

# THE CHOICE-OF-LAW REVOLUTION FIFTY YEARS AFTER CURRIE: AN END AND A BEGINNING

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*This Article is part of a symposium commemorating the fiftieth anniversary from the passing of Professor Brainerd Currie (1913–1965), the protagonist of the American choice-of-law revolution that began in the 1960s.*

*The Article begins with a discussion of what was wrong and what is right with the key component of Currie’s “governmental interest analysis”—his concept of “governmental” or state interests. It contends that, when properly conceived, state interests can provide a rational basis for usefully classifying conflicts into three categories and sensibly resolving conflicts falling within two of those categories (“false” and “true” conflicts).*

*The Article then discusses the revolution’s past, present, and future. It chronicles the revolution in tort and contract conflicts by tracing the gradual abandonment of the *lex loci delicti* and *lex loci contractus* rules in the majority of states of the United States. It then summarizes the methodological changes produced by the revolution and the substantive results reached by the courts that joined it. The Article concludes by building the case for an exit strategy that will turn the revolution’s numerical victory into a substantive success by using the vehicle provided by the process of drafting the *Third Conflicts Restatement*.*

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## I. INTRODUCTION

Professor Brainerd Currie, the chief protagonist of what came to be known as the American choice-of-law revolution, passed away fifty years ago, on September 7, 1965.<sup>1</sup> He lived for only fifty-two short years, but, as one of his contemporaries wrote at the time, “[i]n his curtailed lifetime, Brainerd Currie’s achievements were of a brilliance and variety sufficient to have conferred eminence on the lives of several men.”<sup>2</sup> He “transformed through his scholarship the field of conflict of laws.”<sup>3</sup> The “scholastic revolution” that he began, along with others, instigated and guided a judicial revolution that eventually overthrew the then established system for choosing the law applicable to multistate cases.<sup>4</sup>

The Association of American Law Schools (“AALS”) Section on Conflict of Laws marked this occasion by dedicating its 2015 meeting to Currie and the revolution he led. Professor Herma Hill Kay, who was Currie’s student and coauthor, but who is also a living conflicts legend in her own right, spoke about Currie as a teacher and scholar. She was followed by four speakers from the current intellectual leadership of conflicts scholarship: Professors Lea Brilmayer (Yale), Peter Hay (Emory), Joseph Singer (Harvard), and Louise Weinberg (Texas). They were asked to reflect on the accomplishments and shortcomings of the revolution and, more importantly, to address the question of “what’s next” in the evolution of American conflicts law. In the meantime, the American Law Institute (“ALI”) may have answered this question, at least in part, when it decided to authorize work on a new Conflicts Restatement to replace the Restatement (Second),<sup>5</sup> whose lifespan largely overlaps with the revolutionary period. Some of the speakers addressed that development as well. This issue of the *University of Illinois Law Review* reproduces the written version of the speakers’ remarks.

As the convener and moderator of the AALS meeting, I chose not to speak so as not to encroach on the limited time available to the speakers. This Article is the written and more expansive version of what I would have said had I spoken. It is divided into four parts. Part II discusses one core component of Currie’s “governmental interest analysis”—his concept of “governmental” or state interests. The next three Parts discuss the revolution’s past, present, and future. Part III chronicles the revolution, Part IV summarizes the methodological changes produced by the revolution and the results reached by the courts that joined

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1. Elvin R. Latty, *Brainerd Currie—Five Tributes*, 1966 DUKE L.J. 1, 15.

2. Lawrence G. Wallace, in ASSOCIATION OF AMERICAN LAW SCHOOLS, PROCEEDINGS, PART I—REPORT OF COMMITTEES 123 (1965), quoted in Latty, *supra* note 1, at 4.

3. Gary J. Simson, *Choice of Law After the Currie Revolution: What Role for the Needs of the Interstate and International Systems?*, 63 MERCER L. REV. 715, 716 (2012) (“It is no exaggeration to say that Currie was the most influential conflicts scholar of the last century.”).

4. For a comprehensive discussion and documentation of both the scholastic and the judicial choice-of-law revolution, see SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE (2006) [hereinafter SYMEONIDES, REVOLUTION].

5. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

it, and Part V pleads for an exit strategy that will turn the revolution's numerical victory into a substantive success by using the vehicle provided by the process of drafting the new Conflicts Restatement.

## II. BRAINERD CURRIE AND STATE INTERESTS

### A. Introduction

Brainerd Currie was one of three leaders of the scholastic choice-of-law revolution that instigated and guided the judicial revolution. The other two were Walter W. Cook<sup>6</sup> and David F. Cavers.<sup>7</sup> While Cook and Cavers demonstrated the major flaws of the traditional choice-of-law system enshrined in Joseph Beale's Restatement,<sup>8</sup> Currie was the one who inflicted the decisive blow. Currie built upon the foundations they and others provided, and he enunciated his "governmental interest analysis" in a series of law review articles published in the 1950s and early 1960s.<sup>9</sup>

Currie's analysis dominated choice-of-law thinking in the United States for more than three decades. His "seductive . . . style" of writing "hypnotized a generation of American lawyers,"<sup>10</sup> perhaps in the same way that Beale's teachings had indoctrinated the previous generation. In recent years, judicial following of Currie's analysis has decreased dramatically. As documented later, only two jurisdictions continue to follow Currie's approach, and even they have rejected some significant features of that analysis, such as his pervasive *lex-foi* favoritism and his proscription of interest weighing.<sup>11</sup> Similarly, Currie's direct influence on other academic approaches now seems to be at its lowest point ever. His critics outnumber his allies, old and new. Nevertheless, Currie's analysis "still controls the academic conflicts agenda,"<sup>12</sup> perhaps because (1) it remains the most popular pedagogical vehicle for teaching conflicts law in American law schools, and (2) it is "the very language of contemporary conflicts theory."<sup>13</sup>

There is much to criticize in Currie's analysis. But there is also much that deserves praise. Some of Currie's critics have focused more on debunking his theory than on separating its tenable elements from its untenable ones. Even if the latter elements outnumber the former, Currie's

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6. See WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942).

7. See DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965) [hereinafter, CAVERS, *CHOICE-OF-LAW*]; David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933) [hereinafter Cavers, *Critique*].

8. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).

9. These articles are collected in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963) [hereinafter CURRIE, *SELECTED ESSAYS*].

10. Harold Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 812 (1983).

11. See *infra* Part IV.A.4.

12. Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 14 (1984) [hereinafter Juenger, *Critique*].

13. Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1649 (2005).

overall contribution to the advancement of American conflicts law is a decidedly positive one, if only because he stirred the stagnant waters of the “dismal swamp” of American conflicts law.<sup>14</sup> In fact, Currie did much more.

In previous writings, I attempted to separate the helpful from the unhelpful parts of Currie’s analysis.<sup>15</sup> In this Article, I focus on only one core component of that analysis—the concept of state interests or, as Currie called them, “governmental” interests. I contend that:

- (1) Currie’s basic premise—namely, that states have an interest in the outcome of multistate disputes between private persons—accurately reflects contemporary realities;
- (2) Currie’s articulation of those interests, however, was intentionally provocative and unintentionally chauvinistic;
- (3) Properly conceived, state interest can provide the criteria for classifying conflicts cases into three analytically helpful categories—false conflicts, true conflicts, and “no interest” cases—and for rationally resolving false conflicts;
- (4) It is permissible and feasible to weigh conflicting state interests. Such a weighing, if carried out impartially, can properly resolve many true conflicts; and,
- (5) An analysis based on state interests cannot provide good solutions to cases of the “no-interest” category. For those cases, it is necessary to resort to other criteria of conflict resolution, including territorial criteria.

