

*University of Southern California Law  
School*

Legal Studies Working Paper Series

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*Year 2016*

*Paper 112*

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**Jurisdiction, Choice of Law and Property**

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## **Abstract**

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# Jurisdiction, Choice of Law and Property

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Forthcoming in *Law and Economics of Possession*, ed. Yun-chien Chang (Cambridge University Press)

## Abstract

Jurisdiction and choice of law in property disputes has been remarkably stable. The situs rule, which requires adjudication where the property is located and application of that state's law, remains the norm in most of the world. This article is the first to apply modern economic analysis to choice of law and jurisdiction in property disputes. It largely confirms the wisdom of the situs rule, but suggests some situations where other rules may be superior. For example, in disputes about stolen art, the state where the work was last undisputedly owned may be both the most efficient forum and the best source of applicable law.

### 1. Introduction

Jurisdiction and choice of law in property disputes has been remarkably stable. While personal jurisdiction and choice of law for torts, contracts, and other areas of the law have changed dramatically, the revolutions in these areas have had little effect on property disputes (Hay et al. 2010: 1230; Stern 2014). For the most part, the state in which the property is located has exclusive jurisdiction over disputes about the property, and that state's law will be applied to the dispute.<sup>1</sup> While there has been some criticism of this "situs rule," with some calling it the "land taboo" (Note 1938: 1051; Hancock 1967), the same rules that applied in the nineteenth century continue to apply today in most cases.<sup>2</sup>

This article uses new economic theories of adjudicative jurisdiction<sup>3</sup> and choice of law to analyze property disputes, with particular emphasis on disputes involving

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<sup>1</sup> This article will use the term "state" to refer both to independent countries (such as France or Japan) as well as to U.S. states (such as Massachusetts or California).

<sup>2</sup> One notable exception is succession, where, in a number of countries, all aspects of the probate are controlled by the law of the decedent's last domicile, even if there is real property in another state. The author thanks Patrick Borchers for pointing out this exception.

<sup>3</sup> Adjudicative jurisdiction is the authority of the courts of a state to determine a legal dispute. In most situations, personal jurisdiction and adjudicated jurisdiction are synonyms. On

possession. In many instances, for example disputes regarding the acquisition of water rights, this new analysis provides fresh reasons to support existing rules. In other areas, for example adverse possession of stolen art, economic analysis supports rules not generally applied in current courts, such as application of the law of the place where the property was last possessed by an owner with undisputed title.

This article's conclusion that the situs rule is largely correct is similar to that reached by James Stern's recent article (Stern 2014). Nevertheless, his analysis is different. Whereas Stern's analysis emphasizes the way the situs rule facilitates uniformity, the analysis here focuses on individual behavior and on legislative and judicial incentives to develop efficient law. Stern's article contrasts sharply with Bell and Parchomovsky (2005), "Of Property and Federalism." Bell and Parchomovsky argue that, in most cases, parties should be able to choose the property law they prefer, rather than being forced to follow the law of the place the property is located. The tension between Bell and Parchomovsky's article and this article is more apparent than real. Bell and Parchomovsky focus on doctrines, such as co-tenancies and easements, that govern rights among small groups of people, all of whom would need to consent to the choice of foreign law to govern their rights. In contrast, this article focuses on rules that affect third parties – future acquirers of water rights and unknown prior owners of stolen art. Even Bell and Parchomovsky concede that parties should not be able to choose applicable law in circumstances such as these where there are significant externalities.

Part 2 of this article deals with choice of law. Part 2.A explains the economic approach to choice of law. This approach focuses on the effect of choice of law rules on primary behavior (such as whether to acquire a piece of land or where to sell a work of art) and on the incentive of judges and legislators to make efficient or inefficient law. The ideal choice of law rule gives judges and legislators incentives to make laws that give individuals incentives to act efficiently. Bad choice of law rules give judges and legislators incentives to make laws that inefficiently redistribute wealth to citizens of their states and give individuals and corporations incentives to take actions that reduce social welfare.

Part 2.B applies this approach to the acquisition of water rights. Traditional territorial rules are generally efficient. They give states incentives to make efficient rules which maximize the value of water resources. In addition, they ensure that land to which water rights attach goes to the persons or entities that are likely to make best use of the land and attendant water, regardless of the residence or citizenship of the potential possessors of those rights. In contrast, under choice of law rules that would make water

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the other hand, some authors do not use the term "personal jurisdiction" when the issue is jurisdiction to adjudicate a dispute that is "in rem." For this reason, this article will not use the term "personal jurisdiction" when talking about jurisdiction to adjudicate property disputes, and instead will use "adjudicative jurisdiction" or simply "jurisdiction"

rights dependent on the residence of the right's holder, land to which water attached would go to residents of states with the most aggressive water law, rather than to those who might make the best use of the land and water. Furthermore, such choice of law rules might encourage some states to formulate rules that gave their residents advantages in acquiring rights in other states, even if those rules reduced overall welfare.

Part 2.C shows how similar reasoning supports the traditional, territorial rule in most disputes relating to real property, including adverse possession. It also shows how similar reasoning supports the traditional rule in disputes about the acquisition of rights to wild animals.

Part 2.D turns to stolen art. When the owner (or his or her descendants) tries to reclaim stolen art from a bona fide purchaser, choice of law can make an enormous difference, because some states give the bona fide purchaser strong rights (usually through the doctrine of adverse possession) while others limit the operation of adverse possession. Most courts currently apply the law of the state where the stolen art was sold to the bona fide purchaser. As some commentators have pointed out, this rule encourages art thieves to sell their loot in jurisdictions whose laws favor bona fide purchasers. In addition, this rule gives states incentives to make their laws favorable to bona fide purchasers, because doing so attracts art business to their state. In contrast, a choice of law rule that applied the law of the last place of undisputed ownership would give thieves no incentive to sell in a place with more favorable law. In addition, it would give states incentives to develop law that reaches an efficient balance between protecting property from theft and encouraging a vigorous (legitimate) art market.

