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FORMALISM AND NONFORMALISM IN CHOICE OF LAW METHODOLOGY

William C. Powers, Jr.*

In Baffin Land Corp. v. Monticello Motor Inn, Inc.,1 the Washington Supreme Court rejected for contract cases2 the formal, rule-oriented choice of law methodology of the first Restatement3 in favor of the more flexible "significant contact" approach of the Restatement (Second).4 In doing so, the court responded to criticism of formal choice of law rules5 and became part of a trend away from their use.6 In rejecting the formal lex loci rules, however, the court did not give a clear indication of the methodology it will use in choice of law problems.7

This article presents an analysis of choice of law methodologies in terms of their formal and nonformal characteristics. In Part I, formal and nonformal decisionmaking processes are defined, and their benefits and detriments are examined. In Part II, two concrete choice of law problems—the New York experience with host-guest statutes and the policy of validation in contractual and testamentary transactions—are studied to highlight the pitfalls of both formal and nonformal choice of law approaches. In Part III, the shift from formalism to nonformalism in choice of law methodology is analyzed from the perspective of a general theory of judicial shifts between major legal

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1. 70 Wn. 2d 893, 425 P.2d 623 (1967).
2. The "significant contact" approach was subsequently adopted for tort cases in Werner v. Werner, 84 Wn. 2d 360, 526 P.2d 370 (1974). Current Washington choice of law methods will be examined in more detail in Part IV infra.
3. RESTATEMENT OF CONFLICT OF LAWS (1934).
paradigms. Finally, Washington law is discussed in Part IV with suggestions for its development.

I. FORMAL VERSUS NONFORMAL DECISIONMAKING

A formal decision uses less than all available relevant information by following a rule which screens from the decisionmaker's consideration all information not specifically invoked by the rule. The lex loci delictus choice of law rule is formal because it directs the judge to ignore all facts except the place of the wrong when choosing applicable law. In contrast, a nonformal decisionmaker reaches a "proper" result without first screening any information from consideration.

A formal decisionmaking process need not be arbitrary or divorced from considerations that would inform a nonformal decision. A rulemaker might consider all relevant facts and policies when determining the content of a rule so that it mandates results that approximate the results of nonformal decisions. A rule is formal because once it is adopted, it alone, rather than the policies which generated it, becomes the source of decision. Whereas nonformal decisionmaking looks to the entirety of a factual situation and arrives at a conclusion with direct reference to an ultimate standard of correctness, a formal rule is opaque to the considerations upon which it is based.

10. Richardson v. Pacific Power, 11 Wn. 2d 288, 118 P.2d 985 (1941); Restatement of Conflict of Laws § 378 (1934). Under the lex loci delictus rule, the inquiry into the place of the wrong may itself be a complex question. see Alabama Great S.R.R. v. Carroll, 97 Ala. 126, 11 So. 803 (1892); Restatement, supra at § 377, but the inquiry is nevertheless formal because once it is determined where the wrong occurred, all other facts are screened from the decisionmaking process.
11. Even if a rule, when obeyed, is opaque to the policies which generated it, the moral decision to obey or disobey a rule need not treat the rule as opaque. A moral theory may treat rules as being transparent, translucent or opaque in their obligatory force. If a decision to obey or disobey a rule is made without reference to the fact that it is a rule and thereby furthers formal values, the rule can be considered to be transparent to other moral considerations affecting the prescribed conduct. On the other hand, if a rule is obeyed without reference to any factors other than to its own, self-proclaimed legitimacy, then the moral decision to obey it treats it as being opaque. If a decision to obey a rule takes into account both the formal values deriving from the mere fact that it is a rule and other moral considerations relevant to evaluating the prescribed conduct, then the rule is treated as being translucent.

Thus, one could hold an opaque, transparent, or translucent theory of obligation to law depending on whether one believed that disobedience to an unsound or evil law is
controlling decisionmakers who might not be trusted,\textsuperscript{15} (5) help advance certain formal elements of justice by making it more likely that like cases are decided alike,\textsuperscript{16} and (6) promote liberty in the sense of freedom from arbitrary power and the predilections of decisionmakers.\textsuperscript{17} Of course, this is not an exhaustive outline of the benefits of formal rules,\textsuperscript{18} but it is important to note that an argument in favor of formal rules is complex and multifaceted. It is tempting to attack a formal rule by supporting it with one justification (commonly predictability) and then demonstrating that the rule has not obtained its goal.\textsuperscript{19} While such a demonstration reduces the strength of the argument for formal rules, the argument is negated only if all justifications of formality are overcome.

Formal rules also have detriments, two of which are the “mapping problem” and the “freezing problem.” The mapping problem occurs

\textsuperscript{15} See Erlich & Posner, supra note 9, at 267. This assertion must be tentative because formal rules have the disadvantage of deciding some cases contrary to the desire of the rulemaker who promulgated them. See notes 21–22 and accompanying text infra.

\textsuperscript{16} Even if the decisionmaker is willing to submit to the rulemaker’s will, formal rules facilitate the process because they are more understandable than nonformal rules. See R. Unger, KNOWLEDGE AND POLITICS 92 (1975). This is especially significant when the decisionmaker is a lay person conducting daily affairs. It is also significant for the acceptance of decisions by those who are affected.

\textsuperscript{17} This depends, of course, on what is meant by deciding like cases alike. One might conclude that two cases are decided alike when the decisions are based upon policies behind rules which are applied teleologically. See, e.g., von Mehren, Recent Trends in Choice-of-Law Methodology, 60 Cornell L. Rev. 927, 941–46 (1975). But even if this is theoretically true (which is not necessarily so), the reduction of error and bias effected by formality contributes practically to equality of justice.

\textsuperscript{18} One need not favor formal elements of justice over substantive elements to recognize the value of formal justice. In a translucent theory of rules, both formal and substantive elements of justice contribute to the calculus. See note 11 supra. In a translucent theory, it is erroneous to conclude either that like cases should be decided alike regardless of their substantive content, or that “incorrectly” decided cases should never be followed simply for the sake of equality. A theory is translucent toward rules whenever it values both formal and substantive elements of justice and makes neither lexically prior to the other. See, e.g., J. Rawls, A Theory of Justice 235–51 (1971); J. Rousseau, The Social Contract 62–65, 72–83, 151–54 (Penguin ed. M. Cranston transl. 1968); Rawls, Two Concepts of Rules, 64 Phil. Rev. 3, 13–24 (1955).

\textsuperscript{19} See F. Hayek, The Constitution of Liberty 11–21, 133–61 (1960); J. Rawls, supra note 16, at 235–43; J. Rousseau, supra note 16. While formalism may increase liberty vis-a-vis decisionmakers, it does not remove the power of rulemakers. But those affected by the decisionmaker might themselves be the authors of the rules. See J. Rousseau, supra.

\textsuperscript{18} See Erlich & Posner, supra note 9, at 262–67.

\textsuperscript{19} See, e.g., Baffin Land Corp. v. Monticello Motor Inn, Inc., 70 Wn. 2d 893, 899, 425 P.2d 623, 626 (1967).
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Formal decisions derive both their benefits and detriments from their rigidity and exclusion of relevant information. They (1) are likely to be predictable, facilitating private planning and reducing litigation, 12 (2) are easier to apply because the limited scope of information is more manageable, 13 (3) help shift responsibility from decision-makers to rulemakers, 14 (4) help rulemakers transmit their values by never, always, or sometimes moral. A translucent conception of obligation to rules, assigning some but not infinite weight to their formal value, is compatible with an opaque notion of the application of rules, once it has been determined they will be obeyed. See generally Kennedy, supra note 8, at 371; McCloskey, An Examination of Restricted Utilitarianism, 66 Phil. Rev. 466 (1957); Powers. Autonomy and the Legal Control of Self-Regarding Conduct, 51 Wash. L. Rev. 33, 56-57 & n.63 (1975); Smart. Extreme and Restricted Utilitarianism, 6 Phil. Q. 344 (1956); Wasserstrom. The Obligation To Obey the Law, 10 U.C.L.A.L. Rev. 780 (1963).

Even in their application, once obedience has been secured, rules need not be considered as being opaque. An understanding of the purposes behind a rule might be necessary to understand its meaning. See H. Hart & A. Sachs. The Legal Process (unpublished work. 1958); Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 661-69 (1958). This need not be of great concern for the present inquiry. However, since the meaning of formal choice of law rules is usually clear. But see Reese. Does Domestic Bear a Single Meaning?, 55 Colum. L. Rev. 589 (1955). Moreover, the inquiry here is directed to the issue of formal versus nonformal decisions, assuming that the meaning of formal rules can be understood.

The distinction drawn here between formal and nonformal decisions is related to the distinction between rules on the one hand and principles and policies on the other. If a formal rule is not followed, it is considered broken or altered, but a principle or policy that fails to persuade in a nonformal decision retains its vitality. See Dworkin. Hard Cases, 88 Harv. L. Rev. 1057 (1975); Dworkin. The Model of Rules, 35 U. Chi. L. Rev. 14 (1967).


While a reduction of litigation seems a desirable goal, an elimination of litigation is not necessarily desirable. Appellate litigation facilitates official public debate and offers common law rulemakers an opportunity to alter the rules. See notes 85-91 and accompanying text infra.

13. For example, the Statute of Frauds or parol evidence rule makes more manageable the inquiry into the parties' interests by excluding oral testimony. Similarly. judicial inquiry concerning the meaning of a statute would be unmanageable if members of the legislature could be called to give oral testimony.

14. See generally Powers, supra note 11. This is especially relevant when rulemakers are democratically elected legislatures and decisionmakers are less politically responsible courts. Of course, courts can never fully escape responsibility for even the most formal decisions. Rules must be interpreted and applied to facts, and the court can never escape ultimate responsibility for the decision to follow the rule. See note 11 supra; J. Sartre, Existentialism and Humanism 23-37 (Methuen ed. P. Mairet transl. 1948).