### B. Currie’s Conception of Governmental Interests

Currie postulated that whenever a case falls within a law’s spatial reach as delineated by the interpretative process, the state from which that law emanates has a “governmental interest” in applying it in order to effectuate the policy embodied in that law. In Currie’s words, an “interest . . . is the product of (a) a governmental policy and (b) the concurrent existence of an appropriate relationship between the state having the policy and the transaction, the parties, or the litigation.”<sup>16</sup> In this way, Currie projected his legal realist conception of law as “an instrument of social control”<sup>17</sup> at the interstate level by postulating that states have an interest in the outcome of litigation between private parties.

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14. For the context of this over-used phrase, see William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

15. See SYMEONIDES, REVOLUTION, *supra* note 4, at 13–24, 365–84; Symeon C. Symeonides, *Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground?*, 46 OHIO ST. L.J. 549, 558–63 (1985) [hereinafter Symeonides, *Middle Ground*].

16. CURRIE, SELECTED ESSAYS, *supra* note 9, at 621.

17. *Id.* at 64.

The notion that a state may have an interest in private law disputes between private parties was not a novel one in American law, domestic or interstate. For example, this idea had figured prominently in a cluster of U.S. Supreme Court decisions in the 1930s interpreting the Full Faith and Credit clause of the Constitution.<sup>18</sup> What was new was Currie's partisan articulation of this concept. He thought and wrote in terms of a state's yearning to maximize its gains at the expense of other states' policies, rather than in terms of a state's need to avoid impairment of its own strongly held policies and values.<sup>19</sup> Indeed, the main problem with Currie's interest theory was not so much the core concept of state interests, but rather his narrow assumptions about the nature and scope of those interests. In particular:

- (1) Currie refused to consider a state's "multistate" interests—namely, interests that, though not reflected directly in a state's domestic law, stem from the state's membership in a broader community of states;<sup>20</sup>
- (2) Currie assumed that, in the vast majority of cases, a state has an interest in applying its law only when it would benefit its domiciliaries, but not when it would benefit similarly situated nondomiciliaries<sup>21</sup> (a notion referred to hereafter as Currie's "personal-law principle"); and,
- (3) Currie specifically downplayed the interests of the individuals involved in the conflict, as opposed to the interests of their respective home states.<sup>22</sup>

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18. See *Pacific Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493 (1939); *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532 (1935); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932); see also *Watson v. Emp'rs Liab. Assurance Corp. Ltd.*, 348 U.S. 66 (1954).

19. See CURRIE, SELECTED ESSAYS, *supra* note 9.

20. For example, Currie specifically dismissed the view that a state should be guided in its choice-of-law decisions by "the needs of the interstate and international systems." *Id.* at 615. He thought that, because of its international origins, the traditional system was overtaken by "the compulsion of internationalist and altruist ideals;" it had "guiltily suppressed the natural instincts of community self-interest . . . [and] enforce[d] a purposeless self-denial." *Id.* at 525. To compensate for this, Currie championed "the rational, moderate, and controlled pursuit of self-interest." *Id.* These adjectives offered some reassurance, as did his statements that "[t]he short-sighted, selfish state is nothing more than an experimental model," and that "[n]o such state exists, at least in this country." *Id.* at 616. Nevertheless, both the whole tenor and many of the specifics of his theory were far less moderate.

21. Currie argued that a state has an interest in applying its proplaintiff rules only for the benefit of local plaintiffs and its prodefendant rules only for the benefit of local defendants. See *id.* at 691–721 (arguing that New York's unlimited compensatory-damages law "is not for the protection of all who buy tickets in New York, or board planes there. It is for the protection of New York people."); *id.* at 85–86, 724 (arguing that a state that has a guest statute or a prodefendant contract rule has an interest in applying them only if the defendants are domiciled in that state).

22. See *id.* at 610 (stating that Currie found "no place in conflict-of-laws analysis for a calculus of private interests [because] [b]y the time the interstate plane is reached the resolution of conflicting private interests has been achieved; it is subsumed in the statement of the laws of the respective states.").

*C. Do States Have an Interest in Multistate Disputes Between Private Parties?*

The extreme way in which Currie articulated the concept of state interests caused some critics to charge that his whole interest-based approach was constitutionally infirm.<sup>23</sup> But a more fundamental criticism came from scholars who disputed the very notion that states have an interest in the outcome of multistate private law disputes.<sup>24</sup> The late Professor Juenger was the most categorical of those critics. He argued that the notion of a state interest in this context is “a highly implausible construct.”<sup>25</sup> He rejected Currie’s hypothesis that states have such an interest or, as Juenger put it, that states have “a deep-seated concern in the implementation of their legal rules,” and criticized Currie and his followers for “[not] adducing empirical evidence for this hypothesis.”<sup>26</sup> In a similar vein, another scholar asked rhetorically: “Can anyone cite a case in which a state appeared as *amicus curiae* arguing the importance that its own law be applied?”<sup>27</sup> If it were true that “[s]tates often appear as *amicus curiae* asserting interests they do hold dear,”<sup>28</sup> then, the argument goes, states would submit *amicus curiae* briefs urging a court to apply their respective laws. Do they?

Indeed, they do—not in every case, but in more cases than one would think. For example, as documented elsewhere, in practically every major international maritime conflicts case that has reached the U.S. Supreme Court, at least one foreign government, and occasionally the U.S. government, filed *amicus curiae* briefs bringing to the Court’s attention their interests in the outcome of litigation between ship owners and seamen.<sup>29</sup> The same is true of most other international conflicts that come before the U.S. Supreme Court. For example, in *Hartford Fire Ins. Co. v. California*,<sup>30</sup> the British government submitted an *amicus* brief urging the

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23. See John Ely, *Choice of Law and the State’s Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981). Anticipating these criticisms, Currie argued, in essence, that his theory was not unconstitutional because the Constitution would not allow it to be. See CURRIE, SELECTED ESSAYS, *supra* note 9, at 123–26, 185, 191, 280, 285 (stating that the Equal Protection and Privileges and Immunities clauses of the Constitution would help control undue protectionism); *id.* at 191, 271, 280–81 (stating that the Due Process and Full Faith and Credit clauses would help control excessive forum favoritism). Ironically, Currie was correct in the sense that: (1) the Supreme Court does not judge the constitutionality of theories in the abstract, but rather decides whether the application of a theory in the particular case produces an unconstitutional result; and (2) knowing this, reasonable courts will be careful not to apply Currie’s theory in an unconstitutional manner, and thus the theory will not be found unconstitutional.

24. Among the early critics, see ALBERT A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW 63 (1967); Gerhard Kegel, *The Crisis of Conflict of Laws*, 112 RECUEIL DES COURS 91, 180–82 (1964); Max Rheinstein, *How to Review a Festschrift*, 11 AM. J. COMP. L. 632, 664 (1962).

25. FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 135 (1993).

26. *Id.*

27. Michael H. Gottesman, *Adrift in the Sea of Indeterminacy*, 75 IND. L.J. 527, 531 (2000) [hereinafter Gottesman, *Indeterminacy*].

28. *Id.*

29. See the authorities cited in Symeon C. Symeonides, *Maritime Conflicts of Law from the Perspective of Modern Choice of Law Methodology*, 7 MAR. LAW. 223, 224–25, 228, 247 (1982).

30. 509 U.S. 764 (1993).

application of British law in a dispute involving British reinsurers.<sup>31</sup> More recent examples include *F. Hoffman-La Roche Ltd. v. Empagran S.A.*,<sup>32</sup> *Morrison v. Nat'l Austl. Bank Ltd.*,<sup>33</sup> and *Kiobel v. Royal Dutch Petrol. Co.*,<sup>34</sup> in which eight, three, and five foreign governments, respectively, filed amicus briefs urging the Court not to apply U.S. law.<sup>35</sup>

Nor is this phenomenon confined to international conflicts. For example, in *Clay v. Sun Ins. Office, Ltd.*,<sup>36</sup> an interstate conflict involving an insurance dispute between private parties, the Florida Attorney General appeared before the U.S. Supreme Court to defend Florida's interests in applying its law.<sup>37</sup> In *Bernhard v. Harrah's Club*,<sup>38</sup> in which a California court applied California tort law imposing civil liability on a Nevada casino, the State of Nevada filed an amicus brief supporting the casino's petition for a writ of certiorari to the U.S. Supreme Court.