Part 3 addresses jurisdiction. Part 3.A explains the economic approach to adjudicative jurisdiction. That approach focuses on two factors: litigation costs and quality of law. The ideal jurisdictional rule minimizes litigation costs and gives judges and legislators incentives to choose efficient choice of law rules and to reduce bias in adjudication. In contrast, bad jurisdictional rules increase litigation costs. They also give judges and legislators incentives to tolerate or facilitate biased adjudication. Finally, bad jurisdictional rules encourage judges and legislators to choose choice of law rules that inefficiently redistribute wealth to in-state residents.

Part 3.B applies the economic analysis of jurisdiction to disputes about water rights. Litigation in the courts of the state in which the water would be acquired usually minimizes litigation costs, because at least one party is usually from that state and witnesses are likely to be from that state. In addition, because owners want high prices for land (because eventually they know they are likely to sell), and because most owners are residents of the state where the property is located, a state has an incentive to maximize the value of land in the state. Since water rights are usually attached to land, this gives the state where the relevant land is located an incentive to allocate water rights efficiently

through a choice of law rule that mandates application of its own law, and through efficient substantive law and fair adjudication. In contrast, if the state in which an out-of-state claimant resided had jurisdiction over the dispute, litigation costs would be higher and that state would have an incentive to adopt rules and institutions that favored its own residents, because the costs of the resulting inefficiency would mostly be borne by residents of other states.

Part 3.C shows that similar reasoning favors jurisdiction in the state where the property is located in most disputes related to real property and in disputes related to the acquisition of rights to wild animals.

Part 3.D addresses jurisdiction in disputes over stolen art and suggests that there is no clear-cut answer to what would be the most efficient forum. Nevertheless, in many cases the courts of the place where the art was last undisputedly owned is a good candidate. Witnesses relating to the alleged theft are likely to be there. In addition, the claimant or his or her descendants may still live there. That state also has an incentive to be unbiased. If neither claimant still lives there, it is neutral. Even if the claimant and his or her descendants still live there, the state has some incentive to be even handed, because those who live there and own art want a vigorous market for that art, and adjudication biased against bona fide foreign purchasers would undermine that market.

Part 4 concludes.

## 2. Choice of Law

### A. Economic Analysis of Choice of Law

There are two dominant approaches to choice of law: the traditional approach and interest analysis. The traditional approach was dominant in the U.S. until the 1960s and remains influential in other parts of the world. For the most part, the traditional approach is territorial, so applicable law is the law of the place where a relevant event took place or relevant property is located. So, in tort cases, the traditional approach applies the law of the place where the injury was suffered. In property disputes, applicable law is usually the law of the place where the property is located. For the most part, the traditional approach is composed of a multitude of rules that attempt to set out clearly the law to be applied in all situations (American Law Institute 1934).

Starting in the 1950s, American academics pioneered a choice of law approach based primarily on the analysis of the interests of relevant states, and starting in the 1960s this approach was adopted by most courts. So, for example, if there was a car accident in Canada that injured two New Yorkers, New York might be the only state with an interest in resolving the case, so New York law would apply. Or, if Canada's interest were acknowledged, New York's interest might be judged more important, again leading to

application of New York law. Although there are many variations of interest analysis – including Brainerd Currie’s original approach, comparative impairment, New York’s approach, and the Restatement Second (which is a hybrid of many approaches) (Symeonides 2006) – the differences are not relevant here. In general, interest analysis makes applicable law much more dependent on the residence of the parties than the traditional approach, which was based more on the location of property or important events. In addition, interest analysis tends to eschew bright line rules in favor of case-by-case adjudication (Symeonides 2006: 11-43).

There is no single economic approach to choice of law. The earliest economic analysis was William Baxter’s (1963) comparative impairment theory, which was a variant of interest analysis. More recent economic analyses have focused on individual welfare rather than state interests, and that will be the approach adopted in this article. Modern economic approaches focus on incentives for efficient primary behavior and incentives for the creation of efficient substantive law.<sup>4</sup>

Some economic approaches to choice of law generally take substantive law as a given and seek to find the choice of law rule that will result in application of the substantive law that is most efficient for the dispute. For example, in torts, Posner (2011) has argued that the state where an accident takes place usually has a “comparative regulatory advantage” and therefore its law is likely to be most efficient and should be applied. More generally, the goal of choice of law should be to find “which state’s law makes the best fit with the circumstances of the dispute” (Posner 2011: 807). In the international tort context, Jack Goldsmith and Alan Sykes emphasize the way in which bad choice of law rules can distort parties’ incentives (Goldsmith and Sykes 2007; Sykes 2008). For example, if more stringent U.S. tort law applies to torts committed by U.S. companies in Nigeria, while Nigerian law applies to Nigerian or French companies in Nigeria, then U.S. companies will be at a competitive disadvantage in Nigeria. Even if American companies possessed superior technology or were more efficient in other ways, the more stringent laws applied to them would force them out of the market.