Just as the decisionmaker might seek to escape responsibility by applying formal rules, the rulemaker might seek to escape responsibility by promulgating nonformal
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because rules do not always translate (map) perfectly the policies which generated them into results in individual cases.²⁰ By its very nature, a formal rule excludes relevant information from the decision-making process, raising the possibility that the rule will produce a result in an individual case contrary to that supported by the policies which underlie the rule. This is not to say that the rule is a bad one or should be abandoned; it may be the one easily applied formal rule that reaches correct results (i.e., maps policies onto results in individual cases) in more cases than any other simple rule. Where mapping problems arise, however, it is necessary to determine whether the benefits of formalism outweigh the detriment of some incorrect results.²¹

The “freezing problem” occurs when formal rules freeze the decisionmaking process into a set of rules that reflect values of one era which are no longer held in the next. Although this is especially significant when the rulemaker is itself an institution of changing membership like a court or legislature, freezing is a significant problem even for individual rulemakers as their values change.²² Viewing this problem from another perspective, a rulemaker promulgates a rule at time T₁ based on values held at T₁ in conjunction with a prediction of the way in which the rule will affect events at T₂. Rules freeze the generating values held at T₁ but not T₂ and are responsive to conditions at

²⁰ Like a geographic mapping process that projects regions of a sphere onto a plane, rules project policies onto cases. In both situations inaccuracies are introduced, and they are tolerated because the plane and the rule system are easier to handle than the sphere and the policies, respectively.

²¹ See Erlich & Posner, supra note 9, at 268–70. See generally Kennedy, supra note 8.

The mapping problem puts tremendous pressure on formal rules. The parties and the decisionmaker are understandably distressed when a rule mandates a “bad” result, but it must be remembered that the result is “incorrect” even in the eyes of the rulemaker. There need not be a conflict in values between the rulemaker and decisionmaker, although such a conflict will, of course, put added pressure on the rule. Because the mapping problem presumably distresses both the rulemaker and the decisionmaker, at first glance it seems foolish to follow the rule, especially since the detriments of the mapping problem manifest themselves immediately and concretely, whereas many of the benefits of formal rules are general and remote. Nevertheless, refusing to follow the rule tends to undermine the values of formalism.

²² Of course, this might itself be a justification rather than a detriment of formal rules. Institutional rulemakers of one era foreseeing changes in institutional composition might wish to guard against changing values by binding future generations, or at least requiring the conscious effort of formally changing the rule. Even an individual rulemaker might desire to bind his future self to judgments made according to present values. For example, Odysseus tied himself to the mast in order to protect himself against the lure of the Sirens. See G. Dworkin, Paternalism, in Morality and the Law 107, 108–09 (R. Wasserstrom ed. 1971); Powers, supra note 11, at 46–50.
T₁ that might not exist at T₂. Even if the rulemaker's values do not change between T₁ and T₂, his prediction concerning the state of events at T₂ will be at least slightly inaccurate. Thus, the rulemaker may be partially dissatisfied at T₂ with the relationship between the rule and reality.  

In addition to the mapping and freezing problems, the mechanical application of formal rules can be perceived as an undignified, subservient task unworthy of judges. Blind acceptance of formal rules may also dull rather than hone a decisionmaker's ability to make non-formal decisions when necessary. Because formal rules screen considerations relevant to their continuing efficacy from the decisionmaking process, rulemakers and the public are precluded from considering difficult issues with which they may later be forced to grapple. Finally, the application of formal rules can become a bad habit. Rules may mandate bad results (either because they exhibit serious mapping or freezing problems or because they promote undesirable or evil policies), and a prudent rulemaker might want to foster sufficient rule skepticism to guard against future abuse.

23. Of course, rulemakers have the ability to change rules, which is a significant safety valve to mitigate the freezing phenomenon. The process of changing rules has costs, however, that prevent the freezing problem from being completely alleviated. See Erlich & Posner, supra note 9, at 267-68. Courts find it difficult to change rules under the doctrine of stare decisis and the accompanying obligation to elaborate reasoned distinctions between cases involving different results. Also, because the legislative rulemaking process expends resources, legislatures can focus on only a limited number of problems at one time. Moreover, the values that support formal rules are undermined if rules are frequently changed. Indeed, at the limit of increasing frequency of rule changes, formal rules become indistinguishable from nonformal decisions.


25. Of course, public debate concerning the efficacy of rules can take place in forums other than the decisionmaking process. The decisionmaking process is an especially appropriate forum, however, both because it is convenient and because it tempers argument in the forge of decision.

26. See Thoreau, supra note 24, at 28-29, 34; Milgram, Some Conditions of Obedience and Disobedience to Authority, 6 INT. J. PSYCHIATRY 259 (1968).

A deeper problem of rules is the effect they have on human interaction and community. Both rules and the roles they define can cause persons to relate to others according to those roles as partial rather than entire instances of humanity, thereby impeding a true community of souls. See R. Unger, supra note 15, passim. Moreover, to the extent that rule and role structures evoke rational, calculated, egoistic behavior, they impede Underground spontaneity and Dionysian dissolution and transcendence of self in favor of Appollonian rationality and individualism. See Powers, supra note 11 at 52-54 & n.49; F. Dostoyevsky, Notes from Underground, in Three Short Novels 25. 41-46 (Dell-Laurel ed. C. Garnett transl. 1960); F. Nietzsche, The Birth of Tragedy from the Spirit of Music, in The Birth of Tragedy & The Genealogy of
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The decision either to adopt or to apply formal rules is a complicated one. A wholly satisfactory resolution of the tension between formal and ad hoc, nonformal adjudication is impossible because the shortcomings of both approaches cannot be simultaneously eliminated. Rather, a solution that minimizes those problems or maximizes the net benefits of both approaches must be sought. It is not the purpose of this article to work out such a general solution. Indeed, the competing values of each approach manifest themselves with varying strengths in different areas of the law, making it reasonable to adopt a relatively formal approach in one area and a relatively nonformal approach in the next.

An important conclusion to draw from a general understanding of the competing and often irreconcilable values of each approach is that formalism cannot be critiqued with reference to its difficulties alone. A worthwhile assessment of formalism in a given area of the law requires a careful study of both approaches to determine whether formalism or nonformalism is, on balance, a more desirable approach. To a large extent, a proper answer will depend on empirical data, but a lack of empirical data need not prevent a court from making its best judgments with available information and with reference to the complexity of the competing concerns and values of formal and nonformal approaches.

It remains to apply the fruits of this discussion to proposed choice of law methodologies. The lex loci approach of the first Restatement represents the most formal choice of law methodology because the decisionmaker simply identifies a fact (e.g., place of the tort) and choice of law is mechanically determined by a rule. All other facts


Whatever the problems of formal rules in deep social theory, however, their practical values are significant within a rule-oriented legal system, especially when, as in choice of law, the conflicts can be viewed as being between artificial sovereignties rather than "whole" human individuals. Whatever the merits of a nonformal society as a utopian goal, choice of law is not a likely candidate for a place to begin.

27. For one such model, see Erlich & Posner, supra note 9. A solution could take the form of a "synthesis" of the formal and nonformal poles, as is attempted in H. Hart & A. Sachs, supra note 11, or a "mixture" as is contained in the translucent model sketched in note 1 supra. See Kennedy, supra note 8.

and considerations are screened from consideration. If the lex loci rules are analyzed as an attempt formally to map the policies of the "most significant contact" approach onto individual cases, it can be seen that the exclusion of relevant information causes mapping errors. For example, lex loci delictus identifies the jurisdiction with the most significant contacts in more cases than any other simple rule, but it seems to reach an incorrect result in situations involving a compensatory issue where the plaintiff and defendant are residents of one jurisdiction and the accident takes place in another.29

This mapping error can be remedied by adopting a method that utilizes the very information that causes us to realize lex loci maps with

<table>
<thead>
<tr>
<th>Type</th>
<th>Plaintiff's Domicile</th>
<th>Defendant's Domicile</th>
<th>Place of Tort</th>
<th>Ad hoc Preference</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>(2)</td>
<td>X</td>
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<td>(3)</td>
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<td>(4)</td>
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<td>Y</td>
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<tr>
<td>(5)</td>
<td>X</td>
<td>Y</td>
<td>Z</td>
<td>Z</td>
</tr>
</tbody>
</table>

Actually, 27 permutations exist, but they are instances of one of these five types. For example, YYY and ZZZ cases are, for our purposes, indistinguishable from XXX cases and therefore are represented by type (1). Type (1) represents three of the 27 permutations, and types (2)-(5) each represent six of the 27 permutations. Thus, if the three variables were independent, each type would randomly occur in 2/9 of the cases, with the exception of type (1), which would randomly occur in 1/9 of the cases.

If we assume that a jurisdiction with the most connections has the greatest interest in having its law applied and that where each jurisdiction has one connecting factor the place of the tort has a slightly stronger interest, we notice that the lex loci rule handles most cases in the same fashion as a direct appeal to this more ultimate standard. Moreover, the three connecting factors might not vary randomly and independently. A tendency might exist for at least one of the parties to be domiciled in the jurisdiction where the tort occurred, thereby reducing the proportion of type (2) cases where an incorrect result is reached. Thus, if a simple rule is desired, lex loci delictus might be the best. The issue is whether we want a single simple rule. Of course, lex loci delictus exhibits a mapping problem like all formalities: it decides cases of type (2) incorrectly. This alone does not, however, condemn the rule. The issue is whether these "wrong" results are an excessive price for the benefits of a single, simple rule.