Finally, such briefs are not uncommon in state courts, or in lower federal courts. For example, in *Kearney v. Salomon Smith Barney, Inc.*,<sup>39</sup> a tort dispute between a Georgia brokerage firm and its California clients, the California Attorney General filed an amicus brief in the California court supporting the application of California law. In *Modern Computer Sys. v. Modern Banking Sys.*,<sup>40</sup> a franchise contract dispute between a Minnesota franchisee and a Nebraska franchisor, the Minnesota Attorney General appeared as an amicus in a federal district court in Nebraska and argued for the application of Minnesota law.<sup>41</sup> These cases serve as a good reminder that private law disputes between private parties may implicate not only the interests of those parties, but also those of their respective states.

To be sure, amicus briefs are not the only evidence of a state's interest in the application of its law. One can find better evidence by looking at the actual wording of state statutes. Despite statements that stat-

31. *Id.* at 798 (citing Brief for Government of United Kingdom of Great Britain and Northern Ireland as Amicus Curiae Supporting Petitioners).

32. 542 U.S. 155 (2004).

33. 561 U.S. 247 (2010).

34. 133 S. Ct. 1659 (2013).

35. In *Empagran* and *Morrison*, the amici included the European Union, which now encompasses twenty-eight countries.

36. 363 U.S. 207 (1960).

37. *Clay* involved the question of whether Florida could constitutionally apply a statute that prohibited the contractual shortening of the limitation period for suing an insurer on a policy issued in Illinois to an insured who later moved to Florida and sustained the loss there. The U.S. Supreme Court held that Florida could do so, in part because of its interests in protecting insureds who sustain losses in that state. The Court noted that: "Florida's particular interest in this very statute is shown by the fact that the Attorney General of the State filed briefs and participated in oral arguments to support . . . the statute[s] constitutionality . . ." *Id.* at 216.

38. 546 P.2d 719 (Cal. 1976), *cert. denied*, 429 U.S. 859 (1977).

39. 137 P.3d 914 (Cal. 2006).

40. 858 F.2d 1339 (8th Cir. 1988) (deciding the issue under Nebraska conflicts law), *reversed by* *Modern Computer Sys. v. Modern Banking Sys.*, 871 F.2d 734 (8th Cir. 1989).

41. For numerous additional examples of state attorneys general appearing on the side of a private litigant and advocating for their respective states' interests, see Symeon C. Symeonides, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1, 23-24 (2000) [hereinafter Symeonides, *At the Dawn of the 21st Century*].

utes “do not come equipped with labels proclaiming their spatial dimension,”<sup>42</sup> or that “legislatures *have* no actual intent on territorial reach,”<sup>43</sup> such evidence is plentiful. It answers the rhetorical question of whether “any state legislature declared it important that its substantive law be chosen in some defined category of cases having multistate contacts?”<sup>44</sup>

The answer is an emphatic “yes.” A perusal of state statutes reveals the existence of several “localizing rules” that consist of precisely such declarations. These rules proclaim that the statutes that contain them shall apply to transactions or events that have certain enumerated connections with the enacting state. Some of these rules even expressly prohibit the contractual choice of another state’s law. The following are some examples:

- A Nevada statute provides that it applies to: “1. *All* insurers authorized to transact insurance in this state; 2. *All* insurers having policyholders resident in this state; [and] 3. *All* insurers against whom a claim under an insurance contract may arise in this state.”<sup>45</sup> Many other states have similar statutes<sup>46</sup> and many of them expressly prohibit the contractual choice of another state’s law.<sup>47</sup>
- An Oregon statute provides that, in cases of insurance for environmental contamination, “Oregon law shall be applied in all cases where the contaminated property to which the action relates is

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42. Juenger, *Critique*, *supra* note 12, at 35.

43. Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 393 (1980) [hereinafter Brilmayer, *The Myth*].

44. Gottesman, *Indeterminacy*, *supra* note 27, at 531.

45. NEV. REV. STAT. § 696B.020 (2014) (emphasis added).

46. For example, a Texas statute provides that: “Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company . . . doing business within this State shall be . . . governed by [the laws of this State] notwithstanding such . . . contract . . . may provide that the contract was executed and the premiums . . . should be payable without this State.” TEX. INS. CODE ANN. art. 21.42 (West 2013).

A North Carolina Statute provides that: “All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to be made within this State and are subject to the laws thereof.” N.C. GEN. STAT. § 58-3-1 (2014).

A Wisconsin statute provides that: “Every insurance against loss or destruction of or damage to property in this state or in the use of or income from property in this state is governed by the law of this state.” WIS. STAT. § 632.09 (2013).

For other similar statutes, see COLO. REV. STAT. § 10-4-711 (2002); FLA. STAT. § 627.727 (2014); LA. REV. STAT. ANN. §§ 22:611, 22:655, 22:1406(B) (2014); MINN. STAT. § 60A.08(4) (2015) (“All contracts of insurance on property, lives, or interests in this state, shall be deemed to be made in this state . . .”); OKLA. STAT. tit. 36, § 3636 (2014).

47. For example, an Oregon statute provides that, for an insurance policy “delivered or issued for delivery in” Oregon, any “condition, stipulation or agreement requiring such policy to be construed according to the laws of any other state or country . . . shall be invalid.” OR. REV. STAT. §§ 742.001, 742.018 (2014). For examples of similar statutes, see LA. REV. STAT. ANN. § 22:629 (2014); TEX. INS. CODE ANN. art. 21.42 (2013).

located within the State of Oregon.”<sup>48</sup> Statutes in other states also require the application of forum law to cases arising from trans-boundary pollution.<sup>49</sup>

- An Iowa statute mandates the application of forum law to franchises operated in that state,<sup>50</sup> prohibits a contractual choice of another state’s law,<sup>51</sup> and provides that a contractual choice of Iowa law does not alone render that statute applicable.<sup>52</sup> Other states have enacted similar statutes.<sup>53</sup>
- An Indiana statute requires the application of forum law to consumer credit transactions that have certain connections to that state and prohibits a contractual choice of another state’s law.<sup>54</sup> Similar statutes exist in many other states.<sup>55</sup>
- A Louisiana statute requires the application of forum law to construction contracts to be performed in that state and prohibits the contractual choice of another state’s law.<sup>56</sup>
- Finally, virtually every state’s workers’ compensation statutes contain provisions authorizing their extraterritorial application to injuries sustained outside the forum state if the employee or the employment relationship has certain connections with the forum state.<sup>57</sup>

The above statutes do not use phrases such as “conflict of laws” or “choice of law,” and this is why they can easily elude an electronic word search. But they do carry conspicuous “labels proclaiming their spatial

48. OR. REV. STAT. § 465.480(2)(a) (2014). The statute continues as follows: “Nothing in this section shall be interpreted to modify common law rules governing choice of law determinations for sites located outside the State of Oregon.” *Id.*

49. *See, e.g.*, MICH. COMP. LAWS § 324.1804 (2014) (“The law to be applied in an action or other proceeding brought pursuant to this part, including what constitutes ‘pollution’ is the law of this state, excluding choice of law rules.”). For identical provisions, see COLO. REV. STAT. §§ 13-1.5-104, 51-351b (2015); N.J. STAT. ANN. § 2A:58A-5 (West 2015); WIS. STAT. § 299.33(4) (2014).