Other scholars take a step back and ask how choice of law rules affect the creation of substantive law. Some rules give states incentives to develop efficient law, while others encourage wasteful redistribution. In the contractual context, O’Hara and Ribstein (2000; 2009) argue that, in most circumstances, honoring contractual choice of law clauses will allow parties to choose the most efficient law for their relationship and that doing so will encourage states to generate efficient law. McConnell (1988) focused his analysis on product liability and showed that the traditional rule, which allows victims to sue where they are injured, encourages pro-plaintiff law, because states can enrich their

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<sup>4</sup> Bruce Hay (1992) takes the further step of asking what choice of law rules states will have an incentive to choose.

residents by awarding high damages. While in-state residents get the benefits of those damages, the cost is likely to be passed on to consumers in all states. As a result, high damages redistribute wealth from out-of-state consumers and corporations to in-state residents. In contrast, he argued that applying the law of the place of sale would encourage efficient law. Because manufacturers could adjust prices to reflect liability exposure, there is little or no potential for inter-state wealth distribution. As a result, legislators and courts would have incentives to create efficient law, because in-state citizens would both get the benefits of higher liability and pay the cost.<sup>5</sup> Guzman (2002) generalized McConnell's approach and applied it to a variety of regulatory situations. For example, he argued that if courts apply the law of the place where the injurious action took place,<sup>6</sup> states will under-regulate because they will take into account the costs of regulation (which will be borne almost exclusively locally), but will not fully consider the benefits of regulation (which will accrue in part to citizens of other states). Conversely, applying the law of the place of injury will result in over-regulation, because a state in which victims but not the injurer resides will get the benefits of more stringent regulation, but bear only some of its costs.<sup>7</sup>

## B. Choice of Law and Water Rights

There are two main legal regimes governing rights to water from streams and rivers.<sup>8</sup> Under the riparian system, persons<sup>9</sup> owning land adjacent to a river can use a reasonable amount of water. Under the prior appropriation system, the first person to use a particular amount of water acquires the right to use that amount of water indefinitely. Both systems are currently overlaid with a substantial regulatory regime, both for environmental protection and, under the prior appropriation system, to prevent disputes about whose use was prior and how much water the prior user is entitled to. Nevertheless, for simplicity, this section will assume less complex versions of the riparian and prior use regimes, without their more recent regulatory overlays. Although under the prior appropriation system water rights can technically be acquired by persons who do not own land adjacent to the river or stream, this article will assume that acquisition, whether under the riparian or the prior acquisition system, is by a person owning land adjacent to the

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<sup>5</sup> See critique in Hay (1992).

<sup>6</sup> Guzman (2002: 909) calls this "territoriality," but this article will reserve that term for the traditional approach. Under the traditional approach, as exemplified by the First Restatement of Choice of Law, the law governing a tort is usually the place where harm occurs, not the place where the harm-causing action takes place. Under Guzman's nomenclature, the traditional approach would involve extra-territorial application of law.

<sup>7</sup> Guzman (2002: 906) calls such a choice of law regime "extra-territoriality," but, as explained in the prior footnote, this article avoids that term.

<sup>8</sup> For water law generally, see Tarlock (2013).

<sup>9</sup> This article will use the term "person" to refer to natural persons, corporations, and other entities which can own land or operate a business.

river or stream, because otherwise the person acquiring the water would ordinarily be a trespasser.<sup>10</sup>

Water rights are universally governed by the law of the state where the land from which the water was drawn is located. Although that rule has not been subjected to economic analysis, it makes sense from an economic point of view.

Under Posner's approach, the state in which the river or stream is located has a comparative regulatory advantage, and its law is most likely to be efficient for water uses in its territory. For example, Carol Rose has argued that the riparian system is more efficient when water use is non-consumptive (e.g. for water power), whereas the prior use system is more efficient when use is consumptive (e.g. for mining). Thus, in the nineteenth century, eastern states in the U.S. adopted the riparian rule, while western states adopted the prior acquisition rule (Rose 1990). Applying the law of the place where the water is drawn thus usually ensures application of the law that is efficient for that place.

Applying a territorial rule – that is, applying the law of the state where the relevant land is located – also makes sense under Jack Goldsmith's and Alan Sykes' approach, because it assures that all who might use water in a particular location will ordinarily be governed by the same legal regime. As a result, the person (or corporation) who will put the water to its most productive use will be the one to acquire the rights. For example, suppose water is needed to mine minerals on a piece of property adjacent to a stream. If one person has superior mining technology or more efficient management, it would be willing to pay more for the land if it were sold on the open market. Even if the land were currently owned by a less efficient producer, the more efficient miner should be able to offer the current owner a price that will induce the current owner to sell.

On the other hand, suppose water law were determined by the citizenship or residence of the person acquiring the rights.<sup>11</sup> Suppose further that the amount of water allowed by the riparian regime would not be sufficient to operate the mine, but that the amount of water allowed by the prior acquisition system would be, and that the more efficient producer resides in a riparian state, while other potential producers reside in prior acquisition states. In this situation, the less efficient producers will land up operating the mine. If the relevant property were sold on the open market, the efficient owner from the riparian state wouldn't even bid, because it would not be able to secure sufficient water to operate the mine. Similarly, if the current owner were a less efficient miner, then the more

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<sup>10</sup> Acquisition by a non-landowner is particularly relevant when the land is public or when water is used by the owner of mineral rights (Tarlock 2013: 5:26-27).

<sup>11</sup> Such a result might occur under interest analysis, because under interest analysis rights are often dependent on the residence or domicile of the disputant. Nevertheless, even under interest analysis, courts are likely to decide that the state in which the relevant water and land is located has the sole or dominant interest and apply that state's law.

efficient miner would not be able to offer an attractive price to buy out the less efficient miner.

