THE CHOICE-BASED PERSPECTIVE OF CHOICE-OF-LAW

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This Article offers an innovative basis for the choice-of-law question: the Choice-Based Perspective (CBP). The main argument is that there exists an alternative rights-based understanding of choice-of-law to that which is presently known as the "vested rights" theory. This understanding is based on the legal philosophy of perhaps the greatest expositor of the rights-based concept, Immanuel Kant. In contrast to alternative approaches, CPB insists on a purely private conception of the subject, grounded on an organizing principle of unity of persons' choices. Furthermore, 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.

CONTENTS

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INTRODUCTION

> [C]hoice 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 would say with a subtle accent. As a student, I 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 "most significant relationship principle" ("MSR principle")[2] according to which courts apply the law of the jurisdiction having "most significant relationship" to the parties and the event. The exception seems to refer to some form of better-law approach, condemned no less in choice-of-law literature,[3] according to which courts evaluate the substantive merits of the applied laws. Furthermore, the combination of the general principle and the exception lacks internal coherency and consistency.

However, in this Article I argue that the intuitive understanding of Professor Walker's teacher was right. Drawing from Kantian legal philosophy[4] and several neo-Kantian writings,[5] this Article depicts the main contours of what I have labeled a Choice-Based Perspective ("CBP") on choice-of-law. I argue that CBP provides a truly individual-rights–based

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1. Janet Walker, *"Are We There Yet?" Towards a New Rule for Choice of Law in Tort*, 38 OSGOODE HALL L.J. 331, 332 (2000).

2. *See e.g.* ALBERT EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS, 351 (1962) (mocking the MSR principle as a "meaningless generalization"); Brainerd Currie, *Full Faith and Credit Chiefly to Judgments: A Role for* Congres,s SUP. CT. REV. 89, 95 (1964) (mocking the MSR principle as showing a "lack of standard").

3. For extensive criticism pointing to the inherently subjective nature of the best-law approach, see e.g. Paul H. Neuhaus, *Legal Certainty Versus Equity in the Conflict of Laws*, 28 LAW & CONTEMP. PROBS. 795, 802–07 (1963); O. Kahn-Freund, *General Problems of Private International Law*, 143 RECUEIL DES COURS 139, 466 (1974).

4. *See generally* IMMANUEL KANT, THE METAPHYSICS OF MORALS (Mary Gregor trans & ed.., 1996) (1797) [hereinafter KANT, DOCTRINE OF RIGHT]; Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, *in* KANT: POLITICAL WRITINGS (H.B. Nisbet trans., Hans Reiss ed.,1991) (1795).

5. *See generally* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995) [hereinafter WEINRIB, THE IDEA]; ARTHUR RIPSTEIN, FORCE AND FREEDOM (2009).

understanding of the subject that is so lacking in traditional and contemporary choice-of-law literature. While other accounts have fundamentally grounded their vision on the principle of states' sovereignty, CBP presents a purely private conception of choice-of-law as the union of the choices of two persons.

Furthermore, I argue that CBP is not detached from reality, but in fact reflects it. Despite the popular instrumentalist conception of the choice of law as a tool for promoting states' interests,[6] 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;[7] (2) the universally recognized *parties' autonomy* principle;[8] (3) the flexible choice-of-law connecting factors or "starting points" that have been established for each of the private law categories;[9] (4) the central concept of "parties' reasonable expectations";[10] and (5) the inherent reference, in various doctrines, to the substantive merits of the involved laws in extreme cases.[11]

This Article proceeds as follows. Part I introduces the notion of *relational choice* as an organizing idea of CBP and distinguishes this notion from the popular sovereignty principle. Part II elaborates on the three foundational blocks of CBP—(1) the *Parties' Autonomy* Principle (2) the *Doctrine of Constructive Inference*; and (3) the *Innate Right Test of Legality*—and traces their presence in contemporary and traditional choice-of-law rules, doctrines, and concepts. Part III provides several examples of the operational mechanics of CBP.

I. A FRESH START

It has become axiomatic that the choice-of-law discipline must somehow be grounded on the organizing principles of the Law of Nations: states' sovereignty or states' relationships.[12] This notion appears throughout the development of choice-of-law thought.[13] Choice-of-law

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6. *See generally* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).]
7. *See infra* notes 47–58 and accompanying text.
8. *See infra* Part II.A.
9. *See infra* Part II.B.3.
10. *See infra* notes 44–46 and accompanying text.
11. *See infra* Part II.C.
12. *See e.g.* FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 159–61 (1993). For a similar argument regarding the centrality of the sovereignty principle for classical and modern choice-of-law methodologies, see Gerhard Kegel, *The Crisis of Conflict of Laws,* 112 RECUEIL DES COURS 95, 184 (1964); Annelise Riles, *Cultural Conflicts*, 71 LAW & CONTEMP. PROBS. 273, 278–84 (2008).
13. For a striking example of this type of historical argument, see Alex Mills, *The Private History*

theorist 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' involvement. This explains why the recent provocative argument regarding the entire public international law foundation of private international law has suddenly seemed so reasonable and convincing.[14]

Take for the example, the two American leading choice-of-law approaches of the last century: Joseph Beale's version of the vested rights theory[15] and Brainerd Currie's interest analysis.[16] Grounded on the notion that choice-of-law is a tool for advancing states' interests, interest analysis has inherently linked itself to states' activities. The same is true with respect to Beale's approach. Although it uses the terminology of "individual rights," the central components of this theory were ultimately grounded on the principle of states' sovereignty.[17]

CBP, however, offers something completely different. It defends the conception under which the choice-of-law question is viewed as purely related to the interaction between litigating parties and as providing the juridical (as opposed to political) manifestation of this interaction. In this way, CBP joins the very few commentators who did not take the sovereignty axiom for granted. Gerhard Kegel[18] and Friedrich Juenger[19] intuitively challenged the relevance of states' sovereignty and states' interests in grasping the nature of choice-of-law question. This strictly "private" conception of the subject has a rich tradition in the choice-of-law literature that for years has refused to open the foundations of choice-of-law process to the principles of the Law of Nations.[20]

So, if choice-of-law process has nothing to do with states' sovereignty and states' interests, what is choice-of-law about? In a nutshell, the normative foundation of CBP follows from the title of the discipline itself—it is about *relational choice*.

