny’s three basic ideas on the nature of choice-of-law and “clearing the slate” of alternative conceptions of the subject, it has been argued that Savigny’s theory is fundamentally grounded on an organizing principle of voluntary submission. By discussing the innovative nature of the voluntary submission principle in the context of traditional and contemporary understandings of the subject, tracing the principle’s relation to elements that are central to Savigny’s general thought, this study has depicted the contours of the most central normative foundation of Savigny’s theory. Furthermore, Savigny’s complex juridical mechanism for the actual operation of the voluntary submission principle has been demonstrated. It has been argued that this mechanism consists of the integration of the following two notions: (1) explicit choice; and (2) the doctrine of constructive inference. Within the doctrine of constructive inference two inherent accessory tools have been presented: (1) juridical presumptions; and (2) juridical indicators, which together make a united ensemble of indicative components that shed light on the content of the organizing principle of voluntary submission in particular cases. Finally, Savigny’s two significant deviations from the voluntary submission principle have been delineated. First, Savigny created the so-called Exceptional Category of laws that are
immune from the scope of the universal methodology of the voluntary submission
principle. Secondly, at the implementation level, Savigny’s theory’s frequent tendency to
“affix” juridical presumptions has been noticed.

Drawing on and qualifying Savigny’s theory, the Second Stage of this study
presented CBP’s understanding of choice-of-law, its organizing principle of relational
juridical choice, and its three foundational blocks: (1) the party autonomy principle; (2) the
doctrine of constructive inference; and (3) the “two substantive tests of legality” (TSTL).
While adopting many of Savigny’s insights on the nature of the subject, CBP has distanced
itself from Savigny’s choice-of-law account in many respects. Although grounded in a
shared theoretical basis, CBP in some parts has followed and extended Savigny’s
argument, in some parts it has modified and qualified it, and in other parts it has
completely departed from it and replaced it with an alternative argument. More
specifically, CBP has followed a significantly qualified version of Savigny’s voluntary
submission principle. It also accepted and elaborated on an extended and much qualified
version of each of Savigny’s notions of the party autonomy principle and constructive
inference (together with its two accessory tools: juridical indicators and juridical
presumptions). Finally, CBP has rejected both of Savigny’s deviations from the organizing
principle of voluntary submission and has introduced instead an alternative truly neo-
Kantian element for the choice-of-law process – that of TSTL.

At its Third Stage, the study has further elaborated on CBP’s nature and its central
elements through the discussion about its relation to theory and practice. After delineating
CBP’s conceptual distinctiveness from other leading traditional and contemporary choice-of-law approaches, the work has provided a close analysis of CBP’s relation to practice. Taking the popular American Second Restatement as a platform for its analysis, the study has shown that the proposed understanding of choice-of-law is not detached from the reality of American judicial practice, but in fact reflects it. Moreover, several tentative suggestions have been made on CBP’s possible contributions to the understanding of the most popular method of American practice and its internal coherency. Finally, several comments have been made with respect to the question of the relation between CBP and the traditionally fundamental for choice-of-law distinction between procedure and substance.

Buried under volumes of policy-based analysis, states’ interests, the comity doctrine of contemporary and traditional choice-of-law scholarship; wrongly associated with vested rights; distracted from its own internal coherency by Savigny’s theory; and dismissed from the choice-of-law landscape by the legal realists’ illusionary triumph over any rights-based conception of the subject: CBP is evident throughout the broad spectrum of choice-of-law rules, doctrines, and concepts of many legal systems. This is why CBP so matters for our thinking on the subject and understanding of the fundamental intuition of the courts with respect to the nature of choice-of-law.
Appendices

Appendix I: Savigny’s Model of Choice-of-Law Rules

Savigny’s model of choice-of-law rules as presented in this study is illustrated in the following chart:

Classification between Matters of “Substance” and “Procedure”

Matters of Procedure  |  Matters of Substance

lex fori  |  ‘Anomalous Laws’  |  ‘Normal Laws’

lex fori  |  The Organizing Principle of voluntary submission

Expressed Consent  |  Doctrine of Constructive Inference

Classification into Private Law Categories

Property Law  |  Contract Law  |  Status  |  Succession  |  Family Law

Place of Property (J. Presumption)  |  Place of Performance (J. Presumption)  |  Place of domicile (J. Presumption)  |  Place of deceased domicile (J. Presumption)  |  Husband’s domicile (J. Presumption)

Various  |  Various  |  Various  |  Various  |  Various

J. Indicators  |  J. Indicators  |  J. Indicators  |  J. Indicators  |  J. Indicators
Appendix II: CBP’s Model of Choice-of-Law Rules

The CBP model of choice-of-law rules as presented in this work is illustrated in the following chart:

Classification between Matters of ‘Substance’ and ‘Procedure’

- Matters of Procedure
- Matters of Substance

Did the Parties Explicitly Express their Choice?

- lex fori
- Party Autonomy Principle
- Reasonable connection
- Doctrine of Constructive Inference

Classification into Private Law Categories

- Property Law
- Contract
- Unjust Enrichment
- Tort

Place of Property

Place of Performance

Place of Enrichment

Place of Wrong

- Juridical Indicators

Juridical Indicators

Juridical Indicators

Juridical Indicators

Juridical Indicators

TSTL

TSTL

TSTL

TSTL
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