Of course, the tie-breaker assumption favors the lex loci rule. We might justify a "place of the plaintiff's domicile" rule with another tie-breaker assumption. If we lack other information, however, some form of tie-breaker rule is required to handle type (5). A lex loci tie-breaker is justified because it involves the most easily ascertainable fact and it points to the jurisdiction that has both a regulatory and a (short term) compensatory interest. See, e.g., Brown, Toward an Economic Theory of Liability, 2 J. LEGAL STUD. 323 (1973); Williams, The Aims of the Law of Tort, 4 CURRENT LEGAL PROBLEMS 137 (1951); cf. Watson v. Employers Liab. Assurance Corp., 348 U.S. 66 (1954).
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less than perfect accuracy: the nature of the issue and an expanded list of connecting factors.\textsuperscript{30} This new method—grouping of contacts—is less formal than lex loci because it attempts to make a more direct appeal to the criterion of significance by utilizing more relevant information. By taking into account information not available under the lex loci method, the judge could reach a "correct" result in cases where lex loci reached "incorrect" results. A greater propensity for correct results, however, is achieved at the cost of a partial loss of the benefits of formalism because the decision requires more information and calls for a more subjective judgment.\textsuperscript{31}

Grouping of contacts is itself a formal approach because it excludes from consideration other relevant information: the content of each jurisdiction's rule and the policies it reflects. By including this new information in its calculus, "interest analysis" eliminates some of the mapping errors encountered when using the grouping of contacts approach.\textsuperscript{32} Whereas grouping of contacts counts a contact in all

\begin{itemize}
\item For torts these would include:
\begin{itemize}
\item (a) the place where the injury occurred,
\item (b) the place where the conduct causing the injury occurred,
\item (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
\item (d) the place where the relationship, if any, between the parties is centered.
\end{itemize}
\textit{Restatement (Second) of Conflict of Laws} § 145(2) (1971).
\item For contracts, absent a choice by the parties, they include:
\begin{itemize}
\item (a) the place of contracting,
\item (b) the place of negotiation of the contract,
\item (c) the place of performance,
\item (d) the location of the subject matter of the contract, and,
\item (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.
\end{itemize}
\textit{Id.} at § 188(2).
\end{itemize}

\textsuperscript{31} Lex loci can also be criticized for its failure to secure absolute predictability. Judgments concerning the applicability and application of the first \textit{Restatement} rules (formulation and characterization) create uncertainty. \textit{See}, e.g., University of Chicago v. Dater, 277 Mich. 658, 270 N.W. 175 (1936); A. Von Mehren & D. Trautman, \textit{supra} note 5, at 487–92. \textit{Compare} Val Blatz Brewing Co. v. Gerard, 201 Wis. 474, 230 N.W. 622 (1930), with Alabama Great S.R.R. v. Carroll, 97 Ala. 126, 11 So. 803 (1892). The relevant consideration, however, is their incremental addition to predictability. They can also be criticized as reaching fortuitous results. \textit{See}, e.g., Goranson v. Capital Airlines, Inc., 345 F.2d 750 (6th Cir. 1965).


\textsuperscript{32} Interest analysis as it is used here most closely corresponds to Brainerd Currie's governmental interest methodology. \textit{See} Currie, \textit{supra} note 5. It also corresponds to the methodology used in Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240
cases, interest analysis counts a contact only if it indicates that a policy behind that jurisdiction's rule comes into play (i.e., is manifested) in the specific factual situation. Thus, interest analysis more finely tunes the analysis to the actual interests of each jurisdiction in individual cases. But again, formal benefits are mitigated, because the identification of policies behind each jurisdiction's substantive rule is a subjective and energy-consuming task.\textsuperscript{33}

Interest analysis, in turn, is itself a formality because it excludes still further relevant information from the analysis. It considers only those policies that support a jurisdiction's domestic rule (i.e., the dominant policies that prevailed in the debate whether to adopt one rule or another). In reality, however, a substantive rule reflects a compromise between competing policies, including policies that were suppressed when the rule was adopted. Additionally, jurisdictions have special interests in multistate situations—such as projecting an image of evenhandedness or upholding expectations which are more legitimate than in wholly domestic situations—that are not necessarily reflected in their domestic rules.\textsuperscript{34} By taking into account suppressed and special multistate interests, "functional analysis" better gauges the strength of each jurisdiction's interest in an attempt to reach correct results in more individual cases.\textsuperscript{35} But again, the insertion of a new level of subjectivity undermines formal values.

Finally, even functional analysis can be analyzed as a formality. Although it takes into account all interests of each jurisdiction, it limits the choice of law to the domestic rules of the concerned jurisdictions. By screening from consideration outcomes other than those dictated by the competing domestic rules, even functional analysis fails to maximize the reconciliation of interests among competing ju-

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\textsuperscript{33} See Part II infra. The change in formal benefits along the range of increasing nonformality is neither necessarily linear nor negatively sloped. For instance, it might well be that interest analysis is more predictable or at least only slightly less predictable than grouping of contacts.

\textsuperscript{34} See, e.g., In re Chappell, 124 Wash. 128. 213 P. 684 (1923); People v. One 1953 Ford Victoria, 48 Cal.2d 595. 311 P.2d 480 (1957); Lillianthal v. Kaufman. 239 Ore. 1. 395 P.2d 543 (1964); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

\textsuperscript{35} See A. VON MEHREN & D. TRAUTMAN, supra note 5, at 80–435.
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risdictions. Thus, a method permitting special multistate results that compromise competing concerns would be even less formal and would theoretically reach correct results in more individual cases. The subjectivity of the method, however, nearly eliminates the benefits of formalism.

An informed choice among choice of law methodologies cannot be made with reference to the rhetoric of either formalism or nonformalism alone. Rather, it should be made with an appreciation of the advantages and disadvantages of each approach in an attempt to find the level of formality that maximizes overall benefits.

II. TWO PROBLEMS

The respective difficulties of formal and nonformal choice of law methodologies can be better understood by examining their specific applications. This section will first examine the difficulties encountered by the New York Court of Appeals when using interest analysis in host-guest statute cases. Next, the shortcomings of the formal approach are illustrated through a discussion of the inability of formal rules to deal with the problem of validation for multistate transactions. These specific problems are presented to demonstrate that the selection of a choice of law methodology poses a dilemma and that different methods representing different levels of formality may be appropriate for different areas of law.

A. The New York Experience with Host-Guest Statutes

Babcock v. Jackson was heralded as a breakthrough for interest analysis and a welcome rejection of the talismanic, rule-oriented approach of the first Restatement. Babcock and its progeny demonstrate, however, the difficulties of abandoning rules. Indeed, as shall be seen in the final case of the New York series, Neumeier v. Kueh-

the court abandoned a purely ad hoc, nonformal approach in favor of a new rule. The factors that led the New York court to reach this conclusion in *Neumeier* can inform a court embarking on a similar journey.

Georgia Babcock was injured when the car in which she was a passenger went out of control, left the highway, and crashed into an adjacent stone wall. The car was driven by her friend, William Jackson, who with his wife and Ms. Babcock was on a weekend outing to Ontario, Canada, where the accident occurred. Ms. Babcock and the Jacksons were New York residents, and the car was garaged and registered there. Ms. Babcock sued Mr. Jackson in New York alleging negligence, and the choice of law issue was whether the claim was barred by Ontario's host-guest statute or allowed by New York law, which permitted suits by guests against their hosts.

Methodologically, the issue was whether Ontario law should be applied merely because Ontario was the place of the tort, as required by lex loci delictus. The court rejected lex loci delictus and used interest analysis to apply New York law as the law of the jurisdiction with the most significant contact. The court divined that Ontario's host-guest statute was designed "to prevent the fraudulent assertion of claims by passengers, in collusion with the drivers, against insurance companies ...."40 Because the Ontario statute was designed to protect insurance companies against collusive claims by friendly hosts and guests, and because an Ontario insurance company was not involved in this case, the court reasoned that Ontario had no legitimate interest in having its host-guest statute applied.41 On the other hand, the applicability of "New York's policy of requiring a tort-feasor to compensate his guest for injuries caused by his negligence [could not] be doubted,"42 because the case involved a New York guest.

On the face of the opinion, *Babcock* is a powerful case for interest

41. The court stated: "Whether New York defendants are imposed upon or their insurers defrauded by a New York plaintiff is scarcely a valid legislative concern of Ontario simply because the accident occurred there ...." 12 N.Y.2d at 483. 191 N.E.2d at 284, 240 N.Y.S.2d at 750.
42. *Id.*
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analysis. Whereas lex loci delictus compels the application of Ontario law, an examination of the policies behind each jurisdiction's rule and the applicability of those policies to the facts reveals a false conflict, with New York alone holding an interest in having its law applied. Lex loci delictus simply commits an egregious mapping error. Closer analysis, however, reveals problems with the court's seemingly simple application of interest analysis.

Once the court determined that the Ontario host-guest statute reflected a policy of protecting Ontario insurers from fraudulent claims, it was necessary to determine whether an Ontario insurer was involved. The court noted that the plaintiff and defendant were New York residents and that the car was garaged and licensed there and concluded that the car was "undoubtedly insured in New York."\(^{43}\)

It is unclear why this necessarily negates Ontario's interest. Even with the territorial assumption that the well-being of New York defendants and insurers is "scarcely a valid legislative concern of Ontario"\(^{44}\) (which is not self-evidently correct), it is unclear what is meant by a "New York insurer." The presumed New York insurer in Babcock was doing business in Ontario, at least to the extent that it insured risks in Ontario. If one of Ontario's policies is to encourage insuring risks within its territory and its host-guest statute advances this policy by protecting insurance companies from collusive suits, then Ontario has an interest in applying its host-guest statute to any accident occurring in Ontario.\(^{45}\) New York may have a greater interest than Ontario, but it is no longer clear, as the court asserts, that "Ontario has no conceivable interest in denying a remedy to a New York guest against his New York host for injuries suffered in Ontario by reason of conduct which was tortious under Ontario law."\(^{46}\)

Another policy which might support Ontario's host-guest statute concerns the regulation of conduct within Ontario's borders.\(^{47}\) Anti-

\(^{43}\) Id.
\(^{44}\) Id.
\(^{45}\) It is true that the insurer was willing to insure risks in New York without the protection of a host-guest statute, but this does not necessarily mean that it would be willing to do so elsewhere where defense burdens or other costs might be greater.
\(^{46}\) 12 N.Y.2d at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.
\(^{47}\) Nor is this the only interest Ontario might have in the application of its host-guest statute. It might have an interest, arising from a conception of justice, favoring the application of the rule equally to all accidents occurring in Ontario. Ontario's interest here might be either a direct concern for equality or an attempt to satisfy a feeling of its citizens that all accidents in Ontario should be governed by uniform law. To be sure, a persuasive argument can be made that treating like cases alike depends
compensation rules such as host-guest statutes protect the assets of tortfeasors, a matter of primary concern to the jurisdiction with which the tortfeasor has a continuing relationship. Liability-limiting rules, however, also influence conduct.\textsuperscript{48} Expanded damages theoretically cause people to be more careful, and limited damages (or a rule that eliminates damages in certain circumstances) will theoretically tend to make people less careful. Because this is a conduct-regulating effect and the conduct in\textit{Babcock} occurred in Ontario, Ontario had a potential interest in having its host-guest statute applied.