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of International Law, 55 INT'L & COMP. L.Q. 1 (2006).

14. ALEX MILLS, THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW (2009).

15. JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935). For further discussions on vested rights theory, see *infra* notes 17, 91–96 and accompanying text.

16. CURRIE, *supra* note 6.

17. Thus, Beale insisted on the national conception of the subject according to which the courts do not apply the foreign law, but recognize the plaintiff's right under the domestic 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. BEALE, *supra* note 15, §5.4, at 53. Furthermore, because of the sovereignty principle, Beale insisted that the positive law of the country where the last event took place ultimately determines the question of choice-of-law. *Id.* §§ 4.12, 8A.1, 8A.6, at 45–47, 58, 62–63.

18. Kegel, *supra* note 12, at 180, 198.

19. JUENGER, *supra* note 12, at 159–61.

20. *See, e.g.*, C.M.V.CLARKSON & JONATHAN HILL, THE CONFLICT OF LAWS 3 (4rd ed. 2011); ARTHUR NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 30 (1943).

The aspect of *choice* is derived from the Kantian justification of the contemporary international order. Kant viewed independent states with public legal institutions as a necessary reflection of the his organizing principle of individuals' freedom.[21] Within this order, the question which framework applies for determining the rightfulness of 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 North Carolina between two North Carolina businessmen with respect to delivery of goods in North Carolina; (2) a contract signed in North Carolina between North Carolina residents with respect to delivery of goods in the State of New York; and (3) a contract signed in North Carolina between New York residents with respect to delivery of goods in California. Given that the court of North Carolina has jurisdiction in these cases, does it need conceptually to deal with the question of the identity of the applied law in each one of the cases? CBP's answer to this question is "yes." Although the 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.[22]

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21. KANT, DOCTRINE OF RIGHT, *supra* note 4, [6:230, 6:313]. Therefore, the 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 individuals' freedom. *See also* RIPSTEIN, *supra* note 5, at 8–9, 145–81. For a more detailed discussion of the Kantian normative justification for contemporary international order, see *infra* notes 97–105 and accompanying text.

22. Accordingly, CBP reminds somewhat of the argument made by Larry Kramer. Kramer has challenged the conventional wisdom 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 argues 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* Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 282–83 (1990). 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 "[t]he first—and most important—point to recognize is that moving from wholly domestic cases with multistate contacts does not change

The nature of the parties' choice of which framework under which to adjudicate their private dispute sheds light on the centrality of the states under CBP. This choice is not abstract; it inherently refers to a specific territory and, consequently, the specific positive law that governs this territory. Accordingly, states do not disappear under CBP. 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, territory over which states exercise their sovereign power in the form of the states' positive laws.[23]

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 *unity 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.[24] Based precisely on this relational character of private law, contemporary neo-Kantian scholars have developed the modern private law categories of contract,[25] tort,[26] unjust enrichment[27] and the law of property.[28] Since CBP insists on a strictly

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the essential nature of the interpretive problem." *Id.* 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.

23. 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.,* Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N. Y. U. L. REV. 719, 729, n.53 (2009); Mathias Reimann, *Domestic and International Conflicts Law in the United States and Western Europe*, in INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM 109 (Patrick J. Borchers & Joachim Zekoll eds., 2001). Since choice-of-law is conceptually viewed as addressing the question of individuals' choice with respect to a certain framework to adjudicate their private law dispute 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.

24. 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. *See generally* WEINRIB, THE IDEA, *supra* note 5; JULIUS COLEMAN, THE PRACTICE OF PRINCIPLE (2001).

25. *See generally* RIPSTEIN, *supra* note 5 at 107–45.

26. *See generally* WEINRIB, THE IDEA, *supra* note 5, at 101–44.

27. *See generally* Ernest J. Weinrib, *The Normative Structure of Unjust Enrichment*, in STRUCTURE AND JUSTIFICATION IN PRIVATE LAW: ESSAYS FOR PETER BIRKS 21 (Charles Rickett and Ross Grantham eds., 2008); Sagi Peari, *Improperly Collected Taxes: The Border between Private and Public Law*, 23 CAN. J. L. & JURISPRUDENCE 125 (2010).

28. *See generally* RIPSTEIN, *supra* note 5, at 86–107.

"private" conception of choice-of-law, it follows this relational structure of private interaction. The idea of choice becomes the idea of united choice.[29]

Part II elaborates on the three foundational blocks of this idea: (1) the *Parties' Autonomy* Principle; (2) the *Doctrine of Constructive Inference*; and (3) the *Innate Right Test of Legality*.

II. THE THREE FOUNDATIONAL BLOCKS OF CBP

A. Parties' Autonomy Principle

Approaching universal recognition, the so-called *parties' 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. In a rare consensus among legal scholars and judicial decisions, the *parties' autonomy* principle has long been accepted in the area of contract law.[30] Section 187 of the Restatement (Second) of Conflict of Laws[31] and Article 3 of the European Rome I Regulation[32] have explicitly incorporated this principle. Furthermore, the *parties' 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.[33]

Despite the general acceptance of the *parties' autonomy* principle in practice, its theoretical underpinnings remain obscured. More specifically, the principle has created at least two riddles for traditional positivistic

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29. It should be noted that the argument presented in this Article is of limited scope. While fundamentally relying on 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, movable property and certain family law interaction) 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 require an additional normative argument (such as the case of immovable property).

30. *See*, *e.g.*, Hessel E. Yntema, *Autonomy in Choice-of-Law*, 1 AM. J. COMP. L. 341, 345–53 (1954); Mathias Reimann, *Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 VA. J. INT'L L. 571, 575–77 (1999); Patrick J. Borchers, *Categorical Exceptions to Party Autonomy in Private International Law*, 82 TUL. L. REV. 1645, 1646 (2008).

31. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §187 (1971).

32. 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), ART. 3 [hereinafter Rome I Regulation].

