NAVIGATING THE STORMY SKIES: BLUE SKY STATUTES & CONFLICT OF LAWS

Danielle Beth Rosenthal*

ABSTRACT

As in no other area of choice-of-law jurisprudence, courts have rejected application of conflicts principles to Blue Sky claims. This Article examines this "Blue Sky exception" to traditional conflicts law on two levels. First, this Article takes a value-neutral perspective to examine the rationales that courts have put forth in favor of this approach, concluding that these justifications lack persuasive force and, at times, even rely on incorrect statements of positive law. Next, switching to a normative analysis, the Article argues that the Blue Sky exception is undesirable as a matter of public policy, given its inconsistency with the principles, objectives, and values that underlie modern choice-of-law jurisprudence.

* Yale Law School, J.D. 2013; Cornell University, School of Industrial and Labor Relations, B.S. 2009. Special thanks to Lea Brilmayer, Anuja Thatte, Juliana Yee, and the entire editorial team at the Stanford Journal of Complex Litigation.

INTRODUCTION

Choice-of-law matters are critical in high-stakes residential mortgage-backed securities (RMBS) litigation, where over $300 billion in liability and $1 trillion of securities are at stake.[1] A court's choice of law could mean the difference between a defendant paying out hundreds of billions of dollars to settle just one suit out of dozens scattered all across the country and walking away scot-free.[2]

The battle over choice of law is being played out in courtrooms from coast to coast as litigation arising out of the RMBS crisis continues to unfold. The litigation over bad loans and faulty underwriting is of an unparalleled magnitude. Between 2007 and July 2011, plaintiffs filed "over 2430 credit crisis-related securities lawsuits" against Wall Street's biggest banks, claiming billions of dollars in damages for the banks' roles in making allegedly false statements in connection with the issuance of RMBS.[3]

When the courts have analyzed plaintiffs' common-law claims in these cases, the results have been as expected. Federal and state courts have trudged through the analysis slowly, methodically attempting to discern the potentially applicable state statutes, the content of those statutes, and how the statutes are to be prioritized in the cases at hand. But when the courts have come to plaintiffs' claims brought under state securities statutes (or "Blue Sky" laws), they have abruptly changed course. The courts have breezed past the choice-of-law issues raised by these claims, declaring that "[s]ecurities transactions are unique and a traditional conflict of laws analysis is not a good fit"[4]—often with little explanation.[5]

Recent RMBS litigation has brought to light courts' refusal to apply traditional conflict-of-laws analysis to Blue Sky claims in a way that has been replicated in no other area of U.S. law. While this "Blue Sky exception" to choice-of-law jurisprudence first appeared over three decades ago in the seminal case

1. *See* Jessica Silver-Greenberg, *Mortgage Crisis Presents a New Reckoning to Banks*, N.Y. TIMES (Dec. 9, 2012), http://www.nytimes.com/2012/12/10/business/banks-face-a-huge-reckoning-in-the-mortgage-mess.html.

2. *See, e.g.*, *id*. (noting that seventeen banks face $200 billion in damages in a single suit alone filed in 2012 by the Federal Housing Finance Agency (FHFA)).

3. Kevin LaCroix, *Wells Fargo Mortgage-Backed Securities Case Settles for $125 Million*, D&O DIARY (July 8, 2011), http://www.dandodiary.com/2011/07/articles/subprime-litigation/wells-fargo-mortgagebacked-securities-case-settles-for-125-million.

4. United Heritage Life Ins. Co. v. First Matrix Inv. Servs. Corp., No. 1:06-CV-496, 2009 WL 3229374, at *4 (D. Idaho Sept. 30, 2009).

5. See infra notes 62-63 and accompanying text.

of *Lintz v. Carey Manor Ltd.*,[6] it has taken on critical, if not monumental, proportions in light of the "tsunami" of RMBS litigation,[7] almost all of which has involved choice-of-law issues.[8] Courts that have recognized this exception have concluded that claims brought under Blue Sky statutes present questions solely of statutory interpretation: Regardless of which state's Blue Sky statute the plaintiff chooses in bringing her claim, the court should conduct an inquiry to determine whether a sufficient "nexus" exists between the statute and the conduct at issue. If the criteria are met—regardless of any other party or state interest—the court should apply the plaintiff's choice of law, no questions asked.

Although no scholar has examined with any measure of rigor the rationales that the courts have put forth in favor of this approach, several have remarked on the unusual nature of this practice. For example, Professor Howard M. Friedman noted in passing, "Alone, blue sky cases seem to remain outside this mainstream of legal development. As in no other area, courts here seem to ignore the choice-of-law revolution."[9] Similarly, Jack E. McClard has cautioned that, in the context of Blue Sky law, lawyers should resist their "natural inclination" to "assume that the court must select among state remedies by applying conflict of law principles."[10] But rather than questioning the merits of this "revolution[ary]"[11] and "shak[y],"[12] yet widespread, exception to conflicts law, scholars have taken the merits of the approach as given, instead focusing their efforts in large part on how plaintiffs may best avail themselves of their conflict-of-laws windfall.[13]

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6. 613 F. Supp. 543 (W.D. Va. 1985).

7. Alison Frankel, *Quinn Emanuel Is Not Riding a Wave: It Triggered a Tsunami*, THOMSON REUTERS (Sept. 2, 2011), http://newsandinsight.thomsonreuters.com/Legal/News/2011/09_-_September/Quinn_Emanuel_is_not_riding_an_MBS_wave__it_triggered_a_tsunami.

8. In reality, the revival of the issue gained momentum in the late 1990s and early 2000s with the boom in securities litigation more generally. *See, e.g.*, *United Heritage*, 2009 WL 3229374; Nuveen Premium Income Mun. Fund 4, Inc. v. Morgan Keegan & Co., 200 F. Supp. 2d 1313 (W.D. Okla. 2002), *vacated following settlement*, No. 5:00-CV-935, 2005 WL 857002 (W.D. Okla. Apr. 11, 2005); Citizen Ins. Co. of Am. v. Daccach, 217 S.W.3d 430 (Tex. 2007). However, the number of courts to consider the issue has increased exponentially in recent years in connection with the litigation stemming from the RMBS crisis. *See infra* note 26.

9. Howard M. Friedman, *Searching for a Blue Sky Remedy—A Forum Shopper's Guide*, 15 WAYNE L. REV. 1495, 1497 (1969).

10. Jack E. McClard, *The Applicability of Local Securities Acts to Multi-State Securities Transactions*, 20 U. RICH. L. REV. 139, 139 (1985).

11. Hilb Rogal & Hobbs Co. v. Rick Strategy Partners, No. 3:05-CV-355, 2006 WL 5908727, at *11 (E.D. Va. Feb. 10, 2006).

12. McInnis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 706 F. Supp. 1355, 1358 (M.D. Tenn. 1989).

13. *See* Friedman, *supra* note 9, at 10; Benjamin R. Picker, *Selecting the Appropriate*

This Article fills this gap in the scholarship. It concludes that the practice of giving plaintiffs unilateral control over choice of law in Blue Sky cases is neither logically principled nor normatively desirable. First, this Article takes a value-neutral perspective to examine the rationales that courts have put forth in favor of this approach, concluding that these justifications lack persuasive force and, at times, even rely on incorrect statements of positive law. Next, switching to a normative analysis, the Article argues that the Blue Sky exception is undesirable as a matter of public policy, given its inconsistency with the principles, objectives, and values that underlie modern choice-of-law jurisprudence.

Part I lays the groundwork for examining the Blue Sky exception. Part I.A identifies the primary areas of conflict among states' Blue Sky statutes in order to shed light on the stakes of the debate and to provide context for the remainder of the analysis. After providing an example of how the exception operates in practice, Part I.B outlines the views of the few dissenting courts that have barred plaintiffs from unilaterally choosing the governing law, holding that, as in other cases, the parties must defer to conventional choice-of-law principles.

Part II scrutinizes the three rationales that courts have commonly put forth to explain their adoption of this seeming anomaly in conflicts jurisprudence. As Part II explains, courts have framed the practice as consistent with the conflicts rules established in their fora, rather than as a public-policy exception rooted in values external to strict adherence to the forum's clearly established positive law. I conclude that these attempts to fit the Blue Sky exception within established conflicts molds are misguided; no court has provided a sufficiently persuasive rationale as to why the approach is consistent with or mandated by the positive law of its forum.

Part III examines the exception from an "external" perspective. The mere fact that the majority of courts treat Blue Sky cases unconventionally does not, in and of itself, justify its eradication. Because, theoretically, states may adopt any conflicts methodology within constitutional bounds,[14] a more robust normative analysis is needed. In Part III.A, I attempt to do so by identifying the underlying goals that inform modern choice-of-law theories—an exercise necessary before examining the practice's normative value. Then, in Part III.B, after concluding that the exception serves very few accepted choice-of-law values at the expense of many, I reason that the Blue Sky exception offers courts little reason to depart from established modes of analysis, which are more strongly grounded in stated objectives.

Blue Sky Law(s) Under Which To Bring a Claim—A Case Study, 3 PUB. INVESTORS ARB. B. ASS'N B.J. 353 (2011).

14. To the extent that common law dictates conflicts rules, a court's adoption of the Blue Sky exception ostensibly incorporates it into the forum state's positive law.

I. CONFLICTS AND THE BLUE SKY LAWS

A. Conflicts Between Blue Sky Statutes

Kansas enacted the first Blue Sky law in 1911, marking the beginning of our statutory securities scheme.[15] Today, all fifty states have Blue Sky laws.[16] These statutes, together with federal securities laws, serve to regulate transactions relating to the sale of securities and provide avenues of relief for defrauded investors.[17] Every state's securities statute, other than New York's "Martin Act,"[18] provides investors a private right of action for fraudulent misrepresentations or omissions relating to the sale of securities.[19]

In the mid-1990s, the National Securities Markets Improvement Act of 1996[20] significantly curtailed the scope and utility of the Blue Sky laws.[21] Reversing the longstanding pattern of concurrent federal and state securities regulation, the 1996 Act explicitly preempted several areas of state securities regulation, including registration and reporting requirements and regulation of investment advisers and broker-dealers.[22] Although the 1996 statute did not preclude private state-fraud actions, potential plaintiffs hoping to bring state statutory claims with respect to publicly traded securities were dealt a blow by the passage of the Securities Litigation Uniform Standards Act (SLUSA) of 1998,[23] barring particular securities-fraud class actions.[24]

With the 1990s reforms, Blue Sky litigation became relatively less attractive than its federal counterpart, and its accompanying choice-of-law issues retreated into the background. In recent years, however, as a result of the boom in RMBS litigation specifically and securities litigation more generally, Blue Sky litigation has witnessed a revival. Plaintiffs have found that state causes of action not only have enabled them to circumvent a number of obstacles imposed by the federal securities statutes, including heightened pleading standards, discovery stays, and particular remedy restrictions, but also have provided them with the added bonus of allowing them to haul Wall Street giants into state courts, which plaintiffs view as more hospitable to their claims and more

15. 1 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 1.2 (5th ed. 2006).

16. *Id*.

17. *Id*.

18. Martin Act of 1921, N.Y. GEN. BUS. LAW §§ 352-359 (McKinney 2003).

19. *See* Picker, *supra* note 13, at 353-54.

20. National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (codified in scattered sections of 15 U.S.C.).

21. HAZEN, *supra* note 15, § 1.2.

22. *Id*.

23. Securities Litigation Uniform Standards Act (SLUSA) of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.).

24. HAZEN, *supra* note 15, § 1.2.

plaintiff-friendly generally.[25]

As plaintiff-investors have increasingly relied upon state securities statutes to serve as vehicles for their claims, and as bet-the-company litigation stemming from the RMBS crisis has blossomed, the question of which state's law is to be applied has taken center stage.[26] Blue Sky statutes *can* be extraordinarily advantageous to plaintiffs, but these advantages are highly dependent upon the choice of statute. The stakes of this decision are high, as Blue Sky statutes "vary greatly" on such key issues as their extraterritorial application, the availability of private causes of action, statutes of limitations, and obtainable remedies.[27] Although several states' adoption of the Uniform Securities Act has standardized these statutes somewhat, many states have adopted the model legislation only in part or not at all.[28]

Statutes of limitations[29] and repose have proven to be among the biggest battlegrounds. Because a year or two can make or break a multimillion-dollar

25. Although the advantages of bringing state-law claims in RMBS litigation are complex and beyond the scope of this Article, certain benefits are readily apparent. *See, e.g.*, Douglas M. Branson, *Securities Litigation in State Courts—Something Old, Something New, Something Borrowed*, 76 WASH. U. L.Q. 509, 509 (1998) (explaining the hurdles plaintiffs face in federal court, including "the 'bespeaks caution' doctrine; requirements that fraud be pleaded with particularity; special and strict state of mind pleading standards; effective elimination of professional and semiprofessional plaintiffs; a mandatory quest for the 'most appropriate plaintiff'; mandatory Rule 11 review of plaintiffs' pleadings, the specter of shifting enormous defense legal fees onto plaintiffs; mandatory stays on discovery by plaintiffs; and on and on"); *see also* Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, *in* COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH 143, 177 (Klaus J. Hopt et al. eds., 1998) ("[S]ome litigants began turning to state actions in the aftermath of the Supreme Court's restrictive interpretations of the federal antifraud provisions, which began in the 1970s, and this trend is expect to increase given Congress's recent tightening of procedural requirements for federal securities actions."); J.E. Cullens Jr., *Next Time a Louisiana Investor Calls, Consider Pleading Louisiana's Blue Sky Law Exclusively*, LA. ADVOCS., Mar. 2004, at 11.

26. A number of courts have considered the issue and applied the Blue Sky exception in the context of RMBS litigation. *See, e.g.*, FHFA v. Deutsche Bank AG, 903 F. Supp. 2d 285 (S.D.N.Y. 2012); *In re* Countrywide Fin. Corp. Mortgage-Backed Sec. Litig., No. 1:11-CV-10414, 2012 WL 1322884 (C.D. Cal. Apr. 16, 2012); Cambridge Place Inv. Mgmt., Inc. v. Morgan Stanley & Co., Nos. 10-2741, 11-4605, 2012 WL 5351233 (Mass. Super. Ct. Sept. 28, 2012); Fed. Home Loan Bank of Seattle v. Banc of Am. Sec. LLC, Nos. 09-2-46319-1 et al., 2011 WL 2693115 (Wash. Super. Ct. June 23, 2011).

