HAYEKIAN CHOICE OF LAW FAVORS A NATIONAL SOLUTION

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W.D. Carroll, a brakeman working for the Alabama Great Southern Railroad Company, had reason to believe he would win damages from his employer.[1] After all, he had been injured on the job after his coworkers failed to discover a defective link between two freight train cars, and Alabama—his home state, the railroad's home state, and the state where his coworkers' negligence occurred—allowed for damages. But Carroll's injury, though caused in Alabama, occurred only when the train link snapped in Mississippi, and Mississippi's law did not allow for his suit. When Carroll sued the railroad in Alabama state court, he might have expected to win damages. But the court applied Mississippi law and he received nothing.

Choice-of-law rules enable courts to select the governing law for a case with connections to multiple jurisdictions.[2] These rules have determined the outcomes of a wide variety of cases. Consider some illustrations. When a Missouri law firm sold a valuable sketch to a New Mexico art gallery and then declared bankruptcy, a court had to decide whether to use Missouri law and allow the sale.[3] When a husband fled to Mexico to get a divorce, moved to New York, and then failed to pay promised support to his former wife back in England, a court faced a choice of law to determine the remedy.[4] And one can imagine that these rules might be key in future suits against airlines whose planes are made in one state and fall apart mid-flight over another.[5]

This essay contends that a national, legislative solution is necessary to harmonize choice of law in American state courts with the rule of law, as framed by economist F.A. Hayek. Section I explains that choice-of-law rules, in their current form, undermine the rule of law through their unpredictability and judicial malleability. Section II argues that Hayek's paradigm for the common law judge cannot guide judges in solving choice-of-law problems. Finally, Section III discusses why Hayek's framework permits a national legislative choice-of-law solution.

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* J.D., Harvard Law School Class of 2024. This essay synthesizes two fantastic courses I had the opportunity to take in the Spring Term of 2024: "Conflict of Laws," taught by Professor Stephen Sachs, and "Classical Liberalism," taught by Judge Raymond Kethledge. I relied on the syllabi to these courses (along with the Brilmayer et al. casebook, first cited below in footnote 2) to find many of the sources in this essay.

[1] Alabama G.S.R. Co. v. Carroll, 97 Ala. 126, 127–30 (1892).

[2] LEA BRILMAYER, JACK GOLDSMITH, ERIN O'HARA O'CONNOR & CARLOS M. VÁSQUEZ, CONFLICTS OF LAWS: CASES AND MATERIALS xxiii (8th ed. 2019).

[3] Blackwell v. Lurie, 71 P.3d 509, 510–13 (N.M. Ct. App. 2003).

[4] Auten v. Auten, 124 N.E.2d 99, 102–04 (N.Y. 1954).

[5] *Cf.* Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 592 U.S. 351 (2021); *semble "cuius est solum, eius est usque ad coelum et ad inferos,"* a maxim of real property meaning "whoever owns the soil, holds title all the way up to the heavens and down to the depth of hell."

I. STATES' CURRENT CHOICE-OF-LAW RULES UNDERMINE THE RULE OF LAW.

Under the rule of law, a government may coerce individuals only by enforcing rules that (1) are "known and certain," and (2) "apply equally to all."[6] This section will explain how choice-of-law rules are coercive but satisfy neither criterion.

Although choice-of-law questions arise almost exclusively in disputes between private parties rather than in government enforcement proceedings,[7] choice-of-law rules are still coercive. Hayek explains that the government coerces individuals when it directs them toward preferred actions by making alternative actions more painful.[8] The chief mode of coercion is punishment.[9] For this reason, the rules that govern private legal disputes—including choice-of-law rules— are coercive, because the losing party knows it will be punished by the government if it fails to obey a judgment.[10] Had the Alabama state court applied Alabama law to Carroll's suit, the railroad would have had to compensate him or face a penalty.

For coercive rules to be permissible under the rule of law, they must first be "known and certain"; choice-of-law rules are not. "The essential point" of this criterion is that "the decisions of the courts can be predicted."[11] But state courts vary wildly in their preferred choice-of-law rules.[12] Some, like Alabama, use a "traditional approach," applying the law of the state where a plaintiff's right to sue "vested."[13] But it is not always clear when a plaintiff's right to sue vests,[14] and courts that are ostensibly faithful to this method still might favor their own states' laws out of public policy considerations.[15] Roughly half of all states apply the "Restatement Second" approach,[16] applying the law of the state that has the "most significant relationship" to a given

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[6] F.A. HAYEK, THE CONSTITUTION OF LIBERTY 309–10, 315–16 (Ronald Hamowy ed., The University of Chicago Press 2011) (1960).