33. COMMISSION REGULATION 864/2007, ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS (ROME II), art. 14, 2007 O.J. (L 199) 40 (EC), [hereinafter Rome II Regulation]; Mo Zhang, *Party Autonomy in Non-Contractual Obligations: Rome II and Its Impacts on Choice of Law*, 39 SETON HALL L. REV. 861, 864 (2009) (calling the *parties' autonomy* principle as the "most innovative part of Rome II").

thought.[34] 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 themselves the framework that will govern their dispute. Joseph Beale famously mocked this possibility as no less than "permission to the parties to do a legislative act."[35] Secondly, why should parties be permitted to choose a framework that is not the positive law of one of the existing states, 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 present no difficulty. The very nature of the *parties' autonomy* principle embodies CBP's fundamental idea of the parties' united choice with respect to the framework to be applied to resolve their dispute. Thus, the *parties' autonomy* principle is a paradigmatic case for CBP and follows CPB's normative justification that united choice is always required in private-law cases. Furthermore, the relational structure of private-law categories which is presupposed by CBP is consistent with the contemporary tendency to further extend the *parties' autonomy* principle to other private-law categories, such as tort law, unjust enrichment,[36] and family law.[37]

Kantian philosophy justifies the legislative branch as addressing the problem of indeterminacy in a hypothetical regime of purely private rights lacking public legal institutions.[38] Yet, under the *parties' autonomy* principle the parties explicitly replace the legislative provision with an alternative framework despite the theoretical necessity of that framework for parties' autonomy, thus introducing the possibility of adopting non-state provisions. CBP resolves the apparent contradiction: it objects to the contemporary general tendency to disqualify in advance the possibility of

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34. *See e.g.,* Matthias Lehmann, *Liberating the Individual from the Battles between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT'L L. 381, 383 (2008) (mentioning the "theoretical headaches to any serious positivist" that the *parties' autonomy* principle has caused).

35. BEALE, *supra* note 15, § 332.1, at 1079.

36. *See* Rome II Regulation*, supra* note 33.

37. *See e.g.*, Erik Jayme, *Parties Autonomy Principle in International Family Law and Succession Law: New Tendencies*, 11 Y.B. PRIVATE INT'L L. 1 (2009). For further discussion on the extension of the *parties' autonomy* principle to family law from the Neo-Kantian theoretical perspective, see Sagi Peari, *Choice-of-Law in Family Law: Kant, Savigny and the Parties' Autonomy Principle*, 4 NETH. J. OF PRIVATE INT'L L. 597 (2012).

38. KANT, DOCTRINE OF RIGHT, *supra* note 4, at [6:297, 6:313]; *see also* Ernest Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795, 808-10 (2003) [hereinafter Weinrib, *System of Rights*].

choice of non-state law,[39] but at the same time it also imposes a significant restriction on such choice. Since the *parties' autonomy* principle addresses the problem of indeterminacy in the regime of absence of public legal institutions, a similar 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.[40]

While the *parties' autonomy* principle is a reflection of choice-of-law in its purest form, one may inquire as to the relevance of the argument in the vast majority of cases which lack explicit choice of the parties. The next section of this Article addresses these cases. Through the introduction of the *Doctrine of Constructive Inference*[41] and its three constitutive ingredients—(a) *juridical imposition*, (b) *juridical indicators*, and (c) *juridical presuppositions*—this section will demonstrate how united choice is still possible in such cases.

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39. For discussion of the difficulty in incorporating non-state norms into the provisions of the American Second Restatement, and the Rome I and Rome II Regulations, see Katharina Boele-Woelki, *Unifying and Harmonizing Substantive Law and The Role of Conflict of Laws*, 340 RECUEIL DES COURS 275, 401-19 (2010); Giesela Rühl, *Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency*, *in* CONFLICT OF LAWS IN A GLOBALIZED WORLD 153, 164-67; Symeon C. Symeonides, *Party Autonomy in Rome I and II from a Comparative Perspective, in* CONVERGENCE AND DIVERGENCE IN PRIVATE INTERNATIONAL LAW – LIBER AMICORUM KURT SIEHR 513, 539-40 (Katharina Boele-Woelki et al. eds., 2010).

40. For further elaboration on the "specificity requirement" within a concrete example of Jewish law, see *infra* notes 117-20 and accompanying text. This is not, however, to say that the "specificity requirement" is the *only* limitation that CBP imposes on parties' potential choice. Since the three foundational blocks of CBP are normatively interconnected, Part III of this Article will demonstrate further limitations on the *parties' autonomy* principle as a result of its relation to the *Doctrine of Constructive Inference* (in the form of the "reasonable connection" requirement) and its relation to the *Innate Right Test of Legality* (in the form of a substantive restriction on parties' potential choice). For discussion of these issues, see *infra* notes 116–19 and accompanying text.

41. The term "constructive inference" is borrowed from Friedrich Carl von Savigny's work on choice-of-law. *See* FRIEDRICH CARL VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS, AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME 202 (William Guthrie trans., 1880) (1849). On the extensive analysis of this work as a reflection of the complex synthesis and interplay of natural rights philosophy, Roman law sources, the historical school of jurisprudence and the principal objection to judicial discretion, see Sagi Peari, *Savigny's Theory of Choice-of-Law as a Principle of Voluntary Submission,* 64 U. TORONTO L.J. (forthcoming 2014).

B. The Doctrine of Constructive Inference

1. Juridical Imposition

The *Doctrine of Constructive Inference* is based on one of the central notions of Kantian legal philosophy, *juridical imposition*. Since this philosophy focuses on the parties' external actions rather than on subjective beliefs and wishes, judicial impartiality is crucial. For Kant, the judge represents a "person that is authorized to impute with rightful force."[42] Accordingly, contemporary neo-Kantian accounts have emphasized the normative necessity of impartial authority, which provides an external juridical standpoint to parties' interactions.[43] In the context of CBP, 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 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"[44] illuminates the notion of *juridical imposition*. 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.[45] CBP, however, does not restrict this concept to the contract-law category. Objectively imposing "reasonable expectations" on both sides of private-law litigation, CBP reflects 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[46]: movable property, tort, unjust enrichment, and family law.

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42. KANT, DOCTRINE OF RIGHT, *supra* note 4, at 6:227.