27. Picker, *supra* note 13, at 364; *see also, e.g.*, HAZEN, *supra* note 15, § 8.1[1][A].

28. *See* Marc I. Steinberg & Chris Claassen, *Attorney Liability Under the State Securities Laws: Landscapes and Minefields*, 3 BERKELEY BUS. L.J. 1, 8 (2005).

29. It is important to note that the issue of statutes of limitations can be thorny, given that some states' choice-of-law rules treat statutes of limitations as "procedural." *See, e.g.*, Nez v. Forney, 783 P.2d 471, 472 (N.M. 1989); Keeton v. Hustler Magazine, Inc., 549 A.2d 1187, 1190-91 (N.H. 1988). States that consider statutes of limitations to be procedural typically apply their own statutes of limitations to cases filed in their courts. *Nez*, 783 P.2d at 472; *Keeton*, 549 A.2d at 1191-93. This Article addresses this wrinkle as it becomes pertinent to the discussion. *See infra* notes 96, 143-159.

claim, parties are fighting tooth and nail to convince the courts that their laws of choice should govern. It is not only the governing limitations periods that matter;[30] states also differ, for example, on the inclusion of a "discovery rule," which starts the statute of limitations running only when an investor actually discovers or reasonably should have discovered the illicit conduct.[31] The majority of states do recognize such a rule, but a handful of states do not.[32]

Another area ripe for disagreement involves the statutory elements of a claim. Plaintiffs benefit enormously when they merely need to show negligence,[33] and only some Blue Sky statutes require a showing of reliance or causation.[34] Certain states, for instance, enable plaintiffs to rely on the "fraud on the market" theory,[35] which "entitles plaintiffs to a rebuttable presumption of the existence of transaction causation . . . even where they were unaware of the fraudulent conduct at the time of their purchase or sale."[36] In contrast, other states are not only unwilling to presume a plaintiff's reliance on the alleged

30. *See* Picker, *supra* note 13, at 364-65 ("[B]oth Connecticut's and Florida's Blue Sky law provides a statute of limitations of two years after the date when the fraud or misrepresentation is discovered or in the exercise of due diligence should have been discovered, but with an overall maximum of five years from the date that such fraud or misrepresentation occurred. However, the statute of limitations under Pennsylvania's Blue Sky law is more restrictive, providing only one year after the date that the claimant knew or should have known of the violation, with a maximum of five years after the transaction at issue." (citations omitted) (citing, *inter alia*, CONN. GEN. STAT. ANN. § 36b-29 (West 2010); 70 PA. CONS. STAT. ANN. § 1-504 (West 1994))). Statutes of repose vary as well. *Id*. A "statute of repose" is defined as "[a] statute barring any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury." BLACK'S LAW DICTIONARY 1546 (9th ed. 2009).

31. Picker, *supra* note 13, at 365 ("[A]lthough most Blue Sky law statutes of limitations specifically incorporate the discovery rule, others do not do so, at least on their face.").

32. West Virginia and Wisconsin are examples of two states that recognize such a rule. *Id*.

33. *See, e.g*., Minneapolis Emps. Ret. Fund v. Allison Williams Co., 519 N.W.2d 176 (Minn. 1994) (holding that mere negligence is not enough to state a claim under Minnesota's Blue Sky law).

34. For example, in *Green v. Green*, 293 S.W.3d 493, 507 (Tenn. 2009), the Tennessee Supreme Court considered whether Tennessee's Blue Sky law requires that a plaintiff bring a claim absent proof of reliance on the defendant's representations or omissions. Pointing to the fact that "[n]owhere in the plain language of [the statute] does the requirement of reliance by the seller on the purchaser's representation or omission appear," the court held that "reliance is not an element of a right of action for false or misleading statements in a securities transaction." *Id*. at 507-08. By contrast, in *McGonigle v. Combs*, 968 F.2d 810, 826 (9th Cir. 1992), the Ninth Circuit held that "the district court correctly instructed the jury that reliance and loss causation are elements of a claim under Kentucky's blue sky laws."

35. *See, e.g*., State v. Marsh & McLennan Cos., 292 P.3d 525 (Or. 2012) (en banc).

36. David M. Brodsky & Jeff G. Hammel, *The Fraud on the Market Theory and Securities Fraud Claims*, N.Y. L.J., Oct. 24, 2003, *available at* http://www.lw.com/upload/pubContent/ _pdf/pub835.pdf.

fraud, but also will conduct a fact-intensive inquiry to determine the reasonableness of this reliance, including the plaintiff's exercise of care and judgment.[37]

Finally, states differ on a prevailing plaintiff's available remedies. Some states are hesitant to imply remedies into their respective Blue Sky statutes,[38] while others generously allow plaintiffs to collect damages in addition to availing themselves of the standard remedy of rescission.[39] Statutes also provide divergent measures of damages,[40] with other common issues including whether and to what extent interest is recoverable[41] and allowances for punitive damages[42] and attorneys' fees.[43] It is because the differences between statutes implicate such key issues—some capable of resolving the case from the outset—that the choice-of-law issues here are so critical.

B. The Split Among the Courts

When statutory conflicts have arisen in Blue Sky cases, state and federal courts alike have split on whether a "traditional choice of laws" analysis is applicable.[44] Typically, where multiple states' laws may apply, the court con-

37. *See, e.g.*, Ogdon v. Byron Nelson Co., 123 Wash. App. 1009, 2004 WL 1932661 (2004).

38. HAZAN, *supra* note 15, § 8.1; *see, e.g.*, Shofstall v. Allied Van Lines, Inc., 455 F. Supp. 351, 358 (N.D. Ill. 1978) (holding that Illinois's Blue Sky law does not provide an implied remedy for damages and that the sole civil remedy under the statute is rescission); Kroungold v. Treister, 407 F. Supp. 414, 419 (E.D. Pa. 1975) (holding that there is no implied remedy under Pennsylvania's Blue Sky law); Tobey v. NX Corp., 323 N.E.2d 30, 35 (Ill. App. Ct. 1974) (holding that "[s]ince damages are not available as a remedy under [Illinois's Blue Sky law], [a] plaintiff must stand ready at all times to return the securities."). *But see* Carothers v. Rice, 633 F.2d 7, 9 (6th Cir. 1980) (finding the existence of an implied remedy for defrauded sellers under Kentucky's Blue Sky law).

39. *See* Picker, *supra* note 13, at 362. The availability of damages is particularly important in cases where the investor no longer owns the securities at issue, and therefore rescission is unavailable.

40. *Id.* (giving the example of Michigan's Blue Sky law, which defines "damages" as "the amount that would be recoverable upon a tender [of the security], less the value of the security when the buyer disposed of it, and the interest at the statutory rate from the date of disposition" (quoting MICH. COMP. LAWS ANN. § 451.2509(2) (West 2009))).

41. *Id.*

42. *Compare* Citigroup Global Markets, Inc. v. Salerno, 445 F. Supp. 2d 124, 127 (D. Mass. 2006) (noting that punitive damages are unavailable under the Massachusetts Uniform Securities Act), *with* Anvil Inv. Ltd. P'ship v. Thornhill Condos., Ltd., 407 N.E.2d 645, 654 (Ill. App. Ct. 1980) (affirming an award of punitive damages in an action brought under the Illinois Securities Act of 1953).

43. Picker, *supra* note 13, at 362-63 ("The only jurisdictions that do not permit recovery of attorneys' fees are California, New Jersey, New York (which does not permit a private right of action), Ohio, Pennsylvania, and Tennessee."). Statutes also differ in the amount of attorneys' fees that can be recovered. *Id.* at 364.

44. Hilb Rogal & Hobbs Co. v. Rick Strategy Partners, No. 3:05-CV-355, 2006 WL

ducts a conflicts analysis under its choice-of-law rules. For example, a state that follows "governmental interest analysis" first examines which states have "interests" in having their laws apply and then gives controlling effect either to the forum law, in the case of a true conflict, or to the law of the only state with a true interest in its law's application, in the case of a false conflict.[45] A state that instead follows the *Restatement (Second) of Conflict of Laws*'s "most significant relationship" test conducts an ad-hoc inquiry, weighing: (1) "the needs of the interstate and international systems"; (2) "the relevant policies of the forum"; (3) "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue"; (4) "the protection of justified expectations"; (5) "the basic policies underlying the particular field of law"; (6) "certainty, predictability and uniformity of result"; and (7) "ease in the determination and application of the law to be applied."[46]

This is precisely the analysis that courts have employed with regard to other causes of action brought alongside Blue Sky claims. For example, in *Garland v. Advanced Medical Fund, L.P. II*, the plaintiffs, citizens of Florida, brought both common-law and Blue Sky claims arising out of a series of investments that they had made in the defendants' companies, located in Georgia.[47] To determine which state's law governed the plaintiffs' common-law claims, the court applied Georgia's relevant choice-of-law rule, *lex loci delicti*[48]—the Latin term for "[t]he law of the place where the tort or other wrong was committed."[49] Noting that the plaintiffs "resided at all relevant times in Florida and bore the economic impact of the alleged torts in Florida," the court found that "any harm suffered as a result of the [misconduct] . . . occurred in Florida . . . and their reliance and any damages attributable thereto occurred in Florida."[50] This meant that Florida law would govern.[51]

But, as have the vast majority of courts in other state securities cases, when it came time to conduct the same analysis with respect to the plaintiffs' Blue Sky claims, the *Garland* court abruptly changed course. Rebuffing the defendants' requests to conduct a similar choice-of-law analysis to determine the gov-

5908727, at *11 (E.D. Va. Feb. 10, 2006) ("There is a split of authority among district courts as to whether the approach adopted by the *Lintz* court with respect to choice of law questions in securities cases is proper.").

45. 1A C.J.S. *Actions* § 51 (2005). In later years, Professor Currie modified his theory somewhat in terms of advocating for the uniform adoption of forum law in the case of a true conflict. *See* Brainerd Currie, *The Disinterested Third State*, 28 LAW & COMTEMP. PROBS. 754 (l963).

46. RESTATEMENT (SECOND) CONFLICTS OF LAW § 6(2) (1971).

47. 86 F. Supp. 2d 1195, 1198 (N.D. Ga. 2000). The common-law claims included negligent misrepresentation, breach of fiduciary duty, and conspiracy. *Id.*

48. *Id.* at 1205.

49. BLACK'S LAW DICTIONARY 995 (9th ed. 2009).

50. *Id.*

51. *Garland*, 86 F. Supp. 2d at 1205.

erning state securities statute, the court explained "that the weight of the legal authority indicate[d] that conflicts of law principles are not applicable in cases involving Blue Sky laws."[52] This meant that the plaintiffs could bring suit under the statute of any state with a significant "nexus" to the transaction in dispute, which was a matter to be determined wholly through statutory interpretation.[53] In other words, as in no other area of the law, the plaintiffs could choose, subject to minimal constitutional restrictions, not only the forum for the dispute but also the governing substantive law.

This practice, which this Article terms the "Blue Sky exception," has taken hold in federal and state courts alike across the nation. The practice is provocative given not only the pro-plaintiff bias for which it stands, but also its failure to take root in even seemingly similar areas of the law.[54] Adding to the intrigue is how extensively the approach has caught on in the Blue Sky context, even in the face of widely divergent explanations to justify its application. Although courts that have embraced the exception have argued that it is not only justified, but also compelled, by their existing conflicts jurisprudence, explanations have ranged from the fact that no conflict exists in the first instance[55] to the fact that a statutory directive embedded in Blue Sky statutes supplants default common-law conflicts rules.[56]

While most courts faced with Blue Sky claims have refused to engage in conflicts analyses, a small minority of courts has disagreed, holding that a plaintiff may not choose among multiple states' securities laws if the forum would recognize a conflict under its ordinary conflicts jurisprudence. These outliers appear either perplexed by or unaware of the reigning approach. While some have eschewed and cursorily rejected the Blue Sky exception as relying on "shak[y] ground"[57] or as being "impractical, confusing and unfair,"[58] others

52. *Id.* at 1204.

53. *See* United Heritage Life Ins. Co. v. First Matrix Inv. Servs. Corp., No. 1:06-CV-496, 2009 WL 3229374, at *4 (D. Idaho Sept. 30, 2009) ("The developing majority view is that so long as there is a territorial nexus, more than one states' securities laws can apply to a transaction, so long as that statute does not limit its own application.").

54. *See, e.g.*, Hilb Rogal & Hobbs Co. v. Rick Strategy Partners, No. 3:05-CV-355, 2006 WL 5908727, at *4 (E.D. Va. Feb. 10, 2006) (noting that to expand the approach to all business torts would "revolutionize the choice of law jurisprudence"); Davis v. Duran, No. 1:98-CV-656, 1998 WL 378420, at *2 (N.D. Ill. 1998) (commenting that the plaintiff "d[id] not explain why the peculiar policy concerns underlying abandonment of a traditional choice of law analysis in favor of nexus inquiry in the state securities law context should extend to state debt collection law").

55. *See, e.g.*, Lintz v. Carey Manor Ltd., 613 F. Supp. 543, 548 (W.D. Va. 1985); Cambridge Place Inv. Mgmt. Inc. v. Morgan Stanley Co., Nos. 10-2741, 11-4605, 2012 WL 5351233, at *8 (Mass. Super. Ct. Sept. 28, 2012).

56. *See, e.g.*, Citizens Ins. Co. of Am. v. Daccach, 217 S.W.3d 430, 442-43 (Tex. 2007).

57. McInnis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 706 F. Supp. 1355, 1358 (M.D. Tenn. 1989); *see also In re* Rospatch Sec. Litig., Nos. 1:90-CV-805, 1:90-CV-806,

have applied their typical conflicts methodologies as though nothing were out of the ordinary.[59] Not one of these courts has fully engaged with and rejected the actual reasoning put forth by a court with the opposite view.[60] Defendants, for their part, remain confused and frustrated that "none of these cases provide[a sufficient] explanation for this exception to conflicts analysis."[61] The subsequent Part accepts this invitation to examine the rationales that courts have put forth in favor of applying the exception.

