

# SECOND-ORDER CHOICE OF LAW IN BANKRUPTCY

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*This Note attempts to answer the question of which choice-of-law regime ought to apply to bankruptcy cases. Taking the facts of a recent Second Circuit case as my example, I argue that Congress should amend the Bankruptcy Code to include a blackletter second-order choice-of-law section for use in all bankruptcy cases. First, Part I examines the state of Second Circuit jurisprudence on the question before this case, probing the reasoning and basic justifications for the resulting rule. Second, Part II establishes a normative framework, drawing on both bankruptcy and choice-of-law theory, for evaluating any proposed answer to this dilemma. I show here that the Second Circuit solution does not meet this framework and thus must be discarded. Third, Part III articulates my proposed solution, showing that it is most consistent with this framework.*

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## INTRODUCTION

In 2004, the executives of Statek Corporation learned that their bankrupt, embezzling ex-CEO had engaged Coudert LLP, their

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corporate counsel, in covering up his misdeeds.<sup>1</sup> Shocked, Statek filed a state law tort action against Coudert in Connecticut state court.<sup>2</sup> Soon afterwards, Coudert filed for bankruptcy in the Southern District of New York, staying the Connecticut litigation.<sup>3</sup> Statek then filed a proof of claim<sup>4</sup> in bankruptcy court derived from the state tort action, attempting to recover at least some of the \$85 million in claimed damages from Coudert's bankruptcy estate.<sup>5</sup>

Much to Statek's dismay, however, the bankruptcy court decided that the claim was worth nothing. As a federal judge sitting in New York, the bankruptcy judge held that the New York state borrowing statute—rather than the Connecticut statute—provided the applicable statute of limitations. Since Statek had already conceded untimeliness under New York's statute of limitations, the bankruptcy judge dismissed the claim, preventing any monetary recovery.<sup>6</sup>

On appeal, the Second Circuit was faced with a conundrum. In order for the court to decide whether Statek's proof of claim was timely filed, the court not only needed to determine which state's substantive law governed the timeliness of Statek's claim, but first which state's choice-of-law regime should be applied in making that determination. Under Connecticut's choice-of-law regime, Connecticut law would govern and the claim would be timely, but under New York's choice-of-law regime, New York law would govern and the claim would not be timely.<sup>7</sup> Thus, the critical question: How should the court go about choosing between choice-of-law regimes?

Surprisingly, in analyzing this question, the Second Circuit found itself breaking new ground in *Coudert*. As one commentator recently noted, comparatively little attention has been given to the question of second-order choice of law<sup>8</sup> (or, how to determine which state's first-order choice-of-law regime the court should apply to determine which state's substantive law should govern) despite the unfortunate truth

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<sup>1</sup> *Statek Corp. v. Dev. Specialists, Inc. (In re Coudert Bros. LLP)*, 673 F.3d 180, 183 (2d Cir. 2012).

<sup>2</sup> *Coudert Bros.*, 673 F.3d at 184.

<sup>3</sup> *Id.*

<sup>4</sup> A proof of claim is "a written statement setting forth a creditor's claim," used in bankruptcy to inform the court of the outstanding debts of the debtor. FED. R. BANKR. P. 3001.

<sup>5</sup> *Coudert Bros.*, 673 F.3d at 184.

<sup>6</sup> *Id.* at 185.

<sup>7</sup> See *id.* (explaining that applying the choice-of-law rule in New York's borrowing statute would displace the otherwise applicable Connecticut statute of limitations).

<sup>8</sup> See William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371, 1373–74 (2012) ("[R]emarkably little has been written about the second-order conflicts problem of how the federal government should make choices among state laws." (emphasis in original)).

that there is no universal choice-of-law system that federal courts can rely on. Instead, the prudent court must often engage in a second-order debate to ascertain the applicable choice-of-law regime for a given claim. This dilemma does not exist in all cases, of course. The Supreme Court's pronouncement more than sixty years ago in *Klaxon Co. v. Stentor Electric Manufacturing* ensures that federal courts sitting in diversity will apply the choice-of-law regime of the state in which they sit, meaning they need not go beyond a case citation to resolve the matter.<sup>9</sup> However, the question of what rule prevails in a federal question situation like bankruptcy remains unanswered by the Court, and the federal circuits are in disagreement.<sup>10</sup>

In *Coudert*, the Second Circuit rightly recognized the anomaly of the result below. Statek had filed its tort claim in timely fashion under the law of the jurisdiction it chose, only to have the law of a different state apply to reduce the potential recovery from eight figures to nothing.<sup>11</sup> The Second Circuit's solution, consistent with its prior decisions in the area,<sup>12</sup> was to treat the claim as if it had been *transferred* from federal court in Connecticut to federal court in New York (rather than just stayed in Connecticut). Using this transfer analogy, the Second Circuit applied the well-established federal rule from *Van Dusen v. Barrack*<sup>13</sup> that a transferred case is governed by the law of

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<sup>9</sup> 313 U.S. 487, 496 (1941). *Klaxon* is an extension of the doctrine from the Supreme Court's decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). In *Erie*, the Court announced that a federal court, when exercising diversity jurisdiction, needed to apply the law of the state in which it sat, rather than constructing general federal common law. *Id.* at 78.

<sup>10</sup> 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4518 (2d ed. 1996) (noting and analyzing the circuit split).

<sup>11</sup> See *Coudert Bros.*, 673 F.3d at 190–91 (“[I]t would be fundamentally unfair to allow Coudert's bankruptcy, coming as it did in the midst of the Connecticut action, to deprive Statek of the state-law advantages adhering to the exercise of its venue privilege.”).

<sup>12</sup> See *infra* Part I.A (explaining the prior circuit precedent regarding choice of law in bankruptcy).

<sup>13</sup> 376 U.S. 612 (1964). At this point, the Court had already decided the seminal *Erie* and *Klaxon* cases. *Supra* note 9 and accompanying text. *Klaxon's* pronouncement, however, left open the question of which state's law should govern when a case was transferred from one state to another under 28 U.S.C. § 1404(a), which allows such transfer for party convenience at the district court's discretion. The *Van Dusen* Court held that § 1404(a) transfers were intended to alleviate logistical inconveniences, not to affect the law applied to a given case. *Id.* at 642–43. As a result, the “forum state” referenced in *Klaxon* is the state where the action was initially filed, rather than the state where the action was now being litigated. See *id.* at 635–39 (explaining the rationale for the rule). The district court sitting in the former state will be referred to as the “transferor court,” and the court sitting in the latter state as the “transferee court.”

the transferor state (here, Connecticut) when the federal court is sitting in diversity.<sup>14</sup>

As far as fairness to Statek and Coudert goes, this result is difficult to critique because it allowed Statek to recover under its preferred forum's law. However, the Second Circuit's solution in *Coudert* is "highly questionable" because of the impact it will have in future cases.<sup>15</sup> In particular, there is no justification in the opinion for why, in the absence of statutory authorization, the filing of a proof of claim in bankruptcy (following a stay of parallel litigation in federal court) is akin to a transfer and may be governed by the same rules.<sup>16</sup> The Second Circuit simply saw a "fundamental[ ] unfair[ness]"<sup>17</sup> on the facts and fixed it in a way that made intuitive sense. If the Supreme Court sees *Van Dusen* as a good solution for the anomalies created by *Klaxon* in the diversity context, then a *Coudert*-style bankruptcy rule modeled on the former case seems to be a commonsense solution for the anomalies created by the bankruptcy version of the latter case.

A lack of such justification might be acceptable if the Second Circuit's rule yielded proper results; this would not, after all, be the first judicially created doctrine to continue existing primarily for policy reasons.<sup>18</sup> However, the relatively recent vintage of the rule, the potential impact in cases where substantial sums may be at stake, and the lack of analytical justification for the transfer analogy all mean that waiting to see what lower courts make of this new doctrine is unwise. More to the point, by extending the plaintiff-friendly rule from the transfer context, the *Coudert* rule creates an incentive for plaintiffs to file lawsuits before defendants enter bankruptcy in order to obtain a favorable choice-of-law regime.

This Note argues that the *Coudert* rule should be rejected because it privileges first-to-file plaintiffs and thus creates an incentive for plaintiffs to file lawsuits immediately and lock in their choice of law. This incentive is in direct tension with a primary goal of

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<sup>14</sup> *Coudert Bros.*, 673 F.3d at 191 ("[W]e hold that bankruptcy courts should follow *Van Dusen* and look to the choice of law rules of the state where the underlying prepetition complaint was filed.").

<sup>15</sup> Ralph Brubaker, *The Erie Doctrine, Code Common Law, and Choice-of-Law Rules in Bankruptcy (Part II)*, 32 No. 6 BANKRUPTCY LAW LETTER 1, 9–10 (June 2012) (available on Westlaw) ("The convoluted means by which the court comes to [its result in *Coudert*], however, are highly questionable. . . . [This approach] will surely cause future difficulties . . .").

<sup>16</sup> Cf. *Coudert Bros.*, 673 F.3d at 189–91 (failing to provide a justification).

<sup>17</sup> *Id.* at 190.

<sup>18</sup> See, e.g., *Allen v. Wright*, 468 U.S. 737, 751 (1984) (referring to prudential standing as "judicially self-imposed limits on the exercise of federal jurisdiction"); *Harlow v. Fitzgerald*, 457 U.S. 800, 813–14 (1982) (defending qualified immunity for public officials as "the best attainable accommodation of competing values").

bankruptcy: avoiding a race to the courthouse.<sup>19</sup> The *Coudert* rule should therefore be rejected in favor of legislation creating a second-order choice-of-law regime for bankruptcy. The argument proceeds in three parts. Part I provides a deeper analysis of the Second Circuit's jurisprudence in this area, articulating more fully what the Second Circuit saw as its choices in *Coudert*, what the *Coudert* rule is, and how that rule will play out in future cases. Part II articulates the various bankruptcy and choice-of-law policies at stake, examining whether the Second Circuit's chosen rule in *Coudert* satisfies those policy values and concluding that it does not. Finally, Part III suggests an alternative solution—congressional amendment of the Bankruptcy Code to include a black-letter second-order choice-of-law section.