43. *See* Ernest J. Weinrib, *Two Conceptions of Remedies*, *in* JUSTIFYING PRIVATE LAW REMEDIES 3, 27 (Charles Rickett ed. 2008); *see also* Ernest J. Weinrib, *Publicness and Private Law*, *in* 1 PROCEEDINGS OF THE EIGHTH INTERNATIONAL KANT CONGRESS 191, 192 (H. Robinson & Gordon Brittan eds., 1995). Many contemporary legal doctrines, such as the objective standard of negligence law, incorporate the notion of *juridical imposition*. For discussion of this point, see WEINRIB, THE IDEA, *supra* note 5, at 177-83.

44. For an argument regarding the primary centrality of this concept in choice-of-law thought, see CLARKSON & HILL, *supra* note 20, at 6-7; Peter E. Nygh, *The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort*, 251 RECUEIL DES COURS 273, 294-96 (1995).

45. *See* Vita Food Products, Inc. v. Unus Shipping Co., [1939] A.C. 277 (P.C.) (appeal taken from N.S.). As Lord Wright states, "the 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." *Id*. at 290; *see also* ADRIAN BRIGGS, AGREEMENT ON JURISDICTION AND CHOICE OF LAW 429-40 (2008).

46. For an argument in this direction, see Nygh, *supra* note 44.

Furthermore, 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 law that reflects the most significant relationship to the given factual situation. Thus, this principle is stated in the popular[47] Second Restatement with respect to the choice-of-law rule for torts:

> 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.[48]

Similarly, the Second Restatement's choice-of-law rules for contract,[49] unjust enrichment,[50] movable property,[51] and family law[52] are formulated in a substantially identical way. Aside from the subordination to section 6's organizing principles, such as Brainerd Currie's interest analysis[53] as well other considerations,[54] CBP willingly adopts these general tort, contract, unjust enrichment, family law, and property choice-of-law rules. The quest for the "most significant relationship" signifies precisely the above-presented notion of *juridical imposition*, under which united choice is imposed on the parties through analysis of their external voluntary acts. Furthermore, the word "occurrence" (or "transaction" in the context of the contract law category[55]) relates to the parties, too. Because of the Kantian relational structure of private-law categories, the "occurrence" represents a relational aspect of parties' interaction and inherently links the parties in a bipolar structure.

It should be noted that the MSR principle is not restricted to the American legal system; it also has a solid basis in other jurisdictions'

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47. On the centrality of the Second Restatement in United States daily choice-of-law practice, see, e.g., Symeon C. Symeonides, *A New Conflicts Restatement: Why Not?*, 5 J. PRIV. INT. L. 383, 393 (2009).

48. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971) (emphasis added).

49. *Id.* §§ 188(1), 189-197.

50. *Id.* § 221(1).

51. *Id.* §§ 222, 244, 250-251.

52. *Id.* §§ 154, 283(1), 284, 287(1), 288.

53. *Id*. § 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. Siehr, *Domestic Relations in Europe: European Equivalents to American Evolutions*, 30 AM. J. COMP. L. 37, 40–46 (1982) (discussing the similarity between § 6 and Currie's interest analysis).

54. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2).

55. *See id.* § 188.

choice-of-law traditions. For example, the default rule of Article 12 (2) of the now-abolished Private International Law Act[56] referred to the "significance of factors"[57] in the tort law area. 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.[58]

What is, however, the operational mechanism of the *Doctrine of Constructive Inference*? The notions of *juridical indicators* and *juridical presuppositions* are accessory tools of the doctrine, which facilitate its operation. The following two sections elaborate on this matter.

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,[59] the place of injury,[60] the place of contracting,[61] the place of performance,[62] the place of the business,[63] the place of enrichment,[64] or even nationality,[65] 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. I label these connecting factors *juridical indicators*. The contemporary international order comprised of sovereign states with defined territories explains the territorial nature of *juridical*

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56. Private International Law (Miscellaneous Provisions) Act, 1995, c. 42 (U.K.) [hereinafter PIL Act].

57. The unlimited list of these factors included "factors 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.
Id. § 12(2).

58. Rome II Regulation*, supra* note 33, art. 4(3). *See generally* Richard Fentiman, *The Significance of Close Connection*, *in* THE ROME II REGULATION ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS 85 (John Ahern & William Binchy eds., 2009).

59. Rome II Regulation*, supra* note 33, arts. 4(2), 10(2). For views supporting the concept of domicile as ultimately grounded on a person's choice, see e.g., CARL LUDWIG VON BAR, THE THEORY AND PRACTICE OF PRIVATE INTERNATIONAL LAW 112—15 (G.R. Gillespie trans., 2d ed.1889); JOHN WESTLAKE, TREATISE ON PRIVATE INTERNATIONAL LAW 304 (1859).

60. Rome II Regulation*, supra* note 33, art. 4(1); RESTATEMENT (SECOND) OF CONFLICT OF LAWS **§** 145(2)(a); PIL Act, *supra* note 56, art. 11(2)(a).

61. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2)(a).

62. *Id.* **§** 188(2)(c).

63. *Id.* **§§** 145(2)(c),188(2)(e).

64. *Id.* **§** 221(2)(c); Rome II Regulation, *supra* note 33, art. 10(3).

65. *Id.* §§ 145(2)(c), 188(2)(e).

indicators. Since each territory is governed by its respective positive laws, the choice of a territory becomes a choice of positive law.[66]

The inherent territorial nature of *juridical indicators* explains why CBP unequivocally rejects the conceptual distinction in choice-of-law literature and judicial 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).[67] 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;[68] they simply represent different sides of the same coin of the normative structure of choice-of-law.[69]

This unified normative basis of connecting factors also answers the criticism of the MSR principle's flexibility. Since this principle counts and weighs connecting factors, it has been accused of causing the great

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66. This notion of the inherently territorial nature of juridical indicators sheds light on the place of "nationality" connecting factor within the CBP. This connecting factor, being inherently related to a state's activity and the notion of citizenship, plays a much less central role for CBP than the territorial factors. Accordingly, it would be normatively relevant only to the extent it indicates the identity of the framework that the persons chose to adjudicate their dispute.