II. FLAWS IN THE ANALYSIS

Given the uniqueness of the Blue Sky exception, one might expect its proponents to explain why a deviation from the traditional analysis is warranted. In contrast, numerous courts have failed to dissect the merits of the approach, preferring instead to rest their holdings on historical practice[62] and "the weight of the legal authority."[63] Other courts, unwilling to apply the exception on the basis of precedent alone, have defiantly fought the proposition that the Blue Sky "exception" is an exception at all, concluding that there is nothing inconsistent between this practice and established positive law. In doing so, they have tried to construct post-hoc rationalizations about how the practice can be reconciled with the remainder of their conflicts jurisprudence. This Part evaluates the rationales advanced by courts in favor of this approach and reveals each as inherently flawed. It concludes that the Blue Sky exception is neither justified nor compelled by any prevailing conflicts methodology.

A. The Multiple-Interests Hypothesis

Most commonly, courts have tried to explain their unique approach to Blue Sky claims by focusing on the fact that more than one statute can rightfully "apply" to a single set of facts where multiple states have interests in regulation. *Lintz v. Carey Manor Ltd.*, the first case to recognize the Blue Sky excep-

1992 WL 226912, at *15 (W.D. Mich. July 8, 1992) (explaining that it would be "impractical, confusing and unfair to apply more than one state statutory law to a claim . . . [because this approach] could require both plaintiff and defendants to deal with conflicting theories of liability or defenses . . . [and] would undoubtedly promote jury confusion").

58. *In re* Rospatch Sec. Litig., 1992 WL 226912, at *15.

59. *See, e.g.*, Greenberg Traurig of N.Y., P.C. v. Moody, 161 S.W.3d 56, 70 (Tex. Ct. App. 2005).

60. There is one arguable exception. In *Daccach*, 217 S.W.3d 460, a Texas Supreme Court case, the concurrence criticized the reasoning put forth by the majority, which followed the tide in holding choice-of-law analysis inapplicable.

61. *Id.*

62. *See, e.g.*, Fed. Home Loan Bank of Seattle v. Banc of Am. Sec. LLC, Nos. 09-2-46319-1 et al., 2011 WL 2693115 (Wash. Super. Ct. June 23, 2011).

63. Garland v. Advanced Med. Fund, L.P. II, 86 F. Supp. 2d 1195, 1204 (N.D. Ga. 2000) (explaining "that the weight of the legal authority indicates that conflicts of law principles are not applicable in cases involving state Blue Sky laws").

tion, demonstrates this reasoning.[64] Before the court could rule on the defendants' motion for summary judgment, it had to determine whether New Jersey's, Florida's, or Virginia's securities statute governed the plaintiffs' claims.[65] The defendants sought a determination that, under Virginia's traditional rule of *lex loci delicti*,[66] either New Jersey's or Florida's but not Virginia's Blue Sky statute was applicable.[67]

The court rejected the defendants' argument. Refusing to choose between the three states' statutes, the court held that because multiple states can have overlapping interests in a single securities transaction, "the Defendants [were] incorrect in viewing this [issue] as a conflicts of law question."[68] Rather, "the penalties imposed by [any of] th[e] statutes c[ould] be applied."[69] In other words, the court finds "nothing inconsistent in trying a securities case on multiple theories, and determining liability under each statute that is applicable, so long as the plaintiff is prevented from multiple recoveries."[70]

The primary flaw in this analysis, as in that of others who have relied on the same line of reasoning,[71] lies not in the court's conclusion that multiple statutes may "apply" to a single transaction, but in the court's logical deduction that this conclusion ends the need to conduct further analysis. In other words, the court conflated the issue of scope (i.e., "determin[ing] who can claim rights under state law—what people, where, and in what circumstances") with the issue of priority (i.e., "determin[ing] which of two conflicting rights under different states' laws will prevail").[72] These two questions are analytically dis-

64. 613 F. Supp. 543 (W.D. Va. 1985).

65. *Id*. at 544.

66. *See supra* text accompanying note 49.

67. *Lintz*, 613 F. Supp. at 547.

68. *Id*. at 550.

69. *Id*. at 551. The court explained that "Virginia ha[d] a legitimate interest in applying its securities laws to operations conducted within the state, even if aimed at nonresidents," and "[t]he same analysis c[ould] be applied to the Blue Sky laws of New Jersey, Florida, or any other state." *Id*.

70. *Id*.

71. *See, e.g*., Chrysler Capital Corp. v. Century Power Corp., No. 1:91-CV-1937, 1992 WL 163006, at *2 (S.D.N.Y. June 24, 1992) (adopting the reasoning of *Simms Investment Co. v. E.F. Hutton & Co*., 699 F. Supp. 543, 545 (M.D.N.C. 1988), which the court in *Chrysler* characterized as "holding that because more than one state can have an interest in regulating a single securities transaction, '[o]verlapping state securities laws do not present a classic conflict of laws question.'" (alteration in original)), *aff'd on reh'g*, 800 F. Supp. 1189 (S.D.N.Y. 1992).

72. Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to* CAFA *and* Shady Grove, 106 NW. U. L. REV. 1, 18 (2012). The various conflict-of-law theories each tackle these two questions, although using different nomenclature. *See* Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301, 1301 (1989). Other methodologies similarly can be divided into a two-part inquiry. The political-rights approach, for example, first looks at which statutes may apply to a defend-

tinct—that a set of facts meets the criteria sufficient to trigger application of a statute reveals virtually nothing about the secondary question of whether the statute should trump others which are similarly "prima-facie applicable."[73]

The question of scope is two-fold. First, the court must determine whether each state seeks to regulate the conduct at issue. Although a court can sometimes answer this question by referring directly to "territoriality" language in the statute itself (e.g., a statement that "this statute applies where a party makes an offer to sell or buy within the state"[74]), the reality is that this language is rare, which means that courts most often resolve it by discerning whether the state that promulgated the statute has an "interest" in its law's application.[75] Some scholars have criticized proposition that "state interests" should be the relevant consideration[76] and others have taken issue with certain definitions of this critical term,[77] but courts generally have accepted state interest as the appropriate test to determine "a state's legislative intent concerning [its] law's territorial scope."[78]

So far, the *Lintz* court's analysis is consistent with all of the above. There

ant's affairs under a "negative political rights" analysis (scope). *See* Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1308 (1989). Only once this process is completed are different criteria used to choose among the laws that pass this initial hurdle (priority). *Id*. ("A rights-based approach leaves open a wide range of permissible options. It would seem to be the rare case in which analysis of rights would narrow the range of possibilities and leave only a single fair application of one's state's law. The forum is left with a choice that must be made on some other basis than the parties' negative political rights.").

73. *See* Accu-Tech Corp. v. Jackson, 352 F. Supp. 2d 831, 835 (E.D. Mich. 2005) ("It is necessary to set forth the distinction between conflict of laws principles and statutory interpretation. A conflict of laws inquiry is necessary only if there are two relevant forums with divergent laws. This occurs only if the court determines that both forums' legislators intended their law to apply to the situation. In other words, the court interprets both forums' laws; if both apply, the court moves on to a conflict of laws determination."); Perovich v. Humphrey, No. 1:97-CV-3209, 1997 WL 674975, at *6 (N.D. Ill. Oct. 28, 1997) (holding that a California statute's "express[] provi[sion] for extra-territorial application, . . . does not alter Illinois choice of law rules"). I adopt Larry Kramer's use of the term "prima-facie applicable." Larry Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, 24 CORNELL INT'L L.J. 245, 277 (1991).

74. This language is very similar to that contained in section 414 of the Uniform Securities Act, UNIFORM SEC. ACT OF 1956 § 414 (amended 1958), 7B U.L.A. 509 (1968), the relevance of which is a matter that I take up later in the Article.

75. Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2462 (1999).

76. *See generally* Brilmayer, *supra* note 72, at 1277 (arguing in favor of a rights-based choice-of-law inquiry, rather than one based on states' alleged "interests" in having their laws govern particular disputes).

77. *See generally* Lea Brilmayer, *The Other State's Interests*, 24 CORNELL INT'L L.J. 233 (1991) (discussing from a normative perspective different definitions of the term "interest" used to determine whether a conflict exists).

78. Larry E. Ribstein, *From Efficiency in Politics to Contractual Choice of Law*, 37 GA. L. REV. 363, 370 (2003).

is nothing aberrant about how the court identified the overlapping interests and concluded that multiple statutes can potentially apply to a single securities transaction if each of the states has intended to regulate the conduct at issue.[79] This proposition is also constitutionally uncontroversial; it is fully consistent with Supreme Court precedent that a state may have a constitutionally sufficient interest in applying its own law to a securities case even in certain cases where a portion of the relevant conduct has occurred outside its borders.[80]

Where the court veered off course, however, is in reasoning that this jurisdictional overlap negates the secondary issue of priority.[81] The question of scope only resolves whether multiple state laws are prima facie applicable—or, put differently, whether multiple states have competing interests in the application of their laws.[82] What it does not answer is the independent and dispositive question of how this "true conflict" is to be resolved.[83] In fact, it is precisely because a single incident of alleged misconduct may potentially fall within the scope of multiple states' overlapping statutes that courts must undertake a conflict-of-laws analysis in the first instance.[84]

Well acquainted with the notion that the question of statutory scope only speaks to a statute's prima facie applicability, courts outside of the Blue Sky context have refused to accept that a statutory overlap alters relevant *priority* rules. For example, in *Hartman v. Meridian Financial Services*, the District Court for the Western District of Wisconsin was faced with deciding whether it should apply Wisconsin's or North Carolina's statute, each of which "prohibit[ed] debt collectors from engaging in various forms of deceptive or coercive behavior when attempting to collect debt from consumers."[85] The statutes imposed substantially different legal requirements upon debt collectors but did not substantially differ in other respects.[86] It was uncontroverted that Wisconsin

79. Kramer, *supra* note 72, at 1317.

80. *See* Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559 (1917); Hall v. Geiger-Jones, 242 U.S. 539 (1917); Merrick v. Halsey & Co., 242 U.S. 568 (1917).

81. The court equated overlapping state interests with there being no true conflict, when in reality, it is when only a single state has a true interest in applying its law that a false conflict negates a need to look at the secondary issue of priority. *See* Roosevelt, *supra* note 75, at 2462.

82. Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 1014 (1991).

83. For example, "a state whose law is applicable in this sense may still choose not to enforce that law because another state's law is similarly applicable." *Id*.

84. *See* Kramer, *supra* note 82, at 1013 (noting that questions of scope "resolve[] [only] some cases by revealing that there is no conflict because, for instance, only one law is even prima facie applicable"); *see also* Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 283 (1990) ("A choice of law problem exists only if the different laws relied on by the parties can plausibly be construed to govern the case."). Indeed, "[a] conflict of laws exists only when the factual contacts are distributed in such a way that more than one state wants to regulate." Kramer, *supra* note 82, at 1013.

85. Nos. 3:01-CV-60 et al., 2001 WL 1823617, at *1 (W.D. Wis. Aug. 28, 2001).

86. *Id*.

law would govern under the forum's regular conflicts rules, but the plaintiffs asserted that, under the Blue Sky line of cases, the court should allow them to "pursue relief under both statutes simultaneously . . . . so long as they [were] limited to a single recovery if liability [was] found."[87]

In the end, the court found the Blue Sky cases "insufficient to persuade [it] to abandon traditional choice-of-law principles in favor of the approach taken by a few courts in a completely different area of law."[88] In rejecting the plaintiffs' argument, the court explained that although it "agree[d] with [the] plaintiffs that . . . both Wisconsin's and North Carolina's statutes appl[ied] in theory to [the] defendant's conduct, . . . it could not accept that this meant that [the] plaintiffs [could] pursue relief under both statutes simultaneously."[89] Rather, held the court, "[t]he fact that [the] plaintiffs may [have] me[t] the jurisdictional requirements of both Wisconsin and North Carolina's statutes d[id] not make th[e] case any different from the myriad of other cases involving bi-state occurrences beginning in one state and ending in another."[90] This meant that, just as in any other case, where the conduct at issue involves "substantial contacts with [multiple states]," "Wisconsin courts w[ould] apply choice of law rules to determine whether to apply the law of the forum or that of another state."[91]

B. The Congruence-of-Interests Hypothesis

A more sophisticated version of the last argument rests not on the mere presence of multiple interests, but on the argument that in Blue Sky cases these multiple interests are congruent, meaning that the court's choice of any single statute "will not undermine the policies of either jurisdiction nor will it affect the interests of either party."[92]

The reasoning in *Cambridge Place Investment Management, Inc. v. Morgan Stanley & Co.*[93] exemplifies this approach. There, the Massachusetts-based plaintiff, Cambridge Place Investment Management, Inc. (CPIM) brought suit under the Massachusetts Uniform Securities Act (MUSA), seeking damages and/or recession of the RMBS that the defendants (a group of underwriters, depositors, and dealers) offered and sold to CPIM's nine international clients.[94] The international clients assigned their claims to CPIM, their alleged

87. *Id.* at *2.
88. *Id.* at *3.
89. *Id.* at *2.
90. *Id.* at *3.
91. *Id.* at *2.
92. Ramey v. Wal-Mart, Inc., 967 F. Supp. 843, 845 (E.D. Pa. 1997) (defining a false conflict).
93. Nos. 10-2741, 11-4605, 2012 WL 5351233 (Mass. Super. Ct. Sept. 28, 2012).
94. *Id.* at *1-3.

"investment advisor,"[95] who in turn contended that, because the defendants had several Massachusetts meetings to pitch the securities to CPIM, MUSA's statute of limitations applied.[96]

Although the defendants disagreed with the premise that MUSA was applicable in the first instance, they argued that the question of its applicability had no consequence.[97] This was because, explained the defendants, the court was bound to apply the laws of the defendants' states of incorporation under Massachusetts's rule that a court must "apply the law of [the] state[] with 'the more significant relationship to the occurrence and to the parties with respect to the issue of limitations.'"[98] The issue was critical because, if the defendants' statutes applied, the plaintiff's claims would be time-barred.[99]

The Massachusetts court quickly rejected the defendants' analysis. First, the court held that Massachusetts had a sufficient "nexus" to the alleged misconduct to render MUSA applicable.[100] Although MUSA did not contain any territoriality language delineating its scope, the court recognized that Massachusetts had a "strong interest in adjudicating" the alleged misconduct because it was in Massachusetts that defendants had pitched the securities.[101] Next, the court concluded that, unlike "competing common law provisions of different states," the antifraud provisions of the Blue Sky laws "seek to serve *similar* interests": (1) to "protect resident purchasers of securities, without regard to the origin of the security"; and (2) to "protect legitimate resident insurers by exposing illegitimate resident insurers to liability without regard to the markets of the

95. *Id*. at *6 ("[MUSA] defines an 'investment adviser' as 'any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the admissibility of investment in, purchasing, or selling securities, or who, for compensation and as a part of regular business, issues or promulgates analyses or reports concerning securities.'" (quoting MASS. GEN. LAWS ch. 110A, § 401(m))).