It is tempting to conclude that Ontario is indifferent to whether people are more careful, especially when the sanction to make them more careful is not paid by an Ontario resident. At some point, however, the costs of extra care (including both direct costs of safety and foregone opportunities to engage in worthwhile but risky activities) outweigh its benefits.\textsuperscript{49} Other things being equal, Ontario presumably has an interest in having people use the optimum amount of care within its borders. This interest will be frustrated when either too much or too little care is exercised.

If the benefits of taking chances accrue only to the actor, Ontario might be interested only in ensuring that its own citizens can take chances without excessive fear of damages. If the actor's risk-creating activity has collateral benefits for others in Ontario, however, the mere fact that the conduct occurs in Ontario is sufficient to trigger Ontario's interest in having its liability-limiting rule applied. Again, it is difficult to agree, at least on the information given by the court, that "Ontario has no conceivable interest" in having its law applied to the facts of\textit{Babcock}.\textsuperscript{50}

on treating them according to the purposes of the rules that govern them. New York's refusal to apply the Ontario host-guest statute in\textit{Babcock} might not offend a duty to treat like cases alike, because the refusal occurred in a situation where the rule's purposes, as perceived by the court, did not come into play. This, however, is beside the point. Ontario's conception of treating like cases alike, unlike New York's, might be to treat every accident occurring in Ontario alike regardless of the residence of the parties. Of course, it is possible that Ontario does not have such an interest. But the court in\textit{Babcock} did not consider whether or not it does, undermining its assertion that "Ontario has no conceivable interest" in having its law applied.

A related difficulty is the source of information necessary to ascertain a jurisdiction's interests. The court in\textit{Babcock} utilized a periodical. See note 40 \textit{supra}. It is unlikely that courts will be able to do more than divine policies that might support a rule.


49. Thus, Ontario does not impose a ten-mile-per-hour speed limit, even though it would increase highway safety.

50. See text accompanying note 46 \textit{supra}. Another interest Ontario might have in
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The point of this analysis is not to demonstrate that *Babcock* was incorrectly decided. Even if all of Ontario's "conceivable" interests are included in the interest analysis calculus, New York's interest in compensating its plaintiff from the pocket of its defendant seems to outweigh the interests of Ontario. What the analysis does reveal is the fundamental difficulty of interest analysis: identifying accurately the policies reflected in the rules of competing, concerned jurisdictions. To the extent that the identification of policies behind various rules becomes indeterminable and subject to manipulation, the method itself becomes inconclusive and subject to manipulation. If interest analysis is covertly manipulable or subject to unwitting error, either by judges identifying policies or by skillful lawyers suggesting policies, the benefits of formalism are seriously undermined.51

The problems encountered in the *Babcock* analysis multiplied when the New York court encountered variant factual situations. In *Dym v. Gordon*,52 the host and guest were again New York residents, and the car was registered there. Rather than taking a weekend trip outside New York, however, both parties were attending summer school in Colorado where the host-guest relationship was formed. The accident occurred in Colorado and, unlike the single car accident in *Babcock*, involved a second car in which third persons were injured.

Using the policies of host-guest statutes identified in *Babcock*, New York might have applied its own law, because Colorado would have "no conceivable interest" in protecting a New York insurer from collusive claims by a New York driver and his New York guest. The *Dym* court, however, identified a new policy behind host-guest statutes. The guest was denied recovery in order to protect the recovery fund—including the defendant's assets and insurance proceeds—for adopting its host-guest statute is encouraging passengers to be better lookouts, knowing that their own safety is in their own hands since they cannot rely on recovery. Of course, this benefit could be offset by the increased carelessness of drivers, but it might nevertheless reflect Ontario's judgment concerning the optimum combination of driver and passenger care. Since this would be a conduct-regulating policy and the conduct occurred in Ontario, it would be manifested in *Babcock*. While this might be a contrived policy, no criteria in *Babcock* exclude it from the calculus.

51. Even if manipulation and error were not problems, the costs of gathering the necessary information to apply the method properly are imposing. How did the court know, for example, that Ontario's actual policy was to prevent collusive claims, that Ontario was not interested in encouraging socially beneficial risky conduct, or even that Ontario was not interested in protecting the assets of a New York resident because they would ultimately be devised to an Ontario heir? Even if interest analysis is applied with absolute good faith and skill, the costs of accumulating this information are significant.

52. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).
injured third persons. This was certainly a plausible interest behind Colorado’s host-guest statute, and it was manifested in Dym because there was an injured Colorado resident for whom the recovery fund could be protected.

The use of a new policy not even mentioned in Babcock creates the appearance that policies can be divined to manipulate a result. It might appear fortuitous to the plaintiff in Dym that his recovery was barred because, unlike Ms. Babcock, he was unlucky enough to be involved in an accident with a second car. The sudden appearance of a new policy in Dym might be explained by asserting that it was not manifested in Babcock because there were no Ontario third parties. For all the court knew, however, a third party might have suffered damage in Babcock when the car went off the road. Indeed, the Babcock opinion noted that the car hit “an adjacent stone wall,”53 which suggests that the adjacent landowner might have suffered damage. Defendant’s counsel in Babcock would have perceived no need to plead and prove that fact at trial, because it was irrelevant to personal injury tort liability, and it was irrelevant to choice of law prior to Dym. Thus, Dym appears to result from the identification of a new policy by counsel or court. This appearance could have been avoided by a more careful identification of policies in Babcock, but it is the very difficulty of this task which undermines the viability of interest analysis.54

Dym reveals yet another problem of interest analysis—the lack of a method for resolving true conflicts. After collecting the information and identifying the policies necessary to apply interest analysis, the Dym court demonstrated that both Colorado and New York had an interest in having their respective rules applied to the facts of the case. Without formulating criteria by which a true conflict is to be resolved,

53. 12 N.Y.2d at 476, 191 N.E.2d at 280, 240 N.Y.S.2d at 745.
54. Even the facts known to the court in Dym were insufficient to properly apply interest analysis. If the totality of claims against the recovery fund were insufficient to exhaust it, Colorado’s interest in ensuring recovery by third parties would not come into play. But the court made no attempt to determine whether the fund was in danger of exhaustion. Indeed, to do so would require awaiting settlement of other claims before determining which law would control the guest’s claim, thereby raising administrative difficulties as well as the spectre of fortuity in the eyes of the parties. These difficulties might be mitigated by invoking this policy whenever a third party injury of any magnitude is involved, but then Babcock might have invoked it as well.

The court might have invoked a special multistate rule simply by giving third parties priority in their claims. See notes 35–36 and accompanying text supra. The court did not, however, consider this possibility.
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the court simply chose to apply Colorado rather than New York law. Various methods are available for resolving true conflicts, but they either involve elements of formality or raise interest analysis to still higher levels of sophistication. If a formal approach is used to resolve true conflicts, it is plausible to consider a formal answer (e.g., the place of the accident or the plaintiff's domicile) instead of interest analysis. Even if the difficulty of identifying policies in interest analysis is sometimes justified, its justification is questionable when it reaps nothing but a true conflict which is resolved formally.

The New York court encountered still further difficulties with interest analysis in Tooker v. Lopez. The factual situation was similar to that in Dym: the host and guest were New York residents riding in a "New York car," and the accident occurred in Michigan, where they were attending school. The only significant difference between the facts in Tooker and those in Dym was that no third party was injured in Tooker. This would, of course, indicate that the policy of protecting the recovery fund did not come into play. The court was willing, however, to overlook this distinction and decide the case as though it were indistinguishable from Dym. The court then apparently overruled Dym and applied New York law.

The error of Dym was revealed in Tooker by a more sophisticated analysis of the policies behind host-guest statutes. It was now apparent, the court argued, that because the host-guest statutes permit guests to recover if the host is grossly negligent, they do not reflect a policy of protecting the recovery fund for injured third parties.

55. Various methods of resolving true conflicts distinguish submethods within interest analysis. In addition to subjectively evaluating the respective governmental interests, the court could automatically apply forum law. See, e.g., Currie, supra note 5, at 178; W. Reese & M. Rosenberg, Conflict of Laws 523-24 (6th ed. 1971) (explication of Currie's methodology); Lilianthal v. Kaufman, 239 Ore. 1, 395 P.2d 543 (1964). But see Casey v. Manson Constr. & Eng'r. Co., 247 Ore. 274, 428 P.2d 898 (1967). The court could also apply the more enlightened law, see, e.g., R. Leflar, American Conflicts Law 243-45 (1968), or it could resort to the even less formal method of functional analysis, see A. von Mehren & D. Trautman, supra note 5, at 80-435.

56. While interest analysis will be useful to the extent that it reveals false conflicts, the analysis of Babcock suggests that they will be rare.


