Green wonders whether the relevant law to use to determine whether a choice-of-law clause in a contract should be upheld is not forum law but rather the law of the state whose law would apply absent the choice of law clause

e.g. NJ ct (using the 2nd Rest) concludes that CA is the state whose law would apply absent a choice of law clause

should it use 187 of the 2nd Rest to determine whether a choice of law clause or CA law (which, let us assume, does not uphold such clauses)

arguably CA

NOTE:

with respect to a choice of law clause that *invalidates* the K, 2nd Rest says that if clause was bargained for deliberately and in good faith, then it will be considered a mutual mistake and disregarded

* + 1. If no real bargaining, will hold to term and invalidate K
       1. important bc invalidity is often form of protection for a vulnerable party

Interest analysis

Finally – heart of course

Basic idea –

* Scope of law should be read in light of law’s purposes unless text answers the matter

Harris v. Harris (Ga. 1984)  
two married but separated Georgians get into car accident in Georgia in which husband is negligent – wife sues  
does Georgia spousal immunity rule apply?

Court might have concluded that text answers the question – separated spouses are spouses

* But did not take the matter to be answered by the text
* So answered it by law’s purposes
  + Promoting marital harmony and avoiding fraud
* No marital harmony to promote if spouses are separated
* And not more likely to collude than unmarried people
* So law is not applicable
* GA negligence law applies instead

Interest analyst claims same approach applies for territorial scope

* Does law apply to the cross-border facts?
* Can’t answer by text – laws do not limit their territorial scope in text
* With only a few exceptions
* Wis. Stat. § 895.03 (action for wrongful death “caused in this state”)

So must answer by law’s purposes

two married Californians get into car accident in Georgia in which husband is negligent, wife sues  
does Georgia’s spousal immunity rule apply?

* Answer by looking to law’s purposes
  + Promoting marital harmony and avoiding fraud
* GA not interested in marital harmony of Californians
* And GA not interested in fraud concerning CA insurance contracts
  + Fraud will be felt in CA
* So not applicable
* CA law is applicable
  + Purposes of CA negligence law is compensation and deterrence
  + CA not interested in deterring negligent husbands, even CA husbands, in GA
  + BUT is interested in compensating CA wives harmed by their negligent husbands
  + So CA law applies

As we shall see, Green’s thinks interest analysis is misguided

BUT, just like you need to know how to use the 1st Rest, even though its view about exclusive lawmaking power based on territory is nonsense, so you need to know how to do interest analysis , even though its view about state interests is nonsense

1. Example – Currie on Milliken v Pratt

Goes through all scenarios and shows how 1st Rest gets interests wrong

Applies law of uninterested state

When both states are interested can lead forum to vindicate the interest of the lother state

Currie thought that was wrong – sort of a form of treason

False conflict – only one interested state

True conflict – more than one state interested

Is it a false conflict when both states have the same law? NO

One might think it means that court doesn’t need to make choice of law decision in such a case, because laws are the same

BUT is that true? It may be that neither state is interested in its law applying

remember Marie v Garrison

It is false conflicts that motivate the move from 1st Rest to interest analysis

1. 1st case to make the change
   1. Babcock v Jackson
      1. NY P – guest in car w/ NY D-host
      2. Crashed into stone wall in Ontario
      3. Question of application of Ontario guest statute
      4. Guest statute exists…
         1. to prevent collusion between guest and host to defraud host’s insurer
      5. Ontario interested only if Ontario host
      6. So Ont not interested
      7. NY is interested in its guest-host negligence liability rule applying
         1. Purposes…?
            1. Deterrence of negligent hosts