96. *Id*. at *8. As *Cambridge Place* involved conflicts between states' statutes of limitations, it is important to note, as an aside, that the court's decision to apply Massachusetts law cannot be explained by the traditional substance-procedure divide. *See supra* note 29. Not only did the court never characterize statutes of limitations as procedural, but Massachusetts has adopted the most-significant-relationship test in determining which state's statute of limitations to apply. *See* New Eng. Tel. & Tel. Co. v. Gourdeau Constr. Co., 647 N.E.2d 42, 43, 46 (Mass. 1995) (holding that whether to apply the forum state's statute of limitations should not be treated as a procedural question but rather should be determined by ascertaining the state "with the most significant relationship to or interested in the matter").

97. *Cambridge Place*, 2012 WL 5351233, at *5, *8.

98. Defendants' Reply Memorandum of Law in Support of Their Joint Motion To Dismiss for Failure To State a Claim ¶ 4, *Cambridge Place*, 2012 WL 5351233 (Nos. 10-2741, 11-4605) (quoting *New Eng. Tel*., 647 N.E.2d at 44-45).

99. *Cambridge Place*, 2012 WL 5351233, at *7.

100. *Id*. at *8.

101. *Id*.

insurer."[102] The court reasoned that because interest analysis requires competing interests to find a "true conflict," there was no need for the court to pick and choose among the statutes.[103]

The court's application of interest analysis, however, misses the mark. Although each state's interest may have converged with respect to its antifraud provisions, it was the states' interests underlying their respective statutes of limitations that should have occupied the court's attention. States do not enact statutes of limitations to stamp out illegal activity and vindicate plaintiffs' rights, but rather to "protect state residents from the burden of defending [stale] cases"[104] and to attract business to their states.[105] Because the defendants resided in foreign states with shorter statutes of limitations than Massachusetts's. Massachusetts "could not advance its policy of protecting the local plaintiff without frustrating the foreign state[s'] polic[ies] of granting repose to its defendant[s]."[106] Mischaracterizing the conflict as nonexistent, the court erred as a matter of black-letter doctrine.

C. The Statutory-Directive Hypothesis

Saved for last is the most promising explanation,[107] yet the one that courts least frequently have utilized. Based on the well-settled principle, recognized in the *Restatement (Second)*, that "[w]hen determining choice of law questions,

102. *Id*.

103. *See* Simms Inv. Co. v. E.F. Hutton & Co., 699 F. Supp. 543, 545-46 (M.D.N.C. 1988).

104. Ledesma v. Jack Stewart Produce, Inc., 816 F.2d 482, 485 (9th Cir. 1987) (quoting Nelson v. Int'l Paint Co., 716 F.2d 640, 644 (9th Cir. 1983)) (internal quotation marks omitted). Statutes of limitations also "protect the courts of the state from the need to process stale claims," *id*., but this was not at issue in *Cambridge Place* because the plaintiff brought the litigation in Massachusetts.

105. Lindsay Traylor Braunig, Note, *Statutory Interpretation in a Choice of Law Context*, 80 N.Y.U. L. REV. 1050 (2005).

106. *See* Gary L. Milholli, *Interest Analysis and Conflicts Between Statutes of Limitations*, 27 HASTINGS L.J. 1, 12 (1975) ("If the defendant did reside in the foreign state, however, a 'true conflict' would arise because the forum could not advance its policy of protecting the local plaintiff without frustrating the foreign state's policy of granting repose to its defendant. One would then expect the forum either to weigh the competing interests, or to apply its own law." (footnote omitted)); *see also id*. at 18 ("[I]t seems logical to treat conflicts between statutes of limitations the same as conflicts between other rules of law. Courts following interest analysis should, therefore, be expected to apply it eventually to statutes of limitations." (footnote omitted)).

107. What makes this hypothesis strong is that, to the extent that Blue Sky statutes do indeed contain such provisions, this practice, surprisingly, fits fairly neatly within conflicts jurisprudence. It is well established, including under the *Restatement (Second) Conflict of Laws*, that a court must follow a conflicts directive from the forum state's legislature. *See* GARY J. SIMSON, ISSUES AND PERSPECTIVES IN CONFLICT OF LAWS 365 (4th ed. 2005) ("Under every state's principles of separation of powers, a court must defer to a choice-of-law solution prescribed by the legislature of the forum state.").

a court will generally follow the statutory directives of its own state,"[108] the "statutory directive" hypothesis attributes to state legislatures commands that courts not apply otherwise applicable choice-of-law rules to Blue Sky cases.[109] Advocates of this approach argue that Blue Sky statues contain "choice of law" directives, with which courts must comply as dutiful state agents, so as not to run afoul of the separation-of-powers doctrine.[110]

The court that made this argument most clearly was the Texas Supreme Court in *Citizens Insurance Co. of America v. Daccach*.[111] The case involved a choice-of-law question in connection with the certification of a class action for alleged violations of the registration provisions of the Texas Securities Act (TSA).[112] Relying on section 6(1) of the *Restatement (Second) of Conflict of Laws*, the Texas Supreme Court reiterated the principle that "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."[113] Only if there was no such directive, explained the court, would section 6(2) of the *Restatement (Second)* apply, in which case the court would choose the governing law by weighing a set of more amorphous conflicts principles.[114]

In examining the Texas statute to discern whether the TSA indeed contains "statutory guidance that the law [was] intended to govern the transaction," the court focused on section 12 of the TSA, which "prohibit[s] the offer or sale of a security '*in this state*' by any company or person, who has not previously complied with the requirement to register as a securities dealer or satisfied a dealer, security, or transaction exemption from registration."[115] The court read the phrase "in this state" (which it labeled a "term of art") to be "a directive from the Legislature to apply Texas law [where this threshold requirement is met],

108. Busse v. Pac. Cattle Feeding Fund No. 1, Ltd., 896 S.W.2d 807, 813 (Tex. App. 1995).

109. The scant literature that has addressed this issue appears to favor this explanation. *See, e.g.*, Wendell M. Basye, *A Glimpse of Oregon's Blue Sky Legislation: A Revision of 1967*, 47 OR. L. REV. 403, 415 (1968) (noting that the Uniform Securities Act "codif[ies] certain conflict-of-laws provisions").

110. ROBERT A. LEFLAR, LUTHER L. MCDOUGAL III & ROBERT L. FELIX, AMERICAN CONFLICTS LAW 284 (4th ed. 1986).

111. 217 S.W.3d 430 (Tex. 2007).

112. *Id.* at 436. The court recognized that "[a]bsent unique statutory circumstances, trial courts must conduct [an] extensive choice of law analysis . . . before making a certification decision." *Id.* at 441 (citing Compaq Computer Corp. v. Lapray, 135 S.W.3d 657, 672 (Tex. 2004)).

113. *Id.* at 442 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971)).

114. *Id.* at 443 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971)); *see also supra* text accompanying note 46.

115. *Daccach*, 217 S.W.3d at 443-44 (quoting TEX. REV. CIV. STAT. ANN. arts. 581-12(A), - 33(A)(1)).

even though some acts may have occurred outside Texas."[116] Because the court found that, in the case before it, an offer or sale absent registration indeed took place in Texas, it applied the TSA to comply dutifully with the legislature's command.[117]

Although this argument is attractive, the court's application of the foregoing principles exposes the fallacy in its reasoning. First, on the most rudimentary level, the statutory-directive hypothesis cannot universally explain the Blue Sky exception because courts have routinely applied the exception to statutes without such territoriality provisions.[118] An example is the decision of the District Court for the Western District of Virginia in *Lintz v. Carey Manor Ltd.*,[119] discussed above. Some courts have attempted to explain away this problem by arguing that the territoriality language in the Uniform Securities Act has heavily influenced common-law conflicts rules for Blue Sky cases,[120] but this argument is hard to swallow with respect to states, such as Virginia, where legislatures intending to abrogate the common law must do so plainly and expressly.[121]

Furthermore, the argument only holds water in cases where the court "follow[s] the dictates of its *own* legislature," as the *Restatement (Second)*, for example, commands.[122] What makes Blue Sky cases so anomalous, however, is

116. *Id.*

117. *Id.* at 446.

118. *See, e.g.*, *In re* Infocure Sec. Litig., 210 F. Supp. 2d 1331, 1362-66 (N.D. Ga. 2002) (allowing the plaintiffs to bring claims simultaneously under the South Carolina, North Carolina, Michigan, and Florida Blue Sky statutes); Barnebey v. E.F. Hutton & Co., 715 F. Supp. 1512, 1535-36 (M.D. Fla. 1989) (applying the Oklahoma Securities Act under Florida's choice-of-law rules in order to "comport[] with legislative directives to apply state securities statutes in prescribed situations"); Klawans v. E.F. Hutton & Co., No. IP 83-680-C, 1989 U.S. Dist. LEXIS 18194 (S.D. Ind. Feb. 15, 1989) (applying the Oklahoma Securities Act under Indiana's choice-of-law principles).

119. 613 F. Supp. 543, 548 (W.D. Va. 1985).

120. *See, e.g.*, *id.*

121. *See, e.g.*, Country Vintner, Inc. v. Louis Latour, Inc., 634 S.E.2d 745, 751 (Va. 2006) ("The common law will not be considered as altered or changed by statute unless the legislative intent is plainly manifested. A statutory change in the common law is limited to that which is expressly stated or necessarily implied because the presumption is that no change was intended.); *see also, e.g.*, Wal-Mart Stores, Inc. v. McDonald, 676 So. 2d 12, 17 (Fla. Dist. Ct. App. 1996) (stating that "any legislative intent to either abolish or limit the common law must indicate such change clearly, or else the rule of common law stands"), *aff'd sub nom.* Merrill Crossings Assoc. v. McDonald, 705 So. 2d 560 (Fla. 1998); Fruehauf Corp. v. Huntington Moving & Storage Co., 217 S.E.2d 907, 911 (W. Va. 1975) ("[T]he common law is not to be deemed altered or abrogated by statute unless the Legislature's intent to do so be plainly manifested."). Beyond this widely adopted principle of statutory interpretation, it also can be argued that the fact that the legislature did not do so makes its contrary intention clear.

122. Lauritzen v. Larsen, 345 U.S. 571, 579 n.7 (1953) (emphasis added) (quoting Elliot E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV.

that a court applying the Blue Sky exception does not look to the forum state's legislation for a statutory directive but rather looks to the plaintiff's statute of choice. For example, in *Barnebey v. E.F. Hutton & Co.*, the U.S. District Court for the Middle District of Florida applied the Oklahoma Securities Act under Florida's choice-of-law principles in order to "comport[] with the [Oklahoma legislature's] directive[] to apply [its] securities statute[] in prescribed situations."[123] Similarly, in *Klawans v. E.F. Hutton & Co.*, the District Court for the Southern District of Indiana applied the Oklahoma Securities Act pursuant to Indiana's conflicts rules.[124] To the extent that courts, such as in the *Daccach* case, have applied the laws of their forum states, it appears they have done so coincidently.

This insight reveals another deficiency in the theory: its inability to cope with the issue of renvoi. The *Restatement (First)*, *Restatement (Second)*,[125] and interest analysis[126] all reject the concept of renvoi—the phenomenon where a state applies the "whole" law of another, including its choice-of-law rules.[127] Here, even if we accept the fallacy that the forum state has somehow *directed* the court to apply the plaintiff's choice of statute, the court must apply only the foreign state's "internal" law so as not to succumb to renvoi. When the foreign

959, 961 (1952)); *see also* Willis L.M. Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679, 682 (1963).

123. 715 F. Supp. at 1535-36; *see also* Dillon Secs., Inc. v. Bartolini, No. 88-1810, 1991 WL 184096, at *3 (10th Cir. Sept. 18, 1991) (affirming the district court's adoption of the magistrate judge's report and recommendation, stating that "[t]he territoriality provisions of the [Utah Securities] Act define when the statute of a particular state applies to any given securities transaction, without regard to whether the statute of some other state might also apply" (footnote omitted)).

124. No. IP 83-680-C, 1989 U.S. Dist. LEXIS 18194 (S.D. Ind. Feb. 15, 1989); *see also In re* Infocure Sec. Litig., 210 F. Supp. 2d 1331, 1362-66 (N.D. Ga. 2002) (allowing the plaintiffs to bring claims simultaneously under the South Carolina, North Carolina, Michigan, and Florida Blue Sky statutes).

125. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1971). *See* LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 26 (1991); *see also* JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS § 5.4, at 53 (1935) ("The vice in the decisions [accepting the renvoi] results from the assumption that the foreign law has a legal force in a decision of the case; whereas, as has been pointed out, the only Conflict-of-Laws rule that can possibly be applied is the law of the forum and the foreign law is called in simply for furnishing a factual rule for the succession to the estate. The rule of the foreign law adopted by the law of the forum is the rule of succession, not the Conflict-of-Laws rule.").

126. BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 184-85 (1963) (stating that because foreign law applies "only when the court has determined that the foreign state has a legitimate interest in the application of its law and policy . . . there can be no question of applying anything other than the internal law of the foreign state"). There is a debate, however, on how well interest analysis accomplishes this goal. Specifically, Professor Brilmayer has argued that renvoi appears in interest analysis despite the fact that "Currie thought he had banished [it] from choice of law thinking." BRILMAYER, *supra* note 125, at 96.