Of course, if the situation described in the prior paragraph really occurred, clever businessmen and lawyers would probably find ways around the inefficiency, as Coase would predict. Perhaps the efficient miner, if an individual, would establish residence in a prior acquisition state. Or the efficient miner, if a corporation would reincorporate or establish its primary place of business in a prior acquisition state. Or, perhaps the efficient miner would purchase the water rights from an owner who resided a prior acquisition state. For example, if the current owner were a less efficient miner, the efficient miner might not buy the land, but rather might buy the right to mine and the right to use the water, while leaving the inefficient miner as the owner of the land with the right to appropriate the water. Of course, whether the law of relevant states would respect the water rights acquired in this way is a question that (fortunately) has never had to be answered. In any case, all of these solutions involve transactions costs. So, even if a non-territorial allocation of water rights didn't result in inefficient use of the water, it would result in unnecessary transactions costs, which are themselves a type of inefficiency. Furthermore, the additional transactions costs are likely to block some beneficial uses of the water.

A non-territorial approach to water rights would cause other inefficiencies as well. Whether water rights are governed by one legal regime or another affects not just the development of the land at issue, but also all downstream users. That is, water law is fundamentally concerned with managing externalities (Smith 2008). The riparian and prior acquisition regimes manage those externalities differently, but the efficiency of either system is impaired when some users can opt into the other legal regime. For example, suppose all current users of a given river are governed by the prior acquisition system and, under that system, no water is available for further appropriation. If a new user were governed by the riparian system, it could use a reasonable amount of water, even though that would reduce the amount of water available to downstream users, thus potentially impairing more productive uses of the water.<sup>12</sup>

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<sup>12</sup> Of course, it is possible that allowing the identity of the landowner to change the legal regime could increase efficiency in particular cases. For example, suppose, in a prior acquisition state, Y is downstream and has a right to a large amount of water, but uses it inefficiently. Suppose further that X is upstream and has a right to little water, but would use the water efficiently, if he had more. Ordinarily, X and Y would be expected to bargain to reallocate some of Y's water rights to X. Because X would use the water more productively, X and Y should be able to reach a mutually beneficial agreement. Nevertheless, bargaining might breakdown or legal impediments might block the sale, and Y might not be willing to sell X the water rights he needs. In this situation, it would be efficiency enhancing if X could sell his land to someone, Z, who lives in a riparian state and who could pursue the same efficient use as X planned. Nevertheless, while efficiency would be enhanced under these particular facts, it would make terrible policy to allow

Andrew Guzman's approach looks at the incentives states have to develop efficient water law in the first place. For example, it was suggested above that an application of Posner's comparative regulatory advantage approach would result in efficient law, because states have incentives to develop law appropriate for the geography and water uses prevalent in their state. This argument is strongest when rivers and streams are located wholly within one state. When, as is common, rivers border or flow through several states, Guzman's approach, which emphasizes the strategic interaction between states, suggests that a territorial approach may not lead to efficiency. When a river is bordered by more than one state, the state whose residents are in a position to acquire a disproportionate share of the rights first has an inefficient incentive to adopt the prior acquisition system, even if riparian rights would be more efficient overall. Conversely, a state whose residents had lost the race to acquire water rights would favor the riparian system, because that would allow its residents to make reasonable use of the water, even if doing so interfered with water rights acquired by residents of other states under the prior acquisition system. In the situation where multiple states have an interest in a given water or stream, no choice of law rule give states incentives to develop efficient law.

Although incentives to adopt efficient water law are therefore not perfect under the territorial approach, they may be good enough. Whether the territorial approach actually causes states to adopt inefficient water law depends on three factors: the proportion of rivers and streams that are wholly within a state, whether states could develop different water regimes for rivers wholly within a state and those that are shared, and cooperation between states. If nearly all usable rivers and streams were wholly within a state, and if a state were constrained to develop uniform water law,<sup>13</sup> the state would have an incentive to develop efficient water law. While inefficient water law might aid its residents in acquiring water from rivers shared with other states, the cost in inefficient water use for wholly local streams and rivers would be too great. On the other hand, if a state were allowed to vary its laws, it could adopt efficient water law for wholly internal waters, but apply the legal regime that favored its residents to rivers shared with other states. Fortunately, since the number of affected states is small (perhaps only two), they will often be able to reach an efficient solution through negotiation. That solution might

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purchase to change the legal regime for two reasons. (1) This is a setting of low transactions costs, so X and Y should ordinarily be able to bargain to the efficient solution, and (2) there is nothing that guarantees that Z will use the water any more efficiently than Y. It might be profitable for Z to buy the land even if he were to planning to use the water as inefficiently (or more inefficiently) than Y. The argument in this footnote is similar to one of the economic arguments for laws against theft. While it is true that a thief may sometimes value a piece of property more than the current owner, it is usually better to encourage the potential thief to buy the property from the current owner rather than steal it, because, if theft were allowed more generally, most thefts would involve situations where the thief valued the property less than the current owner.

<sup>13</sup> An attempt to apply different law to inter-state versus intra-state rivers might be a violation of the Commerce Clause of the US Constitution.

involve both states coordinating on a single choice of law rule for water drawn from shared rivers, or it might involve allocating water quotas to each state. On the other hand, one should not underestimate the danger that negotiations will break down and inefficient water use will result. For this reason, in the United States, the federal government has the power to allocate water between states and to resolve interstate disputes about water.

### C. Choice of Law and Most Other Property Disputes

Economic analysis suggests that most other property disputes are properly governed by the territorial approach. For example, rules about adverse possession of land are appropriately governed by the law of the state in which the land is located. If the rules varied with the residence of the adverse possessor, there would be an incentive for adverse possessors to transfer their possession to residents of states with shorter statutes of limitations. In addition, states that wanted to give their citizens an advantage in adverse possession disputes might inefficiently shorten their statutes of limitations, although that seems unlikely, because of the inefficiency doing so would cause for locals in disputes with their neighbors.