## I

### THE *COUDERT* APPROACH

The Second Circuit's decision in *Coudert* cannot be understood in a vacuum; rather, it is the culmination of over a decade of jurisprudence. Furthermore, as the foregoing analysis shows, the result in the case has intuitive appeal for judges, who are not accustomed to thinking about the forum-shopping implications that their choice-of-law pronouncements will have.<sup>20</sup>

This Part's analysis of *Coudert* thus begins with an examination of *In re Gaston & Snow*, the 2001 case where the Second Circuit decided that bankruptcy courts should be bound by the *Klaxon* rule.<sup>21</sup> *Gaston & Snow* represents a fuller articulation of the Second Circuit's views on choice of law. Moreover, *Coudert*'s application of *Van Dusen*'s transfer rule is easier to accept if one believes *Gaston & Snow*'s application of *Klaxon* is justified. Indeed, the Supreme Court felt that *Van Dusen* was more or less a natural consequence of *Klaxon*; since transfer was not supposed to affect the substantive law applied to a given case, the choice-of-law regime applied was expected not to change, either.<sup>22</sup> Thus, if one is to successfully critique *Coudert*'s application of *Van Dusen* in bankruptcy, one must understand the arguments for the application of *Klaxon* to see whether the Court's analysis in the diversity context is applicable to the bankruptcy context.

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<sup>19</sup> *Infra* Part II.A.

<sup>20</sup> See Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 951 (1994) (describing judicial circumscription of choice-of-law questions).

<sup>21</sup> *Bianco v. Erkins (In re Gaston & Snow)*, 243 F.3d 599, 601–02 (2d Cir. 2001).

<sup>22</sup> See *Van Dusen v. Barrack*, 376 U.S. 612, 638–39 & n.38 (1964) (noting that the policy of uniformity underlying *Klaxon* and *Erie* required the result in the case).

After examining *Gaston & Snow*, Part I turns to the two options that the Second Circuit had in *Coudert*. It argues that the *Coudert* court's holding relied on an ill-justified assumption about the timing of party behavior—namely, that plaintiffs always bring suit *before* defendants file for bankruptcy. This decision was consequentialist in nature and sought a fair outcome on the particular facts of the case, but the court's faulty timing assumption risks the soundness of the rule's application in future cases.

### A. *The Road to Coudert: In re Gaston & Snow*

In 1984, the Erkins, an Idaho couple, started a new venture marketing oyster mushrooms.<sup>23</sup> When acrimonious litigation emerged around that company's finances, they hired the Boston law firm Gaston & Snow to be their "hard hitting litigators."<sup>24</sup> Subsequently, a dispute arose between the Erkins and Gaston & Snow about the nature of their billing arrangement and the amount of money the couple owed the law firm. Thus, when Gaston & Snow filed for bankruptcy under Chapter 11 in New York, the law firm's bankruptcy trustee filed an adversary proceeding against the Erkins for \$1.7 million in unpaid fees.<sup>25</sup>

In this proceeding, a choice-of-law question quickly emerged regarding the applicable statute of limitations.<sup>26</sup> The Erkins argued that the four-year Idaho statute of limitations should apply and bar the law firm's contract claim. In contrast, the law firm argued that the six-year New York statute of limitations should apply, meaning its claim was still timely.<sup>27</sup> The federal bankruptcy judge, stating "that he would sit as if he were a New York state court judge," applied the New York choice-of-law regime to find the New York statute of limitations applicable, and found the claim timely.<sup>28</sup>

On appeal, the Second Circuit was squarely presented with the question of whether the court below was right to apply New York's state choice-of-law regime, as the alternative (a federal common-law approach to choice-of-law in bankruptcy) would almost definitely have led to the opposite result.<sup>29</sup> Breaking with its sister circuits that had held that a federal common-law approach to the first-order

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<sup>23</sup> *In re Gaston & Snow*, 243 F.3d at 602.

<sup>24</sup> *Id.* (internal quotation marks omitted).

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* at 601 (describing a resolution of this issue as "required").

<sup>27</sup> *Id.* at 604.

<sup>28</sup> *See id.* (discussing the bankruptcy judge's ruling below).

<sup>29</sup> *See id.* at 605 ("[I]f federal choice of law rules are to be utilized . . . there is little doubt that New York's statute of limitations would not apply.").

choice-of-law question was superior, the Second Circuit held that the absence of risk to a strong federal policy interest meant that applying the first-order choice-of-law regime of the state in which the federal bankruptcy court sat was the best solution.<sup>30</sup> The Second Circuit's opinion rejected the argument that national uniformity alone could justify displacing state conflicts rules because it was contrary to the Supreme Court's decision in *Klaxon*, which specifically held that federal courts sitting in diversity were required to apply forum-state conflicts rules.<sup>31</sup> Instead of adopting a uniform federal solution, therefore, the Second Circuit in *Gaston & Snow* extended the *Klaxon* rule to cover bankruptcy cases.<sup>32</sup>

### B. *The Second Circuit's Options in Coudert*

After *Gaston & Snow*, federal bankruptcy judges, like federal judges sitting in diversity, were obligated to apply the forum state's choice-of-law rules to bankruptcy proceedings. In *Coudert*, the Second Circuit was forced to grapple with the question left open in *Gaston & Snow*: What is the forum state for a pre-bankruptcy suit that is stayed by the filing of a bankruptcy petition, the state where the claim was originally filed or the state where the bankruptcy petition (and thus the plaintiff's bankruptcy proof of claim) is filed?

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<sup>30</sup> *Id.* at 605–07. In particular, the Second Circuit dismissed the Ninth Circuit's proposed rule of a uniform federal common-law choice-of-law regime on the grounds that the Supreme Court had already “rejected the need for uniformity as a justification for displacing state conflicts rules.” *Id.* at 606. Instead, the Second Circuit agreed with the Fourth Circuit and adopted a rule of deference to state law when faced with a very similar, if somewhat inapposite, situation. *See id.* at 606–07 (explaining that “[t]he situation presented in the instant case is slightly different from that facing the Fourth Circuit” but “the other reasons advanced” by that court were nonetheless persuasive). Moreover, the Second Circuit started with a presumption that the creation of federal common law is disfavored; if the policy arguments from either side seemed close, the court was inclined to find the creation of such law improper. *See id.* at 606 (“The ability of the federal courts to create federal common law and displace state created rules is severely limited.”).

<sup>31</sup> *See id.* at 606 (“While an interest in uniformity can justify the creation of federal common law, *Klaxon* rejected the need for uniformity as a justification for displacing state conflicts rules.” (internal citations omitted)).

<sup>32</sup> *See id.* at 601–02 (explaining the holding as an extension of *Klaxon*). Recall that *Klaxon* explained its holding as a derivative of *Erie*—specifically, the Court held that the general disavowal of any ability of the federal judiciary to create federal common law must also “extend[ ] to the field of conflict of laws,” because any other ruling would allow for intrastate forum shopping. *Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487, 496 (1941) (explaining the consequence of any other holding as “constantly disturb[ing] equal administration of justice in coordinate state and federal courts sitting side by side” (citing *Erie R.R. v. Tompkins*, 304 U.S. 64, 74–77 (1938))). Thus, the Second Circuit's ruling has quite a solid pedigree—as *Klaxon* extended *Erie*'s policy analysis to choice of law, *Gaston & Snow* extended *Klaxon* to bankruptcy proceedings.

Despite the district court's adhering to the "broad language, in dicta" from *Gaston & Snow* that might have indicated otherwise,<sup>33</sup> the Second Circuit ruled that the correct forum was the state where the claim was originally filed.<sup>34</sup> In so doing, the Second Circuit relied expressly on the Supreme Court's jurisprudence in diversity jurisdiction cases. In light of the Court's "tolerance for inter-state forum shopping by plaintiffs" and lack of a similar pronouncement for defendants "locked into the forum," the Second Circuit saw defendants' shopping for a forum (and that forum's choice-of-law regime) as unacceptable.<sup>35</sup> Thus, the *Coudert* court determined that analogy to the Supreme Court's jurisprudence on transfer in the diversity context justified adopting what might be called a doctrine of quasi-transfer in the bankruptcy context: Though the state law tort claim at issue in *Coudert* was merely stayed and never actually transferred,<sup>36</sup> the fact that the substance of the bankruptcy proceeding arose from a "parallel, out-of-state, non-bankruptcy proceeding" was a central factor in applying the *Van Dusen* doctrine in a bankruptcy case.<sup>37</sup>

The *Coudert* court framed its choice around the policies underlying the *Klaxon* decision, but there are reasons to suspect the court was being more results-oriented than that. For one, the *Coudert* court did not isolate a strong federal policy of the sort *Gaston & Snow* correctly deemed required if state law was to be displaced.<sup>38</sup> Instead, the court focused on the fundamental unfairness associated with finding Statek's claim untimely in this instance, despite that being fully a consequence of the particular quirks of state law at issue.<sup>39</sup> Moreover, if

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<sup>33</sup> See *In re Coudert Bros. LLP*, 673 F.3d 180, 191 & n.10 (2d Cir. 2012) ("[O]ur opinion in *In re Gaston* includes the statement: '[W]e decide that bankruptcy courts confronting state law claims that do not implicate federal policy concerns should apply the choice of law rules of the forum state.'" (quoting *In re Gaston & Snow*, 243 F.3d 599, 601–02 (2d Cir. 2001)) (second alteration in original)).

<sup>34</sup> *Id.* at 191.