127. BRILMAYER, *supra* note 125, at 29-30.

statute's territoriality language is conceived of as a choice-of-law priority rule, however, this principle is violated. Further, even putting the issue of renvoi aside, a foreign statute's territoriality provision cannot be read in isolation, as these courts have done; it must be examined in the context of the foreign state's other choice-of-law rules. After all, some state courts have rejected the argument that such language should be read as a choice-of-law directive;[128] others have found that a contractual choice-of-law provision trumps any other inquiry;[129] and still others have applied the Blue Sky exception to all but the statutes of limitations in the plaintiff's choice of statutes, an issue, according to these courts, that is susceptible to traditional conflicts rules.[130]

Finally, the statutory-directive hypothesis is objectionable because it is unclear that these alleged directives are in fact instructing the courts to do as the courts claim. When the *Daccach* court labeled the TSA as "contain[ing] a statutory directive compelling the application of Texas law,"[131] the court was referring to an instruction to prioritize Texas law *over* that of competing states. But nothing in the language in the TSA addresses the prioritization of Texas law. Rather, the TSA contains the sort of "generic, prefatory language"[132] that courts have deemed inadequate elsewhere to articulate rules of priority.[133] As

128. *See, e.g.*, Cohain D.D.S. v. Klimley, Nos. 1:08-CV-5047 et al., 2010 WL 3701362 (S.D.N.Y. Sept. 20, 2010) (applying typical choice-of-law rules to a Blue Sky claim), *aff'd sub nom*. Sissel v. Rehwaldt, 519 F. App'x 13 (2d Cir. 2013).

129. Pyott-Boone Elecs. Inc. v. IRR Trust for Donald L. Fetterolf Dated Dec. 9, 1997, 918 F. Supp. 2d 532, 548 (W.D. Va. 2013) (distinguishing *Lintz* on the ground that the parties before the court already had "identified the applicable law in a contractual choice-of-law provision"). *But see* Brenner v. Oppenheimer & Co., 44 P.3d 364 (Kan. 2002) (holding that contractual choice-of-law provisions are invalid with respect to Blue Sky claims).

130. See, for example, *Garland v. Advanced Medical Fund, L.P. II*, 86 F. Supp. 2d 1195 (N.D. Ga. 2000), discussed *infra* notes 143-149 and in the accompanying text.

131. Citizens Ins. Co. of Am. v. Daccach, 217 S.W.3d 430, 442 (Tex. 2007).

132. Dale v. ALA Acquisitions I, Inc., 434 F. Supp. 2d 423, 432 (S.D. Miss. 2006) (noting that the phrase "[i]n any civil action" constitutes "generic, prefatory language" that "is not considered sufficient to establish a 'statutory directive' on choice of law").

133. *See, e.g.*, Boyd Rosene & Assocs., Inc. v. Kan. Mun. Gas Agency, 174 F.3d 1115, 1117, 1118 (10th Cir. 1999) (holding that the Oklahoma district court should have applied Kansas law on the issue of attorneys' fees, despite the Oklahoma statute reading, "*In any civil action* to recover" (emphasis added)); Pastor v. Union Cent. Life Ins. Co, 184 F. Supp. 2d 1301, 1306 (S.D. Fla. 2002) (rejecting the argument that the language "'[n]o person shall transact insurance in this state . . . without complying with the applicable provisions of this code' . . . indicates the legislature's intent to bind all insurers to every provision of the Insurance Code" (first alteration in original) (quoting FLA. STAT. § 624.11(1))); Ryan v. Ford Motor Co., 334 F. Supp. 674, 675 (E.D. Mich. 1971) (applying Montana law on the availability of pre-judgment interest, despite the Michigan statute "providing for interest from the date of filing *in any civil action*" (emphasis added)); Chang v. Chang, No. CV-04-198722-S, 2004 WL 2095116, at *3-4 (Conn. Super. Ct. Aug. 16, 2004) (applying Florida law on punitive damages, despite the Connecticut statute reading, "*In any civil action* to recover damages . . . ." (emphasis added)). The question of extraterritorial reach is clearly one of scope. *See* Kramer, *supra* note 73, at 259-60.

courts have noted with respect to analogous statutes, this language is much more reasonably suited as a direction of statutory scope, or, put simply, whether the statue grants the plaintiff a cause of action in the first place.[134]

That this language is far from sufficient to constitute a choice-of-law priority provision can be seen in an analogous case, *Cairns v. Franklin Mint Co*.[135] There, the Ninth Circuit examined section 3341 of California's post-mortem right-of-publicity statute, stating that the statute "*shall apply* to cases . . . aris[ing] from acts occurring directly in [California]."[136] Rejecting an overly literal interpretation of the statute, the court concluded that the provision's language fails to convey "that California's post-mortem right of publicity statute applies to [all] such cases *regardless of the domicile* of the owner of the right."[137] Instead, the Ninth Circuit found that "by the plain meaning of its language, this provision is not a choice of law provision, but 'simply addresses the reach of the statute's coverage.'"[138]

The relevant language in the TSA which the court examined in *Daccach* makes an even weaker case than does the language examined in *Cairns*. Because the TSA—unlike the California post-mortem right-to-publicity statute—does not contain the words "shall apply," the *Daccach* court's analysis was left hanging on by the threads of the phrase "in this state."[139] It strains credulity to read into the TSA a command that the TSA apply *in each and every* case implicating Texas simply because the statute uses the words "in this state" to

134. *See* cases cited *supra* note 133. Scholars have debated whether the court should accept a foreign state's statement as to its own statute's scope any more than it would a rule of priority. Some would argue the former raises the same issue of renvoi as the latter. For example, Professor Brilmayer takes the position that a deep-rooted flaw of interest analysis is that there is a fundamental inconsistency in arguing that a foreign state should be the final interpreter of its own interests—or statutory scope—while simultaneously arguing that the forum court should only look to a foreign state's "internal" law and not its "whole" law. BRILMAYER, *supra* note 125, at 106-09. Roosevelt and Kramer concede that deferring to a foreign state's statement of statutory scope raises the problem of renvoi, but argue that the court in such cases should simply "accept the renvoi." *See* Kramer, *supra* note 82, at 1030; *see also* Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1873 (2005) ("The renvoi problem occurs, essentially, when forum and foreign law differ as to their scopes—each state's choice-of-law rules assert that rights are created by the law of the other state and not its own. Heeding both states' laws produces the infinite regress of renvoi, but ignoring the foreign choice-of-law rules is impossible to justify. Recognizing that each state's law is authoritative as to its own scope (and not as to the scope of the other state's law) is the only workable solution.").

135. 292 F.3d 1139 (9th Cir. 2002).

136. *Id*. at 1147 (alterations in original) (quoting CAL. CIV. CODE § 3344.1(n) (West 2012)).

137. *Id*.

138. *Id*. (quoting Cairns v. Franklin Mint Co., 120 F. Supp. 2d 880, 883 (C.D. Cal. 2000)).

139. Citizens Ins. Co. of Am. v. Daccach, 217 S.W.3d 430, 446 (Tex. 2007).

make the boundaries of its application clear. This point was not lost on Justice Jefferson, who delivered a concurring opinion in *Daccach*.[140] Justice Jefferson contrasted the "vague" language of the TSA with unambiguous choice-of-law directives enacted by the Texas legislature.[141] He explained that not only was the TSA's language insufficient to "explicitly provide which state's law governs a particular dispute," but to treat the TSA's language as a statutory directive under section 6(1) of the *Restatement (Second)* would lead to bizarre results: "If the registration mandates of the TSA are a 'statutory directive' because they contain the words 'in this state,'" he recognized, "it is difficult to imagine a claim based on *any* Texas statute that would not be viewed as a statutory directive on choice of law."[142]

Further, reading this statutory language as a priority directive becomes untenable when one evaluates the court opinions that cherry-pick provisions of a single Blue Sky statute that it wishes to apply. If one understands such language to be a choice-of-law directive under section 6(1) of the *Restatement (Second)*, it only makes sense to apply the *entire* statute to a plaintiff's claims. But in *Garland v. Advanced Medical Fund, L.P. II*, for example, the court applied the "substantive" part of Florida's Blue Sky statute on the theory that "conflicts of law principles are not applicable in cases involving Blue Sky laws," while it applied the two-year statute of limitations provided for in the Georgia Securities Act on the ground that, with respect to statutes of limitations, "Georgia courts generally follow the rule of *lex loci fori*."[143] In doing so, the court split up Florida's Blue Sky statute, and its own for that matter, confusing the issue of when the forum state's choice-of-law rules apply.[144] With regard to the statute of limitations, it properly applied Georgia's choice-of-law rule.[145] Georgia views statutes of limitations as procedural, and thus always applies Georgia law.[146] With regard to the remaining aspects of the state secu-

140. *Daccach*, 217 S.W.3d at 464 (Jefferson, J., concurring) ("But just because a statute *may* apply does not mean that it *must* apply; that is, a statute's permissible application does not dispense with the need to examine the section 6(2) factors and application of another state's law.").

141. *See id*. (citing TEX. BUS. & COM. CODE ANN. § 35.531(c) (West 2005); TEX. FAM. CODE ANN. § 1.103 (West 1997); TEX. FAM. CODE ANN. § 159.604 (West 2003); TEX. OCC. CODE ANN. § 2301.478 (West 2003); TEX. INS. CODE ANN. art. 21.42 (West 1951)).

142. *Id*. at 465.

143. 86 F. Supp. 2d 1195, 1204 (N.D. Ga. 2000). The rule of *lex loci fori* "states that 'procedural or remedial questions are governed by the law of the forum, the state in which the action is brought.'" *Id*. (quoting Lloyd v. Prudential Sec., Inc., 438 S.E.2d 703, 704 (Ga. Ct. App. 1993)).

144. This issue is closely related to the issue of renvoi, which is discussed *infra* notes notes 125-128 and in the accompanying text.

145. *Garland*, 86 F. Supp. 2d at 1205-06.

146. *Id*.

rities claims, however, the court changed course.[147] Here, the *Garland* court decided that Georgia's choice-of-law rules, *lex loci contractus* and *lex loci delicti*, did not govern.[148] Instead, because the plaintiffs preferred the law of Florida, it was Florida's Blue Sky statute that should rightfully be applied.[149]

It also is important to consider that legislatively mandated rules of priority are rare, and legislatures must be explicit in enacting them.[150] This is particularly so, given the common requirement of legislative clarity in cases where a state purports to alter common law rules.[151] An actual choice-of-law provision therefore typically includes an explicit reference to choice of law or at least to that statute's priority over other states' laws. For instance, a statute might specify, "The law of this state . . . *shall govern* all aspects . . . *regardless* of the citizenship, residence, location, or domicile of any other party."[152] Or, to take an example from Mississippi, the legislature might direct that "the courts in this state *shall apply*, to the fullest extent permissible under the United States Constitution, *this state's* substantive law."[153] These provisions leave no doubt as to legislatures' intentions to choose one set of laws over another.

Scholars similarly agree that explicit "choice of law" language is required for a statutory provision to be read as a priority directive. For example, Larry Kramer has written that courts should be skeptical of "say[ing] that a law 'clearly' applies without the regard for the applicability of any other state's law."[154] According to Kramer, "just saying 'this law should apply whenever the injury occurs within the state,' is not explicit enough to warrant a further presumption that forum law always applies when this condition is satisfied."[155] Therefore, for a statutory provision to be treated as a true choice-of-law directive, Kramer "would argue that a law should also include language like 'regardless of the provisions of any other state's law' before courts presume that there is no deference to the laws of other states in true conflicts situations."[156]

147. *Id.* at 1204.

148. *Id.*

149. *Id.*

150. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971) ("Statutes that are expressly directed to choice of law, that is to say, statutes which provide for the application of the local law of one state, rather than the local law of another state, are comparatively few in number.").

151. Pastor v. Union Cent. Life Ins. Co., 184 F. Supp. 2d 1301, 1307 (S.D. Fla. 2002) ("[I]n order for the legislature to abolish or limit a common law rule, such as *lex loci contractus*, it 'must indicate such change clearly, or else the rule of common law stands.'" (quoting Wal-Mart Stores, Inc. v. McDonald, 676 So. 2d 12, 17 (Fla. Ct. App. 1996))).

152. *Id.* (alterations in original) (emphasis added) (quoting Sanchez v. Sanchez de Davila, 547 So. 2d 943, 945 (Fla. Ct. App. 1989)).

153. MISS. CODE ANN. § 79-33-11 (West 2004).

154. Kramer, *supra* note 84, at 314 n.119.

155. *Id.*

156. *Id.*

Similarly, Kermit Roosevelt has explained that most statutes with territoriality language speak only to questions of scope.[157] For example, a statute stating that it "applies to all cases in which an injury is received in Mississippi,"[158] only tells the court that the statute *can* apply, not "which [statute] is to prevail" in the event that "the case falls within the scope of [multiple] states laws."[159]

Perhaps recognizing that the words of the TSA provide no guidance as to how courts should prioritize application of the TSA over that of other Blue Sky statutes purporting to regulate the same conduct, the *Daccach* court also looked to indications of legislative intent. Instead of relying on the legislative history of the TSA, however, the majority turned to a *Harvard Law Review* article authored by the primary drafter of the Uniform Securities Act, Professor Louis Loss.[160] The court noted that Loss drafted section 414 of the Uniform Securities Act (the provision of the model act with territoriality language) to allow for the model statute's application so long as the "transaction ha[s] some physical nexus or acts within the state whose securities statute [is] alleged to govern."[161] The court reasoned that Loss's article persuasively supports the proposition that Loss intended what is labeled as the "scope" provision in the Uniform Securities Act of 1956 to function as a directive of priority.[162] Coupled with the insight that "[t]he Texas Securities Act was adopted substantially from the Uniform Securities Act," the court found that "the Texas Legislature [similarly] intended section 12 of the Texas Securities Act" to function as a priority directive.[163]

First, it is puzzling that Loss's article, relied upon by the *Daccach* court, did not even pertain to the statute at hand. Although the *Daccach* majority noted that "[t]he Texas Legislature incorporated part of the Uniform Securities Act in Texas Blue Sky laws, including . . . [the] term of art . . . 'in this state,'"[164] the concurrence pointed out that "in enacting the TSA, Texas did *not* adopt [section 414] of the Uniform Securities Act's choice-of-law provision," and the term "in this state" appears in a wholly different part of the TSA than it does in the Uniform Securities Act.[165]

157. *See, e.g.*, KERMIT ROOSEVELT III, CONFLICT OF LAWS 36 (2010) ("Faced with these conflicting statutes, a court is only better off than with no legislative guidance. It is somewhat better off, because the legislatures have answered questions about the scope of the state laws under consideration. But those answers have left the court with the question of priority: given that the case falls within the scope of both states' laws, which is to prevail?").