Not interested because negligence occurred in Ont

* + - * 1. Compensation to guests harmed by negligent hosts

Interested because there is a NY guest deserving compensation

* 1. Dym v Gordon
     1. P and D both NY domiciliaries
     2. BUT taking courses at U of Colo
     3. Collision with another vehicle (from Kansas) in Colo
     4. Colo has guest statute
     5. NY has host liability for negligence to guest
     6. How not like babcock?
        1. another non NY party in accident
        2. relationship started in Colo
     7. Also new theory of guest statutes
        1. make ungrateful guests later in priority
        2. Colo interested bc the guest host relationship is a Colorado one
     8. So true conflict, bc NY interest as well
        1. wants recovery for NY guest

nevertheless NY ct applied Colo law

Tooker v Lopez

1. Marcia Lopez (NY) crashed car (overturned after trying to pass other car)
2. Killed guest in car, Catharine Tooker (NY)
3. And injured Susan Silk (Michigan)
4. All at Mich State
5. Action by Tooker’s father for wrongful death
6. Mich has guest statute
7. What makes it like Babcock?
8. no other side of accident (seems relevant)
9. What makes it like Dym?

parties residing in Mich, even though domiciled in NY

1. Court applies NY law

how to get out of Dym?

reinterprets guest statute

* + - * 1. Guest statutes can’t be about priority with respect to ungrateful guests
        2. can’t be, if it allows guest to sue host only if host is reckless

if you satisfy higher standard, then are not later in line

if you don’t satisfy standard you are not later in line, you don’t get anything

* + - * 1. ct argues that case is really about higher burden of proof because of worries of fraud

1. Green: maybe the priority argument doesn’t work but might still be about ungratefulness of guests
2. Purpose is view that guest is biting the hand that feeds him
3. Compensation is inappropriate
4. unless relationship is really abused (when the host is reckless)
5. that would suggest Mich is interested, because guest host relation is centered in Mich
6. More fundamentally the question of the purpose of a guest statute must be answered on a statute by statute basis

Purposes of CO guest statute could be different from Mich’s and Ont’s

1. But let’s assume that Mich guest statute is about fraud
   1. What suggests that NY is the interested state concerning fraud?
   2. Domicile of host may not be relevant
      1. It may be where the car is registered

Or where insurer is incorporated

where insurer has most customers

Ct draws distinction between conduct regulating and loss allocating rules

Very important distinction in interest analysis

* Used in NY’s Neumeier rules
* Used in La and Ore choice of law statute
* But also important in normal interest analysis

I am going to approach the distinction very carefully

The distinction is (usually) used for tort rules only

A tort rule either creates liability for harm that results from some conduct or it limits or blocks liability

If a conduct regulating rule

Then if creates liability that means it has liability as a means of discouraging the conduct that caused the harm  
example – negligence liability (in its deterrence function)  
  
If a conduct regulating rule and blocks liability that means it forbids liability as a means of permitting people to engage freely in the harm-causing conduct  
example – no liability for looking at me funny even if it hurts my feelings

The interest analyst will say that for conduct regulating rules the interested state is the state where the harm or the wrongful conduct occurred

Loss allocating rules

really come in two flavors

For some the purpose is really about loss allocation, that is, about appropriate compensation between the parties (1st type)

But some “loss-allocating” rules are about encouraging or discouraging a certain type of conduct – but the conduct is other than the conduct that caused the harm (2nd type)

Creates liability and is solely loss-allocating of the 1st type means it has liability not to discourage the conduct that caused the harm – the conduct was rightful – but it has liability because the defendant still should compensate the plaintiff

example – respondeat superior – liability of employer for torts of employee even though the employer was non-negligent in hiring and monitoring

* Basis is a view about where the loss should rest not a claim that the employer should have acted differently

Blocks liability and is solely loss-allocating 1st type means it blocks liability not to give people freedom to engage in the conduct that caused the harm – the conduct was wrongful – but it blocks liability because the wrongdoer should not compensate the person he harmed for some reason  
example?

Guest statute when they are about don’t bite the hand that feeds you

Not saying host behaved rightly – he was negligent

But compensation is inappropriate

Sometimes both loss-allocation first type and conduct regulating

e.g. cause of action for negligence

(discourage negligence and compensate those harmed)

No cause of action for harm due to looking at someone funny

(encourage looking at people however you want and harm therefrom should not be compensated for)