58. Id. at 574-75, 249 N.E.2d at 397, 301 N.Y.S.2d at 523.


60. The court reasoned as follows:

The teleological argument advanced by some . . . that the guest statute was intended to assure the priority of injured nonguests in the assets of a negligent
policy, as originally recognized in Babcock, was simply to protect insur- 

The only justification for discrimination between injured guests which 

It is apparent from Tooker that the court had, by its own admission, 

The formal approach produces errors due to mapping problems 

host, in addition to the prevention of fraudulent claims, overlooks not only the 

24 N.Y.2d at 575, 249 N.E.2d at 397, 301 N.Y.S.2d at 523–24. 

61. Id. at 575, 249 N.E.2d at 397, 301 N.Y.S.2d at 524. 

62. Of course, the fact that interest analysis leads to an error in one case is in-

A related point which emerges from a comparison of Tooker and Dym is that like 

A plaintiff in Dym must now be told that although his case was treated as being identical to Tooker,
Even if *Tooker* were not inconsistent with *Dym*, its reasoning is fallacious because it involves a *non sequitur*. Significantly, it is fallacious for the very reason under discussion: it inadequately analyzes the policies behind the Michigan host-guest statute. The court concluded that, if protecting the recovery fund were a policy behind host-guest statutes, it would be irrational to distinguish between negligent and grossly negligent conduct so as to protect the fund against the former but not the latter. There are two reasons why it would not be irrational to make such a distinction. First, protecting the recovery fund for injured third persons is only one policy behind a host-guest statute; it supplements the policy of protecting insurance companies from collusive suits. The combination of these policies might persuade Michigan to suppress its policy of compensating victims. But in cases where the risk of collusive claims is reduced (i.e., where the plaintiff can prove gross negligence), the policy of protecting the recovery fund alone might not outweigh the policy of compensating victims. Thus, the bifurcated standard of a host-guest statute is consistent with a policy of protecting the recovery fund for injured third persons.

Secondly, Michigan's reason for protecting the recovery fund might be the likelihood of fraud in guest claims rather than an inherent preference for third persons over guests. Michigan might feel that whatever the equities between guests and third parties in their own right, third parties at least should have the insurance fund protected against classes of claims that are more likely to be fraudulent. Under the *Tooker* court's analysis of Michigan's policies, guest claims proving mere negligence are more likely to be fraudulent than those proving gross negligence. Therefore, it is rational for Michigan to protect the fund in the former situation but not in the latter. Yet the court was unable "to perceive any rational basis for predicating that protection on the degree of negligence the guest is able to establish."63 One wonders

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6. 24 N.Y.2d at 575, 249 N.E.2d at 397, 301 N.Y.S.2d at 524.
whether the court would reinstate *Dym* if presented with this new analysis of policies.\textsuperscript{64}

New York reduced its methodological problems in *Neumeier v. Keuhner*,\textsuperscript{65} where "[a] domiciliary of Ontario, Canada, was killed when the automobile in which he was riding, owned and driven by a New York resident, collided with a train in Ontario."\textsuperscript{66} In what looked like another case for interest analysis, the court withdrew from a case-by-case examination of policies for many of the reasons explored above.\textsuperscript{67} Instead, the court promulgated three rules to decide host-guest cases.\textsuperscript{68} Schematically they are as follows:

(1) Host + guest + car = choice of that jurisdiction's law.
(2a) Host + accident + host-guest statute = choice of that jurisdiction's law.
(2b) Guest + accident + no host-guest statute = choice of that jurisdiction's law.
(3) Otherwise, choose the law of the place of accident unless a reason exists to displace the normally applicable rule.

The effect of the "unless" clause of rule (3) is unclear. *Neumeier* pre-

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\textsuperscript{64} After *Tooker*, an attorney in New York with a host-guest problem might have had "more need of an ouija board ... than a copy of Shepard's citations." Rosenberg, *Two Views on Kell v. Henderson*, 67 COLUM. L. REV. 459, 460 (1967). Even when applied correctly, interest analysis has information-gathering costs and does not adequately resolve a true conflict. At this point, we might ask whether the mapping errors caused by a more formal approach are so intolerable that they must be avoided even at the cost of the confusion created by interest analysis.

\textsuperscript{65} 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

\textsuperscript{66} Id. at 123-24, 286 N.E.2d at 455, 335 N.Y.S.2d at 66.

\textsuperscript{67} The court commented as follows:

[O]ur decisions in multi-state highway accident cases, particularly in those involving guest-host controversies, have, it must be acknowledged, lacked consistency. This stemmed, in part, from the circumstance that it is frequently difficult to discover the purposes or policies underlying the relevant local law rules of the respective jurisdictions involved. It is even more difficult, assuming that these purposes or policies are found to conflict, to determine on some principled basis which should be given effect at the expense of the others.

The single all-encompassing rule which called, inexorably, for selection of the law of the place of injury was discarded, and wisely, because it was too broad to prove satisfactory in application. There is, however, no reason why choice-of-law rules, more narrow than those previously devised, should not be successfully developed, in order to assure a greater degree of predictability and uniformity, on the basis of our present knowledge and experience.

\textit{Id.} at 127, 286 N.E.2d at 457, 335 N.Y.S.2d at 69 (citations omitted).

\textsuperscript{68} The court stated the rules as follows:

1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.
2. When the driver's conduct occurred in the state of his domicile and that state
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sented a case where it might have been invoked, but "the plaintiff . . . failed to show that [New York's] connection with the controversy was sufficient to justify displacing the rule of lex loci delictus." Because it was not invoked in Neumeier, it is unclear whether it will ever be invoked, or if it is, how the case could be distinguished from Neumeier. If the "unless" clause of rule (3) is inoperative, the three rules are entailed by a much simpler rule:

Lex loci delictus unless guest + host + car coincide in a single state, in which case that state's rule is applied.

This is simply a slight modification of lex loci delictus to account for cases where the lex loci mapping problem is most acute.

The New York experience indicates that the lex loci approach was erroneous not because it was a rule but because it was not quite the right rule. It also illustrates the difficulty of nonformal interest analysis and vindicates the utility of rules as a rational choice of law methodology.

B. Rules of Validation

Although the New York host-guest cases demonstrate the difficulties of interest analysis and vindicate formal rules, the serious mapping problems of rules should not be overlooked. This section will examine the issue of validating multistate transactions to fulfill legitimate party expectations—an area where rules have special mapping problems. The inability of rules to deal effectively with this issue high-

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Id. at 128, 286 N.E.2d at 457–58, 335 N.Y.S.2d at 70.

Id. at 129, 286 N.E.2d at 458, 335 N.Y.S.2d at 71.

lights the irreconcilable tension between formalism and nonformalism and the dilemma it poses for courts.

When cases involving multistate transactions are analyzed individually—identifying all interests and policies of concerned jurisdictions, including suppressed and special multistate interests under functional analysis—a general policy in favor of validating multistate transactions emerges. This is due to the fact that the frustration of party expectations has greater significance in multistate than in domestic transactions. The question is whether choice of law methodology should vindicate this policy on a case-by-case basis or should instead adopt a formal rule of validation applicable over broad areas of substantive law.

Even where a state's domestic law frustrates party autonomy with a rule like the Statute of Frauds, the state need not be insensitive to the parties' expectations. While a dominant policy supporting the invalidation of a transaction might have prevailed in the adoption of the domestic rule, a suppressed interest of upholding party expectations is nevertheless present. This interest is weaker in a wholly domestic situation, because the applicable invalidating rule is ascertainable. The parties can mitigate their frustration by complying with the rule (e.g., by putting their contract in writing to comply with the Statute of Frauds) or can avoid reliance on the transaction if compliance is impracticable. On the other hand, in multistate situations the parties can more legitimately claim ignorance of the applicability of the invalidating rule. For example, they might legitimately claim that they thought their transaction was valid under the law of another concerned jurisdiction. Thus, the suppressed interest of upholding party

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71. There are issues, like the interpretation of contracts, where the primary goal of domestic substantive law is to effect the will of the parties. If the parties could have chosen in substantive terms how to regulate their respective rights and duties, choice of law principles should adhere to their expression of expectations. Since parties generally will have anticipated their transactions to be valid, choice of law rules should tend to validate transactions in areas where the parties are given the power of choice under domestic substantive law. See Siegelman v. Cunard White Star Ltd., 221 F.2d 189, 194–96 (2d Cir. 1955); Restatement (Second) of Conflict of Laws § 187 (1971). But most rules that invalidate transactions, such as the doctrine of consideration and the Statute of Frauds, are designed specifically to frustrate party choice and autonomy in certain situations. In these areas, it would be incongruous to base a rule or policy of validation on party autonomy. But see Siegelman v. Cunard White Star Ltd., supra; Restatement (Second) of Conflict of Laws § 187 (1971).

72. For example, parties cannot comply with incapacitating rules based on the nature of the parties or the subject matter. See, e.g., Meacham v. Jamestown, Franklin & Clearfield R.R., 211 N.Y. 346, 105 N.E. 653 (1914).
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expectations is relatively stronger in the multistate situation, and a jurisdiction might be inclined to validate multistate transactions more readily than purely domestic ones. A policy of validation is especially appropriate where the jurisdiction that has an invalidating rule was not reasonably connected to the transaction at the time of its execution. Thus, the strength of the policy varies depending on the foreseeability at the time of the transaction of a connection with a specific jurisdiction.

Another factor which affects the strength of the policy of validating multistate transactions is the nature and purpose of the domestic rule. Some invalidating rules are designed to protect individual parties and do justice in individual cases. For example, the invalidity of oral promises to make testamentary gifts under a Statute of Frauds protects individual estates against fraudulent claims which the decedent cannot refute. Although this may frustrate valid claims, the justification is that however attractive the claim seems, experience teaches us that invalidating such claims does justice in the majority of cases. Thus, in this area, the Statute of Frauds is our best guess at justice in the individual case.