50. *See* IOWA CODE § 523H.2 (2015).

51. *See id.* § 523H.14.

52. *See id.* § 523H.2.

53. *See, e.g., id.* § 325E.064 (2015) (farm equipment dealerships); *id.* § 325E.0683 (heavy equipment dealerships); MINN. STAT. § 80C.21 (2015) (franchises).

54. *See* IND. CODE § 24-4.5-1-201 (2014).

55. *See, e.g.*, LA. REV. STAT. ANN. §§ 9:3511, 9:3563, 51:1418 (2014).

56. *See, e.g., id.* at § 9:2779 (repealed 2009); *see also id.* at §§ 9:2778 (repealed 2009), 38:2196 (2014) (same with regard to contracts involving the state and its agencies or subdivisions).

57. *See, e.g.*, ALA. CODE § 25-5-35 (2015); ARIZ. REV. STAT. § 23-904 (LexisNexis 2015); CAL. LAB. CODE § 3600.5 (West 2014); GA. CODE ANN. § 34-9-242 (2014); IND. CODE § 22-3-2-20 (2014); KY. REV. STAT. ANN. § 342.670 (West 2014); LA. REV. STAT. ANN. § 23:1035.1 (2014); MD. CODE ANN. LAB. & EMPL. § 9-203 (West 2014); TENN. CODE ANN. § 50-6-115 (2014); TEX. CODE ANN. § 406.071 (2013).

dimension.”<sup>58</sup> In the awkward, anthropomorphic terminology of interest analysis, these statutes proclaim the enacting state’s “interest” (or *volonté d’application*) in regulating the enumerated multistate transactions. In the terminology of classic private international law, these statutes are veritable choice-of-law rules of the unilateral, inward looking genre.<sup>59</sup>

#### D. Are State Interests Ascertainable?

It is true, however, that statutes that expressly declare their intended territorial reach are the exception rather than the rule. Most statutes are either silent on the question of their application to foreign cases or contain “boilerplate language”<sup>60</sup> whose “literal catholicity,”<sup>61</sup> if taken at face value, would make them applicable to any and all activities, territorial or extraterritorial. As Currie once observed, “[l]awgivers . . . are accustomed to speak[ing] in terms of unqualified generality . . . [using] words like ‘all,’ ‘every,’ ‘no,’ ‘any,’ and ‘whoever’”<sup>62</sup> because “they ordinarily give no thought to the phenomena that would suggest the need for qualification.”<sup>63</sup> For example, the Jones Act purports to provide a remedy to “[a]ny seaman” who suffers an injury in the course of his employment.<sup>64</sup> Similarly, the Americans with Disabilities Act (“ADA”) provides that “[n]o individual” shall be discriminated against on the basis of disability by “any person” who owns or operates a place of “public accommodation.”<sup>65</sup>

In cases involving such statutes, it falls upon the courts to determine which of the “any and all” persons or activities the legislature intended to regulate. Courts discharge this task day in and day out by employing a process of statutory construction “rather commonplace in a federal system by which courts often have to decide whether ‘any’ or ‘every’ reaches to the limits of the enacting authority’s usual scope or is to be applied to foreign events or transactions.”<sup>66</sup> This is what Currie meant when he said that the court should resort to the method of statutory “construction and interpretation” that courts employ in fully domestic cases. In Currie’s words, “[j]ust as we determine by that process how a statute ap-

58. Juenger, *Critique*, *supra* note 12, at 35–36.

59. For several examples of similar localizing rules in other countries, see SYMEON C. SYMEONIDES, *CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS*, 294–329 (2014) [hereinafter SYMEONIDES, *CODIFYING CHOICE OF LAW*] (discussing localizing rules, international mandatory rules, and unilateral choice-of-law rules).

60. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813–14 (1993); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 249 (1991).

61. *Lauritzen v. Larsen*, 345 U.S. 571, 576 (1953).

62. CURRIE, *SELECTED ESSAYS*, *supra* note 9, at 81.

63. *Id.* at 82.

64. 46 U.S.C. § 30104 (2014). For cases involving the extraterritorial reach of the Jones Act, see Symeonides, *Maritime Conflicts*, *supra* note 29, at 225–63.

65. 42 U.S.C. § 12182(a) (2014). For the question of whether the ADA applies to foreign cruise ships while in U.S. waters, see *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005), discussed in Symeon C. Symeonides, *Cruising in American Waters: Spector, Maritime Conflicts, and Choice of Law*, 37 J. MAR. L. & COM. 491 (2006).

66. *Lauritzen*, 345 U.S. at 578–79.

plies in time, and how it applies to marginal cases, so we may determine how it should be applied to cases involving foreign elements.”<sup>67</sup>

Currie’s critics charged that this “domestic method” of statutory construction and interpretation fails to recognize the differences between domestic and multistate cases<sup>68</sup> and that it is incapable of pinpointing the policies underlying the conflicting rules of law.<sup>69</sup> They also argued that, even if such policies can be ascertained, they cannot help delineate a law’s intended territorial reach.<sup>70</sup>

To the extent they deny the domestic method’s ability to ascertain state policies, at least those of the forum state, these criticisms are unjustified. “The most important lesson taught in the first year of law school is that an intelligent decision to apply or not to apply a legal rule depends upon knowing the reasons for the rule.”<sup>71</sup> In this sense, Currie’s domestic method is just another name for the teleological method,<sup>72</sup> which ought to be beyond reproach, at least among the revolutionary ranks. Ascertaining the *telos* or purpose of a law is more difficult in conflicts cases than in ordinary domestic cases, but it is both a surmountable and a worthy task.<sup>73</sup>

67. CURRIE, SELECTED ESSAYS, *supra* note 9, at 184.

68. See, e.g., Brilmayer, *The Myth*, *supra* note 43, at 417 (“[D]omestic interpretation and conflicts interpretation are different enterprises altogether.”); Maurice Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946, 947 (1981) (arguing that, by resorting to the domestic method, Currie “inescapably” implies that “the ‘foreign elements’ in a case do not call for a distinctive mode of refereeing.”); see also Robert A. Lefflar, *Choice-of-Law Statutes*, 44 TENN. L. REV. 951, 954 (1977) (“The term ‘statutory construction’ is no more than a pretentious disguise for application of the court’s conflicts law.”) [hereinafter Lefflar, *Choice-of-Law Statutes*].

69. See, *inter alia*, Edgar Bodenheimer, *The Need for a Reorientation in American Conflicts Law*, 29 HASTINGS L.J. 731, 737 (1978); Brilmayer, *The Myth*, *supra* note 43, at 399, 417, 424; Peter Hay, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1644, 1661 (1981); Juenger, *Critique*, *supra* note 12, at 33–35 (1984); Willis L.M. Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 559–60 (1971); Maurice Rosenberg, *Two Views on Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 463–64 (1967).

70. See Brilmayer, *The Myth*, *supra* note 43, at 393 (“[L]egislatures have no actual intent on territorial reach.”); Juenger, *Critique*, *supra* note 12, at 35 (“[P]olicies do not come equipped with labels proclaiming their spatial dimension . . .”). For counter arguments, see Herma H. Kay, *A Defense of Currie’s Governmental Interest Analysis*, 215 RECUEIL DES COURS 9, 117–29 (1989); Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the ‘New Critics’*, 34 MERCER L. REV. 593, 606–20 (1983); Robert A. Sedler, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1628, 1632–35 (1981); Russell J. Weintraub, *Interest Analysis in the Conflict of Laws as an Application of Sound Legal Reasoning*, 35 MERCER L. REV. 629, 630–34 (1984) [hereinafter Weintraub, *Interest Analysis*].