<sup>35</sup> *Id.* at 189–90.

<sup>36</sup> Transfers of this sort are not part of the Bankruptcy Code. The closest analog is transferring the entire bankruptcy case to a different district under 28 U.S.C. § 1412, but there is nothing in the text of that provision that would allow the transfer of a single claim akin to the analogy drawn by the Second Circuit here.

<sup>37</sup> See *Coudert Bros.*, 673 F.3d at 191 (describing the application of *Van Dusen* as "the appropriate course of action where . . . the claim before the bankruptcy court is wholly derived from another claim already pending in a parallel, out-of-state, non-bankruptcy proceeding").

<sup>38</sup> Compare *id.* at 188 (interpreting *Gaston & Snow* as requiring an "important federal interest or policy concern" to justify abandonment of state law), with *id.* at 190–91 (justifying the result by appealing to the "fundamental[] unfair[ness]" of a contrary holding with no characterization of this as a federal concern).

<sup>39</sup> The court recognized that the New York borrowing statute, which "mandate[d] use of the *shortest* statute of limitations available" in cases involving out-of-state plaintiffs, was



the Second Circuit was principally focused on the balance of power between federal and state courts, as *Klaxon* was, why not defer to the forum state's policy determination (as in *Gaston & Snow*) against out-of-state residents, even if the results seemed absurd in the instant case?

In other words, the Second Circuit's decision was fundamentally consequentialist in nature; it was a policy-based decision rooted in predicted future outcomes from this rule. However, the Second Circuit made a key assumption—that plaintiffs always bring suit before defendants file for bankruptcy—that renders its policy analysis incomplete. The next section turns to understanding that assumption and highlighting its limitations.

### C. Assumptions of the *Coudert* Rule

The Second Circuit's justification for the *Coudert* rule assumes that plaintiffs always make their forum choice before defendants do—the court's analogy to the Supreme Court's pro-plaintiff transfer jurisprudence reveals that they expect the *Coudert* rule to also be pro-plaintiff. However, the underlying assumption is not justified in the bankruptcy context, because the Bankruptcy Code allows for the filing of proofs of claim that do not relate to any already-filed legal action.<sup>40</sup> The *Coudert* rule is therefore incomplete in its application.

To see the force of the *Coudert* court's timing assumption, consider two hypotheticals. Suppose that plaintiffs always choose their forum before defendants file for bankruptcy. If this were the case, the Second Circuit's *Coudert* rule would yield reasonably coherent results. There are only two real possibilities from a second-order perspective. Either both parties prefer the same choice-of-law regime or they do not. If they *do* prefer the same choice-of-law regime, then there is no problem because *Coudert* holds that the plaintiff's choice prevails and both parties get their preference.<sup>41</sup> If they *do not* prefer the same choice-of-law regime, then the Second Circuit's reasoning in *Coudert*

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the only reason for the fundamental unfairness in the case. *Id.* at 190 (emphasis in original).

<sup>40</sup> Indeed, § 101(5)(A) of the Bankruptcy Code defines a "claim" as any right to payment or equitable remedy that gives rise to a right to payment, "whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured," which is breathtaking in its expansiveness. 11 U.S.C. § 101(5)(A) (2012). Moreover, 11 U.S.C. § 502(b) does not include in its lengthy list of exceptions to allowed claims any provision regarding unfiled claims; to the contrary, § 502(c)(1) specifically allows for the estimation of claims that remain contingent so that the orderly administration of the bankruptcy case may continue.

<sup>41</sup> See *supra* note 35 and accompanying text (noting the *Coudert* rule's pro-plaintiff bent).

provides at least a reasonable argument for putting a thumb on the scale for plaintiffs. Though one might well argue for a different outcome on policy grounds, the court was aware that it had to defend its decision on these policy grounds.<sup>42</sup>

Suppose now, however, that plaintiffs do not always act before defendants do—more concretely, suppose that a given defendant files her bankruptcy petition before a given plaintiff files her civil action against the defendant. The filing of the bankruptcy petition hamstring the plaintiff considerably. Under bankruptcy law, all attempts to collect assets from the now-bankrupt defendant (including the filing of a lawsuit) are automatically stayed at the moment a bankruptcy case commences and the plaintiff cannot file her suit without first receiving authorization from the bankruptcy court.<sup>43</sup> The plaintiff must instead file a proof of claim, essentially providing the bankruptcy court notice of her alleged loss and the amount she is claiming.<sup>44</sup> The bankruptcy court will then determine the value of the plaintiff's claim after notice and a hearing.<sup>45</sup> Here, presumably, the defendant-debtor will argue for its preferred choice-of-law regime in objecting to the claim, while the plaintiff will argue for her preference.<sup>46</sup>

This is where *Coudert* is incomplete: It is not clear from the opinion how the bankruptcy court should decide between the two choice-of-law preferences in the second hypothetical. After all, though *Coudert* reflects a pro-plaintiff bent, it does so explicitly because the facts (a pre-bankruptcy tort suit followed by a subsequent, forced bankruptcy proof of claim) presented a logical analogy to transfer.<sup>47</sup>

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<sup>42</sup> See *id.* (noting the Second Circuit's attempt to justify *Coudert's* pro-plaintiff approach using Supreme Court precedent).

<sup>43</sup> This is mandated by the text of 11 U.S.C. § 362(a)(1), which says that the filing of a bankruptcy petition “operates as a stay, applicable to all entities, of the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy] case . . . .” The bankruptcy judge is allowed to lift the stay for cause under § 362(d), which might provide solace for plaintiffs except for its requirement that for any claim not against a piece of property, the proponent must demonstrate that the relief is “for cause.”

<sup>44</sup> See *infra* Part II.A (explaining the bankruptcy process). It is worth noting here that the proof of claim does not require any evidence of prior litigation activity; debtors often file for bankruptcy before their creditors have had a chance to file claims in court. See FED. R. BANKR. P. 3001 (outlining requirements for proofs of claims).

<sup>45</sup> See 11 U.S.C. § 502(b) (describing the claim valuation process).

<sup>46</sup> This assumes debtors will have standing to make such an argument, a somewhat controversial assumption beyond the scope of this Note. For an introduction to the question of standing to make objections to claims in bankruptcy, see JOAN N. FEENEY, BANKRUPTCY LAW MANUAL § 6:10 (5th ed. 2012) (available on Westlaw).

<sup>47</sup> See *In re Coudert Bros. LLP*, 673 F.3d 180, 190 (2d Cir. 2012) (noting that “[e]xcept by the most formalistic of interpretations, Statek . . . did not choose to litigate in New York,” but was instead forced into this forum if it wished to recover from the estate).

In the second hypothetical, however, no such analogy is possible—the claim was never filed in the original trial court, and there is no “transferor court” to speak of. The transfer analogy would also be unworkable: Since the choice-of-law rules in transfer situations assume that jurisdiction in the first court was proper, the bankruptcy court evaluating this sort of hypothetical transfer would have to resolve any objections to that jurisdiction before giving the plaintiff the benefit of her alleged forum choice.<sup>48</sup>

In sum, the faulty timing assumption in *Coudert* and the *Gaston & Snow* requirement of a strong federal policy in order to displace state forum law both suggest that the defendant’s forum choice, not the plaintiff’s, should control on the facts of *Coudert*.<sup>49</sup> One might well doubt, however, whether the timing assumption really matters—cases that run into this problem might be very rare, and the benefits of the *Coudert* rule in general might outweigh such a minor cost. Part II responds to this doubt in two steps. It first develops a normative framework that looks at the consequences of the faulty timing assumption. It then explains how the elements of that framework ought to be weighted and concludes that the failures of the *Coudert* rule are weighty indeed.

## II

### THE VALUES AT STAKE

There is considerable debate between both bankruptcy<sup>50</sup> and choice-of-law<sup>51</sup> scholars as to what policy values are most important. As such, rather than add to the lengthy literature arguing for one hierarchy or the other, Part II uses a modal approach that seeks potential

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<sup>48</sup> Though the Supreme Court has never explicitly held this, dicta in *Van Dusen* and holdings in various circuit court decisions confirm that the choice of law of the transferor court does not bind the transferee court if the transfer was made under 28 U.S.C. § 1406 for impropriety of initial venue. *Van Dusen v. Barrack*, 376 U.S. 612, 634 (1964); *Adam v. J.B. Hunt Transp., Inc.*, 130 F.3d 219, 230 (6th Cir. 1997); *Wisland v. Admiral Beverage Corp.*, 119 F.3d 733, 735–36 (8th Cir. 1997); *LaVay Corp. v. Dominion Fed. Sav. & Loan Ass’n*, 830 F.2d 522, 526 (4th Cir. 1987); *Manley v. Engram*, 755 F.2d 1463, 1467 (11th Cir. 1985); see also *Toy v. Plumbers & Pipefitters Local Union No. 74 Pension Plan*, 439 F. Supp. 2d 337, 339–40 (D. Del. 2006) (collecting cases). Thus, the bankruptcy court in the second hypothetical would somehow have to determine whether or not venue in the original state would have been proper in order to determine whether to apply the *Coudert* rule or not.

<sup>49</sup> See *supra* notes 30–32 and accompanying text (noting importance of the lack of over-riding federal interest in *Gaston & Snow*).

<sup>50</sup> For a good overview of various approaches to bankruptcy theory, see Nick Axelrod, Note, *Into the Perfect Storm: The Failure of Trustee Actions Against Third Parties*, 68 N.Y.U. ANN. SURV. AM. L. 441, 471–75 (2012).