In contrast, some invalidating rules are designed to sacrifice justice in individual cases to further a more general social benefit. For example, a Statute of Frauds that requires written contracts between living persons encourages written evidence that either prevents misunderstanding or makes litigation easier for a court to handle if it occurs. Similarly, an invalidating rule like the Rule Against Perpetuities is designed to prevent commerce from becoming clogged with inalienable property. Even if justice in an individual case would be promoted by ignoring the invalidating rule, the court will nevertheless apply it to give credibility to the command and thereby secure the future social benefit.

73. For example, it seems particularly harsh to invalidate a will under the law of the testator's domicile at death when the decedent did not move to that jurisdiction until after the will was executed, see Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961), or, similarly, to invalidate a chattel mortgage on an automobile, valid where executed, because it is invalid under the law of a state to which the car was unforeseeably driven, see People v. One 1953 Ford Victoria, 48 Cal. 2d 595, 311 P.2d 480 (1957). This is true even though the decedent's domicile at death or the situs of a chattel are very important connections for choice of law in each respective area.

74. Invalidating rules need not be purely of one type. For example, the invalidity of oral promises to make testamentary gifts facilitates the judicial process and a "two witness rule" reduces the chance of an incorrect result in an individual case. Similarly,
When an invalidating rule is primarily designed to do justice in individual cases, there is no special reason to prefer validation through choice of law principles; the very purpose of the domestic rule suggests that an injustice is likely to occur if the transaction is upheld. On the other hand, when an invalidating rule is designed to secure a general social benefit, a special case for validation can be made on the theory that the social goal of the invalidating rule is substantially effectuated if nearly all transactions conform to its terms. For instance, commerce will remain unclogged if nearly all property is unfettered, and courts can remain unclogged if nearly all litigation is based on written rather than oral evidence. The detriment to the general social goal will be even less when the domestic rules of the competing jurisdictions differ only in detail, such as the length of time specified by the Rule Against Perpetuities. Thus, there can be exceptions to enforcement, especially when they are sufficiently distinguishable that they do not undermine the credibility of the command to the domestic population.

This argument in favor of selective validation enhances the earlier argument concerning the special weight of party expectations in the multistate situation. It is more justifiable to sacrifice parties to further a general social benefit, if it is clear that the parties were or should have been on notice at the time of their transaction that it would fall under the invalidating rule. It is less justifiable to make an example of parties when it becomes unclear whether they could have anticipated that the law of the invalidating jurisdiction would be applied to their transaction.

The strongest argument for validation occurs in cases where the invalidating rule furthers a general societal benefit but is mandated by a jurisdiction that did not become connected with the transaction until

usury rules seek both to protect individual debtors and to regulate the price of credit by preventing creditors from bidding it up. The point is that different invalidating rules have different emphases.


In addition to supporting this rationale for validation, the fact that two jurisdictions' rules effect similar policies but differ in detail is an independent reason for validation. Even where an invalidating rule is designed to do justice in individual cases, justice will not necessarily be frustrated by applying a similar rule that differs in detail only.

76. This is similar to exempting an ambassador from altering his smog control device if the car complies with foreign law, but not exempting him from stopping at red lights.
after its execution. Conversely, the weakest case for validation occurs where the invalidating rule seeks justice in individual cases and is mandated by a jurisdiction with a close connection to the transaction from the beginning. Cases are more difficult where pro-validation and anti-validation arguments collide.

Further complexity arises from the fact that within substantive areas, policies change from issue to issue. For example, whereas the Statute of Frauds reflects policies that are of greatest concern to the decedent's domicile, the Rule Against Perpetuities reflects policies of greatest concern to the situs of the decedent's property. Coupled with the crosscutting rationales for validation, this creates a complex situation refusing adequate treatment by a single rule. While a sufficiently complex rule system could anticipate most situations, its complexity would defeat many of the benefits of having an easily applicable rule. Thus, the imposition of a single rule or simple rule system on this area of choice of law might result in serious mapping problems, with the rules creating more harm than good.

The New York host-guest cases and the cases involving the validation of multistate transactions exemplify the dilemma of choosing between formal and nonformal choice of law methodologies. Neither formalism nor nonformalism offers a panacea; each mitigates problems of the other only to add problems of its own. The host-guest and validation examples suggest an irreconcilable tension between formal and nonformal approaches, at least at the practical level. Although we can search for solutions, even mixtures, that maximize benefits or minimize detriments in specific areas, we should recognize the ever-present drawbacks of each approach and abandon a search for methodologies that are ideologically pure. Moreover, even the treatment given here of the host-guest and validation problems suggests that different levels of formality are appropriate for different areas of law.

The New York host-guest cases suggest caution before hasty adoption of nonformal methods like interest analysis. One can be easily deceived into believing that more information is always better, that

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77. E.g., People v. One 1953 Ford Victoria, 48 Cal. 2d 595, 311 P.2d 480 (1957). The situation is even more complex because a third variable—whether the competing rules differ only in detail—also varies independently.

78. Whether the tension is irreconcilable at the theoretical level is beyond the scope of the present discussion. Compare H. Hart & A. Sachs, supra note 11, with Kennedy, supra note 8. See generally R. Unger, supra note 15.

79. See note 11 supra.
justice should be pursued in each case, and that a rule should never be applied when doing so would frustrate its own purpose. If nothing else, the New York experience suggests caution in the acceptance of these notions. The counterweight of the validation cases and the complexity and tension in choosing between formalism and nonformalism have a broader message. Choices among choice of law methodologies should be made with an awareness of the complexity of the choice rather than with an a priori commitment to the rhetoric and ideology of either formalism or nonformalism.

III. CONCEPTUALISM AND INSTRUMENTALISM

The foregoing analysis of formalism has focused on the pressures which mapping problems exert on the application of formal rules. As noted in Part I, however, formal rules also exhibit a freezing problem, in that they reflect policies of one era that become out of tune with conditions of a new era. An analysis of this aspect of formalism facilitates insight into contemporary developments in choice of law methodology and helps overcome the myopia inherent in dealing with a current phenomenon.

Although the lex loci rules championed by Professor Beale and the first Restatement can be analyzed as formally pursuing the goal of selecting the jurisdiction with the most significant interest in regulating a transaction, historically they were justified through the conceptualism of the vested rights theory. Like many of his predecessors, Professor Beale developed a conceptual theory explaining why one sovereign defers to the law of another and defining the power of sovereigns and the legal obligations of individuals in multistate situations. His vested rights theory held that if a right or obligation was created, it followed the person and could be enforced everywhere. Because the forum enforced a preexisting right, it applied the law of the place

80. See note 29 and accompanying text supra.
82. See, e.g., S. LIVERMORE, DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS (1828); J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834). See also W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942).
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where the right was created to determine its existence and scope. It was from these principles that the lex loci rules were derived. A right was created when and where the last act occurred that gave rise to liability, which for torts was the injury and for contracts was the last act forming a contract or the act constituting a breach. As conceptualism gave way to instrumentalism (i.e., the notion that law should advance social policies rather than merely flow from a conceptual construct), the rationale of the lex loci rules was no longer accepted by judges called on to apply them. A freezing problem existed because a rule system reflecting a bygone intellectual paradigm remained static while the underlying outlook of the legal community was changing.

In such cases the pressure of stare decisis reflecting formal values initially supports the bygone rule system. When new values shift sufficiently, however, results mandated by the old rule system become increasingly intolerable. Thus, old rules tend to crack under the increasing pressure of the freezing phenomenon and give way to a new order. The new order might be either a new set of rules, as formal as the old rules but with a new content reflecting prevailing values, or an era of nonformalism with direct appeal to the new values. In the latter case it may be expected that rules generally, rather than merely the specific rules of the old order, will come under attack in conjunction with an appeal to the values of nonformalism.

The recent break with the old order in choice of law has taken the latter course, which is not atypical of the judicial process generally. Although it is difficult to explain precisely why this course has been taken, two suggestions can be made. First, a methodological shift from formalism to nonformalism rather than a direct substantive shift from one rule system to another gives the judicial process the appear-

83. Instrumentalism is used in this discussion merely to refer to the idea that rules or decisions should reflect social policy rather than be derived solely from a logical, conceptual system. Instrumentalism is not, as it might be, used to refer to a theory in which rules are followed only if doing so would advance their social policy bases. See generally Horwitz, The Emergence of an Instrumental Conception of American Law, 1780–1820, in 5 Perspectives in American History 287 (1971).

84. If the lex loci rules were purely logical derivatives from the vested rights theory they would not, of course, commit mapping errors vis-a-vis vested rights. The concept of mapping errors applies only to formal rules and not to logical entailments.

85. Stare decisis is the archetypical legal formality, because it directs judges to disregard solutions except as embodied in precedents.

86. See generally Horwitz, supra note 83; Kennedy, supra note 8.

87. See notes 93–100 and accompanying text infra.
ance of propriety. A direct shift from one rule system to another must be justified in terms of changing values. While legal realists have shown that an appeal to value is often unavoidable, judges are more comfortable appealing to a harmonization of values as defined by legislators and precedents than they are defining new values themselves. A methodological shift from formalism to nonformalism need not explicitly rely on changing values because it can be justified in the jurisprudential terms of the mapping problem. New results can then be justified with direct reference to new values without mention of the fact that these values differ from those which generated the rules of a bygone era. Even if reference is made to a shift in values, a methodological change can be justified at least partially with reference to methodological concerns, softening the appearance of judicial legislation. By focusing on the mapping problem and the level of formality, a court can divert attention from a possibly controversial value shift, or make the shift appear less abrupt and arbitrary. Second, while it is easy to determine that old rules grate on sensibilities created by new values, it is difficult to develop immediately a formal rule system that translates new values into results. A new formal order cannot intelligently be created until the new value paradigm, hidden by the old formal system and therefore not openly discussed and debated, is fully understood. An understanding of policies behind rules and reasoned distinctions between cases, as well as experience with predictability and the quantity of litigation, is required before common law rule-makers become sufficiently proficient with the new values to promulgate new formal rules. Immediately adopted new formal rules may be mistaken, and they would screen factors and cut off debate about the new values which judges seek to understand.