71. Weintraub, *Interest Analysis*, *supra* note 70, at 631.

72. See Hans W. Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers*, *The Choice-of-Law Process*, 46 TEX. L. REV. 141, 149 (1967) (“Governmental interest analysis is merely one of the many applications of teleological interpretation. It seeks to determine the pertinence of rules of law to multiple-contact cases through an analysis of the purposes behind these rules.”).

73. PETER HAY, PATRICK BORCHERS, & SYMEON SYMEONIDES, *CONFLICT OF LAW* 49–50 (5th ed. 2010) (“In broad outline, the laws of the several states are remarkably similar, and the policies behind those laws are largely shared and thus presumptively familiar to the examining court. This familiarity enables the court, on comparing the points at which significant variations do occur, to identify the purpose or policy which objectively seems to be served by the variation and to assess the strength of that policy. This is not a search in legislative history but an observation based on common background.

Equally unjustified is the criticism regarding the ability of the teleological method to delineate the intended spatial reach of the interpreted laws. The vitality of this method has never depended on proof of *actual* legislative intent, as the critics have assumed. Without agreeing with Currie's method or with his particular inferences about the spatial reach of laws, one can still accept the notion that the spatial reach of laws is best determined by looking to their purpose and function. It is another matter that such a determination is only half of the process of actually resolving a conflicts problem. The second half of the process, in which Currie's insights were much less inspiring, is to actually and rationally accommodate laws with overlapping spatial reach (i.e., to resolve true conflicts).

In sum, having gone down the road of completely rejecting the established choice-of-law system, Currie had the sense of turning to something equally established but more flexible and more resourceful—the domestic common law method. This opened the way for introducing functionalism into choice-of-law thinking, allowing a more individualized approach to cases, and tempering the conflictual method by injecting into it considerations of substantive justice. Of all the elements of Currie's theory, this was the least problematic.

In conclusion, even when a conflict involves statutes (or common law rules) that do not declare their intended territorial reach, it is not difficult to determine whether the application of one statute or rule would promote the policies or values of the state from which the statute or rule originates. For example, it is not difficult to see that the tax base of a state like Nevada, which depends heavily on the casino industry, would be adversely affected if that industry is subjected to civil liability under the law of another state;<sup>74</sup> that a state like Michigan, the home of the three large U.S. auto makers, would be adversely affected if they are subjected to punitive damages under the law of another state;<sup>75</sup> or that a country that depends heavily on its shipping industry would be adversely affected if that industry is subjected to American operating and compen-

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For the most part, the court is merely asked to think about why a rule exists and to consider whether that purpose should, or even can be given effect in this case.”).

74. Even the California court acknowledged this interest in *Bernhard v. Harrah's Club*, 546 P.2d 719, 722 (Cal. 1976).

75. See, e.g., *In re Air Crash Disaster Near Chicago*, 644 F.2d 594, 614 (7th Cir. 1981), cert. denied 454 U.S. 878 (1981) (emphasizing California's “substantial interest in the economic health of corporations . . . which do business within its borders” and the ability of such corporations to “enhance[] the economic well-being of the state.”); *Kelly v. Ford Motor Co.*, 933 F. Supp. 465, 470 (E.D. Pa. 1996) (stating that Michigan had “a very strong interest” in applying its law denying punitive damages so as to ensure that “its domiciliary defendants are protected from excessive financial liability,” and that by protecting companies such as Ford from punitive damages, “Michigan hopes to promote corporate migration into its economy . . . [which] will enhance the economic climate and well being of the state . . . by generating revenues”) (citations omitted); *Ness v. Ford Motor Co.*, 1993 WL 996164, at \*2 (N.D. Ill. 1993) (“Michigan has an interest in seeing that product-liability plaintiffs are not overcompensated, resulting in higher insurance premiums for Michigan manufacturers, higher costs, and lost jobs”). For Michigan's protectionism of the three major automakers, see Symeon C. Symeonides, *Choice of Law in the American Courts in 1998: Twelfth Annual Survey*, 47 AM. J. COMP. L. 327, 375–76 (1999), and authorities cited therein.

sation standards.<sup>76</sup> It is *this adverse impact* that is the essence of the term state “interest.”

*E. Not Only in “Public Laws” and Not “Only in America”*

Moreover, the old assumption prevalent in European circles, that only so-called “public laws” (such as antitrust or taxation laws) embody state interests,<sup>77</sup> is as dated as the assumption that a state’s interests are only economic. Even European authors now recognize that “[e]conomic regulatory policies are not a monopoly of public law” and that there is at least an “intermingling of private and public interests.”<sup>78</sup>

What is more, this recognition is evident in most of the eighty-four private international law codifications enacted in the rest of the world during the last fifty years. As a recent study of these codifications documents, “contemporary legislatures employ a whole panoply of devices designed to protect specific values or interests of the forum state in the international or interstate arena.”<sup>79</sup> Besides multilateral rules that are facially neutral but are crafted in a way that frequently leads to the application of *lex fori*, these devices include: (1) unilateral choice-of-law rules, (2) rules of “immediate application” or mandatory rules, and (3) “localizing rules” contained in substantive statutes that mandate the application of those statutes to an increasingly expanding range of multistate cases.<sup>80</sup>

These rules exist in virtually every country; they are employed in diverse fields of law, not only in traditional public law fields, but also in traditional private law fields, such as contracts, marriage, divorce, maintenance, property, and successions. They protect not only economic interests of the enacting state, but also certain strongly held societal values and beliefs. For example, ensuring gender equality in marriage or facilitating divorce—as some of these rules do—does not protect an economic interest, but it does promote a society’s sense of equality and fairness.<sup>81</sup>

In conclusion, states are not indifferent to the outcome of multistate private-law disputes, although they are not as selfish as Currie assumed them to be. Conflicts law is no longer as “private,” neutral, or “innocent”<sup>82</sup> as it was supposed to be half a century ago. International uni-

76. See Symeonides, *Maritime Conflicts*, *supra* note 29, at 224–25, 228, 247.

77. See, e.g., Gerhard Kegel, *The Crisis of the Conflict of Laws*, 112 RECUEIL DES COURS 91 (1964).

78. Horatia Muir Watt, *Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy*, 9 COLUM. J. EUR. L. 383 (2003). For extensive discussion of these ideas and relevant authorities, see Horatia Muir Watt, *Aspects économiques du droit international privé*, 307 RECUEIL DES COURS 25 (2004).

79. SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 59, at 332.

80. See *id.* at 289–344.

81. See *id.* at 318–22.

82. See Spyridon Vrellis, *Rapport grec*, in PRIVATE INTERNATIONAL LAW AT THE END OF THE 20TH CENTURY: PROGRESS OR REGRESS? 247 (Symeon C. Symeonides ed., 2000) (“Le droit international privé a perdu son innocence.”); Alexander Lüderitz, *Anknüpfung im Parteiinteresse*, in INTERNATIONALES PRIVATRECHT UND RECHTSVERGLEICHUNG IM AUSGANG DES 20.

formity remains the *official* desideratum of the choice-of-law process, but only as long as it does not stand in the way of other, less exalted objectives of the forum state.<sup>83</sup> As a distinguished European author noted, “we preach the equivalence of all legal systems of the world, [while] at the same time applying our own law as often as we can.”<sup>84</sup>

While the “loss of innocence” is regrettable, it would be even more regrettable if we pretended that it has not occurred. A good understanding of reality is the first precondition for successfully addressing the problem at hand. As we proceed into the twenty-first century, we can expect that states will assert their interest even more boldly in multistate private law disputes. Our discipline can serve the interstate and international legal order by recognizing the existence of state interests, diagnosing when they truly conflict, and articulating the principles and mechanisms that will provide a reasonable accommodation between these interests.