67. *See generally* SYMEON C.SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 123—140 (2006) [hereinafter SYMEONIDES, REVOLUTION]; Symeon C. Symeonides, *Territoriality and Personality in Tort Conflicts*, *in* INTERCONTINENTAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW: ESSAYS IN MEMORY OF PETER E. NYGH 401 (Talia Einhorn & Kurt Siehr eds., 2004).

68. For somewhat related comments on the "territoriality"/"personality" distinction, *see* Ralf Michaels, *Globalizing Savigny? The State in Savigny's Private International Law and the Challenge from Europeanization and Globalization*, *in* AKTUELLE FRAGEN ZU POLITISCHER UND RECHTLICHER STEUERUNG IM KONTEXT DER GLOBALISIERUNG 119, 134 (Michael Stolleis & Wolfgang Streeck eds., 2007); Reimann, *supra* note 30 at 590.

69. Accordingly, CBP is at odds with 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 generally* William A. Reppy. Jr., *Eclecticism in Methods for Resolving Tort and Contract Conflict of Laws: The United States and the European Union*, 82 TUL. L. REV. 2053 (2008). 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 Article, under the notion of the *Innate Right Test of Legality*, a restricted version of the "better law" theory is integrated into the normative structure of the choice-of-law question.

unpredictability of the Second Restatement in its implementation.[70] The MSR principle has been mocked as being a "no rules approach"[71] or "unabashedly open-ended."[72] 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."[73] 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, movable property, family law. Accordingly, choice has to be related to these categories. Thus, for example, in the case of tort law, the indicators of the parties' domicile, the place of permanent business, and so on, have to be assessed *at the time of the tort*. Accordingly, the indicator of the place of the forum, for instance, offered by some commentators,[74] must be rejected as normatively defective because it bears no relation to the tort that forms the party's interaction.

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.[75] The era of the Internet and people's

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70. *See e.g.,* Russell J. Weintraub, "*At Least, To Do No Harm": Does the Second Restatement of Conflicts Meet the Hippocratic Standard?*, 56 MD. L. REV. 1284, 1288-89 (1997); Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts,* 97 MICH. L. REV. 2448, 2466. For a recent objection to the alleged unpredictability of the Second Restatement, *see* Whytock, *supra* note 23, at 745-76.

71. Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 381 (1966).

72. Laura E. Little, *Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism*, 37 U.C. DAVIS L. REV. 925, 958 (2004).

73. Friedrich K. Juenger, *The E.E.C. Convention on the Law Applicable to Contractual Obligations: An American Assessment, in* CONTRACT CONFLICTS 295, 300 (P.M. North ed., 1982).

74. *See e.g.,* CURRIE, *supra* note 6, at 141. For a related discussion, albeit in the context of jurisdictional rules, *see* Mills, *supra* note 14 at 237 (distinguishing between the "time of proceedings" and the "time of event related to the dispute").

75. For examples of the operational mechanics of juridical indicators, *see* WEINRIB, *supra* note 27, at 34-43; Peari, *supra* note 27, at 154-61.

increased mobility add much complexity to this task. However, hard cases will always remain hard cases.[76] 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."[77]

Furthermore, 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 operational mechanism of the *Doctrine of Constructive Inference*—the notion of *juridical presuppositions*.

3. Juridical Presuppositions

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 of law for adjudicating their private-law interaction. This connecting factor serves for CBP as a starting point for further evaluation of *juridical indicators*. I label these categories' structural points of departure "*juridical presuppositions*."

Let me demonstrate this argument through the category of contract law. 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.[78] Within this relation, the Kantian conception of the

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76. 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". SAVIGNY, *supra* note 41, at 230.

77. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145(2), 188(2), 221(2). This exposition of the flexible nature of juridical indicators pre-empts the possibility of challenging CBP based on the objections that have been raised by Lea Brilmayer against the notion of *tacit consent*. By invoking the case of a person's accidental physical presence in a state's territory, Brilmayer has reached the conclusion that the notion of *tacit consent* cannot be perceived as a consensual submission. Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN L. REV. 1, 6-10 (1989) [hereinafter Brilmayer, *Consent*]; Lea Brilmayer, *Rights, Fairness, and Choice-of-law*, 98 YALE L.J. 1277, 1304 (1989) [hereinafter Brilmayer, *Rights*]). Accordingly, Brilmayer mocks the doctrine *of tacit consent* as "purely fictional" and declares it to be not applicable to the choice-of-law question. *Id*. at 1303. This objection, however, fails to undermine CBP's notion of juridical indicators. Indeed, the circumstances in which a person's domicile does not shed light on a person's choice do 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. Furthermore, the 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. *See* Brilmayer, *Consent*, *supra*, at 7 (emphasis not in original). For discussion of the central role of "legal fictions" under the Neo-Kantian theory of private law, *see* WEINRIB, THE IDEA, *supra* note 5, at 177-96.

78. For an alternative conception of contractual entitlement as a relation between a person and

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 item bargained for, but rather acquires a right merely to the performance of the promised act.[79] Thus, for example, if I agree with my neighbor to buy his horse, the signing of the contract itself does not mean that the horse is already mine. By making a contract with my neighbor I acquire merely a right to require my neighbor to perform his 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.[80]

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, localized at this essential element, establishes a *juridical presupposition* 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, presumed doctrine of validity of contract,[81] and so forth have to be considered and balanced.[82]

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

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thing, see the Hegelian conception of contract law as a relation between the person and thing. G.W.F. HEGEL, OUTLINES OF THE PHILOSOPHY OF RIGHT 84-92 (T.M. Knox, trans. 2008) (1952). *See also* Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077 (1989).

79. 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 Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT. L. REV. 55, 65-70 (2003); RIPSTEIN, *supra* note 5, at 69-70.

80. 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, *supra* note 79, at 67 (reference omitted).

81. For an exposition of the presumed validity of contract doctrine as fundamentally related to the parties' presumed choice (and therefore fully consistent with CBP), *see* Nygh, *supra* note 44, at 338-40.