Because it is difficult to design a new order immediately from the perspective of an old order or its ashes, it is reasonable to develop the new order slowly in an era of flexible nonformalism. In such an era, the costs of nonformalism could be justified not only as avoiding

88. See Holmes, supra note 12, at 464–68.
90. Although the new rules could continue to be altered until they reflect the new value paradigm, overly frequent changes make the judicial process appear arbitrary and undermine many of the formal values supporting rules as rules. Moreover, even with frequent rule changes, the policy discussion inherent in nonformalism and necessary to promulgate informed rules would be curtailed.
the costs of formalism within the era but also as informing the promulgation of new formal rules. Thus, the period of nonformalism will pay dividends for the entire life of a new formal order.

This process occurred in the New York host-guest cases. It was possible to make a decision in Babcock that lex loci delictus should be abandoned, but insufficient information and experience existed to develop a new formal rule. As more cases were decided, however, greater understanding developed concerning the policies and values at stake in host-guest situations. After experience with the new value system, which would have been hidden by an immediate promulgation of new rules in Babcock, the court in Neumeier was in a better position to promulgate a rule that would withstand the test of time. Thus, the process involved (1) a rejection of an old rule system in favor of both nonformalism and a new set of underlying instrumental values, (2) an era of nonformalism where the new values became understood, and (3) a crystallization of new formal rules reflecting the new value system.92

The model of judicial change exhibited by the New York host-guest cases is not atypical of judicial paradigmatic shifts. For example, flourishing nonformal instrumentalism in the early 19th century fits a similar model. Notwithstanding the formal values of stare decisis, application of 18th-century protective notions of property inflicted increasing costs on economic development.93 Thus, the old rules cracked and gave way to a new order of pro-developmental decisions, such as the reasonable use doctrine in riparian rights94 and negligence in torts.95 The new standards were nonformal, thereby inviting an inquiry into reasonableness in each case. Formal rules could have been developed at the outset to define reasonableness, but it is unlikely

92. The rules need not crystallize in one step. Nonformalism can give way to guidelines which in turn can be replaced by presumptions before the court is confident enough to announce formal rules. See Reese, supra note 89, at 323. The “unless” clause in rule (3) in Neumeier can be viewed as a response to these considerations. Neumeier v. Keuhter, 31 N.Y.2d 121, 128, 286 N.E.2d 454, 458, 335 N.Y.S.2d 64, 70 (1972).
93. See generally Horwitz, supra note 83. Although monopolistic, vested rights property rules might have been required to attract high risk capital from first entrants, such rules frustrated second entrants equipped with better technology.
that judges had sufficient understanding of or experience with the embryonic economy to promulgate wise rules. Thus, the fact that the frozen 18th-century rules were out of alignment with prevailing economic conditions put pressure on them that led to their collapse and the rise of a flexible, instrumental era of judicial reasoning.

Moreover, formal values did not strike a chord in the beginning of the 19th century and therefore did not support stare decisis and the application of the old rules in spite of their content. Predictability was provided to a limited extent by a rising professional bar that could predict (or control) without formal rules. Moreover, the control of judges was unlikely to be perceived as a significant problem in an era when values were shared, at least among those in power. With the costs of formalism high and its benefits low, it is not surprising to find that nonformal instrumentalism flourished in the early part of the 19th century. Nor is it surprising to find a return to formalism later in the century when shared values collapsed following the Civil War and legal doctrines, developed in an era of nonformalism, had become aligned with the new economic order.

Whatever its shortcomings due to generalization and simplification, an historical view of this process can provide participants in the development of choice of law methodology a perspective that mitigates myopia. By revealing the contingency of formal and nonformal rhetorics upon changing social conditions, an historical perspective can help judges resist the temptation of committing themselves to the ideology of nonformalism as a determinant of methodology in perpetuity. Different methodologies strike a chord at different stages of legal development. After a bygone order has been dismantled and sufficient understanding of the new order is attained during a nonformal period, judges should be prepared to explore cautiously a new formal system.

99. An historical perspective also mitigates the tendency of modernity to find old approaches laughable and naive. It often turns out that they simply responded to different conditions.
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It would be appropriate for courts to consider this approach for choice of law methodology, and in this respect, the New York host-guest cases might be prophetic. 100

IV. WASHINGTON CHOICE OF LAW METHODOLOGY

Although Washington has clearly abandoned lex loci for both contracts 101 and torts 102 in favor of the "most significant contacts" approach, the contours of the new approach are unclear. Specifically, Washington has not clearly chosen among the various nonformal methods discussed in Part I. Thus, Washington choice of law methodology is at a sufficiently formative stage that the court has not yet foreclosed the opportunity to select carefully a method based on the considerations discussed above, including a return to carefully formulated rules developed during a period of nonformality.

The Washington Supreme Court has considered four choice of law cases involving contracts in which the "most significant contacts" approach has been applied. In Baffin Land Corp. v. Monticello Motor Inn, Inc., 103 a Delaware corporation contracted to rent television sets to a hotel operated by a Washington resident and his wife. Subsequently, the hotel operators were divorced. The litigation involved the wife's liability for this obligation of the hotel. The contract was negotiated and signed by the lessee in Washington, but because it was later signed by the lessor in New York, it was a "New York contract," and lex loci contractus would have dictated the application of New York law. The court abandoned lex loci contractus, claiming that it did not always achieve its goal of simplicity and predictability on the one hand and that it was not sufficiently flexible to handle the variety of multistate transactions on the other. 104 The court then hinted at the contours of its new method.

The court explicitly declined wholesale adoption of the Restatement (Second), but it did "acknowledge [its] reliance on the work of

100. See Reese, supra note 89, at 318–24.
103. 70 Wn. 2d 893, 425 P.2d 623 (1967).
the drafters of the Second Restatement as the basic stepping stone in [its] attempt to arrive at a better contracts choice of law doctrine."

Absent more specific guidance, we must start with the proposition that the new Washington method is roughly outlined in the Restatement (Second), but its details are unclear. In terms of the analysis presented in Part I, the court did not explicitly choose between "grouping of contacts," in which a court does not take into account the content of and policies behind each jurisdiction's rule, and interest analysis, in which a court does make such an inquiry.

The court did indicate that "[t]he approach is not to count contacts, but rather to consider which contacts are most significant and to determine where those contacts are found." At first glance, this might be seen as an adoption of interest analysis. Contacts, however, can vary in significance in ways other than those revealed by interest analysis. Certain issues, such as ceremonial formalities of a contract, might heighten the significance of the place of the contract's execution, whereas other issues, such as execution against community property, might enhance the significance of the parties' domicile. Therefore, refusal merely to count contacts does not entail an adoption of interest analysis.

Indeed, the court's application of the new method to the facts of Baffin indicates that interest analysis was not used. The court identified the significant contacts, assigned them to the respective con-

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105. 70 Wn. 2d at 900, 425 P.2d at 627. In terms of nomenclature, the court equated the "most significant relationship" theory with the "center of gravity" theory, using the two expressions interchangeably. Id. at 896 n.1, 425 P.2d at 625 n.1.

106. Id. at 900, 425 P.2d at 628 (emphasis in original).

107. The court noted the following formulation:

(1) In the absence of an effective choice of law by the parties consideration will be given to the following factors, among others, in determining the state with which the contract has its most significant relationship:

(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the situs of the subject matter of the contract,
(e) the domicile, residence, nationality, place of incorporation and place of business of the parties,
(f) the place under whose local law the contract will be most effective.

(2) If the place of contracting, the place of negotiating the contract and the place of performance are in the same state, the local law of this state ordinarily determines the validity of the contract, except in the case of usury. . . .

Id. at 901, 425 P.2d at 628, quoting Weintraub, The Contracts Proposals of the Second Restatement of Conflict of Laws—A Critique, 46 IOWA L. REV. 713, 723 (1961) (quotation of November 1960 modification of § 322b tentative draft). This listing originated in Restatement (Second) of Conflict of Laws § 322b, comment h (Tent.
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cerned jurisdictions, and determined that certain of them were more significant:

[T]he contacts . . . involving the places of contracting, negotiation, and performance seem to be the most important in the present case, with emphasis here on the place of performance since it was one of the parties sole place of business, the place where the parties actually did business together, and the place whose laws the parties most likely had in mind in this type of a transaction.

The court concluded that Washington had the most significant contacts and that its law should therefore govern the wife’s contractual liability. Nowhere in its choice of law analysis did the court refer to the content of either jurisdiction’s rule or the policies supporting it. Only after choosing Washington law did the court relate its content, and nowhere was the content of New York law discussed.

Pacific States Cut Stone Co. v. Goble, decided the same day as Baffin, shed little additional light on the new method. Like Baffin, it involved the issue of marital community liability for a contractual obligation, in this instance a contract for the sale of a piece of machinery. The seller was a Washington corporation and the purchasers and their wives were Washington residents. Numerous contacts with Oregon were present, however, and the court concluded that Oregon law controlled:

The contract was executed in Oregon, at least part of the negotiations took place in Oregon, the seller completely performed in Oregon, and

Draft No. 6, 1960). For the present listing, see Restatement (Second) of Conflict of Laws § 188 (1971).

108. Since there was no express choice of law determined by the parties in the present instance, we shall apply the above factors to the facts before us. The place of contracting was in New York. The place of negotiation of the contract was at least partially in Washington. . . . At least the major portion of the performance of the contract was to, and did, take place in Washington. . . . If there can be said to be a subject matter of the instant contract, it was the television sets which were installed in Washington. [The lessee] was domiciled in and a resident of Washington at the time of contracting, and [the lessor], a Delaware corporation, was authorized to and was doing business in Washington.