<sup>51</sup> See Sterk, *supra* note 20, at 950 (“Choice of law theorists differ not only about method but also about the very foundations of choice of law theory.”).

sites of commonality between these various values, despite the lack of abstract agreement.<sup>52</sup> Part II.A lays out the bankruptcy values that ought to guide a policymaker in this arena—avoiding a race to the courthouse, *Butner* deference to state law, and efficiency—and concludes that while *Coudert* is fairly consistent with *Butner* deference and efficiency, it critically fails to avoid a race to the courthouse. Part II.B similarly draws out the choice-of-law concepts of sovereignty, reliance interests, and uniformity, and concludes that *Coudert* performs ably across all three. Part II.C draws these goals into a more overarching framework, and shows why the *Coudert* rule’s failure outweighs its successes.

### A. Bankruptcy Values

To understand the relevant considerations for bankruptcy policy, it is useful to begin by examining the bankruptcy process.<sup>53</sup> First, a debtor files a petition for bankruptcy, like *Coudert* LLP did. Under the expansive venue provisions of the Bankruptcy Code<sup>54</sup> (and given that there is no personal jurisdiction issue under the Bankruptcy Code<sup>55</sup>), the bankruptcy petition may be filed in any federal district court, provided that (1) the debtor’s “domicile, residence, principal place of business in the United States, or principal assets in the United States” are in the district where that court sits, or (2) a Chapter 11 bankruptcy case involving the debtor’s “affiliate, general partner, or partnership” has been filed there.<sup>56</sup> Upon filing of the petition, all judicial proceedings involving the debtor’s possessions in any court are automatically stayed.<sup>57</sup> The entire estate—that is, everything the

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<sup>52</sup> This borrows from Cass Sunstein’s argument that such “incompletely theorized agreements” represent a way forward for policymaking in a democracy. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995) (identifying incompletely theorized agreements as a strategy for producing agreements to resolve legal disputes amidst pluralism, alleviating the parties’ “need . . . [to] agree on fundamental principle”).

<sup>53</sup> This describes a voluntary bankruptcy, as these are the most common in contemporary practice, and because the procedure for a voluntary bankruptcy is slightly simpler than for an involuntary one. Involuntary bankruptcies proceed identically after the filing of the petition, but their involuntary nature makes it difficult to presume, as I have, that defendants have complete freedom to file or not file for bankruptcy whenever they like. For the purposes of this Note, therefore, I assume a bankruptcy characterized by such freedom.

<sup>54</sup> 28 U.S.C. § 1408 (2012).

<sup>55</sup> See FED. R. BANKR. P. 7004(f) (noting that if proper service is made on a party over whom the court may constitutionally assert jurisdiction, that is “effective to establish personal jurisdiction over the person of any defendant with respect to a case under the [Bankruptcy] Code”).

<sup>56</sup> 28 U.S.C. § 1408.

<sup>57</sup> 11 U.S.C. § 362 (2012) (providing for the automatic stay).

debtor has an interest in<sup>58</sup>—is then consolidated in the bankruptcy forum. As part of this consolidation, the bankruptcy court evaluates claims (such as Statek's tort claim in *Coudert*) to determine their legitimacy and value. Depending on the type of bankruptcy (and the type of debtor), the court then either liquidates the estate or approves a plan to pay off these claims.<sup>59</sup> In either case, claims are paid in the legally mandated order.<sup>60</sup> If the estate has been liquidated, the debtor receives a discharge of its debts,<sup>61</sup> and the process is ended. If not, then the debtor proceeds under the payment plan that has been approved, the debtor receives a discharge, and the process ends.

It is worth noting that this process is not set in stone; indeed, Congress has amended the Bankruptcy Code many times.<sup>62</sup> To understand and explain these legislative changes and their judicial gloss, as well as to articulate a coherent explanation for having bankruptcy processes in the first place, bankruptcy scholars have identified several foundational principles.

First, the most straightforward account of why bankruptcy (a process with major economic consequences for its participants) exists is itself economic. In his seminal piece on the subject, Thomas Jackson argues that the point of bankruptcy is to avoid the situation that results when creditors sniff out a borrower's impending insolvency and attempt self-help to resolve their debts.<sup>63</sup> The ensuing tumult creates the sort of economic inefficiency endemic to collective action problems. Creditors are self-interested actors who seek to maximize the proceeds they can claw back from a bankrupt debtor. When faced with an insolvent debtor, and thus the prospect of incomplete repayment, creditors will seek to maximize their returns at other creditors' expense, typically by seizing assets of the debtor and selling them off.<sup>64</sup> Two inefficiencies thus result. First, there might be more value in the debtor's estate as a going concern than there would be in a

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<sup>58</sup> See 11 U.S.C. § 541 (defining property of the estate).

<sup>59</sup> See generally 4 NORTON BANKR. L. & PRAC. 3d § 86 (2014) (describing the various ways in which bankruptcy proceedings end) (available on Westlaw).

<sup>60</sup> See 9D AM. JUR. 2D *Bankruptcy* § 3305 (2006) (describing the basic claim priority scheme in bankruptcy). The complexity of this plan, and some details of the order in which creditors are repaid, will vary based on the facts of the situation and the kind of debtor involved.

<sup>61</sup> As with the plan confirmation process, the contours of this discharge are omitted as beyond the scope of this Note.

<sup>62</sup> See 9 AM. JUR. 2D *Bankruptcy* § 15 (2006) (summarizing major amendments to the Bankruptcy Code since 1978).

<sup>63</sup> Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982); see also Axelrod, *supra* note 50, at 471–75 (describing this assumption as central to both major theoretical accounts of bankruptcy law).

<sup>64</sup> See Axelrod, *supra* note 50, at 472 (explaining the rationality of such maneuvering).

liquidation because some assets, like specialized machinery, may generate more value when paired together than their individual sale prices would indicate.<sup>65</sup> Second, a system that benefits first-moving creditors encourages all creditors to invest in wasteful monitoring of the debtor to ensure that they will be first, using resources that might be better put to another use.<sup>66</sup>

The consequence of the above account for the *Coudert* rule is clear. Since the very point of bankruptcy is to remove the advantage that goes to the victor of a “race to the courthouse,”<sup>67</sup> a choice-of-law regime for bankruptcy should be blind to the relative times at which the bankruptcy petition and creditors’ claims are filed. On these grounds alone, the *Coudert* rule is problematic—if one of two identically situated plaintiffs (in, say, a mass tort context) files his claim before bankruptcy and the other files afterwards, the former will be able to gain the advantage of his choice of state law in the bankruptcy proceeding while the latter will not.<sup>68</sup>

Second, federal bankruptcy law seeks comity with state law. Despite the fact that the Constitution explicitly grants Congress power to act in the bankruptcy arena,<sup>69</sup> there is a strong preference in bankruptcy to maintain as much of the substantive law governing underlying claims as possible, unless there are strong bankruptcy-specific reasons for altering the substantive law. This principle, known as the *Butner* principle,<sup>70</sup> draws its normative force from the fact that bankruptcy tends to disrupt the usual rights and obligations people have through its consolidation and discharge provisions.<sup>71</sup> Of course, some alteration of these rights is unavoidable. Most obviously, some creditors will have to accept less than the full value of their claims if the

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<sup>65</sup> See Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. LEGAL STUD. 127, 133–40 (1986) (explaining that preservation of going concern value is necessary to resolve the “common pool problem” plaguing insolvent entities).

<sup>66</sup> Jackson, *supra* note 63, at 862–63 (analyzing this situation as a “classic example of the game theorist’s ‘prisoner’s dilemma’”).

<sup>67</sup> See *id.* at 861–62 (explaining the “race to the courthouse” dynamic).

<sup>68</sup> This follows from the fact that *Coudert*’s reasoning assumes plaintiffs will act before defendants. *Supra* Part I.C. If one plaintiff acts before the defendant files for bankruptcy and the other acts afterwards, the logic of *Coudert* will hold for the first but not the second.

<sup>69</sup> U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . .”).

<sup>70</sup> *Butner v. United States*, 440 U.S. 48, 55 (1979) (“Unless some federal interest requires a different result, there is no reason why [property interests created by state law] should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.”).

<sup>71</sup> See Kyle Christopher Oehmke, *Holding on to Creditors’ Rights Under the Hanging Paragraph of BAPCPA: Analysis of In re Wright*, 33 S. ILL. U. L.J. 95, 107 (2008) (describing reduction of this instability as “an important policy argument” underlying the *Butner* decision).

debtor is insolvent.<sup>72</sup> Nonetheless, constitutional status of congressional bankruptcy power notwithstanding, a “first, do no harm” attitude is critical to the bankruptcy system.<sup>73</sup> Indeed, a dramatic change in the way such rights and obligations are treated would cause major economic harm; if parties expect their dealings to be handled in a particular way, disrupting those expectations induces uncertainty that is likely to prove inefficient and thus should be avoided.<sup>74</sup> Here, the *Coudert* rule looks quite good—unsurprisingly so, as the fundamental unfairness of disrupting party expectations via the filing of a bankruptcy petition was the *Coudert* court’s principal justification for its new rule.<sup>75</sup>

Third, efficient and speedy resolution of cases is an important side constraint on bankruptcy case management.<sup>76</sup> Bankruptcy highly values speed, even if it does not always obtain it. Indeed, there are comparatively few appellate decisions on the subject because most cases end too quickly for meaningful appellate review.<sup>77</sup> Estate management within bankruptcy is cumbersome,<sup>78</sup> so it is to all parties’ economic advantage to end the process as quickly as possible so that the debtor can move on to more economically productive activity and the

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<sup>72</sup> Since insolvency is defined as the inability to fully pay one’s debts, this follows naturally—at least one debt (held by at least one creditor) must be unsatisfied if the debtor is truly insolvent.

<sup>73</sup> Cf. Thomas E. Plank, *Bankruptcy and Federalism*, 71 *FORDHAM L. REV.* 1063, 1130–31 (2002) (explaining that “refrain[ing] from altering the rights of creditors more than necessary” is more consistent with the federalism principles of the Constitution than “broader view[s]” of bankruptcy policy).