[7] Courtland H. Peterson, *Private International Law at the End of the Twentieth Century: Progress or Regress?*, 46 AM. J. COMP. L. 197, 199 (Supp. 1998) ("[Q]uestions of choice of law in the United States are almost exclusively matters of private law, regulated by states rather than the federal government.").

[8] HAYEK, *supra* note 6, at 200.

[9] HAYEK, *supra* note 6, at 312.

[10] Randa Trapp et al., *You Have a Judgment, Now What? Mastering the Art of Judgment Collection*, THE AMERICAN BAR ASSOCIATION: BUSINESS LAW TODAY (Sep. 15, 2021), https://www.americanbar.org/groups/business_law/resources/business-law-today/2021-september/you-have-a-judgment/. The converse is also true; judgements lacking any real threat of punishment are not coercive. *Cf.* Andrew Jackson's apocryphal statement, "John Marshall has made his decision, now let him enforce it."

[11] HAYEK, *supra* note 6, at 316. Note that the rules need not be explicitly written; they can also manifest as "sense[s] of justice" which parties implicitly recognize. *Id.*; *see infra* Section II (describing Hayek's paradigm for a judge).

[12] State legislatures retain the ability to prescribe choice-of-law rules for their courts to apply. And yet, almost all state legislatures have "refrained from enacting comprehensive choice-of-law rules." Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 665–67 (2013). *Cf.* Russell J. Weintraub, *The Restatement Third of Conflicts of Laws: An Idea Whose Time Has Not Come*, 75 IND. L.J. 679, 679 (2000) ("There is no coherent body of case law on choice of law.").

[13] John F. Coyle, William S. Dodge & Aaron D. Simowitz, *Choice of Law in the American Courts in 2021: Thirty-Fifth Annual Survey*, 70 AM. J. COMP. L. 318, 321 (Supp. 2023) (surveying choice-of-law rules across the fifty states); *see, e.g.*, Alabama G.S.R. Co. v. Carroll, 97 Ala. 126, 127–30 (Ala. 1892).

[14] For example, what should a court do if a person is injured in one state, but only experiences that injury's effects after crossing into another state?

[15] *See, e.g.*, Lab'y Corp. of Am. v. Hood, 911 A.2d 841, 848–51 (Md. 2006).

[16] Coyle et. al., *supra* note 13, at 321.

case.[17] But this method is even *more* unpredictable than the traditional approach because a court can consider the ease of applying a certain state's laws, the relevant public policies, the needs of the interstate system, and a plethora of other factors.[18] And still, alternative methods are just as indeterminate. Some courts ask which state is most "interested" in having its law applied to a case, others ask what the "better law" is, and others eschew a singular approach entirely.[19]

Nor can these choice-of-law rules "apply equally to all." Hayek explains that rules must be "general" to apply equally to all, meaning that they must be abstract and not single out any specific person or group of persons.[20] This ensures that the government applies its laws irrespective of whether the consequences of doing so in particular instances are desirable.[21] Although Hayek concedes that some rules must draw classifications between groups,[22] he emphasizes that classifications should not be aimed to benefit or harm specific persons.[23] But modern choice-of-law rules—quite overtly—invite judges to "sidestep perceived substantive evils" in particular cases.[24] The New York Court of Appeals, for example, chose to apply New York's law, which allowed liability, when a New York passenger sued a New York driver over a car crash that occurred in Ontario,[25] but *not* when an *Ontario* passenger later sued a New York driver for a crash that also occurred in Ontario.[26] As the court later remarked, "candor requires the admission that our past decisions have lacked a precise consistency."[27]

The incompatibility of current choice-of-law rules with the rule of law is more than a mere academic concern; it is a problem that warrants a solution. "The Rule of Law is not an end in itself,"[28] but rather fosters and protects prosperity by guarding a "protected sphere" which consists of conduct that individuals know they can pursue free from government coercion.[29] The rule of law is thus supposed to enable individuals to make the "fullest use of [their] knowledge."[30] Because economic enterprise requires "minute knowledge of a thousand particulars," and because individuals have a better awareness than "any statesman or lawgiver" of their own interests,[31] the rule of law advances economic growth more than a system

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[17] *See* Restatement (Second) of Conflict of L. §§ 145, 188 (Am. L. Inst. 1971).