#### F. *Reconceptualizing State Interests*

Unfortunately, in articulating the otherwise valid concept of state interests, Currie used terms that implied an *active desire* on the part of a “government” to apply its law and—even worse—a proclivity to assert that desire in an aggressive, imperialistic, “beggar thy neighbor” fashion.<sup>85</sup>

Currie either erred or exaggerated. States do not have active desires regarding the outcome of private disputes. But the policies, purposes, and values embodied in a state’s law *can* be adversely affected when that law is *not* applied to a case the law was intended to reach. In this sense, speaking of a state’s “interest” in applying its law is simply a shorthand way of describing this *adverse consequence*. Whether one calls this an “interest” or a “concern”—or whether one opts for a term such as “the most significant relationship,” which the uninitiated may mistake for a mere geographical test—is really a secondary matter. The bottom line is that states are *not* indifferent to the resolution of conflicts between their respective laws. Consequently, a choice-of-law analysis that fails to consider this factor is presumptively deficient.

This conclusion does not carry with it a wholesale, or even a partial, subscription to Currie’s particular value system, especially the narrow, selfish perspective that Currie ascribed to the forum state and his assumption that states are only interested in protecting their own citizens

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JAHRHUNDERTS: BEWAHRUNG ODER WENDE? FESTSCHRIFT FÜR GERHARD KEGEL 31 (Gerhard Kegel et al. eds., 1977) (“Das Internationale Privatrecht hat seine Unschuld verloren.”).

83. Cf. Ted M. de Boer, *Facultative Choice of Law: The Procedural Status of Choice-of-Law Rules and Foreign Law*, 257 RECUEIL DES COURS 223, 285 (1996) (“If Savigny’s theory was meant to bring about uniformity of result, or decisional harmony, it has failed miserably.”).

84. *Id.* at 419.

85. See Symeonides, *Middle Ground*, *supra* note 15, at 558–63.

(i.e., the “personal law” principle).<sup>86</sup> It is not that these tenets are unconstitutional, as some critics have charged.<sup>87</sup> Rather, they are antithetical to the goals of private interstate and international law.<sup>88</sup> To paraphrase John Donne, *no state is an island*, even if it is geographically so.<sup>89</sup> The selfish pursuit of the forum’s interests is inimical to individual justice and state coexistence, as well as detrimental to the forum’s own long-term interests.

### G. *Can an Interest-Based Approach Rationally Resolve Conflicts?*

The next question is whether an approach based on state interests properly conceived can provide a promising basis for resolving conflicts of laws. As explained below, the answer is: (1) “yes” for false conflicts; (2) “yes, but” for true conflicts; and (3) “no” for the no-interest cases.<sup>90</sup>

#### 1. *False Conflicts*

Because a false conflict is, by definition, a case in which only one state has an interest in applying its law, applying the law of the only interested state, as Currie suggested, is the only sensible solution. This part of Currie’s analysis is neither controversial nor controvertible, and this explains why all other modern approaches have embraced this solution. This was a significant improvement over the First Restatement, which based the choice of the applicable law on the location of a single contact

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86. See *supra* note 23 and accompanying text.

87. See *supra* note 23 and accompanying text.

88. See, e.g., CAVERS, CHOICE-OF-LAW, *supra* note 7, at 151 n.29 (charging that some of Currie’s prescriptions are “more appropriate to a tribal system of law than to that prevailing in the American Union”). Currie explained that his analysis did “not imply the ruthless pursuit of self-interest by the states,” and did not preclude what he called “rational altruism.” CURRIE, SELECTED ESSAYS, *supra* note 9, at 185–86; see also *id.* at 549 (“In a federal union such as ours there is no room for the cycle of discrimination, retaliation, and reciprocity. Each state may and should extend the benefits of its laws to foreigners, not merely with the hope but with the assurance that all other states will reciprocate as a matter of course.”). However, Currie never retracted his personal-law principle, according to which a state’s interest is confined to protecting only its own citizens. In short, he first elevated a faulty assumption into a choice-of-law principle, and then relied on “rational altruism” and self-restraint to resolve the resulting problems and curtail the inevitable excesses.

89. John Donne, *No Man is an Island, Meditation XVII*, in DEVOTIONS UPON EMERGENT OCCASIONS 62 (1624).

90. This tripartite categorization of conflicts, for which Currie deserves full credit, is analytically useful. However, the three labels Currie attached to them are problematic because they forejudge the answer to the basic question (i.e., whether a state has an interest in applying its law to the particular case), a question that reasonable minds often answer differently. For this reason, I have suggested the terms “direct” and “inverse” conflicts as alternatives to Currie’s second and third labels: (1) Direct conflicts (Currie’s “true conflicts”) are those in which each involved state has a law that favors a party affiliated with that state; and (2) Inverse conflicts (Currie’s “no-interest”) are those in which each state has a law that favors the party affiliated with the other state. These alternative terms objectively describe the content of each state’s substantive law without assuming that the state does, or does not, have an interest in applying it, and without forejudging the court’s own categorization of the conflict or its ultimate outcome. See SYMEON C. SYMEONIDES & WENDY C. PERDUE, CONFLICT OF LAWS, AMERICAN COMPARATIVE, INTERNATIONAL, 150–51 (3rd ed. 2012). Nevertheless, in deference to Currie, I use his labels in this Article.

rather than on the policies of the contact states.<sup>91</sup> More often than not, that insistence led to randomly sacrificing the interests of one state without promoting the interests of another state.<sup>92</sup> In contrast, Currie's solution to an admittedly false conflict effectuates the policies of the interested state without sacrificing any policies of the uninterested state.

This is by no means a small accomplishment. In the centuries old history of conflicts laws, progress has come in slow, tiny steps. In this sense, empowering the decision maker to separate false conflicts from other conflicts and to resolve the former by applying the law of the only interested state is one of few breakthroughs in the recent history of private international law.<sup>93</sup> This is true even after conceding, as one should, that reasonable minds can differ in defining a state's interest or on whether a particular case is, in fact, a false conflict.

## 2. *True Conflicts*

Currie's solution to true conflicts left as much to be desired as his rationale for it. He contended that the only solution was to apply the law of the forum because a court *may not* subordinate the forum's interests to those of another state.<sup>94</sup> Indeed, the very possibility of such subordination impelled Currie to insist that judges should not even attempt to weigh the interests of the two states. His explanation was that judges have neither the constitutional power, nor the necessary resources, to weigh conflicting governmental interests and should not be put in the position of having to subordinate the forum's interests. Currie thought that such a weighing is a "political function of a very high order . . . that should not be committed to courts in a democracy."<sup>95</sup>

In light of Currie's proud adherence to the common law tradition,<sup>96</sup> the above explanation is surprising in that it assumes a conception of the judicial process that does not reflect the realities of the American common law tradition, in which judges almost routinely engage in evaluating

91. William M. Richman, *The First Restatement of Conflict Laws on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1198 (1997).

92. See CURRIE, SELECTED ESSAYS, *supra* note 9, at 191; see also *id.* at 589–90.

93. See Symeonides, *Middle Ground*, *supra* note 15, at 564 ("That [the concept of a false conflict] is by now taken for granted, even by [Currie's] critics, and forms the common denominator of all current choice of law methodologies is no reason to deny him the credit rightfully due to him. Even if this were Currie's only contribution to conflicts theory, it would be sufficient to secure him a permanent position in the conflicts 'Hall of Fame.'").

94. See Brainerd Currie, *Comments on Babcock v. Jackson—A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1237–38 (1963) ("In the absence of action by higher authority, each state must be conceded the *right* to apply its own laws for the reasonable effectuation of its own policies.") (emphasis added).

95. CURRIE, SELECTED ESSAYS, *supra* note 9, at 182; see also *id.* (speaking of the "embarrassment of [a court] having to nullify the interests of its own sovereign"); *id.* at 278–79, 357; Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 778 (1963) [hereinafter, Currie, *The Disinterested Third State*].