<sup>74</sup> See generally Alex Y. Seita, *Uncertainty and Contract Law*, 46 *U. PITT. L. REV.* 75 (1984) (analyzing inefficiencies created in economic bargains by uncertainty).

<sup>75</sup> See *supra* Part I.B (showing that the *Coudert* result was grounded in concerns about this fundamental unfairness).

<sup>76</sup> See Derek N. Pew, *The Need for Speed and Common Sense: Rewriting § 365(c)(2) to Recognize the Practice of Prepetition Agreements for § 364 Debtor-in-Possession Financing*, 140 *U. PA. L. REV.* 2471, 2473–74 (1992) (explaining that speed benefits “courts overburdened by bankruptcy filings” and yields “a reduction in legal fees” and “lower legal costs” for debtors and creditors, making “[t]he desire for speed” a significant factor in modern bankruptcy practice).

<sup>77</sup> See, e.g., *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1069 (2d Cir. 1983) (noting that “a bankruptcy judge must not be shackled” due to underlying bankruptcy policies). The obstacles that ultraquick dispositions posed for meaningful appellate review led Congress to allow direct appeals of bankruptcy issues to appellate courts, ensuring more precedent at minimum cost to the speed prized in bankruptcy. See, e.g., *Weber v. U.S. Trustee*, 484 F.3d 154, 158–61 (2d Cir. 2007) (noting that a major cause of the direct appeal amendment was “widespread unhappiness at the paucity of settled bankruptcy-law precedent,” and declaring intent to take such appeals only when necessary to clarify legal uncertainty in the bankruptcy courts or to correct manifest error).

<sup>78</sup> See, e.g., Lindsey Freeman, Comment, *BAPCPA and Bankruptcy Direct Appeals: The Impact of Procedural Uncertainty on Predictable Precedent*, 159 *U. PA. L. REV.* 543, 545–46 (2011) (noting the importance of speed and avoiding “cumbersome bankruptcy appellate process” as reasons for legislation in the bankruptcy arena).

creditors may reinvest their money elsewhere. For the same reason, simplicity of process is valuable in bankruptcy. Complicated procedures are time consuming and expensive, and make judicial error more likely in the absence of appellate review.<sup>79</sup> Bankruptcy's consolidation of claims is also a direct consequence of the need for efficiency. Cases in far-flung courts all relating to the same bankrupt waste judicial resources (as multiple courts are concerned with cases that one bankruptcy judge could handle) and increase the risk of inconsistent verdicts (as multiple fact finders might disagree amongst themselves, while a single judge has no one to contradict).<sup>80</sup> Thus, claims must be consolidated both accurately (that is, in a fashion consistent with their treatment outside of bankruptcy) and completely (that is, ensuring that all claims are represented within the bankruptcy).

Here, the *Coudert* rule gets things partially right. The rule is simple—all a bankruptcy judge must do is look to where the claim in question was initially filed—and its application will require little analysis and likely be consistent across courts. However, the analysis of the *Coudert* rule, discussed above in Part I.C, shows that the *Coudert* rule can create arbitrary and inaccurate evaluations of claim values. Thus, while *Coudert* is quick, it is not always right, and cannot be said to maximize efficiency in a bankruptcy sense. Moreover, it is worth noting that while *Coudert* is a fairly simple rule, it adds a degree of complexity to the *Gaston & Snow* inquiry. Therefore, while the rule is easy to apply, it cannot be viewed as a complete success on efficiency grounds.

To recap, then, there are three key bankruptcy principles that must be respected: avoiding a race to the courthouse, *Butner* deference to substantive law, and promoting efficiency. A choice-of-law system that is consistent with these principles is superior to one that is not. Two further conclusions can now be drawn about these bankruptcy principles.

First, though these principles may not admit a strict ordering, they are not fully equal. For example, the existence of any federal bankruptcy process necessarily requires altering the rights and obligations existing outside the process; while avoiding disruption sounds

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<sup>79</sup> See Andrew J. Morris, *Some Challenges for Legal Pragmatism: A Closer Look at Pragmatic Legal Reasoning*, 28 N. ILL. U. L. REV. 1, 30–32 (2007) (noting increased risk of judicial error induced by increased decisionmaking complexity).

<sup>80</sup> See Jeffrey T. Ferriell, *The Perils of Nationwide Service of Process in a Bankruptcy Context*, 48 WASH. & LEE L. REV. 1199, 1237–41 (1991) (tracing the history of bankruptcy legislation to identify efficiency as the central justification for modern consolidation processes); Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2285–86 (2000) (arguing that consolidation improves efficiency and is necessary to maximizing asset value).



good, therefore, it can only serve as a constraint as the process attempts to optimize some other value, such as avoiding the race to the courthouse.<sup>81</sup> Similarly, while efficiency is crucial to the practical value of any bankruptcy process, a design that chooses efficiency at all costs (say, by extinguishing all debts automatically) will clearly not suffice. In contrast, avoiding the race to the courthouse is the *foundational* purpose of bankruptcy, meaning that maximum attainment of that purpose is least likely to cause negative results.<sup>82</sup> Thus, it may make more sense to speak of avoiding the race as a necessary condition for any legitimate choice-of-law system in bankruptcy, and *Butner* and efficiency as requiring a more sensitive, context-specific balancing. Second, the *Coudert* rule emerges as unacceptable on bankruptcy grounds. If avoiding a race to the courthouse is necessary for a successful second-order choice-of-law regime, then *Coudert's* violation of this constraint immediately removes it from consideration.

### B. Choice-of-Law Concerns

Though there have been many academic attempts to create cogent, overarching choice-of-law rules for all cases,<sup>83</sup> no one of them has emerged as dominant.<sup>84</sup> That said, some values are clearly present throughout and merit further discussion.

First, choice of law has historically been deeply associated with questions of sovereignty.<sup>85</sup> A state's ability to declare codes of conduct for its citizens has long been viewed as inextricably bound up with its plenary power; indeed, initial resistance to choice-of-law pro-

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<sup>81</sup> See Plank, *supra* note 73, at 1064 (arguing that while Congress may use bankruptcy law to "adjust the relationship between an insolvent debtor and his, her, or its creditors," it should not do any more).

<sup>82</sup> See, e.g., *Union Bank v. Wolas*, 502 U.S. 151, 161–62 (1991) (concluding that avoiding a race to the courthouse is a fundamental principle in bankruptcy); *Hays v. DMAC Invs., Inc. (In re RDM Sports Grp., Inc.)*, 250 B.R. 805, 811 (Bankr. N.D. Ga. 2000) (citing avoidance of a race to courthouse as "the central purpose" of a bankruptcy preference scheme).

<sup>83</sup> E.g., DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965); BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1st ed. 1963); Willis L.M. Reese, *Conflict of Laws and the Restatement Second*, 28 *LAW & CONTEMP. PROBS.* 679 (1963); Max Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 *TUL. L. REV.* 4 (1944).

<sup>84</sup> Cf. William M. Richman, *A New Breed of Smart Empirically Derived Conflicts Rules: Better Law than "Better Law" in the Post-Tort Reform Era*, 82 *TUL. L. REV.* 2181, 2184–85 (2008) (reviewing the results of a study showing variation in state choice-of-law rules that was reported in SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* (2006)).

<sup>85</sup> See, e.g., Harold P. Southerland, *Sovereignty, Value Judgments, and Choice of Law*, 38 *BRANDEIS L.J.* 451, 452–53 (2000) (noting choice of law's historical roots in sovereignty concerns).

visions in contracts came from the concern that private “lawmaking” of this kind wrongly intruded on state power.<sup>86</sup> Though this particular concern has not withstood the test of time, it remains clear that respecting a state’s legitimate legislative power and interest in applying its own laws remains a critical element of this analysis.<sup>87</sup> So-called modern “governmental interest” analysis,<sup>88</sup> for instance, is justified by its recognition that states legislate for certain reasons including to benefit and regulate their citizens,<sup>89</sup> and that choice of law must be sensitive to those reasons if it is to yield rational results. This Note later warns against a context-sensitive inquiry of this kind at the second-order level,<sup>90</sup> but it remains the case that respect for state sovereignty must be reflected in the choice-of-law analysis. The exact contours of state sovereignty present a hotly-contested question,<sup>91</sup> and this respect must be balanced with the overall project of constructing a sensible federal policy.

The rule that emerges is this: State sovereignty ought not be impinged unless strong federal interests are at stake.<sup>92</sup> For the reasons that the *Coudert* rule does well with regard to the *Butner* principle, it does well here—the rule stems from a deep deference to substantive law at the expense of bankruptcy law, and its reliance on state choice-of-law regimes is designed to minimize impact on state sovereignty.<sup>93</sup>

Second, the reliance interests of the parties involved play an important role in choice-of-law analysis.<sup>94</sup> Courts presume that parties

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<sup>86</sup> See, e.g., *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115, 117 (2d Cir. 1931) (Hand, J.) (stating that parties “cannot by agreement substitute the law of another place” for that of the place of contracting).

<sup>87</sup> See Southerland, *supra* note 85, at 456–57 (insisting on sovereignty-based value judgments in choice of law despite the historical development of the doctrine away from express sovereignty concerns).

<sup>88</sup> CURRIE, *supra* note 83, at 189.

<sup>89</sup> See, e.g., Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1047–48 (1987) (summarizing interest analysis).

<sup>90</sup> See *infra* Part III.B.2 (arguing that state sovereignty interests at the second-order level are highly attenuated).

<sup>91</sup> See, e.g., 19 WRIGHT, MILLER & COOPER, *supra* note 10, § 4514 (tracing the difficulty of establishing the exact allocation of federal and state power).