82. This approach seemed to be mentioned in a footnote by the translator of Savigny's work on choice-of-law, William Guthrie, who introduced the traditional English contract choice-of-law rule 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 seems to accept the place of fulfillment of the contractual obligation as a *juridical presupposition*, but it does not disqualify in advance the significance of the place of contracting as a relevant *juridical indicator*. *See* SAVIGNY, *supra* note 41, at 228 (emphasis not in original).

place of enrichment as the *juridical presupposition* of this category.[83] Similar analyses of the movable property and tort law categories establishes the *juridical presuppositions* of the place of property and the place of the wrongful conduct,[84] respectively, as the most central elements in the internal structures of these private-law categories. Under this exposition of the relationships between *juridical presuppositions* and *juridical indicators, juridical presuppositions* are not "fixed," but rather present "loose" starting positions that can be overturned by the relevant *juridical indicators* of the particular circumstances.[85]

The relation proposed here between *juridical presuppositions* 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,[86] the preliminary tort choice-of-law rule under the abolished PIL Act,[87] the preliminary tort and unjust enrichment choice-of-law rules of the Rome II Regulation,[88] and various provisions of the Second Restatement.[89]

Furthermore, the notions of *juridical presuppositions* and *juridical indicators* also insulate CBP from the objections raised by legal realists against Joseph Beale's version of "vested rights" theory, which was eventually destroyed by those objections.[90] CBP seems to obstruct at least

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83. Weinrib, *supra* note 27; Peari, *supra* note 27.

84. CBP supports the juridical presupposition 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*, 39 FLA. ST. U. L. REV. 163 (2012); WEINRIB, THE IDEA, *supra* note 5, at 38-40, 143-203.

85. This was precisely Joachim Zekoll's response to 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* INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM 9, 14 (Patrick J. Borchers & Joachim Zekoll eds., 2001).

86. *See e.g.*, George Panagopoulos, RESTITUTION IN PRIVATE INTERNATIONAL LAW 111-31 (2000); *see also* Robert Leslie, *Unjustified Enrichment in the Conflict of Law*, 2 EDIN. L.R. 233, 235-41 (defending the unjust enrichment choice-of-law rule that combines the place of enrichment and the MSR principle).

87. PIL Act, *supra* note 56, art. 11(1).

88. Rome II Regulation, *supra* note 33, arts. 4(1); 10(3).

89. *See e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (establishing a preliminary point of departure in the area of tort law); *id.* § 191 (establishing a preliminary point of departure in the area of contract law).

90. For a discussion of the realists' exceptionally successful attack on Beale's version of vested

two (out of three[91]) of the realists' principal objections. *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.[92] On the contrary, there is nothing mechanical or arbitrary in CBP. It does not strictly follow the application of a pre-determined (and often arbitrary) connecting factor of vested rights theory, but rather involves a complex adjudicative process of analyzing and weighing the relevant juridical presupposition and juridical indicators.

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.[93] 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.[94] As we have seen, the state does not disappear under CBP.[95] 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,[96] for CBP, the plaintiff's right cannot exist without public judicial authority.

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rights theory, see SYMEONIDES, REVOLUTION, *supra* note 67, at 11-13; Brilmayer, *Rights*, *supra* note 77, at 1281-91.

91. The legal realists' third objection challenged in principle *any* conceptual understanding of the choice-of-law question. *See* WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 4, 8, 15 (1942); *see also* ERNEST G. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS (1947).

92. Thus, Cook coined Beale's last event connecting factor as a 'practical rule' (COOK, supra note 91, 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 6, at 138-39 (mentioning the 'machinery' operation of this theory).

93. *See* COOK, supra note 91, at 20-25. For a recent restatement of this argument, see Kermit Roosevelt, *Resolving Renvoi: The Bewitchment of Our Intelligence By Means of Language*, 80 NOTRE DAME L. REV. 1821, 1830-36 (2004).

94. COOK, supra note 91, at 29-33.

95. *See supra* notes 22-23 and accompanying text.

96. BEALE, *supra* note 15, § 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* Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L. J. 1191, 1195 (1987) (footnotes omitted).

C. Innate Right Test of Legality

The exposition of the CBP of choice-of-law is not complete without its final foundational block. This block addresses the Kantian justification for the positivity of laws and the resulting substantive restriction on that positivity.

The Kantian position on this matter can be stated as follows: within the regime of purely private rights called the "State of Nature", Kant makes a conceptual division between two types of individual rights: the "Innate Right" and "Acquired Rights". The Innate Right is the inherent entitlement that every person has by virtue of his birth.[97] Innate equality, the presumption of innocence, freedom of expression, and freedom of belief are among the constituents of this right that Kant specifies. Acquired Rights, on the other hand, refer to an individual's capacity to acquire objects external to them.[98] Property rights and contractual rights are representative examples of such rights.

In contrast to the Innate Right, the normative structures of Acquired Rights are so obscure and indeterminate that they are perceived as provisional, rather than conclusive, in nature.[99] This provisional nature of Acquired Rights leads to the imperative 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 (or, as Kant refers to it, the "Rightful Condition").[100] 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.[101]

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97. KANT, DOCTRINE OF RIGHT, *supra* note 4, [6:237-6:238].

98. *Id.* [6:245-6:6:252]. 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. Since Kantian Acquired Rights relate to the rights that the 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.

99. For accounts supporting this understanding of the contrast between *Innate Right* and *Acquired Rights*, see Weinrib, *System of Rights*, *supra* note 38, at 808; RIPSTEIN, *supra* note 5, at 177.

100. KANT, DOCTRINE OF RIGHT, *supra* note 4, [6:313].

101. Accordingly, these basic features of the Kantian concept of the *State of Nature* would be at odds with two recent attempts to base the "Neo-Kantian" understanding of choice-of-law on the extension of the *State of Nature* concept to private international interaction. *See* Gian Paolo Romano, Le Droit International Privé à l'épreuve de la Théorie Kantienne de la Justice, 1 JOURNAL DU DROIT INTERNATIONAL 59 (2012); Florian Rödl, Weltbürgerliches Kollisionsrecht, ÜBER DIE FORM DES KOLLISIONSRECHTS UND SEINE GESTALT IM RECHT DER EUROPÄISCHEN UNION (2008). In contrast to these accounts, the Kantian State of Nature fundamentally addresses the regime of natural Acquired Rights with a further transition to the regime of international order consisting of independent states with

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.[102] In this model, all states with their public institutions have to be viewed equally, regardless of their internal approximation towards the Kantian ideal of a republican state.[103] Therefore, no distinction is made between the positive-law provisions of liberal democratic states and corrupted states that do not even have a clear separation of powers. Since for Kant all positive laws are normatively equal, no additional inquiry is needed to decide whether a given law is more or less approximate to Kant's natural rights theory.