Similarly, the right to acquire wild animals is best determined by the law of the place where the animal is captured rather than by the residence of the hunter. The state in which the hunting takes place is in the best position to decide the efficient time at which rights are established, whether that be pursuit, non-mortal wounding, mortal wounding, or physical possession. In addition, if different hunters in the same location could acquire rights at different points in time, those governed by the law that awarded rights at an earlier point in time would have a potentially inefficient (and unsporting) advantage. Furthermore, since hunters will not always know the residence of other hunters or the laws of other states, the danger of disputes among hunters is greater when hunters are governed by different laws. Thomas Merrill and Henry Smith (2010:20–21) have also pointed out that one function of the law in this context is to give hunters notice that a claim is being asserted and thus to prevent wasted time and resources. If different hunters are operating under different legal regimes and, as is plausible, they cannot or do not know the law applicable to the other hunters, this notice function would be vitiated and inefficient use of time and resources would ensue. Finally, states with little hunting but whose residents like to hunt elsewhere would have incentives to create law that inefficiently granted rights at an earlier point in time so that their residents could out-compete hunters in other states.

### D. Choice of Law and Stolen Property

So far, the economic analysis in this paper has provided a new explanation for the territorial rules that most courts already apply to property disputes. Nevertheless, economic analysis does not always favor territorial rules. As this section will explain, in

the context of stolen property, particularly stolen art, the territorial rule may be inefficient, at least as it is usually interpreted.<sup>14</sup>

Although theft is common, litigation about choice of law regarding stolen goods is infrequent, except when the stolen good is art. Because of its high value, some stolen art is worth litigating about. It is also worthwhile for thieves to take into account different local laws when deciding where to sell their art. For these reasons, although much of what is said here would apply to any stolen property, analysis will focus on high-value, stolen art.

Disputes about choice of law and stolen art typically arise when art has been stolen and then sold to a bona fide purchaser. When the owner or his/her descendants discovers who now possesses the art, the resulting lawsuit must weigh the rights of the claimant and bona fide purchaser. Such disputes are difficult, because both parties seem blameless. Different states have widely divergent laws applicable to such situations (Reyhan 2001). Some strongly favor the bona fide purchaser and give that person full rights upon purchase. Most determine such disputes through adverse possession. Even though the bona fide purchaser does not immediately acquire any greater rights than the thief, after the statutory time period has passed, the purchaser gains full ownership. Even among states that determine such disputes through adverse possession, the rules vary dramatically. The time necessary to acquire ownership varies. Some states require the adverse possessor to possess in good faith, while others do not, and even those states that require good faith vary in what good faith requires. In addition, states differ about when the adverse possession clock starts. Traditionally, the clock starts when the purchaser purchases the property. Nevertheless, in recent years, that rule has been thought unfair because the original owner and her descendants often have no way of knowing who the current possessor is, especially if the possessor keeps the art in his or her private collection. As a result, many states now “toll” the statute of limitations either until the identity of the current possessor is known or even until the time the claimant makes a demand upon the current possessor and that demand is refused. When the art work was stolen, sold, or possessed in states with different laws relating to stolen art, difficult choice of law issues arise.

Although one might have thought that the traditional territorial approach would select the law of the state where the art is located at the time of the lawsuit, this is not the case. Instead, most states apply the law of the state where the work was sold, because property transactions are generally governed by the law of the place the transaction took place (Reyhan 2001: 1012-13).

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<sup>14</sup> For more discussion of stolen art, see [Arrunada chapter in this book].

It is widely understood that applying the law of the place of sale results in law that is favorable to the purchaser for two reasons. First, the seller can choose the place of sale. As a result, a sophisticated seller of a high-value work of stolen art can strategically choose to sell in a place with laws that are protective of purchasers (Fincham 2008: 129; Frey 2012: 1069). Second, art sales are lucrative to intermediaries, such as art dealers, appraisers, and shippers. As a result, states have an interest in encouraging art sales within their borders, just as they have an interest in encouraging manufacturers to locate factories in their territory. Since sellers strategically choose their venues, and since purchasers prefer to buy where their interests will be protected, states that want to attract art business have an incentive to choose laws that protect buyers.<sup>15</sup> Although most states are likely to ignore such incentives and base their laws on principles of justice rather than on what best serves the interest of art intermediaries, it only takes one or two strategic states to have a big effect on the art market. For example, Switzerland had laws that were relatively favorable to purchasers and was thus able to garner a disproportionate share of the art trade (Kunitz 2001: 533-40). In 2001, Switzerland was the fifth largest art market in the world (Weber 2006).

A pro-purchaser bias has consequences that are not just distributional. Bias is likely to impair efficiency as well. Most obviously, a pro-purchaser bias increases transactions cost by encouraging buyers and sellers to transact in Switzerland or other purchaser-protective jurisdictions rather than more convenient or lower-cost venues. More fundamentally, efficiency requires a delicate balance between owner protection (which discourages theft) and purchaser protection (which lowers the costs of transacting).

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<sup>15</sup> There may be two countervailing forces. First, states may not want to be havens for stolen art, perhaps because they perceive that the trade in stolen art has negative externalities, such as encouraging other kinds of crime or immoral behavior. In addition, laws that protect true owners may allow sellers with good title to signal the strength of their title. Only those with good title might chose to sell in places with laws favoring original owners over good faith purchasers. Nevertheless, it seems unlikely that, under the law-of-the-place-of-sale rule, the potential for signaling would give states an incentive to have laws less protective of good-faith purchasers. Signaling only works if original-owner protective laws would impose higher expected costs on sellers with bad title than on those with good title, which suggests two limitations on the signaling argument. First, the argument only works if sellers provide a warranty of title, because otherwise sellers would bear no cost if the work turned out to be stolen. If the seller bears no cost regardless of whether it has good or bad title, sale in a place with laws more protective of original owners would provide no signal. Second, signaling information about the strength of title would only be valuable if litigation were likely to take place in a forum that would apply laws more protective of original owners, but not certain to take place there. If litigation in a forum that would apply more original-owner protective laws is unlikely, then signaling the strength of title would not be valuable, because the good-faith purchaser could be fully protected by the laws of the place of sale. On the other hand, if litigation in a forum that would apply laws more protective of original owners was certain, then selling in a place with laws protective of original owners would send no signal, because the law of the place of sale would be irrelevant. The author thanks Erin O'Hara O'Connor for encouraging him to think about these countervailing forces.