<sup>92</sup> This point has been made by scholars analyzing uniform federal choice-of-law rules in other aggregate litigation contexts. See, e.g., Jed J. Borghesi, Note, *Class Action Fairness: A Mature Solution to the 23(b)(3) Choice of Law Problem*, 95 GEO. L.J. 1645, 1656 (2007) (noting that “[s]everal commentators” have called for attempts to “forge a compromise between liberal and federalist interests by facilitating consolidation while retaining substantive state tort law”).

<sup>93</sup> See *supra* note 75 and accompanying text (noting how well *Coudert* does with regard to the *Butner* principle).

<sup>94</sup> See Sterk, *supra* note 20, at 1007 (referring to reliance as a “generally accepted” principle of choice of law).

are aware of the law and fashion their conduct accordingly.<sup>95</sup> Procedures that make it difficult for parties to ascertain the applicable law therefore disrupt this core judicial assumption and increase the risk of arbitrariness.<sup>96</sup> There is always an implicit risk, of course, that such reliance will be difficult to ascertain after the fact—once a tort claim has been lodged or a contract falls apart, self-interest will lead parties to claim that they just happened to rely on the law most beneficial to them. The relevant reliance interest here focuses on the theoretical conduct of individuals *prior* to the controversy before the court, and not on evidence of actual reliance.<sup>97</sup> Thus, satisfaction of the reliance interest can best be ensured by having choice-of-law rules that are clear and straightforward,<sup>98</sup> particularly on the second-order level. If there is never uncertainty regarding the applicable law in a given case, it is far easier to conclude that parties should or would have been aware of the provisions of that law.

On reliance interests, *Coudert* does quite well, as its simplicity means that parties will be able to anticipate which state's law will be applied. However, the fact that the result changes based on the timing of party action<sup>99</sup> means that plaintiffs will not be able to rely on their traditional advantage of forum choice. There is significant risk that a defendant using the *Coudert* rule may be able to disrupt a plaintiff's reasonable reliance on her ability to choose a forum.

Third, uniformity is a crucial element in choice of law. In the United States, there are two dimensions to the uniformity consideration. There is the traditional goal in choice of law to avoid "horizontal" forum shopping among states, such as a plaintiff or bankruptcy-petition filer choosing between New York and Connecticut law.<sup>100</sup> This uniformity goal is premised on the difficulty of justifying different substantive law based purely on where the lawsuit is filed; though plaintiffs have a right to choose the forum in which they litigate, it is undesirable to create a dramatically different result in a case

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<sup>95</sup> 29 AM. JUR. 2D *Evidence* § 290 (2008) (stating this legal assumption and describing it as "merely a restatement of the substantive rule that ignorance of the law is not a defense").

<sup>96</sup> *Supra* note 79 and accompanying text.

<sup>97</sup> Cf. Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 13 (1991) (noting the ability of plaintiffs to "bias[]" the system in their favor by choosing the forum).

<sup>98</sup> See *id.* at 12–13 (decrying the unfairness and waste that results when choice-of-law rules are unclear).

<sup>99</sup> See *supra* Part I.C (demonstrating *Coudert's* inapplicability when defendants file for bankruptcy before plaintiffs have filed their claims).

<sup>100</sup> See Erwin N. Griswold, *In Reply to Mr. Cowan's Views on Renvoi*, 87 U. PA. L. REV. 257, 260 (1939) (arguing that choice of law "can have as its only purpose the effort to make the result reached in a particular case independent of the forum in which it is brought").

simply because of an accident of geography.<sup>101</sup> The desire to avoid horizontal forum shopping has been somewhat furthered in the United States by the Full Faith and Credit Clause of the Constitution,<sup>102</sup> which requires judgments in one state to be respected in the others, and has been interpreted by the Supreme Court as limiting the degree to which a state may construct its choice-of-law regime in favor of its own citizenry.<sup>103</sup> That said, since the restrictions on state autonomy from the Full Faith and Credit Clause remain fairly insignificant, there are few practical constraints on state differentiation in the choice-of-law arena.<sup>104</sup>

Second, the United States has a particular desire to deter “vertical” forum shopping between federal and state courts. Most famously espoused in the “twin aims”<sup>105</sup> of the *Erie* doctrine,<sup>106</sup> this desire is the primary justification for the Rules of Decision Act,<sup>107</sup> which ensures that the substantive law applied in federal courts sitting in diversity jurisdiction is the same as that applied in the state in which the federal court sits.<sup>108</sup> The key principle from these cases is that

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<sup>101</sup> Cf. Dirk H. Bliesener, *Fairness and Choice of Law: A Critique of the Political Rights-Based Approach to the Conflict of Laws*, 42 AM. J. COMP. L. 687, 708 (1994) (arguing that “[t]he predictability of the ultimate outcome of a specific controversy is per se an important fairness concern” because it “is essential for the parties’ legal planning as part of taking responsibility for their social activities”). The practical difficulty of this desire for uniformity has long been that proponents of different choice-of-law methodologies are unlikely to agree that every state ought to adopt the same method. See, e.g., Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403, 405 (2000) (describing the Restatement (Second) as “a warning against the efforts to enshrine disparate and vacillating conflicts doctrines in black-letter rules”); Gene R. Shreve, *Preparing for the Next Century—A New Restatement of Conflicts?: Introduction*, 75 IND. L.J. 399, 400–01 (2000) (noting a difference of opinion on this issue from symposium authors). Thus, while abstract agreement on uniformity is likely, it will prove difficult for adherents of different choice-of-law schools to find practical common ground. Cf. Juenger, *supra*, at 410 (“Not only do the theoretical foundations on which judges purport to rely vary from state to state, one cannot even trust judicial opinions to adhere faithfully to the doctrines they claim to follow.” (internal citation omitted)). A solution to this problem, then, must be developed in the shadow of this understanding that complete national agreement on a particular choice-of-law method is highly unlikely; if the proposal requires this to succeed, it is likely to fail.

<sup>102</sup> U.S. CONST. art. IV, § 1.

<sup>103</sup> *Hughes v. Fetter*, 341 U.S. 609, 613 (1951) (“[W]e conclude that Wisconsin’s statutory policy which excludes this Illinois cause of action is forbidden by the national policy of the Full Faith and Credit Clause.”).

<sup>104</sup> See, e.g., *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516 (1953) (describing the states’ broad discretion in their selection of choice-of-law regimes, subject to minimal constraint from the Full Faith and Credit Clause); see also *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 332 (1981) (Stevens, J., concurring) (“It is not this Court’s function to establish and impose upon state courts a federal choice-of-law rule.”).

<sup>105</sup> *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

<sup>106</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>107</sup> 28 U.S.C. § 1652 (2006).

<sup>108</sup> See *Erie*, 304 U.S. at 78 (announcing this rule).

when federal common law conflicts with state law, state law is given priority.<sup>109</sup> The same, however, is not the case for federal statutory law, which may preempt state law.<sup>110</sup>

The *Coudert* rule does very well on uniformity. The practical import of its rule is that a debtor cannot improve her position by choosing a different bankruptcy forum, as the choice-of-law regime already selected by her creditor is locked in. Thus, horizontal uniformity is satisfied. Moreover, as a judicially fashioned rule of deferring to state law, *Coudert* does as well as a common law rule can with respect to vertical uniformity.

In sum, three choice-of-law principles may be added to the normative framework here developed: respecting state sovereignty, protecting reliance interests, and ensuring uniformity. It is unclear whether any one of these principles is, in the abstract, more important than the others. Rather, the analysis proceeds under the assumption that they are of roughly equal value, and alternative proposals may be evaluated by the tradeoffs made among them.

In the evaluation, the principles from bankruptcy deserve more weight than those from choice of law, simply because the solution chosen will have greater impact within bankruptcy. After all, courts engaging in regular choice-of-law analysis need not apply this second-order solution; every bankruptcy court faced with an out-of-state claim, however, will need to rely on this procedure. Therefore, the same arguments that gave primacy to avoiding the race to the courthouse in the bankruptcy context must also give it primacy over these choice-of-law concerns.

Thus, the complete account of this Note's normative framework is as follows: Avoiding a race to the courthouse is the principal constraint on any alternative to the *Coudert* rule, while five other values—*Butner* deference, efficiency, respect for state sovereignty, party reliance, and uniformity—are goods that the best solution will maximize.

As discussed above, the *Coudert* rule does quite well within this framework. It fully satisfies *Butner*, respect for state sovereignty, and uniformity, partially satisfies party reliance and efficiency, and only

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<sup>109</sup> See *id.* (holding that to find otherwise would be unconstitutional).

<sup>110</sup> Cf. Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFE and Shady Grove*, 106 NW. U. L. REV. 1, 35 (2012) (stating that a federal statute “will be given effect as written” whereas the application of judge-made federal law is less certain). Roosevelt believes that the best way to resolve this and other issues in the *Erie* doctrine is to reconceptualize the entire doctrine as a choice-of-law issue. *Id.* at 53. Though his conclusion is beyond the scope of this Note, it lends some further credence to the claim that federal second-order choice-of-law presents an accurate balancing of the federalism and choice-of-law policies identified herein.

fails at avoiding a race to the courthouse. As this last is the principal constraint, however, alternative proposals are very likely to be superior. The next Part constructs such an alternative.

### III

#### SECOND-ORDER CHOICE

Part III first describes the core proposal of this Note: legislative enactment of a second-order choice-of-law regime that is based on the Restatement (First) of Conflict of Laws. The normative framework developed in Part II is then applied to demonstrate that the proposed solution is superior to the *Coudert* rule, most critically in avoiding a race to the courthouse.

##### A. *The Proposal*

Congress should amend the Bankruptcy Code to include a second-order choice-of-law section governing all bankruptcies.<sup>111</sup> The section should consist of a series of provisions, each of which will be a black-letter second-order rule for a particular kind of action, modeled after the black-letter choice-of-law rules characteristic of the Restatement (First) of Conflict of Laws. For example, the Restatement (First) rule for tort claims is to apply the law of the place of injury to all elements of the plaintiff's claim.<sup>112</sup> Thus, the second-order rule that Congress should adopt is that tort claims be governed by the law chosen by the choice-of-law regime of the place of injury.