[18] *See id.* § 6; Phillips v. Gen. Motors Corp., 995 P.2d 1002, 1007–15 (Mont. 2000) (applying these factors, inter alia).

[19] Coyle et. al, *supra* note 13, at 321.

[20] HAYEK, *supra* note 6, at 222–23.

[21] HAYEK, *supra* note 6, at 226–27.

[22] HAYEK, *supra* note 6, at 316–17.

[23] *Id*. at 318; *see also id*. at 221 ("It is because the lawgiver does not know the particular cases to which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule.").

[24] Paul v. Nat'l Life, 352 S.E.2d 550, 553 (W. Va. 1986).

[25] Babcock v. Jackson, 191 N.E.2d 279, 283–85 (N.Y. 1963).

[26] Neumeier v. Kuehner, 286 N.E.2d 454, 457–59 (N.Y. 1972).

[27] *Nat'l Life*, 352 S.E.2d at 555 (quoting Miller v. Miller, 237 N.E.2d 877, 879 (N.Y. 1968)).

[28] Hon. Raymond M. Kethledge, *Hayek and the Rule of Law: Implications for Unenumerated Rights and the Administrative State*, 13 N.Y.U. J.L. & LIBERTY 193, 193 (2020).

[29] HAYEK, *supra* note 6, at 315 ("There is probably no single factor which has contributed more to the prosperity of the West than the relative certainty of the law which prevailed here."); HAYEK, *supra* note 6, at 223–24 (describing how general rules are designed to "secur[e] to each individual a known range within which he can decide on his actions").

[30] HAYEK, *supra* note 6 at 224.

[31] F.A. HAYEK, THE FATAL CONCEIT 14–15 (W.W. Bartley III ed., University of Chicago Press 1991) (1988) (first quoting SAMUEL BAILEY, A DEFENCE OF JOINT-STOCK BANKS AND COUNTRY ISSUES 3 (London, James Ridgeway 1840); and then

governed by the will of a single ruler or (more saliently for choice-of-law issues) a judge. Societies that adopt the rule of law are thus more likely to succeed than those that do not.[32]

But "[n]o rule can be effective," or leave individuals free to employ their knowledge, that makes the "range of free decisions dependent on remote consequences . . . beyond [individuals'] ability to foresee."[33] Current choice-of-law rules, however, suffer from this problem. Carroll, and other employees of the railroad company, might have taken their labor elsewhere had they known they would not be able to obtain recompense. Drivers may have no sense of the liability they risk every day on the road from out-of-state plaintiffs. And businesses might have trouble anticipating which laws of the fifty states could apply to their operations. American courts need better choice-of-law rules.

II. A HAYEKIAN JUDGE CANNOT DEVELOP CHOICE-OF-LAW RULES.

For Hayek, the role of a common-law judge is to vindicate parties' expectations.[34] A judge upholds this responsibility first by faithfully applying statutes, because statutes articulate rules that a legislature agreed upon, and thus express what society expects of its members.[35] But some societal expectations are not reflected in legislation. Hayek explains that sometimes only *custom* can reveal a society's expectations. Even if individuals are unaware that they are adhering to customs, they may still align their behavior with certain rules of appropriate conduct.[36] Judges, in announcing rules that fill legislative gaps, are either articulating customs or carrying existing customs to contexts where there are none.[37] This process of rulemaking then alters individuals' expectations, because individuals will know that certain societal rules have legal force, and others do not.[38] From this evolution grows a "spontaneous order," where rules and expectations build on each other.[39] The judge is to be a caretaker, enabling this growth.[40]

For an illustration of Hayek's paradigm, consider Anglo-American common law courts. Yes, courts have a responsibility to interpret statutes. But English common-law courts developed rules by examining custom.[41] Frederic William Maitland writes that English courts believed that their responsibility was to simply declare what had always been the law, even

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quoting ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 487 (Oxford University Press 1976) (1776)).

[32] HAYEK, *supra* note 31, at 16 (observing that practices maximizing individuals' use of their knowledge spread "not because men understood that they were more effective . . . but simply because they enabled those groups practising them to procreate more successfully and to include outsiders").