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. However, these defects are related to Acquired Rights, not to the Innate Right. This explains why the Innate Right survives the transition to the Rightful Condition and why a legislative provision that does not respect the Innate Right is not a positive provision at all.[104] In other words, for Kant, all positive laws are normatively equal, subject to passing the fundamental precondition of the *Innate Right Test of Legality* ["*IRTL*"].[105]

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public legal institutions.

102. Kant seems to identify certain extreme situations in which the individuals did not even enter into the Rightful Condition. Accordingly the most horrible and barbaric regimes cannot, for Kant, be regarded as states. *See* IMMANUEL KANT, ANTHROPOLOGY FROM A PRAGMATIC POINT OF VIEW [7:330] (Robert Louden trans., 2006) (1798).

103. KANT, DOCTRINE OF RIGHT, *supra* note 4, [6:340- 6:341]; *see* Garrett W. Brown, *State Sovereignty, Federation and Kantian Cosmopolitanism*, 11 EUR. J. INT'L REL. 495, 505 (2005)

104. 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*, 26 OXFORD J. LEGAL STUD. 1 (Bonne Litschewski Paulson & Stanley L. Paulson trans., 2006) (1946); Gustav Radbruch, *Five Minutes of Legal Philosophy*, 26 OXFORD J. LEGAL STUD. 13 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 2006) (1945); ROBERT ALEXY, THE ARGUMENT FROM INJUSTICE: A REPLY TO LEGAL POSITIVISM (Stanley L. Paulson & Bonnie Litschewski Paulson trans., 2002); SCOTT SHAPIRO, LEGALITY 23, n.23 (2011).

105. The argument in this and the previous three paragraphs 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*,109 HARV. L. REV. 1535 (1996); JEREMY WALDRON, LAW AND DISAGREEMENT (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

In modern choice-of-law terminology, the *IRTL* (which is subsequently important for the private international law component of "equal treatment"[106]) can be traced across a wide spectrum of subjects, doctrines, and concepts appearing in choice-of-law literature under different names: "limitations on the parties' autonomy principle,"[107] the "public policy exception,"[108] the "fundamental public policy exception,"[109] "mandatory rules,"[110] "rules of immediate application,"[111] "human rights,"[112] "supranational human rights,"[113] or "constitutional constraints."[114] Despite the myriad names, the CBP insists on a single unifying basis for understanding these subjects, doctrines, and concepts.[115] Under this understanding, the *IRTL* inheres in the choice-of-law process itself and provides the ultimate normative justification for the wide range of

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positivism; and (2) an exception to legal positivism in radically "unjust" cases. *See* Perry Dane, *The Natural Law Challenge to Choice of Law*, *in* THE ROLE OF ETHICS IN INTERNATIONAL LAW 142, 170-75 (Donald E. Childress ed., 2012).

106. *See, e.g.,* R.H. Graveson, *Philosophical Aspects of the English Conflict of Laws*, 78 LAW Q. REV. 337, 361 (1962); Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 963 (1952); Roosevelt, *supra* note 71, 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 70, at 2481, 2500; Brilmayer, *Rights*, *supra* note 77, at 1315.

107. Both American and European systems tend to intervene in the parties' choice under the *parties' 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 39, at 167–175; Borchers, *supra* note 30, at 1657–59 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 33, Art. 14(1)(b).

108. Accordingly, CBP conceives the doctrine of public policy as an establishment of a minimal substantive threshold for the ordinary choice-of-law process, which is unrelated to any particular policy-based analysis of a particular state. For conceptions of public policy doctrine formulated in somewhat related terms, see JUENGER, *supra* note 12, at 199 (coining the doctrine as of "last resort"); Cheatham & Reese, *supra* note 106, at 980 (referring to the doctrine as "dragging on the coat tails of civilization").

109. *See*, *e.g.,* Borchers, *supra* note 30, at 1652.

110. *Id*. at 1651–57; Rome II Regulation, *supra* note 33, Art. 16.

111. *See*, *e.g.,* Symeon C. Symeonides, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1, 33–34 (2000) (defining "rules of immediate application" as "substantive rules of law which are intended to apply to multistate cases 'immediately' or 'directly' in the sense of bypassing the ordinary choice-of-law rules").

112. *See*, *e.g.,* Adrian Briggs, THE CONFLICT OF LAWS 232 (2nd ed. 2008).

113. Ralf Michaels, *Public and Private International Law: German Views on Global Issues*, J. PRIVATE INT'L. L. 121, 131 (2008) [hereinafter Michaels, *German Views*]. For further discussion on the notion of human rights as a reflection of *IRTL*, see *infra* notes 126–32 and accompanying text.

114. Roosevelt, *supra* note 70, at 2507–34.

115. *See*, *e.g.,* Borchers, *supra* note 30, at 1651–52 (substantially equating the American use of the term "public policy" and the European term "mandatory rules").

exceptions to the application of choice-of-law rules. The authoritative acts of those states that do not meet the substantive requirement of Kantian *Innate Right* are disqualified from this process and cannot in principle serve as an object of persons' united choice.

III. 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, family law, 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. 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.[116] Accordingly, it meets the above-mentioned "specificity requirement" that CBP imposes on the *parties' autonomy* principle.[117] Furthermore, since 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, CBP imposes several additional restrictions on the parties' potential choice. The *IRTL* 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. Accordingly, 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 is not Jewish or because of his gender.[118] Furthermore, the influence of the *Doctrine of Constructive Inference* and

116. For a helpful discussion of these issues, see, Ernest J. Weinrib, *Planting Another's Field: Unrequested Improvements Under Jewish Law*, *in* UNDERSTANDING UNJUST ENRICHMENT 221 (Jason Neyers, Mitchell McInnes & Stephen G.A. Pitel eds., 2004).