158. *Id.*

159. *Id.*

160. Citizens Ins. Co. of Am. v. Daccach, 217 S.W.3d 430, 446 (Tex. 2007) (citing Louis Loss, *The Conflict of Laws and the Blue Sky Laws*, 71 HARV. L. REV. 209 (1957)).

161. *Id.*

162. *Id.* at 445.

163. *Id.* at 446.

164. *Id.*

165. *Id.* at 465 & n.4 (Jackson, J., concurring in part).

Putting to the side, however, the issue of whether it even was proper for the *Daccach* court to have relied so heavily on legislative history of any statute, let alone of a model statute that had not been expressly adopted in the state, Loss's article much less clearly supports the *Daccach* majority's position than the court portrayed.[166] Although perhaps confusing because of its title, *The Conflict of Laws and Blue Sky Laws*,[167] Loss's article fully supports the view that he drafted section 414 only to address the issue of scope—not priority. From the outset, Loss disclaimed an intent to address "conflict-of-law problems at all, except in the broadest sense of the term," given that his goal was to explicate not "whether the statute applies in the face of some other governing law but simply whether it *applies at all as a matter of statutory construction*."[168] If this language was insufficiently clear, Loss continually described his task as elucidating the "scope of the [model] act," stating in the *Harvard Law Review* that through codification he hoped "that the *scope of the act* in interstate transactions . . . be made as explicit as possible."[169]

Ironically, *Lintz v. Carey Manor Ltd*.[170]—the first case to apply the Blue Sky exception (and the opinion most widely cited in support of its application)—is alone in recognizing the irrelevancy of Loss's analysis to resolving the issue of priority among competing Blue Sky laws. Before proceeding to decide the case at hand under what I call the multiple interests hypothesis, as I discussed above,[171] the *Lintz* court explained that "Professor Loss made clear that under section 414, statutes of several states [can] overlap and reach the same transaction," but Loss "never discussed whether a true conflict problem exists under these circumstances."[172] Rejecting the notion that the statute con-

166. There also is strong evidence that, in drafting the Uniform Securities Act, Professor Loss never intended the territoriality language to have any application to the antifraud provisions. Loss, *supra* note 160, at 209 (stating that he did not need to "labor[] . . . the antifraud aspects of the blue sky laws . . . because presumably the conflict-of-law rules [were] not too different there from the rules for common-law deceit or rescission").

167. That he used the word *conflict* in the title of this Article does not color this analysis. It is true that the question of priority often first springs to mind when one thinks of choice of law, and this Article too is guilty of using the terms "choice-of-law rule" and "priority rule" interchangeably. That said, the issue of statutory scope—including a statute's extraterritorial application—is considered very much within the realm of conflicts law. *See, e.g.*, Roosevelt, *supra* note 75, at 2461 ("Currie realized that the first step in choice of law must be analysis of the laws contending for application."); *see also id*. at 2468 ("[T]here are two ways in which a theory might handle the issues raised by multistate cases. It might eliminate conflicts by aggressive use of rules of scope, or it might provide conflicts rules [which Roosevelt terms 'rules of priority' in other writing] to resolve conflicts.").

168. Loss, *supra* note 160, at 219 (emphasis added).

169. *Id*. at 251 (emphasis added).

170. 613 F. Supp. 543 (W.D. Va. 1985).

171. *See supra* notes 64-70.

172. *Id*. at 548; *see also id*. at 550 ("Professor Loss's task was not the traditional conflicts task of determining when the laws of one state were to control over those of another,

tained any such statutory priority directive, the *Lintz* court interpreted section 414's words "in this state" to be only "an implied limitation on the scope of the statute" and noted that "[s]ection 414 of the Uniform Securities Act is . . . helpful as a guide to when a transaction occurs within this state so that the statute is applicable . . . [b]ut [is] in no sense . . . a 'conflicts' provision, nor should it be."[173] The *Lintz* court therefore recognized that its answer had to come from a source external to the statutory text or legislative history.

The *Lintz* court's reasoning on this issue becomes even more convincing when one examines the actual drafters' notes with respect to section 414 of the Uniform Securities Act, which no court or scholar has yet considered. In his drafts of the model statute, Loss often expressed the idea that "[s]ection 414 . . . attempts a solution of the extremely troublesome problems of *statutory scope*."[174] More significantly, however, these writings negate any argument that in using this word "scope," Loss was referring to the related, but distinct, issue of statutory priority. Earlier, in the model statute's first draft, the designated "conflict of laws" provision is left blank, containing only an author's note:

> Professor Arthur T. von Mehren of the Harvard Law School has been retained as consultant on (a) the problem of the extent to which the law of a particular state should be made applicable to offers made by mail or telephone from points outside the state and (b) the orthodox conflict-of-laws problem of determining the choice of law in private actions.[175]

but rather to decide, based upon constitutional and policy grounds, when the securities laws of a particular state should attach to an individual transaction.").

173. *Lintz*, 613 F. Supp. at 548.

174. LOUIS LOSS & EDWARD M. COWETT, A PROPOSED UNIFORM SECURITIES ACT: FINAL DRAFT AND COMMENTARY 9 (1956) (emphasis added); *see also id*. § 414 cmt. ("There is one troublesome area which is universally ignored in the present statutes, and that is their application to interstate or international transactions with only some of their elements in the state in question."). In an earlier draft, Professors Loss and Edward M. Covett (a co-drafter) also explained that "Section 414 and its appendages . . . determine the scope of the statute for all kinds of proceedings—civil, criminal, injunctive and administrative." *Id*. This is significant because the *only* question with regard to criminal statutes is the scope of their application—there is never a question of priority because a criminal offense can only be prosecuted under the forum's law. *See* Robert A. Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 CASE W. RES. L. REV. 44, 47 (1974) ("Whatever the reasons, no American state entertains criminal prosecutions brought by the authorities of another state. . . . The governing law is always that of the forum state, if the forum court has jurisdiction.").

175. LOUIS LOSS, UNIFORM SECURITIES ACT FIRST DRAFT 58 (1955).

Loss clearly understood the difference between (and independence of) statutory scope and priority, and when combined with his later writings, this note clarifies that the final model statute only addresses the former: "the problem of the extent to which the law of a particular state should be made applicable."[176]

Reinforcing this conclusion, in a document entitled "Differences between the Tentative Third Draft of March 1, 1956, and Third Draft of April 1956," Loss wrote:

> The first part of the title [of section 414] has been changed stylistically from "Conflict of Laws" to "Scope of the Act." Technically we are not dealing with conflict of laws in the orthodox sense in which a court determines the choice of law. Rather we are dealing with the scope of this one statute in the case of interstate and international transactions. Moreover, the phrase "Conflict of Laws" might not be too meaningful to a non-lawyer examining the statute.[177]

Had the *Daccach* court seen or interpreted these additional writings, it would have been difficult for it to rest its decision—as have so many other courts—on the understanding that Loss intended the Uniform Security Act's "scope" provision to function as a choice-of-law priority directive.

Finally, it is worth briefly considering an innovative variant of the statutory-directive hypothesis, which surfaced recently in an RMBS opinion out of the Southern District of New York. In *Federal Housing Finance Agency (FHFA) v. Deutsche Bank AG*, the plaintiffs brought suit under the District of Columbia Securities Act and Virginia Securities Act, but the defendants argued that the New York Martin Act governed their claims pursuant to New York's choice-of-law rules.[178]

The district court's reasoning in rejecting the defendants' argument was two-fold. First, the court noted that "[i]n other contexts, it is uncontroversial that the securities regulations of competing sovereigns may be simultaneously applied to a single set of facts."[179] For example, plaintiffs regularly rely on the

176. *Id*.

177. LOUIS LOSS, STUDY OF STATE SECURITIES REGULATION: DIFFERENCES BETWEEN THE TENTATIVE THIRD DRAFT OF MARCH 1, 1956, AND THIRD DRAFT OF APRIL 1956, at 6 (1956).

178. 903 F. Supp. 2d 285, 290 (S.D.N.Y. 2012).

179. *Id*.

"well-settled" principle "that federal law does not enjoy complete preemptive force in the field of securities" in order to "assert state and federal securities claims simultaneously" under[180] there has been no "suggest[ion] . . . that such claims create a conflict that must be resolved through preemption or choice-of-law analysis."[181] By analogy, the court concluded, a plaintiff should be able to bring securities claims under the statutes of multiple states without concern.[182]

But the analogy to the federal-state context is unpersuasive. Identifying the relationship between any two statutes, regardless of whether in the federal-state or interstate context, is a fact-specific inquiry, which is dependent on the precise language of the particular statutes at hand and the rules governing how this language is to be interpreted.[183] Even more fundamentally, however, the relationship between a state and federal law cannot be easily analogized to the interstate context. To take one fundamental problem with such an approach, it fails to account for the unique presumption against federal preemption of state law in order to protect the "American civil justice [system's] . . . implicit premises of dual governance."[184] This means that a court may allow a federal and state statute to stand by side, even though in the *inter*state context, the same pair would be at irreconcilable odds.[185]

Had the court's analysis stopped there, it would have been more easily dismissed. But the court went on to make an innovative argument not seen elsewhere, at least in the context of Blue Sky cases. The court reasoned that the state statutes at issue in *FHFA* include legislative commands that they be *nonexclusive* of those promulgated by other states. In making this argument, the court noted parallel language in the federal and state statutes: just as "[s]ection 15 of the Securities Act [of 1933] explicitly provides that '[t]he rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity,'"[186] the court explained, "[t]he Virginia and D.C. Blue Sky statutes contain nearly identical

180. *Id*.

181. *Id*. (quoting Baker, Watts & Co. v. Miles & Stockbridge, 876 F.2d 1101, 1107 (4th Cir. 1989)).

182. *Id*. at 290-91.

183. *See, e.g*., Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 14 (1995) ("Preemption claims are largely fact-specific given the variety of state law claims—legislative and judicial—that may arguably be preempted by federal law."). Just as a court could not blindly apply its comparison of Blue Sky statutes *A* and *B* to Blue Sky statutes *C* and *D*, a failure of the Federal Securities Act to preempt certain state securities acts tells the court virtually nothing about the relationship among the New Jersey, Virginia, and D.C. statutes.

184. Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1749 (1992).

185. *Id*.

186. FHFA v. Deutsche Bank AG, 903 F. Supp. 2d 285, 290 (S.D.N.Y. 2012) (alteration in original) (quoting 15 U.S.C. § 77(p) (2011)).

disclaimers."[187] The court reasoned that because Congress employed this language in the Federal Securities Act to clarify that it did not intend to preempt state-law causes of action, the Virginia and D.C. legislatures must have analogously used it to abdicate any claim to their own statutes' exclusive applications.[188]

The court's clever argument, however, is not foolproof. First, the court offered no evidence supporting its reading of what it labeled D.C. and Virginia's "non-exclusivity" provisions. A statutory provision stating the rights and remedies the statue provides "shall be in addition to any and all rights and remedies that may exist at law or in equity" can more naturally be read to reflect a legislative intent not to preempt the state's other statutory or common-law causes of action than it can be read to reflect an intent to supersede existing conflict-of-law principles.[189] That such a choice-of-law provision is not targeted to address the question of priority is even more persuasive when one considers that lawmakers rarely legislate with the issue of statutory priority in mind.[190]

Moreover, regardless of how one interprets the statutory language in D.C.'s or Virginia's statutes, the court could point to no non-exclusivity provision in the Martin Act, the statute of the *forum* state and the one that the *defendants* argued should govern. The court recognized and tried to neutralize this issue by reasoning that, even absent such an express provision, New York's Martin Act should be read as if it did contain the same language.[191] The court noted that the New York Court of Appeals had recently read such a provision into the statute.[192] In *Assured Guaranty (UK) Ltd. v. J.P. Morgan Investment Management Inc.*, the New York Court of Appeals held that the Martin Act does not preempt New York common law, meaning that "an injured investor may bring a common-law claim (for fraud or otherwise) that is not entirely dependent on the Martin Act for its viability."[193] This holding, according to the court, "suggests *a fortiori* that the Martin Act does not purport to bar claims that have been statutorily authorized by a co-equal sovereign."[194]

The problem with this argument is that neither the holding in *Assured Guaranty* nor the Martin Act's language suggests anything of the sort. Rather

187. *Id.*

188. *Id.*

189. The analogous *vertical* relationship to that between federal and state statutes is not that between statutes of co-sovereigns, but that between state statutory and state common-law claims: just as Congress has the power to preempt state law, state legislatures may preempt their state's own common law.

190. Braunig, *supra* note 105, at 1053.

191. *FHFA*, 903 F. Supp. 2d at 290-91.

192. *Id.*

193. *Id.* (quoting Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc., 962 N.E.2d 765, 770 (N.Y. 2011)).

194. *Id.*

than elucidate its reasoning, the court offered no explanation for why a state's legislative intent not to preempt its own courts' common law should bear on any *inter*state choice-of-law analysis. In fact, if anything, the *Assured Guaranty* opinion cuts the other way. There, the New York Court of Appeals expressly based its holding that the Martin Act does not preempt New York common-law claims on the grounds "that 'a clear and specific legislative intent is required to override the common law'" and that the Martin Act "does not expressly mention or otherwise contemplate the elimination of common-law claims."[195] The same reasoning ostensibly holds for New York's choice-of-law rules. If the legislature had wished to supplant New York's common-law choice-of-law rules with a statutory directive, it would have had to do so plainly and expressly in the statute itself.

Finally, with respect to the court's references to Virginia's and D.C.'s choice-of-law rules, here, again, a situation that resembles renvoi rears its head—and does so strongly. While some mainstream conflicts theorists argue that a foreign state's definition of statutory scope should be respected (in other words, here, the court should "accept the renvoi"[196]), none would argue—and certainly not those of influence in New York[197]—that, in determining the applicable law, the "whole" laws of D.C. and Virginia should be consulted.[198] But that is precisely what the court did.

* * *

The inadequacy of the rationales put forth to justify the special exemption of Blue Sky laws from traditional conflicts jurisprudence begs the question of whether it is time to reconsider the prevailing view a plaintiff should be given the option, within constitutional limits, to bring her claims under any Blue Sky

195. *Assured Guar.*, 962 N.E.2d at 769 (quoting Hechter v. N.Y. Life Ins. Co., 46 N.Y.2d 34, 39 (1978)).