[33] HAYEK, *supra* note 6 at 225.

[34] F.A. HAYEK, LAW, LEGISLATION AND LIBERTY 93–94 (Routledge 2013) (1973).

[35] *Id*. at 91.

[36] *Id*. at 95.

[37] *Id*. at 95.

[38] *Id*. at 97.

[39] *Id.* at 113.

[40] *Id*. at 97, 114.

[41] Specifically, custom arising from the "whole land" rather than "local customs." F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 22 (Cambridge 1908).

before case law reporters first appeared in the thirteenth century.[42] Court decisions, in turn, eventually can shape custom. People may refrain from activities that carry legal consequences,[43] and certain substantive rights can gain greater social recognition once affirmed by a court.[44] Once new customs emerge, courts consider those customs in making new decisions.[45]

Hayek analogizes the judicial task of preserving parties' expectations to solving a difficult puzzle.[46] But when choice of law enters the fray, a better analogy for the Hayekian paradigm is solving a puzzle whose solution requires division by zero; it simply is not possible. Hayek's paradigm overlooks that individuals, in any given moment, might be subject to multiple courts' jurisdictions. In such cases, individuals' expectations are not accounting for the application of any *particular* law, but of *several* laws. A court must ensure that the outcome of a given case aligns with what individuals would expect from that court. But a court must also ensure that a case's outcome aligns with the expectations that individuals manifest through their behavior. The two objectives are not the same, and indeed are incompatible in choice-of-law disputes.[47]

Multiple courts can exercise jurisdiction over a single person at the same time. Suppose a Wisconsin driver crashes his car in Massachusetts. A victim could sue the driver in Wisconsin, because the driver is from there.[48] Alternatively, the victim could likely sue the driver in Massachusetts, because the driver purposefully availed himself of the privilege to drive in that state.[49]

If every court applied the same substantive rules to a case (after factoring in choice-of-law rules), then Hayek would not worry that an individual might be subject to multiple courts' jurisdictions. A suit in Wisconsin would have the same influence on an individual's expectations as a suit in Massachusetts. For everyone involved—the driver, the victim, those who saw the accident—it would be immaterial which court heard the case.[50]

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[42] *Id*. at 22–23. English justices also swore an oath that if they received letters from the King commanding anything contrary to the "ancient customs of the realm," they would apply custom instead. C.H. MCILWAIN, CONSTITUTIONALISM AND THE CHANGING WORLD 132 (Cambridge 2010) (1939).

[43] Indeed, one of the main functions of tort law is deterrence. *See* Fu v. Fu, 733 A.2d 1133, 1141 (N.J. 1999).

[44] *See*, *e.g.*, Obergefell v. Hodges, 576 U.S. 644, 646 (2015) (observing that a court's failure to recognize certain rights may result in stigmatic harms).

[45] *See*, *e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (including "reliance on [a] decision" as a doctrinal consideration in deciding whether to overrule that decision).

[46] HAYEK, *supra* note 34, at 96.

[47] The resulting impossibility can be demonstrated mathematically. Assume that a court wishes to ensure an individual's expectations ("E(x)") are met given the application of a particular law ("L"). The court, then, is seeking to provide E(L). But the individual's expectations in any given moment are actually shaped by E(L) multiplied by "P," the probability that the particular law would apply, along with E(N), the expectations that any number of other laws apply, multiplied by (1-P), the probability that those other laws apply. So, a Hayekian judge desires to issue E(L), but the individual's ex ante expectations are E(L) * P + E(N) * (1-P). If choice-of-law is a possibility, then P > 0 (there is *some* likelihood of another law applying). So, the only way that the court's Hayekian task aligns with the individual's actual expectations is if E(L) = E(N), meaning that an individual's expectations are unchanged regardless of which law applies. But if a case involves a choice-of-law dispute, presumably E(L) does *not* equal E(N).

[48] *See* Daimler AG v. Bauman, 571 U.S. 117, 127–28 (2014) (domicile can enable jurisdiction).

[49] *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 885–87 (2011) (purposeful availment can enable jurisdiction).

[50] The travel time between states might be costly to individuals and thus influence their expectations (illustrating the saying "the process is the punishment"). But this potential cost only demonstrates another way that individuals' expectations will be influenced by where a suit is filed.