Such a balance is unlikely to be reached in a place that puts excessive weight on purchaser protection in order to attract art business. Similarly, good laws regarding stolen property give owners efficient incentives to pursue and publicize the theft, and give potential purchasers efficient incentives to research the provenance of art they are buying (Landes and Posner 1996; Schwartz and Scott 2011). When states skew the rights in favor of purchasers, they give purchasers insufficient incentive to research their purchases.

A better rule would be to apply the law of the place where the art was last owned by an undisputed owner (Symeonides 2005). For example, if a work of art was indisputably owned by an English resident, allegedly stolen there, sold in Switzerland, currently possessed by a New Yorker, and claimed by descendants of the English owner currently residing in California, English law would apply to the dispute between the California claimants and New York possessors. The place where the art was last undisputedly owned has the proper incentives to devise efficient law, because owners of art have an interest both in protecting their art from thieves and in assuring a thriving art market. Although it may seem paradoxical, even owners whose claims are undisputedly legitimate have an incentive to favor some protection of bona fide purchasers of stolen art, because owners are likely someday to want to sell their art. Some protection for bona fide purchasers is probably necessary for a thriving art market.

By linking choice of law to the last place of undisputed ownership, this choice of law rule eliminates the incentive of states to fashion law that is excessively pro-purchaser in order to attract art business. Since the place of sale would have no effect of the applicable law, states with pro-purchaser rules would have no advantage in attracting out-of-state art sales.

An interesting issue is whether applicable law should be current law or the law as it existed at the time the work was allegedly stolen. Good arguments can be made that it makes more sense to apply the law of the time when the work was allegedly stolen. Circumstances that affect the efficient balance between owner protection and purchaser protection may have changed over time (such as the existence of registries of stolen art), and the law at the time the object was allegedly stolen is more likely to have been appropriate for that time. For similar reasons, if the law-of-the-place-of-last-undisputed-ownership rule is applied to cultural property, as some have proposed (Fincham 2008), it would make sense to apply the law of the time when the property was taken out of its original country. Otherwise states, such as Greece, which claim large amounts of cultural property in foreign hands, would have an incentive to create protective rules which would then apply retroactively to transfers that were legitimate at the time they occurred.

While the rule suggested here might generally work well, there are some circumstances where it would need to be modified. For example, suppose the work was last undisputedly owned by a German Jew in the 1930s and taken by the German

government. It would certainly be inappropriate to apply the law of Nazi Germany to the confiscation. The above discussion of incentives for states to create efficient law assumes that a state values and protects the interests of all its citizens equally. That is a reasonable assumption in many contexts, but certainly not for Nazi Germany. In this situation, it is not clear what law should apply. A plausible candidate would be the law of modern Germany. Still, the connection of modern Germany to the dispute is, in some respects, no greater than the connection of some other random state, such as Thailand. Nevertheless, there is no reason to think that modern German law would be biased in favor of purchasers, so applying modern German law could be efficient.

An alternative to applying the law of the place of last undisputed ownership would be to apply the law of the place where the claimant resides. This may be almost as good. In most circumstances, such a state will have far more art owners than claimants of allegedly stolen art. As a result, the state will have little or no incentive to design rules that favor claimants over current possessors. On the other hand, one might be concerned about a rogue state – perhaps North Korea or Venezuela – where residents owned relatively little art, but that might deliberately tilt its laws in a pro-claimant direction in order to allow its residents to successfully litigate weak or even false claims. Similarly, one might be concerned that those claiming stolen art would move to favorable jurisdictions. While that might seem far-fetched, its practicality depends on how valuable the art is and on how long a residency period would be needed. Even today students move to establish residency in order to get lower in-state tuition, and it used to be common for couples to move to Nevada or other states with lax divorce laws in order to end unhappy marriages. Similar reasoning suggests that, while applying the law of the place where the defendant resides or the art is currently located is likely to be fine in most cases, it might cause some states to become havens for stolen art and might cause some owners of stolen art to move to such havens.

### 3. Jurisdiction

#### A. Economic Analysis of Jurisdiction

Adjudicative jurisdiction has traditionally been allocated to the state or states with the power to enforce a judgment. So, for example, jurisdiction is always proper in the place where an individual resides or is a citizen or the state where a corporation is incorporated or has its principal place of business. For the same reason, jurisdiction in real property disputes has usually been vested in the state in which the property is located. Starting in the twentieth century, with the expansion of inter-state business, these rules were loosened, and individuals and businesses became subject to jurisdiction wherever they did business or performed other activities. In the United States, the constitutional test for determining whether a defendant's activities can subject it to jurisdiction in a particular state is whether the defendant "purposeful availed itself" of the benefits of the forum.

The economic analysis of adjudicative jurisdiction is relatively new. Most economic analysis focuses on litigation costs. For example, both Richard Posner (2011:904) and Geoffrey Miller (2013a; 2013b) defend existing jurisdictional rules on the ground that they usually select a forum where litigation costs are likely to be the lowest (or at least constrict the plaintiff to choosing among fora with relatively low litigation costs). In general, litigation that takes place close to the plaintiff's and/or defendant's usual residence or principal place of business, and/or close to the residence of witnesses, will have lower costs. Dustin Buehler (2012) argues that is also necessary to take into account the cost of litigating jurisdictional issues and that the law could be made more efficient by loosening the constitutional constraints that can make jurisdictional disputes in the United States so complicated.