If this rule were applied to the facts of *Coudert*, the bankruptcy judge would have had to first determine the place of injury for the tort at issue. Most likely, the court would conclude that the accident occurred in Connecticut, the state where Statek's CEO lived and received most of the advice from Coudert that aided his embezzlement.<sup>113</sup> Thus, Connecticut's choice-of-law regime would be applied, yielding the same result as in the actual case.<sup>114</sup> Suppose, on the other hand, that the claim was that Coudert had breached a contract with the plaintiffs, and the contract had been made in New York. Since the Restatement (First) of Conflict of Laws says that contract claims are

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<sup>111</sup> *But see supra* note 53 (indicating that differences in bankruptcies might limit the scope of this Note).

<sup>112</sup> RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934) ("The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.").

<sup>113</sup> Since Coudert did file a *forum non conveniens* motion in Connecticut, however, this is not certain. *In re Coudert Bros. LLP*, 673 F.3d 180, 184 (2d Cir. 2012) (noting that Statek received Coudert's services in Connecticut and filed suit in Connecticut, only to be challenged by Coudert's *forum non conveniens* motion).

<sup>114</sup> *Id.* at 182.

governed by the law of the place of contracting,<sup>115</sup> the bankruptcy judge would apply New York's choice-of-law regime. If the same timing issues as existed in *Coudert* existed in the contract hypothetical, therefore, the claim would have been barred as untimely.<sup>116</sup>

There are four characteristics of the Restatement (First) that prove important to its usage as a second-order system and justify this Note's proposal. First, the system is *territorial*. For any given legal wrong, the Restatement (First) assumes that (1) there was a set of events in the world that needed to finish occurring for the wrong to be actionable, (2) there is a distinct state in which the last such event occurred, and (3) that state is the one whose law should be applied.<sup>117</sup> Second, the Restatement (First) is *uniform*. A forum that follows the Restatement (First) rule for a given legal wrong should end up picking the same substantive law to apply as any other forum that follows the Restatement (First) rule.<sup>118</sup> Third, the Restatement (First) contains *bright-line rules*. The rules it adopts, in contrast to competing approaches such as the Restatement (Second), tend to be straightforward to the point of arbitrariness, rather than consisting of balancing tests or the like.<sup>119</sup> Finally, unlike the numerous other systems that might comply with these criteria, the Restatement (First) is *historical*. Its provisions represent the direct descendants of the most ancient European choice-of-law rules, a pedigree that demonstrates their usability throughout the ages and the fact that they once represented the closest thing to a consensus on choice-of-law that existed.<sup>120</sup> Countless other characterizations of this treatise are possible, of course, but no other choice-of-law system can satisfy all four. Application of the normative framework in the following section demonstrates the importance of these characteristics.

### B. Application of the Normative Framework

Using the normative framework developed in Part II, this Subpart demonstrates the superiority of the proposal described above

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<sup>115</sup> RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 311 (1934).

<sup>116</sup> See *Coudert Bros.*, 673 F.3d at 185 (noting Statek's concession that its claim was untimely under New York law).

<sup>117</sup> See Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1195 (1987) (describing the assumptions behind a territorial view of choice of law).

<sup>118</sup> See *id.* at 1205 (articulating this as a principle of "vestedness" and noting the Restatement (First)'s compliance).

<sup>119</sup> Cf. Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1233 (1997) (criticizing the use of the Restatement (Second)'s flexible, open-ended provisions as "little more than a veil hiding judicial intuition").

<sup>120</sup> *Id.* at 1232 & nn.8-9 (noting this lineage).

along both bankruptcy and choice-of-law dimensions. It concludes that Congress should replace the *Coudert* rule with a second-order choice-of-law regime based on the Restatement (First) of Conflict of Laws.

### 1. *Bankruptcy Framework*

First, to satisfy the critical bankruptcy principle of avoiding a race to the courthouse,<sup>121</sup> bankruptcy procedure should be blind to the timing of claims. If the procedure treats all filed claims in exactly the same way regardless of order, there is no incentive for a particular claimant to file before any other claimant, and there is no reason to race to be the first to file. This Note's Restatement (First) proposal is blind to timing: A bankruptcy judge would be able to evaluate the claim at issue without reference to its timing, and could similarly evaluate any other claim on its facts alone.<sup>122</sup> This Note's proposal is therefore already superior to the *Coudert* solution, which did not satisfy this constraint.<sup>123</sup>

Next, the *Coudert* rule does very well with regard to the *Butner* principle, in large part because it ensures that a state choice-of-law regime is applied and thus approximates what might happen outside of the bankruptcy context. However, the second-order solution proposed in this Note does at least as well, as it chooses a state choice-of-law regime in similarly rigid fashion. Indeed, since this proposal is modeled on the Restatement (First) of Conflict of Laws, it chooses the choice-of-law regime of a state that has traditionally been viewed as having the *only* legitimate ties to the cause of action that matter in choice-of-law analysis, meaning it arguably does better than *Coudert*.<sup>124</sup>

Third is the need for efficiency. This value highlights what is likely the weakest element of the proposal, which adds determining which state's choice-of-law regime is applicable to the process by which claims are valued in bankruptcy, leading to some decrease in speedy case resolution. However, the fact that this proposal is modeled on the Restatement (First) of Conflict of Laws should ameliorate this concern somewhat. Restatements are likely to have been

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<sup>121</sup> See *supra* notes 81–82 and accompanying text (arguing that this principle is most important).

<sup>122</sup> See *supra* notes 113–16 and accompanying text (providing an example of how this solution could be applied to *Coudert's* facts).

<sup>123</sup> *Supra* Part I.C.

<sup>124</sup> See, e.g., Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2455–58 (1999) (explaining the traditional territorial approach to conflicts of law as espoused by Joseph Beale, reporter of the Restatement (First)).



cited and analyzed in judicial opinions,<sup>125</sup> and, therefore, are likely to come with some common-law understandings that can provide guidance to bankruptcy judges facing new legislation to interpret. To some extent, this is a double-edged sword; much of that common-law understanding was motivated by judicial attempts to avoid the seemingly harsh results of bright-line rules,<sup>126</sup> meaning that some error may be imported if bankruptcy judges rely on them blindly. As the system begins to run, though, this common-law precedent will provide helpful guidance to judges trying to understand a complicated new statutory regime. Moreover, the cost of the creation of such common law can be amortized over the life of the system, reducing the overall impact.

Additionally, the Restatement (First) is particularly useful because the rules are notoriously clear and direct—indeed, the Restatement (Second) was widely adopted<sup>127</sup> for its flexibility as compared to the Restatement (First).<sup>128</sup> Practically speaking, also, the degree of deference granted bankruptcy judges in their adjudication of legal issues should ensure that no serious workability concerns emerge.<sup>129</sup> Finally, to the extent that accuracy is part and parcel of efficiency (both because accurate results are more likely to be upheld on appeal, thereby minimizing the risk of lengthy case disposition, and because speed for speed's sake alone as the approach to judicial economy is likely to lead to excessive unintended consequences), the greater accuracy gained from this proposal should counterbalance the efficiency costs outlined herein.

In sum, then, this Note's proposal fares reasonably well with regard to bankruptcy policy values. This is no surprise, given the characteristics of the Restatement identified previously.<sup>130</sup> The bright-line nature of the Restatement, coupled with its uniformity, ensures that

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<sup>125</sup> Cf. Lawrence A. Cunningham, *The Common Law as an Iterative Process: A Preliminary Inquiry*, 81 NOTRE DAME L. REV. 747, 779–80 (2006) (explaining that Restatements, in attempting to describe the law, end up shaping its future contours). Indeed, a major advantage of the Restatements is precisely this: Where they do not already describe the uniformity of the law, they create sites of “artificial uniformity” because of the respect they command. See Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 443–45 (2004) (surveying reasons why courts follow Restatements, including tendencies towards both actual and artificial uniformity).

<sup>126</sup> See Borchers, *supra* note 119, at 1235–36 (stating that the Restatement (First)'s “dogmatic” character led to swift judicial revision of its rules).

<sup>127</sup> *Id.* at 1233 (noting the wide adoption of the Restatement (Second)).

<sup>128</sup> See William L. Reynolds, *The Silver Anniversary of the Second Conflicts Restatement: Introduction*, 56 MD. L. REV. 1193, 1194 (1997) (noting the advantage of the Restatement (Second)'s flexibility for judges who want discretion to be results-oriented).

<sup>129</sup> See, e.g., *Adelphia Bus. Solutions, Inc. v. Abnos*, 482 F.3d 602, 609 (2d Cir. 2007) (collecting cases that argue for broad bankruptcy judge discretion in fashioning remedies).

<sup>130</sup> Those characteristics are territoriality, uniformity, being black-letter, and historical authenticity, identified *supra* in notes 117–20 and accompanying text.

the timing of claims will never matter to the second-order choice-of-law analysis in bankruptcy, avoiding the race to the courthouse. The Restatement's territoriality ensures that the harm to state sovereignty is minimal, as *Butner* demands. Finally, its simple and historical nature ensures that judges are more likely to accurately interpret Congress's will in passing this statute. Courts will not need to reach far to find applicable precedent; by ensuring correct decisions and large bodies of guidance for judges, therefore, the sacrifice of efficiency is minimized. Though there are likely to be some short-term efficiency costs, the guarantee of resolving the race to the courthouse and the satisfaction of the *Butner* principle justify the proposal in this Note. To continue the analysis, however, an examination of its satisfaction of choice-of-law requirements is also necessary.