Granted, under Hayek's theory, state courts conceivably might apply the same laws. Courts, Hayek contends, must preserve expectations. But when jurisdictions overlap, it becomes unclear *whose* expectations different courts must consider. Perhaps the Massachusetts court must consider the expectations of all Wisconsin residents, because Wisconsin residents might eventually enter the court's jurisdiction by driving. Or maybe, because both Massachusetts and Wisconsin are part of a broader interstate system, the courts of each state must consider not only the expectations of the other state's residents, but of *every* state's residents. If courts are considering the same groups' expectations, presumably those courts will generate identical rules.

Although conceivable, the idea that state courts adhering to Hayek's paradigm would always agree on which rules to apply seems highly unlikely. Courts preserve expectations to ensure that people can operate within a protected sphere, meaning that people know the range of permissible conduct that they can pursue free from government coercion.[51] Courts cannot preserve all individuals' expectations, but must elevate certain expectations by conferring legal protection.[52] "Which expectations ought to be protected [depends on which] can maximize the fulfillment of expectations as a whole."[53] If certain courts favor the expectations of individuals who have only a tenuous connection with a society, those courts are not fulfilling their Hayekian responsibility, as they are not *maximizing* the fulfillment of expectations within that society. The key question, then, is whether state courts differ on which society to use as a reference point when evaluating how to maximize individuals' expectations. As a descriptive matter, state courts generate different rules from one another, suggesting that they are responding to different customs, and thus different societies. Under a Hayekian paradigm, then, state courts will continue to produce different rules from one another, because they prioritize different groups' expectations.

Now: observe as the spontaneous order tries to take hold in a Hayekian world that allows for choice of law. A single individual, subject to multiple courts' jurisdictions, is sued in one of those courts regarding certain wrongdoing he committed. The court eventually issues a verdict, by applying a certain state's law.[54] Some time passes; the individual commits the same wrongdoing, and again gets sued—only this time, in a different court, which applies a different state's law and issues a different verdict. Maybe the individual learns of other people's similarly disjointed experience with the legal system; maybe not. But other individuals eventually experience something similar or learn of each other's experience. Gradually, over decades—centuries even—individuals realign their expectations to anticipate the applicability of multiple states' laws.[55]

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[51] *See supra* Section I.

[52] HAYEK, *supra* note 34, at 97.

[53] HAYEK, *supra* note 34, at 98.

[54] "Law," here refers to the combination of substantive laws and choice-of-law rules that a given court relies upon to produce a decision.

[55] Courts applying choice-of-law rules even intend for this realignment in parties' expectations. *Cf.* Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 938-39 (Cal. 2006) (announcing that "out-of-state companies that do business in California now are on notice that, with regard to future conduct, they are subject to California law with regard to the recording of phone conversations").

But how are courts to further this spontaneous order? No matter what a court does, it cannot enable *any* individual to know that "he will not be interfered with in the use of certain means."[56] An individual expects one court to apply one law and another court to apply another law. The individual will thus act anticipating some "expected enforcement," the aggregated expectation of enforcement by different courts, weighted by the probability that each particular court will be the enforcer.[57] If each court enforces its own law, then an individual will never know which law will apply to him next. But if each court alleviates this concern by applying the individual's "expected enforcement," the courts are ignoring their own influence in enabling the individual to generate this expectation. Hayekian choice-of-law is thus a Bertrand Russell "Barber Paradox": "In a certain town there is a barber, who shaves all the men who do not shave themselves. Does the barber shave himself?"[58] There is no answer.

III. HAYEK WOULD ACCEPT A NATIONAL, LEGISLATED CHOICE-OF-LAW CODE.

Where "real change in the law is required"—as with choice of law—Hayek recognizes a role for legislation.[59] This section describes what a legislative solution should look like and argues that Congress, rather than the state legislatures, should take responsibility for enacting it.