This article's author adds another dimension to the economic analysis of jurisdiction. As in the economic analysis of choice of law, one should also take into account the way jurisdictional rules may give judges and legislators incentives to develop efficient or inefficient rules and institutions (Klerman 2012; Klerman 2014). Bad jurisdictional rules give states incentives to develop rules and institutions that transfer wealth from out-of-state residents to residents of the forum. For example, if the jurisdictional rule were that plaintiffs always sued in their home state, all cases would involve in-state plaintiffs, while some would involve out-of-state defendants. As a result, state judges and legislators could redistribute wealth from out-of-state defendants to forum residents by tilting procedure, choice of law, or substantive law in a pro-plaintiff direction. They could have a similarly inefficient redistributive effect by tolerating or encouraging adjudication by jurors or trial judges that was biased against non-residents. Conversely, a jurisdictional rule that required litigation in the defendant's home state would encourage rules and adjudication that were biased against out-of-state plaintiffs. These redistributive tendencies, however, may be tempered when parties can avoid states with biased courts. So, for example, a state would not want to be biased against out-of-state corporations that located factories in the state, because the state would not want to discourage other companies from locating in state, nor would it want to give the companies currently operating in the state an incentive to leave. For this reason, the purposeful availment requirement currently applied in the U.S. may promote efficient adjudication.

Rules that give plaintiffs too much leeway in the choice of forum also have a pernicious effect on state incentives to develop efficient laws and institutions. Although such rules are often criticized as encouraging forum shopping, the reason forum shopping is problematic is not usually well specified. The approach advocated here suggests that the problem with forum shopping is that it encourages "forum selling." If judges or legislators in even a few jurisdictions want to increase local revenue to lawyers and others who profit from litigation, they have an incentive to tilt the law in a pro-plaintiff way, since plaintiffs generally choose the forum.

In addition, one should consider the possible effect of jurisdictional rules on the location of economic activity. Bad jurisdictional rules may encourage parties to locate their activities in inefficient locations that protect them from liability.

### B. Jurisdiction in Water Rights Cases

The economic analysis of jurisdiction usually favors jurisdiction in the place where the water is drawn. That state's courts are likely to be able to adjudicate the dispute at lowest cost to all relevant parties. In most water disputes, at least one party is likely to reside near the disputed water, and often both will. Similarly, witnesses are likely to be from the neighborhood. In addition, since, as discussed above, local law is likely to apply, local judges can more cheaply adjudicate the dispute because they are already likely to be familiar with local water law. Adjudication in the courts of the state where the water is drawn is also a relatively easy rule to apply, so it reduces the cost of disputing jurisdiction.

Adjudication in the place where the water is drawn also gives salutary incentives to judges and legislators to create efficient rules and procedures. First, since it unambiguously identifies a single forum, it eliminates forum shopping and thus the pro-plaintiff bias of forum selling. In addition, the state where the water is drawn has an incentive to adjudicate fairly, even if one of the parties is out-of-state and one is in-state. One might think that that judges and jurors could redistribute wealth by favoring in-state residents, but this would be short sighted. If a state got a reputation for being biased against out-of-state litigants in water cases, out-of-state businesses that relied on water rights – such as mining companies or agricultural businesses – would be less likely to locate in state, thus reducing employment and overall economic activity. In addition, discrimination against out-of-state parties would reduce foreign demand for land adjacent to rivers and streams. This would reduce the prices such land would fetch on the open market. All who owned land adjacent to streams and rivers would thus be harmed by legal rules or adjudicative institutions that discriminated against out-of-state parties. Of course, there may be countervailing interests in favor of such bias. In-state mining and agricultural firms that compete with out-of-state firms might favor bias in order to limit competition. Similarly, in-state residents who do not currently own riparian land but hope to purchase in the future might benefit from bias, because it would drive down the price of the land they hope to buy. Nevertheless, state residents overall would benefit from unbiased rules and adjudication.

Courts in the state where the water is drawn also have incentives to choose efficient choice of law and substantive legal rules. As argued above, the efficient choice of law rule in water disputes is to apply the law of the place where the water is drawn. If the forum is also the state where the water is drawn, it has many reasons to choose that choice of law rule. First, it is more likely to be familiar with that rule, so choosing it saves judicial time. In addition, in-state judges can best ensure application of efficient

substantive law if the applicable substantive law is made by local judges and legislators who know local conditions and care about local citizens. Thus, forum state judges can best advance the welfare of their state's citizens by choosing to apply local law to water disputes.

In contrast, allowing jurisdiction in other states could have deleterious effects. For example, if an out-of-state claimant could get jurisdiction in its home state, that state would have little incentive not to be biased in favor of the in-state party. If it were biased in cases in which the in-state party was claiming out-of-state rights (but not in cases where an out-of-state party was claiming in-state rights), that would not give businesses any reason to avoid establishing mining or agricultural activities in the forum state. Similarly, the value of forum state riparian properties would be unaffected. Finally, out-of-state judges would have little incentive to apply efficient choice of law rules, because the law of the place where the water was drawn would require additional time to learn and might favor the out-of-state party.

An exception to the rule of adjudication in the place where the water is drawn might be appropriate when both of the disputing parties resided the same state and that state was not the forum states. In that situation, litigation costs might be lower if litigation took place in the state where both resided. Witnesses might incur additional expenses traveling to the forum, and the judge might need extra time to learn foreign water law. Nevertheless, the savings in litigation costs to the in-state parties would probably be larger than the increase in costs to witnesses and judges. In addition, if all parties reside in the forum, there is no reason to fear bias against an out-of-state party.