## 2. Choice-of-Law Framework

Part II.B identified three choice-of-law principles to consider: state sovereignty, reliance interests, and uniformity. First, there is a prima facie case for thinking this proposal does well with regard to state sovereignty. The result of the inquiry is always *some* state's first-order choice-of-law regime, which is the same as under the *Coudert* rule, thus recognizing the importance of such regimes for states. While the rigid approach here advocated initially appears to raise some sovereignty concerns (as state interests in having their choice-of-law regime considered are ignored), there is little reason to think such state interests deserve to be valued in this context.<sup>131</sup> After all, such an expansive view of state sovereignty is contrary to judicial experience—the Second Circuit did not harm California's sovereignty in *Coudert* by refusing to consider applying California's choice-of-law regime, because of the obvious lack of Californian interest in the case. Moreover, both the *Butner* principle<sup>132</sup> and the Constitution's grant to Congress of the ability to create bankruptcy rules that trump state law<sup>133</sup> allow federal concerns of workability and coordination of a

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<sup>131</sup> Proposals that there be national choice-of-law legislation are more than a generation old. Gottesman, *supra* note 97, at 16–17. Such proposals have run into serious federalism objections in the past. See, e.g., Robert A. Sedler, *The Complex Litigation Project's Proposal for Federally-Mandated Choice of Law in Mass Tort Cases: Another Assault on State Sovereignty*, 54 LA. L. REV. 1085 (1994) (arguing that a federally mandated choice-of-law rule in mass torts is inconsistent with a federal system that places an emphasis on state sovereignty). Contrary to such proposals, the solution in this Note is congressional enactment of *second-order* legislation, which is far weaker in its assault on sovereignty.

<sup>132</sup> See *Butner v. United States*, 440 U.S. 48, 55 (1979) (providing for the possibility that “some federal interest requires a different result” in bankruptcy than the one mandated by otherwise applicable state law).

<sup>133</sup> U.S. CONST. art. IV, § 1.

national system to eclipse state concerns. At some point, the prudence involved in prudential federalism requires determining that there is no longer much value in turning to the states. All told, this Note's proposal is sufficiently respectful of state interests, particularly as it does not impinge on the traditional areas of state authority indicated above.<sup>134</sup>

Second, the basic point of the reliance argument is that parties should be able to anticipate what law will be applied to them, and therefore substantive law should not be altered by the procedural mechanisms utilized in litigation. If nothing procedural can change the law that will be applied, predicting it is straightforward. Thus, for the same reasons that this proposal does well with regard to avoiding a race to the courthouse, it performs well in terms of ensuring party reliance. The fly in this ointment is that this Note's second-order solution only enables parties to accurately predict what state's choice-of-law regime is applied to them; if that first-order regime is not clear, it can cause reliance problems that this proposal does not solve. In practice, however, this theoretical problem has little consequence. Since most states have well-established choice-of-law regimes<sup>135</sup> that have been debugged through years of judicial and legislative action, it is unlikely that any state's regime would lead to particularly awful results.

Moreover, as the experience with the Restatement (First) has taught the choice-of-law field,<sup>136</sup> first-order certainty comes with a price that most jurisdictions and scholars are unwilling to pay. By choosing the choice-of-law regime of a state that is rationally related to the cause of action at hand, Congress can then respect the balance between certainty and reliance interests that most closely reflects both the policy decisions of states in this substantive arena and the views of academics.

Third is uniformity in both its aspects.<sup>137</sup> This proposal satisfies horizontal uniformity—the choice of forum has no impact on the choice-of-law system selected (and thus on the substantive law selected), as it simply is not a factor in the analysis. There is also strong reason to think that a legislative solution like this proposal is

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<sup>134</sup> See *supra* notes 85–92 and accompanying text (explaining the state interests at issue in this context).

<sup>135</sup> See Symeon C. Symeonides, *Choice of Law in the American Courts in 2007: Twenty-First Annual Survey*, 56 AM. J. COMP. L. 243 (2008) (surveying the various methodologies used in state courts).

<sup>136</sup> See Juenger, *supra* note 101, at 405 (noting that the “conventional conflicts wisdom enshrined in the *First Restatement* . . . all too often yielded unpalatable decisions”).

<sup>137</sup> See *supra* notes 100–10 and accompanying text (explaining horizontal and vertical uniformity).

more likely to accord with the federalism principles underlying the *Erie* doctrine and its concerns with vertical forum-shopping. Indeed, many commentators have argued for a kind of “judicial federalism,”<sup>138</sup> a restriction on judicial lawmaking based on a belief that it is inapt and wrongly used in areas likely to trammel on state sovereignty. At least one scholar has argued that the federal courts have “limited institutional competence” to engage in the creation of “comprehensive regulatory systems”<sup>139</sup> as would be needed to solve a problem of this kind. The high risk of inconsistent judicial decision-making in this arena, evidenced by the longstanding circuit split over whether *Klaxon* applies in bankruptcy at all,<sup>140</sup> provides strong reason to think that a truly uniform solution in this regard can only exist if implemented by Congress. This is another strong reason to prefer this Note’s proposal to continued adherence to the *Coudert* rule.

It is also, notably, a strong reason to prefer congressional action to judicial adoption via federal common law. While a federal common law adoption of the second-order system proposed would capture many of the benefits identified herein, it runs into both of these real concerns over piecemeal judicial decisionmaking and problems of Court inaction. Of course, the federal courts could decide, while waiting for Congress to act, to adopt the proposal outlined in this Note; if the *Coudert* court is any indication, however, courts are more likely to focus on the injustices at hand than they are to resolve systemic issues of this sort.<sup>141</sup>

Again, the four characteristics of the Restatement (First) serve the proposal well in the choice-of-law arena.<sup>142</sup> Territoriality ensures proper respect for sovereignty, and the Restatement’s intellectual foundations sound in sovereignty. The Restatement’s black-letter nature ensures (as well as a thoughtful second-order regime can) that

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<sup>138</sup> See, e.g., Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 13–19 (1985) (discussing the federalism constraints on the judiciary); see also Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 490 (1997) (noting the federalism-based motives of Roosevelt-era Justices, who sought to preserve the power of states as regulators independent of the expanding federal government).

<sup>139</sup> Samuel Issacharoff, *Federalized America: Reflections on Erie v. Tompkins and State-Based Regulation*, 10 GEO. MASON J.L. ECON. & POL’Y 199, 205 (2013).

<sup>140</sup> *Supra* note 10 and accompanying text.

<sup>141</sup> See *supra* notes 11–17 and accompanying text (describing this phenomenon at work in *Coudert*).

<sup>142</sup> Admittedly, the historical nature of the Restatement matters little for its usefulness here, though its aid in ensuring bankruptcy values are respected is great enough that a counterproposal lacking this quality would suffer for it. See *supra* note 130 and accompanying text (discussing the importance of all four factors, including historical authenticity, to bankruptcy).

party reliance is properly respected. Finally, its uniformity, when coupled with its status as congressional enactment, ensures that the choice-of-law values of horizontal and vertical uniformity are properly respected. Thus, it emerges a worthy option for congressional consideration.

### CONCLUSION

Three conclusions emerge from this analysis. First, the *Coudert* problem articulated in this Note gives strong reason, as one commentator has noticed, to doubt whether *Klaxon* ought to apply in bankruptcy cases at all.<sup>143</sup> There does not appear to be an easy way to resolve the choice-of-law dilemmas that emerge from such application. As this Note's analysis of the Second Circuit's ruling in *Coudert* shows, simple acts of obvious justice in this arena can have unanticipated consequences and holdings that seem self-evident when announced can bind a court's hands on a later date. Thus, waiting for courts to do what seems best is a recipe for disaster.

Taking one answer off the table does not resolve the underlying problem: If not by applying *Klaxon*, how *should* bankruptcy courts decide what choice-of-law regime applies to the claim before them? Understanding what is at stake is a crucial first step in answering this question. Therefore, the second conclusion is that the six isolated values—avoiding a race to the courthouse, *Butner* deference, efficiency, respecting state sovereignty, respecting party reliance, and uniformity—provide a useful framework in that they capture the important policy arguments of bankruptcy and choice-of-law, allowing for meaningful evaluation of proposed solutions.

The third conclusion is the specific solution identified as most consistent with these values—Congress should amend the Bankruptcy Code by adding a section of second-order choice-of-law rules modeled on the Restatement (First) of Conflicts of Laws, and *Coudert* should be superseded because it incentivizes a race to the courthouse. This Note's solution is not perfect. In particular, it adds some complexity to bankruptcy proceedings in a way that might reduce efficiency. However, its strengths outweigh its weaknesses and, therefore, legislative adoption of this proposal would be wise.

Recent academic scholarship has suggested that bankruptcy might well provide a way forward for aggregate litigation, solving many of the traditional dilemmas in that area that have long thwarted

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<sup>143</sup> Brubaker, *supra* note 15, at 9–11.

attempted solutions.<sup>144</sup> Though it is not clear whether Congress is planning to take this step, it is clear that new innovations in the bankruptcy sphere are a matter of some legislative attention.<sup>145</sup> If these innovations are to yield maximum returns, adopting a thoughtful solution to second-order choice of law in bankruptcy, such as the one proposed in this Note, is a necessary first step.

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<sup>144</sup> See, e.g., Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 963 (2012) (arguing that “bankruptcy serves as a better model” for the future of “nonclass aggregation of mass tort litigation” than continued reliance on “the conceptual framework of the class action”).

<sup>145</sup> See Todd Ruger, *New Senate Subcommittee to Focus on Federal Courts and Bankruptcy System*, THE BLT: THE BLOG OF LEGALTIMES (Feb. 1, 2013, 11:54 AM), <http://legaltimes.typepad.com/blt/2013/02/new-subcommittee-to-focus-on-federal-courts-and-bankruptcy-system.html> (noting the creation of a new Senate Judiciary Subcommittee to address, among other matters, the judicial rules employed in bankruptcy).