96. See CURRIE, SELECTED ESSAYS, *supra* note 9, at 627 ("I am proud to associate myself with the common-law tradition.").

and weighing conflicting social policies.<sup>97</sup> As Judge Traynor, Currie's friend, once wrote, "judicial responsibility . . . connotes the recurring choice of one policy over another."<sup>98</sup> Currie's explanation also contradicts the basic tenets of his theory which, in every other respect, assumes an activist judge. For example, according to Currie's own analysis, in order to determine whether the conflict is a false or a true one, the judge must identify and articulate the interests of the involved states. The judicial application of this part of Currie's analysis suggests that this task is no less subjective or politically sensitive than the weighing of interests. The two tasks differ only in degree. If judges are qualified and empowered to identify governmental interests, they neither lose nor abdicate that power the moment they encounter a true conflict.<sup>99</sup>

Fortunately, most of the courts that have adopted Currie's analysis reject his proscription of interest weighing. Instead, they openly and unapologetically weigh the conflicting state interests. This is what the District of Columbia courts do<sup>100</sup> and what New Jersey courts did before that state's Supreme Court abandoned Currie's analysis in favor of the Restatement (Second).<sup>101</sup> The same is also true in California, which invented another name for interest weighing—comparative impairment.<sup>102</sup> Rather than weighing state interests themselves, California courts weigh the impairment that would result from not applying the law of the particular state. As Albert Ehrenzweig observed a long time ago, "*all* courts and writers who have professed acceptance of Currie's interest language

97. See Friedrich K. Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 206–07 (1969) ("Ever since conflicts law first developed, courts did precisely what Currie would forbid them to do; no judge has ever been impeached for inventing or applying a choice of law rule that sacrifices forum interests.").

98. Roger J. Traynor, *The Limits of Judicial Creativity*, 63 IOWA L. REV. 1, 12 (1977); see also *id.* at 11 (rejecting the notion that "policy is a matter for the legislators alone").

99. As Cavers put it, in Currie's analysis, "[w]eighing of interests after interpretation is condemned: weighing of interests in interpretation, condoned, not to say, encouraged." David F. Cavers, *Contemporary Conflicts in American Perspective*, 131 RECUEIL DES COURS 75, 148 (1970) (internal quotation marks omitted). In one of his last writings, Currie advised that in some cases the judge should subject the laws of the involved states to a more moderate and restrained interpretation, which could lead to the conclusion that one of those states is not as interested as it might appear at first blush. If so, this would be an *apparent conflict* in which the judge should apply the law of the other state. See Currie, *The Disinterested Third State*, *supra* note 95, at 763–64. Currie asserted—unpersuasively—that this process of reevaluating the two states' interests is qualitatively different from the weighing of the interests. See CURRIE, *SELECTED ESSAYS*, *supra* note 9, at 181–84.

100. See, e.g., *Cárdenas v. Muangman*, 998 A.2d 303, 311–12 (D.C. 2010); *Stutsman v. Kaiser Found. Health Plan of the Mid-Atl. States, Inc.*, 546 A.2d 367, 372–76 (D.C. 1988); *Kaiser-Georgetown Cmty. Health Plan, Inc. v. Stutsman*, 491 A.2d 502, 509–11 (D.C. 1985); see also *Jaffe v. Pallotta Teamworks*, 374 F.3d 1223, 1224, 1227–29 (D.C. Cir. 2004); *Biscoe v. Arlington Cnty.*, 738 F.2d 1352, 1358, 1360–62 (D.C. Cir. 1984).

101. See, e.g., *Gantes v. Kason Corp.*, 679 A.2d 106, 109–16 (N.J. 1996); *Eger v. E.I. Du Pont DeNemours Co.*, 539 A.2d 1213, 1217–19 (N.J. 1988).

102. See *Bernhard v. Harrah's Club*, 546 P.2d 719, 722–24 (Cal. 1976) (adopting Professor Baxter's comparative impairment approach as the method for resolving cases classified as true conflicts under interest analysis). For Baxter's approach, see William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963). For subsequent applications of this mix, see *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 537 (Cal. 2010); *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 918, 937 (Cal. 2006); *Offshore Rental Co. v. Cont'l Oil Co.*, 583 P.2d 721, 725–27 (Cal. 1978).

have transformed it by indulging in that very weighing and balancing of interests from which Currie refrained.<sup>103</sup> What is more, in many cases, these courts concluded that the stronger interest was that of the *foreign* state rather than the forum state.<sup>104</sup> This suggests that, although Currie's analysis was biased in favor of the *lex fori*, such a bias is not an inevitable characteristic of all interest-based approaches.

This then is the way out of Currie's impasse in true conflicts—impartial interest weighing, comparative impairment,<sup>105</sup> or “consequentialism.”<sup>106</sup> The latter is the principle underlying the Louisiana choice-of-law codification of 1991,<sup>107</sup> and the last iteration of Professor Weintraub's approach<sup>108</sup>—namely, applying the law of the state whose interests would suffer the most serious adverse consequences if its law were not applied.<sup>109</sup>

The common denominator between (1) resolving false conflicts by applying the law of the only interested state and (2) resolving true conflicts by applying the law of the state of the most impairment is the basic principle of *accommodation* of state interests. Rather than thinking in terms of *advancing* the interests of one state at the expense of those of another state, the decision maker should aspire to avoid frustrating the interest of the state that has the most to lose by an adverse choice of law. In false conflicts, that state is the only interested state. In true conflicts, it is the state with the strongest interest. This principle of accommodation is a unilateralist principle in that, rather than denying the existence of state interests, it openly acknowledges them. The fact that it then attempts to accommodate these interests makes it a benevolent or accom-

103. Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 389 (1966). Currie's response was sharp and short: “I do not care whether courts undertake to weigh and balance conflicting state interests or not,” he said, but when they do, “such action . . . [can] find its justification in politics, not in jurisprudence.” CURRIE, *SELECTED ESSAYS*, *supra* note 9, at 183, 600. See *id.* at 183, 274 for a more restrained response.

104. See, e.g., *Cárdenas*, 998 A.2d at 303; *Stutsman*, 546 A.2d at 367; *Eger*, 539 A.2d at 1213.

105. See Baxter, *supra* note 102.

106. This term originated in theology to describe a doctrine according to which the morality of an act is to be judged solely by its consequences. In choice-of-law, consequentialism stands for the proposition that the quality of a choice-of-law decision is to be judged by the consequences it produces on the interests and values reflected in the conflicting laws.

107. See Symeon C. Symeonides, *The Conflicts Book of the Louisiana Civil Code: Civilian, American, or Original?*, 83 TUL. L. REV. 1041, 1049–54 (2009) [hereinafter Symeonides, *The Conflicts Book of the Louisiana Civil Code*]. For the differences between the Louisiana approach and Baxter's and California's comparative impairment, see Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677, 691–92 (1992) [hereinafter Symeonides, *Louisiana Exegesis*].

108. See RUSSELL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 372 (5th ed. 2006) (proposing a “consequences-based approach” that “chooses law with knowledge of the content of the laws in each of the [involved] states . . . [and] seeks to minimize the consequences that any such state is likely to experience if its law is not applied.”); see also *id.* at 380 (stating that the Louisiana codification is based on such an approach).