Nevertheless, there are three reasons to prefer adjudication in the state where the water is drawn, even if all parties to the litigation are from a different state. First, as noted above, water rights involve significant externalities, because adjudication of water rights affects not only the disputing parties, but all who are downstream. There is thus a danger that a court in a state other than the place where the water is located might take insufficient account of the interests of downstream owners not directly represented in the litigation. Second, even if judges in the place of common residence tried to apply the correct choice of law and substantive rules, they are more likely to make mistakes, because they are less familiar with law of the state where the water is located. Third, if the plaintiff were allowed to choose between litigation in its home state or the state where the water was drawn, that would introduce the danger of forum shopping and thus forum selling. With only two fora to choose from, the danger of forum selling is not very large, but it is still best avoided.



The analysis in the prior subsection also provides reasons to require adjudication in the place where the property is located in most other kinds of property disputes. Litigation in that forum is likely both to reduce litigation costs and to result in adjudication in a forum with at least some incentive to adjudicate fairly.

For example, in hunting cases, at least one party and most witnesses are likely to be from the state where the wild animal was captured, so that state will probably have the lowest litigation costs. In addition, judges in that state have some incentive to adjudicate fairly, because in-state residents – including hotel owners, restaurant owners, and rental car agencies -- generally benefit when outsiders visit to hunt. In contrast, adjudication in the out-of-state hunter's state would likely increase costs and give judges no incentive to adjudicate fairly.

Cases involving adverse possession of land are also likely to be adjudicated more cheaply in the place where the land is located. In addition, those courts have some reason not to be biased against an out-of-state absentee owner whose land is being occupied by an in-state adverse possessor. If a state got a reputation for being biased against out-of-state absentee owners, out-of-state parties would be less likely to buy land in-state, which would reduce the price of all real estate in the state.

#### D. Jurisdiction in Disputes about Stolen Property

Determining the most efficient forum for disputes about stolen property (and stolen art in particular) presents a stark choice between fora that minimize litigation costs and fora that are likely to be less biased.

In most cases, the forum where litigation costs will be lowest is likely to be either where the claimant resides or where the current possessor resides. While witnesses are likely to be from elsewhere, most litigation costs are incurred by the parties, so costs can be minimized if at least one of them doesn't have to travel. A judge in such a forum may have to learn the law of another jurisdiction, but learning the law is not that time consuming.

Unfortunately, unless both claimant and possessor live in the same state, the courts of one of the two parties are likely to be biased in favor of the local party. Even more dangerous, if jurisdiction was based on where the claimant resided, claimants of particularly valuable art might move to states that were known to be particularly pro-resident. Similarly, although perhaps less plausibly, if jurisdiction were based on where the possessor resided, possessors might move to jurisdictions that were known to be biased in favor of resident or sell their works to those in such jurisdictions. In fact, persons in such jurisdictions would be able to bid more in the art market, and so would likely purchase a disproportionate share of high-value art. Even worse, states that were interested in attractive wealthy art owners might deliberately encourage pro-resident

adjudicatory bias so as to attract wealthy (but unscrupulous) art owners and claimants. As noted above, most states would almost certainly resist (or even fail to notice) the temptation to contort their justice systems for this purpose. Nevertheless, even if only one or two jurisdictions did so, it could have a large effect on the art market.

For this reason, from a prevention of bias perspective, the best forum is the same as the choice of law solution – the place where the art was last undisputedly owned. Especially when neither claimant currently resides in that state, it has no reason to be biased. In addition, because the forum would be unaffected by the claimant or possessor changing his or her residence, one need not be concerned about strategic moves or sales or about states distorting their laws in order to attract wealthy but unscrupulous art owners or claimants. In addition, even when one party was from the forum and the other was not, this forum would have some incentive not to be biased. For example, if the claimant were from the forum while the current possessor was not, the state would not want a reputation for being biased in favor of the claimant, because that would make purchases from current owners of art in the forum less secure and would thus reduce prices. For similar reasons, bias in favor of in-state possessors could result in lower prices to current owners in the forum, because foreign purchasers would anticipate less protection if the work were stolen and then purchased by a local bona fide purchaser.

Choosing the most efficient forum therefore requires balancing litigation costs (which favor adjudication in the place where the claimant or possessor currently resides) and the danger of biased adjudication (which favors adjudication in the place of last undisputed ownership). Resolution of this issue therefore requires an empirical inquiry into these two factors. Thus, even though the data are not currently available that would be necessary to identify the efficient forum, economic analysis can be helpful in identifying the empirical questions that need to be resolved.

One potential problem with jurisdiction in the place of last undisputed ownership is that that state may not have the power to enforce its judgment. Enforcement would not be a problem if suit were in a U.S. state, but the work of art was in another U.S. state, because the Full Faith and Credit Clause of the U.S. Constitution generally requires states to enforce sister state judgments. Enforcement would similarly be unproblematic in the international context where treaties or statutes provided for enforcement. In other situations, jurisdiction in the state of last undisputed ownership would be impractical, unless the work of art was also currently present in that jurisdiction. If the state where the art is currently located does not have treaties facilitating enforcement, it might be necessary for the claimant to sue in that state, even though it might be biased in favor of the defendant.

#### 4. Conclusion

Economic analysis of choice of law and jurisdiction largely confirms the wisdom of current law and practice. It is usually efficient to litigate disputes about property in the courts of the state where the property is located, and it is usually efficient to apply the law of that same state. Nevertheless, in cases involving stolen art (and perhaps other situations), other rules may be superior in giving states incentives to craft efficient law and to create fair adjudicative institutions.

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