70 Wn. 2d at 901-02, 425 P.2d at 628.

109. Id. at 902, 425 P.2d at 628.

110. It is difficult to draw firm conclusions from the court’s explicit application of its method in an individual case. The judges might have implicitly relied on factors included in interest analysis.

111. 70 Wn. 2d 907, 425 P.2d 631 (1967).

112. Id. at 909, 425 P.2d at 632.
the situs of the subject matter of the contract at the time of contracting as at the time of performance by the seller was in Oregon. Most significant is that the place of delivery of possession by the seller was in Oregon. . . . We find, therefore, that application of the most significant contacts rule produces the same result as that obtained by application of the rule of lex loci contractus, which, as indicated above, is no longer the law of this jurisdiction.

Again, nowhere in the choice of law process did the court identify the content of Washington and Oregon law and examine the policies they reflect. Only after deciding to apply Oregon law did the court mention its content. Like Baffin, Pacific States contains little indication that the court is inclined to engage in interest analysis, notwithstanding the comment in Baffin that the new method involves more than simply counting contacts.

Potlatch No. 1 Federal Credit Union v. Kennedy,113 however, offers conflicting evidence. A promissory note between a Washington borrower and an Idaho lender, secured by personal property in Washington and executed in Idaho, was cosigned by the borrower’s brother, a Washington resident. In a suit against the Washington cosigner, the issue was whether his marital community was liable. Under Washington law the marital community would be liable for suretyship debts only if the marital community was benefited by the obligation, whereas under Idaho law the marital community would be obligated notwithstanding lack of benefit.

The Potlatch opinion reiterated the language of Baffin that the new method is not merely to count contacts, and then the court proceeded to apply interest analysis and even elements of functional analysis. Moreover, the court was explicit about its enterprise:114

114. Id. at 810, 459 P.2d at 35. The court quoted at length from a comment in the Restatement (Second) that clearly contemplates interest analysis:

c. Purpose of contract rule. The purpose sought to be achieved by the contract rules of the potentially interested states, and the relation of these states to the transaction and the parties, are important factors to be considered in determining the state of most significant relationship. This is because the interest of a state in having its contract rule applied in the determination of a particular issue will depend upon the purpose sought to be achieved by that rule and upon the relation of the state to the transaction and the parties. So the state where a party to the contract is domiciled has an obvious interest in the application of its contract rule designed to protect that party against the unfair use of superior bargaining power. And a state where a contract provides that a given business practice is to be pursued has an obvious interest in the application of its rule designed to regulate or to deter that business practice. On the other hand, the purpose of a rule and the
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Certainly an identification of contacts is meaningless without consideration of the interests and public policies of potentially concerned states and a regard as to the manner and extent of such policies as they relate to the transaction in issue. These competing policies must also be weighed against the justified expectations of the parties.

After explicating its methodology, the court applied it to the facts of Potlatch. Idaho’s rule reflected a policy of protecting creditors and “insuring the normalcy of business relations within its borders.” These policies were manifested because an Idaho creditor and an Idaho business transaction were involved. On the other hand, Washington’s rule reflected a policy of protecting spousal interests in community assets, which was manifested due to the presence of a Washington marital community.

Since Idaho and Washington each had a manifested interest in having its own law applied, the court was required to resolve a true conflict. Implicitly appealing to aspects of functional analysis, the court analyzed the special multistate interest of deferring to party expectations. The creditor might have expected access to the surety’s community assets under Idaho law and the surety’s wife might have expected protection under Washington law. Because the wife might have been unaware of the transaction, whereas the creditor knew it was dealing with a Washington surety, the court concluded that the creditor had greater reason to anticipate the application of Washington law. Thus, although a true conflict between Washington and Idaho interests existed, the Washington court was able rationally to

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115. 76 Wn. 2d at 811, 459 P.2d at 36. The court discussed the parties’ expectations without expressly indicating the special importance of this issue in multistate transactions.
choose Washington law by referring to the special multistate concern for party expectations.

Unlike Baffin and Pacific States, Potlatch supports a conclusion that Washington choice of law methodology involves interest analysis and possibly even elements of functional analysis. Potlatch also considers a crucial issue not addressed in Baffin and Pacific States: the criteria by which a true conflict is to be resolved. Potlatch refers to rational distinctions between the parties' expectations; Baffin and Pacific States simply opt for certain combinations of interests over others.

It would be a mistake, however, to infer too much from the methodology of Potlatch. Even though the court was self-conscious about its reference to the content of and policies behind Idaho and Washington law, there was no recognition of the fact that this method differs from the one employed in Baffin and Pacific States. While some weight can be given to the fact that Potlatch is a more recent case, the failure of the court to perceive consciously the difference between the Baffin-Pacific States approach and the Potlatch approach raises the possibility that the court will inadvertently oscillate between the two. Moreover, in its two most recent choice of law cases, Werner v. Werner and Granite Equipment Leasing Corp. v. Hutton, the court returned to the Baffin-Pacific States version of the most significant contacts method without referring to the difference between it and the Potlatch version.

Werner is of special interest, because it is the most recent application of the "most significant contacts" approach in Washington, and because it specifically applies that approach to torts. The substantive issue in Werner was whether California notaries were liable in tort for affixing their imprimatur to a forged signature on a document conveying immovables in Washington. The court cited both Baffin and Potlatch as authority for the "most significant contacts" approach without distinguishing between their methodologies, and it pro-

118. 84 Wn.2d 320, 525 P.2d 223 (1974). The choice of law analysis in Granite Equipment is dictum because the failure of either party to plead foreign law raised a presumption that it was identical to the law of Washington. See WASH. REV. CODE § 5.24.040 (1974).
119. 84 Wn. 2d at 368, 526 P.2d at 376.
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ceeded to enumerate contacts without looking to the content of or policy behind the respective Washington and California rules:120

We must consider the significant contacts of this cause with the states of Washington and California. The plaintiff purchasers are presumably here, as well as, the real estate agent . . . and, of course, the subject parcel. In California, however, reside the notaries, their employers and sureties, and probably the forgers. Most importantly, the notaries are public officers of the State of California. Thus, their duties as notaries and potential liabilities must be defined according to California law.

Thus, the Washington Supreme Court has adopted the “most significant contacts” approach for both contracts and torts without giving a clear indication of its contours. The seemingly unconscious divergence of the Potlatch methodology from the Baffin-Pacific States-Werner methodology suggests that the court has not consciously chosen the contours of the method. It seems clear from Potlatch that the court understands and is prepared to use interest analysis and even elements of functional analysis, but precisely when it will do so and whether it fully recognizes the distinctions among the various methodologies is unclear.

Whatever the contours of the method, the court should at least clearly explicate them. Even a nonformal methodology should identify its own contours. If a court is free to choose its methodology on a case-by-case basis, litigants cannot identify relevant information. For example, if the court continues to use the Baffin-Werner methodology, litigants need merely gather and prove facts about contacts. If the court uses the Potlatch interest analysis approach, however, the parties need to identify policies behind each jurisdiction’s law and discover evidence necessary to determine if those policies come into play.121 Given the confusion over the methodology, a litigant or trial

120. Id. at 368, 526 P.2d at 376. Notwithstanding its protestations to the contrary in Baffin, the court evidenced more allegiance to the Restatement (Second) than to the “most significant contact” methodology in its nonformal form. In dictum, the court indicated that the situs of immovables governs questions of their title, citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 222 (1971). 84 Wn. 2d at 367, 526 P.2d at 376.

121. In the host-guest situation, interest analysis, unlike the Baffin methodology, would require the parties to introduce evidence concerning the existence of an injured third party to determine whether the policy of protecting the recovery fund is manifested.
judge would find it difficult to determine whether such evidence is material.

Beyond clearly defining its method, the Washington Supreme Court should adopt and reiterate the *Potlatch* interest analysis approach. The *Baffin* grouping of contacts approach contains nearly all, if not more, of the uncertainties and manipulability of interest analysis without benefitting from a consideration of the policies behind each jurisdiction’s rule. Because the court has abandoned rules, interest analysis or even functional analysis is likely to better reconcile the competing values of formalism and nonformalism. Grouping of contacts is likely to have most of the difficulties of nonformalism without reaping many of its benefits.

Moreover, if the court is sensitive to the analysis in Part III, it should consider a return to new, better rules when it becomes possible to crystallize them from the new methodology. In the long run, a nonformal choice of law methodology can lead to a quagmire similar to that experienced in the New York host-guest cases. Thus, a return to rules that are more complex than lex loci and that reflect instrumental rather than conceptual values should be considered. Decisions in an interim nonformal era can inform a judgment concerning a return to rules, however, only if policies and governmental interests are discussed. Such a discussion can be developed in judicial decisions only if the *Potlatch* interest analysis methodology, including its elements of functional analysis, is adopted. It should be adopted, however, with an eye toward crystallizing new and better choice of law rules to recapture the benefits of formalism. In this way, a transition between lex loci and a new choice of law paradigm can be effected consciously and rationally.

V. CONCLUSION

The Washington Supreme Court has responded to the *Zeitgeist* and has abandoned lex loci contractus and lex loci delictus. It should now carefully and explicitly consider the method that will replace them, and in doing so, it should not permit the value of rules to pale in the rhetoric of nonformalism. By rejecting the old rule system, the court

122. See note 33 supra.
123. “Most,” because even if grouping of contacts is as unpredictable as interest analysis, it requires less information to apply.
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need not become committed to a rejection of all rule systems. If the "significant contacts" method is used properly to include an inquiry into policies and governmental interests behind the rules of competing jurisdictions, it can help precipitate new rules in the future.\textsuperscript{124}

If the Washington court considers the ways in which rules operate and their value as well as their problems, it should be better able to fashion a workable and sensible choice of law methodology. At the very least, it should explicate its method and not oscillate between competing methods without thought to their consequences.

\textsuperscript{124} A preference for rule-oriented choice of law methodology does not entail a preference for a rule-oriented social structure. See note 26 \textit{supra}.