196. *See* Kramer, *supra* note 82, at 1030 ("Because this is a question of Illinois positive law, and because Illinois courts are the authoritative expositors of that law, the Michigan court is bound to follow Illinois decisions. For the purposes of determining the prima facie applicability of Illinois law, in other words, Michigan must 'accept the renvoi.'" (footnote omitted)); *but see* BRILMAYER, *supra* note 125, at 96 (arguing that both inquiries "are a product of the other state's own substantive laws," thus "raising the specter of renvoi"). *But see* Brilmayer, *supra* note 125, at 96 (arguing that both inquiries "are a product of the other state's own substantive laws," thus "raising the specter of renvoi").

197. *See, e.g.*, Wyatt v. Fulrath, 239 N.Y.S.2d 486, 493 (N.Y. Sup. Ct. 1963) (stating "that the renvoi doctrine . . . is not followed in New York"), *aff'd*, 211 N.E.2d 637 (N.Y. 1965).

198. *See* Roosevelt, *supra* note 72, at 20-21 (explaining that because questions of scope go to a statute's meaning, courts "should not be free to disregard a state's definition of the scope of its law, whether that definition is accomplished through explicit statutory language or through choice-of-law rules" but that "obviously no one state can have the last word on the question of whose rights will prevail in the case of a conflict").

statute that provides her with a cause of action. As noted above, none of the rationales or explanations put forth for this approach are satisfying, either on their own terms or when situated within the broader body of conflicts jurisprudence.

Furthermore, the overwhelming number of courts that have thrown their established conflicts methodologies by the wayside have drowned out the few courts that have stepped back to question the rationales undergirding this practice. When defendants have protested the inequities of allowing plaintiffs unbridled control over both the prevailing substantive law and forum, courts have dismissed their arguments using words and phrases like "axiomatic" and "growing weight of authority" to refuse to consider the merits or normative appeal of an alternative approach. As a result, Blue Sky conflicts jurisprudence has grown both unprincipled and hopelessly confused.

But the fact that the Blue Sky exception is not compelled by any prevailing choice-of-law methodology does not, from a normative perspective, in and of itself necessarily justify its eradication. After all, absent constitutional restraint, each state is free to apply its own choice-of-law principles, including seemingly inconsistent principles in different topical areas of the law, as it sees fit. Once one peels back the layers of erroneous justifications put forth in favor of the Blue Sky exception and recognizes that this outcome is commanded by no source of positive law external to this line of cases itself, the exception becomes simply a policy choice that must be evaluated as exactly that. And thus, as with any other policy choice, the exception compels an explanation for why "the results are sensible, practical, wise, or just."[199] Such an analysis is taken up in the subsequent Part.

III. RETURNING TO FIRST PRINCIPLES: ENGAGING IN A NORMATIVE EVALUATION OF THE BLUE SKY EXCEPTION

The previous Part established that the Blue Sky exception is incongruent with and unjustifiable under existing conflicts jurisprudence. But given states' freedom to develop choice-of-law rules within constitutional bounds, the mere idiosyncrasy of an approach cannot alone justify its overhaul. This Part goes a step further, examining the exception not with respect to the existing conflicts rules that form the states' positive law, but to the underlying goals, values, and principles by which the law is informed. After identifying these goals in Part III.A, Part III.B concludes that the Blue Sky exception rests on shaky normative ground. That the Blue Sky exception finds little justification under commonly accepted choice-of-law "desiderata"[200] should give courts that have endorsed the exception additional reason to take pause.

199. Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 479 (1985).

200. I adopt Kermit Roosevelt's use of the term "desiderata" to describe choice-of-law values and principles. ROOSEVELT, *supra* note 157, at 29.

A. Identifying the "Desiderata"

In evaluating any conflicts system, one must start by identifying the normative criteria against which it should be assessed.[201] There is no objectively correct answer for what is wanted from a conflicts system; it this depends on one's normative lens.[202] Conflicts theorists continue to debate what exactly a conflicts system should prioritize and how much weight should be given to each value by which it is informed. Still, an underlying theory should guide every conflicts methodology. One cannot "really apply a choice of law analysis sensibly without knowing the underlying reasoning."[203]

Although the precise set of objectives differs depending on which conflicts methodology a court endorses, scholars have identified a relatively uniform set of features across theories, which have gained some measure of acceptance among courts and scholars alike. One might quibble with precisely how these goals are framed or might add one and delete another, but choice-of-law scholars typically speak in terms of furthering the following goals: (1) uniformity; (2) predictability; (3) ease of judicial application; (4) fairness; (5) efficiency; and (6) furtherance of sovereignty.[204]

Each of the prevailing theories is, at heart, geared towards furthering one, and usually a combination,[205] of these relatively accepted norms.[206] Although

201. *Id*.

202. American courts rejected long ago the idea that there is some "brooding omnipresence in the sky" compelling the application of one set of laws to a given problem. *See* Robert A. Leflar, *The Nature of Conflicts Law*, 81 COLUM. L. REV. 1080, 1081 (1981).

203. Brilmayer, *supra* note 199, at 461.

204. *See* DAVID F. CAVERS, THE CHOICE OF LAW PROCESS 20-32 (1983) (identifying, through a hypothetical case study, the objectives of equity, rationality, reasonable consistency, uniformity of result, predictability, protection of reasonable expectations, ease of application, and consideration for state interests); Brilmayer, *supra* note 199, at 460 (noting that, in addition to state interests, "reasonableness, fairness, and predictability [as choice-of-law criteria] are enjoying a comeback"); *id*. at 476 ("If fairness is important, then it ought to be incorporated into all choice of law analyses, even the identification of the supposed false conflicts."); Scott Frehwald, *A Multilateralist Method of Choice of Law*, 85 KY. L.J. 347, 348 (1986-1987) (noting that a choice-of-law rule "should be grounded in positive law, . . . substantively neutral, . . . forum neutral, . . . predictable, . . . fair to the individual litigants, and . . . reflect the relevant states' interests"); P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1, 34 (acknowledging the "[e]lementary considerations of predictability, practicality, and equality" in resolving conflicts of law); Kramer, *supra* note 84, at 313 & n.113. (explaining that "[multistate] policies like comity toward other states, facilitating multistate activity and providing a regime whose enforcement is uniform and predictable . . . are recognized by choice of law scholars of every persuasion").

205. For example, while "[t]he First Restatement was founded on principles of respect for other states' sovereignty," the *Restatement (Second) of Conflict of Laws* weighs a much broader array of "principles," including comity, fairness, predictability, certainty, and uniformity of result. BRILMAYER, *supra* note 125, at 153 n.18. Leflar's "better law" approach adopts (among others) four of these standard desiderata: "predictability of results, maintenance of interstate and international order, simplification of the judicial task, [and] ad-

modern choice-of-law theories do differ with respect to which of these goals they view as more or less legitimate, the variation more often than not is grounded in how much weight one school gives to a particular factor; typically, fairness or sovereignty is prioritized over the other principles.[207] This of course is a recurrent issue in all areas of the law; for example, rules of criminal procedure predicated entirely on concerns of efficiency will necessarily diverge from those predicated entirely on concerns of fairness. To the extent a court espouses different values in the context of choosing among Blue Sky statutes than it does in the context of resolving the same question with respect to other types of law, the question is raised of whether this discrepancy is justified.

Before these criteria are discussed in the subsequent Part, it bears repeating that this Article does not purport to undertake a normative analysis of which of these factors the choice-of-law hierarchy should prioritize over others or even to argue in an absolute sense that one result is compelled over another; this is the topic upon which the entire field of conflict of laws is predicated and over which scholars continue to debate. The aim of this Article is much narrower: to show that few of these criteria point in favor of the Blue Sky exception, while many weigh against it. To quote Professor Lea Brilmayer, this discussion, in other words, "seeks to influence state decisionmaking . . . by providing strategic analysis that is helpful to states in achieving the variety of goals that they actually have" rather than to "yield concrete recommendations about what choice of law rules, methods, or principles, [they] ought to have."[208]

B. Application to the Blue Sky Context

When one analyzes the Blue Sky exception with respect to these normative criteria, it becomes apparent why an analogous practice has caught on in no other area of the law. The most salient concerns that the exception raises are those that choice-of-law theorists—and thus that current choice-of-law theories adopted by courts and legislatures alike—prioritize most heavily: those of sovereignty and fairness. It is no coincidence that these two deep-seeded norms are those that pop up time and time against where constitutional challenges are raised in the realm of choice of law.

Fairness between litigants is a value long steeped in U.S. conflicts juris-

vancement of the forum's governmental interest." ROOSEVELT, *supra* note 157, at 90. And interest analysis is seen by some as "grounded on a principle of tolerance for the diverse policies of other states." BRILMAYER, *supra* note 125, at 153 n.17 (citing Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 13, 171 (1989)).

206. BRILMAYER, *supra* note 125, at 1.

207. *See, e.g.*, Brilmayer, *supra* note 72, at 1297 (arguing that the political-rights theory prioritizes individual rights over state sovereignty but implicates both values).

208. BRILMAYER, *supra* note 125, at 148-49.

prudence.[209] Although some academics over the years have advocated for more openly plaintiff-friendly regimes, these proposals have always been tempered,[210] and in no other area of conflicts law has a court so openly allowed a plaintiff, in the face of a true conflict, to choose not only the forum in which she brings her claim, but also the governing law. It is the same value of basic fairness that underlies the "general presumption against forum shopping," which one scholar has described as "an accepted principle of the common law—a background understanding that guides the operation of the entire legal system."[211]

Courts, including the Supreme Court, have evidenced their distaste for unilateral deference to a plaintiff's choice of law. For example, in *Phillips Petroleum Co. v. Shutts*, in which the Supreme Court found it unconstitutional for the lower court to apply Kansas law to all the claims in a multistate class action, the Court gave "little credence" to the argument that the plaintiffs had evidenced their desire to be so bound.[212] Noting that "'[i]f a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistible,'" the Court reasoned that "the plaintiffs' desire for forum law is rarely, if ever controlling."[213] Lower courts, too, have refused to "sanction[] forum shopping." or adopt conflicts rules that "would give undue power to plaintiffs, who could select both forum and applicable law unilaterally"[214]

In formulating and critiquing conflicts methodologies, the majority of commentators have also evidenced a deep concern for party neutrality and

209. *Id*. at 1-2 (noting that, although conflicts scholars disagree over the goal of neutrality between states, "as an ideal, the desirability of neutrality [as between litigants] is generally conceded").

210. For example, although David Cavers stated that he sympathizes with "the protagonists of *the plaintiff's option*" in the limited arena of consumer-protection cases because such actions are plagued with unique concerns of "the consumer's lack of knowledge and economic resources." *See* David F. Cavers, *The Proper Law of Producer's Liability*, *in* CONTEMPORARY PROBLEMS IN THE CONFLICT OF LAWS 3, 22-24 (Kenneth R. Simmonds ed., 1978). He cautions, however, that his sympathy, even if this narrow area of the law, is conditioned on whether the producer "could 'reasonably have foreseen' the availability of the harm-causing product in commercial channels, in the State of injury or the plaintiff's residence, if either was relied on as a contact." *Id*. at 22-23.

211. George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 666 (1993).

212. 472 U.S. 797, 820 (1985).

213. *Id*. (second alteration in original) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 337 (1981) (Powell, J., dissenting)).

214. Neumeier v. Kuehner, 286 N.E.2d 454, 458 (N.Y. 1972); *see also* Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 686-87 (N.Y. 1985) (weighing the impact of particular choice-of-law rules on forum shopping); Reich v. Purcell, 432 P.2d 727, 730 (Cal. 1967) ("[I]f the choice of law were made to turn on events happening after the accident, forum shopping would be encouraged.").

basic fairness, both under constitutional and sub-constitutional principles.[215] For example, the American Law Institute has condemned the "plaintiff-option approach" as "inject[ing] clear substantive preferences incompatible with the desire to formulate party-neutral choice of law rules for the complex civil litigation setting."[216] Similarly, Professor Lea Brilmayer has scathingly criticized a pro-plaintiff "philosophy" an endorsement of the principle "that courts exist because of the necessity to transfer money from defendants to plaintiffs, and therefore, the more often they do this, the more adequately they are performing their jobs."[217]

While some theorists might be willing to compromise the principle of neutrality for a methodology that is particularly sensitive to achieving a proper balance of state interests, an approach that unilaterally favors a plaintiff's choice of law caters very little to this concern. Despite the fact that scholars and some courts espouse different views on to what extent a choice-of-law methodology should place special weight on the value of comity, a regard for the balance of state interests pervades each of the modern theories. This is unsurprising given not only that this concern is of constitutional significance,[218] but also that many view choice of law as ultimately targeted to answer the question of how to best allocate authority among coequal sovereigns.[219]

To the extent one believes that a state's courts should defer to the laws of other states if more significant , the Blue Sky exception is certainly misplaced. Just as a rule mandating application of the forum's law in the case of every true conflict plainly disregards the interests of other states, unbridled deference to the plaintiff's choice of law in every case eschews any consideration of which state's interests are paramount.[220] Although it is true that, even under the Blue

215. *See, e.g.*, Cavers, *supra* note 210, at 18 ("Though accorded recognition in such tradition-respecting nations as Germany and Switzerland, the plaintiff's option is frowned upon by many scholars, especially in Britain and on the Continent." (footnote omitted));

216. AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER'S STUDY § 6.07 cmt. c, reporter's note 16, at 437 (1994); *see also id*. (supporting its position by noting that a prior supporter of this philosophy, "Professor Weintraub[,] in later writings . . . retreated from advocating a plaintiff-option approach and instead . . . urged that the court refer directly to the law of the state where the plaintiff habitually resides as long as that state has a reasonable relationship with the defendant's course of conduct.").

217. Lea Brilmayer, *Interstate Federalism*, 1987 BYU L. REV. 949, 959-60.

218. *See, e.g.*, *Shutts*, 472 U.S. at 822 ("Given Kansas' lack of 'interest' in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limitations.").

219. *See* Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 741 n.223 (1987).

220. This is because there is no reason to believe that the plaintiff will necessarily choose the law of the state that has the greatest interest in resolving the questions raised by the plaintiff's complaint.