Despite the unpredictability that currently results from choice of law, Hayek would still recognize the importance of having the states be free to choose their own substantive laws. If Wisconsin and Massachusetts seek to establish different driving regulations, Hayek would want them to be able to do so. Each state legislature is responsive to a particular society: that state's residents. State legislatures are thus better able to channel their constituents' knowledge than Congress, which is concerned with nationwide governance. To be sure, certain regulatory areas, like interstate commerce, might require knowledge drawn from across the country. But residents of a state presumably know more about that state's dilemmas than residents of other states, and thus should be able to set their own state's laws that deal with those localized issues. The rule of law is designed to enable societies to maximize the use of their populations' knowledge. Allowing differences in states' laws encourages just that.[60]

So, Hayekian choice of law must enable individuals to anticipate which substantive laws will apply to their conduct;[61] but it should also recognize that a court's choice of law should still depend on particular circumstances and not always favor the same jurisdiction's substantive laws. Harmonizing this tension, Hayekian choice of law means that, depending on certain, *predictable* contexts, a particular state's law will apply, no matter which court adjudicates the case. Hayekian choice of law thus appears quite similar to the "traditional" choice-of-law

[56] HAYEK, *supra* note 34, at 98.

[57] *See supra* note 47.

[58] James Grimmelmann, *Renvoi and the Barber*, 22 GREEN BAG 2D 109, 110 (2019).

[59] HAYEK, *supra* note 34, at 83.

[60] And of course, there are a myriad of other advantages to federalism; *e.g.,* policy experimentation, checks on federal power, and more responsive governance. This section simply presents one justification that Hayek would likely find persuasive.

[61] Hayek would add that individuals need not be *aware* of what those standards are; it is enough that they subconsciously adjust their behavior in anticipation of those standards. *See* HAYEK, *supra* note 34, at 92.

approaches, which allow the law of the place of a wrong to govern.[62] If an individual goes to a certain state and commits a wrong there, it seems reasonable that the individual should expect for that state's substantive law to apply. If every court adhered to this traditional choice-of-law approach, then the individual would not need to worry that different courts might choose different states' substantive laws under the same set of facts. Further, each state's laws would be operating on a fair choice-of-law playing field, as courts would be using objective criteria to determine which state's laws to apply rather than arbitrarily superimposing a preferred state's laws. State legislatures, in turn, could adjust how they craft their substantive laws in light of the universally accepted, objective choice-of-law criteria. The Massachusetts legislature, recognizing that its laws will always apply to a car accident in Boston—even if the victim sues in Wisconsin—would not feel any pressure to make Massachusetts's laws more appealing to Wisconsin courts. This note is not necessarily contending that Hayekian choice of law *is* the traditional choice-of-law approach, because (as described *supra* Section I) that approach does not always yield a predictable outcome.[63] The point, however, is that under Hayekian choice of law, all states should employ the same objective and predictable criteria.

The responsibility to develop such criteria must fall upon the national government. It seems almost impossible that the states, on their own, could agree upon on a set of choice-of-law rules. After all, much of the confusion around choice of law exists because states departed from the historical consensus that favored the traditional approach.[64] Similarly, states are unlikely to naturally coalesce around a single rule over time. States' choice-of-law rules are immune from the sort of Darwinian natural selection that, Hayek argues, enables the best societal ideas to spread.[65] Such natural selection requires existential stakes.[66] States with inferior choice-of-law rules will not somehow disappear because of those rules; more likely, states with inferior rules will be sustained by the success of other states who adopt better rules, as all states comprise the same national system. And if individuals leave certain states and move to others that have more predictable choice-of-law rules, the effect may just be that individuals who are comfortable with unpredictable choice-of-law rules remain in states that have those rules. A national choice-of-law solution, therefore, is necessary.

All to say, Hayekian choice of law favors a national solution. State courts' current choice-of-law rules undermine the rule of law, and neither judges—nor state legislatures—can fix them. So Congress should.

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[62] *See supra* Section I (describing the traditional approach to choice of law).

[63] For example, when Carroll sued the railroad in Alabama, the court employed a traditional choice of law approach but determined the place of the wrong to be not where the negligence occurred, but where Carroll was injured. *See* Alabama G.S.R. Co. v. Carroll, 97 Ala. 126, 127–30 (1892).

[64] *See* BRILMAYER et al., *supra* note 2, at 179.

[65] HAYEK, *supra* note 31, at 16.

[66] *See* Jack Kieffaber, *Spontaneous Disorder: The Protected Sphere and the Coming Web 3.0 Age*, HARV. J.L. & PUB. POL'Y PER CURIAM, (Apr. 14, 2023), https://journals.law.harvard.edu/jlpp/spontaneous-disorder-the-protected-sphere-and-the-coming-web-3-0-age-jack-kieffaber/.