117. *See supra* notes 38-40 and accompanying text.

118. On the discriminatory nature of Jewish law private law provisions against foreigners, see David Wermuth, *Human Rights in Jewish Law: Contemporary Juristic and Rabbinic Conceptions*, 32 U. PA. J. INT'L L. 1101 (2011). For an attempt to reconcile Jewish law discriminatory provisions in light of contemporary reality, see HAIM H. COHN, HUMAN RIGHTS IN JEWISH LAW (1984).

the MSR principle gives rise to an additional limitation: this choice of Jewish law has to be to a certain degree objectively related to the parties. In this way CBP follows contemporary American doctrines limiting the *parties´ autonomy* principle: (1) the requirement of certain reasonable connection of the parties to the chosen law; and (2) the exception of vulnerable party cases, such as consumer and employee contracts.[119]

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*[120] and English *Chaplin v. Boys*.[121] *Babcock v. Jackson* involved a tort between two New York residents during their short trip to Ontario. Despite CBP's juridical presupposition to apply the law of the place he 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 *IRTL*. Since Ontario's negligence law of that time discriminated against foreign residents in favor of local residents,[122] this law infringes the equality of the parties and consequently is inconsistent with the *IRTL*. 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.

On the other hand, *Chaplin v. Boys* represents a case where the content of the applied law passes the *IRTL*. In this case, a tort had been committed between two English soldiers during their military service in Malta. Despite the juridical presupposition of the place of wrongful conduct, the juridical indicators of the parties' permanent domiciles and the

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119. For a recent discussion of the two limitations that American doctrine imposes on the *parties' autonomy* principle, see Rühl, *supra* note 39, at 155-176, *and* Symeonides, *supra* note 39.

120. Babcock v. Jackson, 12 N.Y.2d 473 (1963). For a discussion on the influence that this case has exercised on American choice-of-law thinking, see SYMEONIDES, REVOLUTION, *supra* note 68, at 106-114.

121. Chaplin v. Boys [1971] A.C. 356. For a discussion on the significance of this case for English tort choice-of-law rules, see CLARKSON & HILL, *supra* note 20, at 292 ("The common law choice of law rules comprise a general rule and an exception. The leading authority is the decision of the House of Lords in *Boys v. Chaplin*.").

122. For a discussion on this point see Donald T. Trautman, *A Comment*, 67 COLUM. L. REV. 465 (1967), *and* Neumeier v. Kuehner, 31 N.Y.2d 121, 133 (1972) (Bergan, J., dissenting).

arbitrary nature of the place of military service[123] 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 *IRTL*. Although, according to the House of Lords' opinion, the Maltese law clearly undercompensated the plaintiff,[124] this fact is irrelevant for the *IRTL*. As long as the equality between the parties is preserved, 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.[125]

The last example I would like to refer to is the well-known notion of international human rights as a reflection of *IRTL*. The *IRTL* sheds light on the conceptual location of this notion. Recognized in a series of international conventions,[126] the universalistic aspirations of human rights have acquired a significant role in contemporary legal scholarship.[127] Through the notion of the *IRTL* and its independence from Law of Nation considerations,[128] CBP rejects any relation to public international law or international relationships. Therefore, despite the current tendency of academic literature,[129] 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

123. *See* SAVIGNY, *supra* note 41, at 103-104 (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).

124. *Chaplin*, [1971] A.C. 356 at 380 (Lord Guest), 373 (Lord Hodson), 384 (Lord Wilberforce), 393 (Lord Pearson).

125. This point demonstrates the conceptual differences between CBP and a purely better-law methodology. While best-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*.

126. *See* Universal Declaration on Human Rights, Dec. 10 1948. G.A. Res. 217 A (III); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, 1249 U.N.T.S. 13; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

127. *See e.g.,* JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 9-27 (2nd ed. 2002); Jerome J. Shestack, *The Philosophical Foundations of Human Rights*, 20 HUM. RTS. Q. 201, 206-208 (1998) (discussing the natural law foundation of human rights); Michael J. Perry, *Are Human Rights Universal? The Relativist Challenge and Related Matters*, 19 HUM. RTS. Q. 461 (1997) (defending a universalistic conception of human rights against the subjectivism of cultural relativism).

128. *See supra* Part I.

129. For an example of the protection of international human rights in public international law, see JOHN H. CURRIE, PUBLIC INTERNATIONAL LAW 412-448 (2nd ed. 2008); *see also* Michaels, *German Views*, *supra* note 114, 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.").

view that private international law and public international law are linked through the subject of international human rights.[130] *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.[131] 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.[132] This would disjoin the *IRTL* from other foundational blocks of CBP. Although the *IRTL* is 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 *IRTL*) is an indispensable part of the normative ensemble that consists of: (1) the *Parties' Autonomy Principle*; (2) the *Doctrine of Constructive Inference;* and (3) *IRTL.*

CONCLUSION

This Article has presented the Choice-Based Perspective of choice-of-law. Starting with the notion of the independence of the choice-of-law process from the principles of the Law of Nations, it argued that the choice-of-law question is ultimately grounded on the idea of persons' united choice with respect to the framework for adjudication of their dispute. This idea has been developed through three foundational blocks: (1) the *Parties' Autonomy Principle*; (2) the *Doctrine of Constructive Inference*; and (3) the *Innate Right Test of Legality.* Furthermore, as it has been shown, the normative underpinnings of CBP are fully consistent with many traditional and contemporary choice-of-law rules, doctrines, and concepts.

130. *See e.g.*, Michaels, *German Views*, *supra* note 114, at 131.

131. *See e.g.,* Veerle Van Den Eecklhout, *Promoting Human Rights within the Union: The Role of Private International Law*, 14 ELJ 105, 111-113, 117-118 (2008).

132. *See e.g.,* Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 TUL. L. REV. 1607, 1634 (2008) ("Fundamental (or human) rights are sometimes viewed as the basis of classical conflict of laws . . . .").

APPENDIX

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

Choice-Based Perspective's Model of Choice-of-Law Rules