Sky exception, "[s]ome nexus between the 'sale' [of securities] . . . and the state is required,"[221] this baseline requirement is minimal. In a stark illustration of this principle, in *In re National Century Financial Enterprises, Inc. Investment Litigation*, a federal district court held that, given the particular facts of the case before it, application of the Blue Sky exception would be unconstitutional under the Full Faith and Credit Clause.[222] In holding that it could not constitutionally apply the plaintiff's choice of statutes, the Ohio Securities Act, the court recognized that even though it previously had concluded, from a statutory-interpretation perspective, "that a sufficient nexus existed to apply [this statute]," it could not "allow[] Ohio's statutory definitions to trump Commerce Clause jurisprudence."[223] In the end, application of the Ohio statute failed to meet the minimal constitutional baseline, which is that some minimal regard be given to the relative needs and preferences of other states.[224]

Not only does the Blue Sky exception evidence a total lack of concern for the value of comity, it also demonstrates a lackluster attitude about the need to protect the forum state's own self-interest in adjudicating the dispute.[225] Some might argue that although some concern must be given to the value of comity, the court's ultimate goal should not be to defer evenhandedly to the law of the state with the "greatest" interest; rather, as an "agent[] of [the forum state's] citizenry and lawmakers," the court should aim to apply its own law to the greatest extent possible.[226] This view is not unpopular. Interest-analysis theorists assume,[227] as do *Restatement (Second)* proponents,[228] that while the forum

221. *In re* Nat'l Century Fin. Enters., Inc. Inv. Litig., 755 F. Supp. 2d 857, 880 (S.D. Ohio 2010).

222. *Id.* at 888.

223. *Id.* at 875, 886.

224. *Id.* at 888.

225. The Supreme Court has repeatedly emphasized the importance of protecting the interests of the forum. *See, e.g.*, Carroll v. Lanza, 349 U.S. 408, 412-13 (1955) ("The State of the forum also has interests to serve and to protect. Here Arkansas has opened its courts to negligence suits against prime contractors, refusing to make relief by way of workmen's compensation the exclusive remedy. Her interests are large and considerable and are to be weighed not only in the light of the facts of this case but by the kind of situation presented." (citation omitted)); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 819 (1985)

226. Although a state may cede control when required to do so constitutionally or for reasons of comity or reciprocity when insufficiently interested to justify its own statute's application, a state's lawmakers are generally presumed to want the law of their own state applied. *See* Kramer, *supra* note 84, at 312 ("[T]he primary concern of a State *A* court is and must be State *A* law. State *A* courts are, after all, agents of State *A*'s citizenry and lawmakers, and their paramount responsibility should be implementation of State *A* law. It is one thing to make room for the laws of other states in cases that do not implicate State *A* law. But when State *A* law is at stake, State *A* lawmakers can be presumed to want it applied. Ideally, State *A* lawmakers probably want State *A* law applied regardless of the forum. But if that is too much to expect given State *B*'s interest, State *A* lawmakers should at least be able to count on having State *A* law applied in a State *A* forum.").

227. Brilmayer, *supra* note 217, at 965-66.

court's responsibility "might be overridden by limitations on [its] freedom of action"[229] or the need "to make room for the laws of other states in cases that do not implicate State *A*'s law," by and large, the "primary concern of a State *A* court is and must be State *A* law."[230]

Though not concerned with deference in the traditional sense, an overriding concern for the forum state's interests also requires a methodical weighing of interests in a manner that the Blue Sky exception ignores. Perhaps counterintuitively, the decision to apply forum law in every case where it would be constitutionally permissible may not be most strategic way to advance the forum's interests to the greatest extent possible. Kramer explains:

> If every state adopts the "law of the forum" solution, State *A*'s policies will be advanced only in true conflicts that are litigated in State *A* courts. But there is no guarantee that this will include even half of the cases. For instance, many cases that implicate prodefendant State *A* laws will not be brought in State *A*, since plaintiffs may shop for a more favorable forum. . . . Moreover, State *A* probably cares more about some true conflicts than others, and there is no assurance that the cases in which State *A* most wants its law applied will be brought in State *A*.[231]

Thus, from a purely "selfish and parochial point of view," State *A* must methodically calculate when to apply each state's law in order strategically to encourage other forums to reciprocate by applying State *A*'s own law in cases State *A* most cares about.[232] In contrast, a method like the Blue Sky exception, which cedes control over the choice-of-law decision to the plaintiff, abdicates the forum court's prerogative to make this tactical determination.

Although the principles of sovereignty and fairness militate strongly against adoption of the Blue Sky exception, one might counter that these costs are outweighed by the benefits of ease of judicial administration, predictability, and uniformity—three procedural principles undoubtedly valued by choice-of-law scholars and courts alike.

For starters, the first problem with this counterargument is that while little

228. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971).
229. Brilmayer, *supra* note 217, at 966.
230. Kramer, *supra* note 84, at 312.
231. *Id*.
232. *Id*.

is clear in choice of law, "it *is* clear that uniformity, predictability, and ease of application are not enough."[233] The *Restatement (Second)*'s drafters, for instance, warned that these values "can . . . be purchased at too great a price" and that in "a rapidly developing area, such as choice of law, it is often more important that good rules be developed than that predictability and uniformity of result should be assured."[234] Multiple scholars have illustrated the absurdity of an approach that prioritizes these goals at the expense of all others by considering the merits of a hypothetical rule that directs the court to apply the law of Alaska in every case.[235] When posed with this hypothetical, one realizes immediately that although such a rule "amply satisf[ies] those three demands," it intuitively "is a pretty bad option . . . because it is arbitrary, unfair, and unresponsive to state policies."[236]

Even if one counters that the need for predictability, uniformity, and judicial ease is sufficiently acute in the specific context of securities litigation to provide a reasoned basis for prioritizing these values more heavily here than elsewhere, this meager justification is still wanting. While it is true that a judge who allows a plaintiff to choose the applicable law may simplify the choice-of-law process, this approach poses the danger of dramatically complicating the court's other tasks. Not only does it have the potential to increase the frequency with which foreign law—with which the judge presumably is least familiar—will be applied, but also it presents the possibility that, by washing her hands of the choice-of-law decision at the outset, a judge may introduce far greater analytical problems down the road. For example, in the *In re National Century* opinion discussed earlier, it was only as a result of the fact that the court "eschewed [a] choice-of-law determination[]" at the beginning that it later had to strike down application of the Ohio statute under the Dormant Commerce Clause.[237] In the end, it was too "unclear how Ohio's interests would be

233. ROOSEVELT, *supra* note 157, at 31 (emphasis added).

234. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) cmt. I (1971).

235. ROOSEVELT, *supra* note 157, at 31; *see also* Richard H. Acker, Comment, *Choice-of-Law Questions in Cyberfraud*, 1996 U. CHI. LEGAL F. 437, 459 & n.115 ("[T]he right answer seems more important than a simple and quick decision. . . . [I]f the main objective is to have a rule that promotes predictability of outcome and ease of application, the solution would be to always apply Alaska's law (since it is our nation's largest and coldest state) in every case, regardless of the fact pattern—courts would effortlessly know which law to apply, and all parties would know with perfect certainty which law would control."); John E. Neal, Comment, *Choice of Law—An Evaluation of Constitutional Limitations and Modern Approaches*, 15 U. KAN. L. REV. 69, 81 (1966) ("As one author has suggested, it would make as much sense to apply the law of Alaska, or any other state. Indeed, if the true objective is uniformity and predictability of outcome, the laws of one particular state should be applied to all causes of action. That this will strike the reader as absurd is indicative of the fact that in a federal system one cannot abrogate entirely the interests of the states." (footnote omitted)).

236. ROOSEVELT, *supra* note 157, at 31.

237. 755 F. Supp. 2d 857, 880, 888 (S.D. Ohio 2010).

advanced allowing the Act to reach and rescind transactions made by out-of-state sellers."[238] The court would not have reached the constitutional issue had it proactively applied the statute of the state most significantly connected to the misconduct.

Moreover, given that securities transactions often implicate the vast majority of states, if not all fifty, the only form of "predictability" that this approach offers is for the defendant to conform its conduct to the law of the most stringent state. By taking this approach, one might argue, the defendant can *predictably* guard against legal liability, but it still leaves the defendant clueless as to the law that will actually be applied.[239] Also, the most plaintiff-friendly statute often will not be most apparent. For example, Statute *A* may have a shorter statute of limitations than Statute *B*, leading one set of plaintiffs to bring their claims under Statute *A*. But where time is not an issue, another set of plaintiff may choose Statute *B*, which, unlike Statute *A*, promises the award of attorneys' fees. This cannot be the definition of predictability contemplated by theorists and courts: *regardless* of the conflicts methodology employed by the court, defendants can *always* predictably escape liability by complying with the laws of *all* states which could potentially exercise jurisdiction.

This resulting unpredictability also raises a whole other issue of efficiency. No one can seriously assert that it is efficient "to govern activity through the *in terrorem* effect of overly broad laws."[240] A concern echoed by many, "[r]egulations that are applied on an unpredictable basis impose costs that cannot be justified by social necessity, since by hypothesis they discourage conduct needlessly."[241] Without knowing which law will be applied, companies are simply unable to plan their activities or insure themselves absent great waste.[242] Finally, this unpredictability compounds the issues of sovereignty and fairness, problems which circle back to the discussion above. As one critic

238. *Id*. at 886.

239. *See* Braunig, *supra* note 105, at 2058 & n.34; *see also* Brilmayer, *supra* note 217, at 962 (noting that this "equates ability to know what the law says with ability to anticipate that it will be applied to a particular case").

240. Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 407 (1980).

241. *Id*.

242. Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 12-13 (1991) ("[T]he system frustrates rational planning. Parties cannot know when they act what law governs their behavior, for that depends upon post-act events such as the plaintiff's choice of forum. . . . Institutional actors, for example, must decide how much to invest in making their activities safer, and what activities to avoid because the liability risks exceed the benefits. And even acts that are not planned are often insured against in advance. There are significant costs when actors—especially risk-averse actors—are forced to make decisions without knowing what law governs their actions."); Braunig, *supra* note 105, at 1057-58 ("[N]ot knowing what law will apply in future litigation makes it difficult for a defendant to structure his affairs so as to comply with the law.").

has argued, even if "from a planning perspective conforming behavior to the most stringent state law work[ed], the necessity of companies making this calculation to comply with the most stringent law does not necessarily serve the policies of states with less stringent policies (who may be trying to attract business, for example), nor is it fair to companies who do business in different states to take full advantage of whatever favorable law exists in each state."[243]

The principle of uniformity also carries little force in justifying the exception. Although one might argue that the Blue Sky exception decreases forum shopping because the plaintiff is no longer dependent on a particular forum to achieve a certain result,[244] it does little to ensure that investors receive uniform treatment. Allowing a plaintiff her pick of statutes still does not allow a court to apply a statute that does not grant the plaintiff a right in the first instance. For example, this means that New York-based Plaintiff *A*, who purchased her security from California Issuer *B*, may be able to choose New York or California to govern her claims, but she cannot ask the court to apply the law of Idaho, the state where Investor *C* (not a party to Plaintiff *A*'s litigation) purchased her own security. The disuniformity of this approach stands in stark contrast to the results produced by, for example, the internal affairs doctrine, which dictates that the court apply the law of the defendant's state of incorporation. The internal affairs doctrine, though admittedly not without its own flaws, ensures not only that the defendant is treated uniformly with respect to all litigation stemming from a given transaction, but it also guarantees uniform treatment of shareholders across various states.[245]

CONCLUSION

In conclusion, the Blue Sky exception can be rejected on two counts. First, it can be rejected solely on the basis of the varied explanations that courts have put forth for its application. Courts have justified the practice by claiming that

243. Braunig, *supra* note 105, at 1058.

244. Of course, even the Blue Sky exception does not eliminate forum shopping altogether because it has not been universally adopted.

245. As Roberta Romano notes, this goal is as laudable in the securities context as it is when applied to corporate law disputes. A follower of the "statutory directive" hypothesis, Professor Romano takes as given that the exception is established under prevailing conflicts methodologies. ROBERTA ROMANO, THE ADVANTAGE OF COMPETITIVE FEDERALISM FOR SECURITIES REGULATION 115 (2002) ("The prevailing choice-of-law approach to securities transactions is codified in provisions of the Uniform Securities Act."). Her task is purely normative, and she approaches the issue from a competitive federalism perspective. *See id.* (arguing that application of the internal affairs doctrine to state securities cases would better advance the goal of competitive federalism). Still, her insight that the current approach "has a number of undesirable consequences," including "lack of uniform treatment across similarly situated individuals and unpredictable standards of conduct for issuers, given the possible application of fifty-one state and District of Columbia statutes," is enormously valuable for the purposes of this Article's analysis as well. *Id.*

the Blue Sky exception is not an "exception" at all to their jurisdictions' respective choice-of-law rules, which constitute part of their positive law. Rather, they have claimed that established methodologies not only compel but also justify the common practice. But when one examines the actual rationales that courts have put forth in favor of the reigning approach, it quickly becomes apparent that the practice can only be justified on the basis of historical precedent. Outside of the Blue Sky cases themselves, the Blue Sky exception is logically unprincipled as a statement of the application of principles developed by prior positive law.

Although one might argue that courts should concede that they are simply departing from prior law in adopting the exception and justify the practice on normative grounds alone, the exception also can be rejected as flawed public policy. When one takes inventory of how the Blue Sky exception fares under established choice-of-law desiderata, the results are bleak. The values that courts and choice-of-law theorists most cherish, fairness and sovereignty, are those that the exception least promotes. Turning to the remainder of the criteria, one finds little additional justification. While one might intuitively posit that the exception furthers the goals of uniformity, predictability, and ease of application, in reality, it performs worse on these measures than would a rule that always applies the law of Alaska, which is a rule that we can confidently reject as leading to the wrong results. And even if these three goals *did* clearly militate in favor of this approach, courts and scholars alike have rejected them as insufficient to justify a conflicts methodology without additional support in weightier values. That the exception furthers very few if any of the values and goals that courts and theorists have explicitly adopted in formulating their choice-of-law methodologies, should only provide a greater warning to courts about the dangers of apply the exception based on historical precedent alone.