109. See LA. CIV. CODE ANN. arts. 3543–44 (2014), for an example of such a resolution of true conflicts. These articles provide that, subject to some qualifications, cases in which the tortfeasor's conduct occurred in one state and the victim's injury occurred in another state with a higher standard of conduct or financial protection for the victim are governed by the law of the latter state if the tortfeasor should have foreseen that the injury would occur in that state. *Id.*

modative unilateralism, as opposed to Currie's aggressive, imperialistic version.<sup>110</sup>

### 3. *No-Interest Cases*

Ironically, the no-interest cases are more problematic for interest analysts than are true conflicts. It is perfectly logical and consistent to resolve a true conflict by applying the law of the state that has the greatest or strongest interest, or whose interests would otherwise suffer the most serious impairment. But what is one to do in the no-interest cases? Try to find the least interested state? This is just another way of saying that Currie's analysis, being built around the notion of state interests, runs into an impasse when neither state has an interest. This means that, to resolve the conflict, one must look for options outside the framework of interest analysis rather than simply recalibrate state interests or search for phantom common policies. In this sense, Currie's solution of applying the law of the forum as the residual law is precisely that—a solution that lies *outside* the framework of interest analysis.

Once it is understood that the solution to the no-interest conundrum must be sought outside the framework of interest analysis, then other options become more palatable. One of these was Currie's *lex fori* solution.<sup>111</sup> It is practical and efficient. But, intellectually, it competes with other options, such as (1) a return to territorialism, which was the established system before the advent of interest analysis, or (2) a resort to material justice considerations.

Interestingly, and despite contrary assumptions or expectations, judges have not found Currie's solution appealing. A telling example is presented by tort cases in which the parties are domiciled in different states and in which both the conduct and the injury occurred either in the tortfeasor's home state with law that protects the victim, or in the victim's home state with law that protects the tortfeasor. As we shall see later, in these cases, the courts applied the law of the state with the three contacts, even when it was not the forum state.<sup>112</sup> The Louisiana and Oregon codifications have adopted the same solution.<sup>113</sup>

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110. For a full discussion of the concept of accommodative unilateralism, see Symeon C. Symeonides, *Accommodative Unilateralism as a Starting Premise in Choice of Law*, in *BALANCING OF INTERESTS: LIBER AMICORUM PETER HAY* 417 (Hans-Eric Rasmussen-Bonne et al., 2005).

111. See, e.g., *Melville v. Am. Home Assurance Co.*, 443 F. Supp. 1064, 1103 (E.D. Pa. 1977); CURRIE, *SELECTED ESSAYS*, *supra* note 9, at 75; Friedrich K. Juenger, *How Do You Rate a Century?*, 37 *WILLAMETTE L. REV.* 89, 105 (2001); Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons*, 82 *TUL. L. REV.* 1741, 1763–64 (2008) [hereinafter, Symeonides, *Reciprocal Lessons*].

112. See *infra* Part IV.C.2.

113. See *infra* notes 160–61 and accompanying text.

### H. Conclusions

To summarize, Currie was essentially correct in postulating that: (1) multistate disputes between private parties implicate not only the interests of those parties, but also the interests of the states that have significant contacts with the dispute; and (2) to identify those interests, one must examine the substantive laws of the involved states, ascertain their underlying purposes or policies, and determine whether they are implicated in the case at hand.

The way in which Currie conceived and articulated these interests, however, conjures cold war memories or conditions of open economic warfare among states. Properly conceived, a state's interest *in the realm of conflict of laws* lies not in selfishly maximizing its gains at the expense of other states, but rather in avoiding an adverse impact on its strongly held policies or values.

This difference in conception is less problematic in false conflicts, where only one state's interests are implicated, than in true conflicts, where it is compounded by Currie's proscription of interest weighing. That proscription was one of Currie's other errors, which can be, and has been, corrected by courts that followed his analysis.<sup>114</sup> The correction can consist of either comparing the strength of the conflicting state interests or, better yet, as suggested here, by weighing the adverse consequences of the choice-of-law decision on the interests of each involved state and applying the law of the state that would suffer the most by an adverse choice of law.

This leaves conflicts that cannot be resolved in the previous two steps, including cases in which none of the involved states have an interest in applying their law. In those cases, the governing law should be chosen by resorting to other choice-of-law criteria, including territorial ones.

### III. THE CHOICE-OF-LAW REVOLUTION IN TORTS AND CONTRACTS

The scholastic dissent against the established conflicts system initiated by Currie and other scholars would have been practically inconsequential had it not been followed by a similar dissent in the judicial ranks. Indeed, inspired in part by these scholars, many judges gradually questioned the premises of the established system and soon began to openly depart from it. This judicial movement away from the traditional ways of thinking can be seen more visibly in the initially gradual, and eventually not so gradual, erosion of two typical and important traditional choice-of-law rules—the *lex loci delicti* and the *lex loci contractus*.<sup>115</sup>

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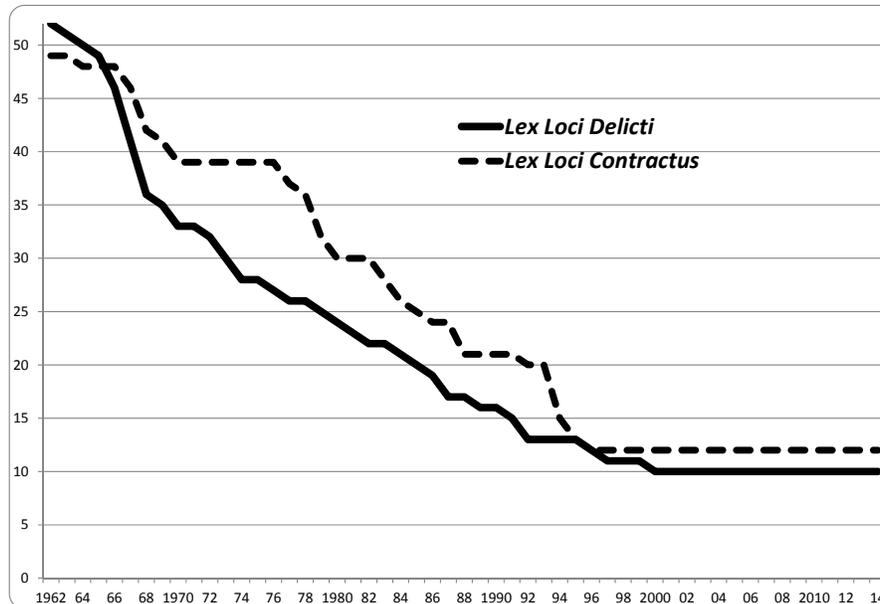
114. See, e.g., Symeon C. Symeonides, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1, 21 (2001); Symeonides, *Reciprocal Lessons*, *supra* note 111, at 1787.

115. Although revolutions seem to erupt overnight, discerning eyes can see the harbingers long before the actual eruption. The same was true of the choice-of-law revolution. For example, conflicts casebooks are replete with cases from the 1950s in which courts created exceptions to, or openly manipulated, the traditional *lex loci delicti* rule. Many of these cases spoke in language that was indicative

### A. *The Retreat of the Lex Loci Delicti Rule*

For all practical purposes, the revolution began in 1963 with the seminal New York case of *Babcock v. Jackson*,<sup>116</sup> which was the first case to openly abandon the traditional *lex loci delicti* rule. By 1977, half of the states had abandoned that rule, and by 2000, a total of forty-two jurisdictions had done so.<sup>117</sup> Charts 1 and 2 and Table 1, below, depict the chronology of this movement, which is documented in the accompanying text and footnotes. Charts 1 and 2 also show the parallel retreat of the *lex loci contractus* rule, which is discussed later.<sup>118</sup>

CHART 1. THE RETREAT OF THE *LEX LOCI DELICTI* AND *LEX LOCI CONTRACTUS* RULES



of later developments. *See, e.g.*, *Lauritzen v. Larsen*, 345 U.S. 571, 588 (1953); *Grant v. McAuliffe*, 264 P.2d 944, 949 (Cal. 1953); *Kilberg v. Ne. Airlines, Inc.*, 172 N.E.2d 526, 528 (N.Y. 1961).

116. 191 N.E.2d 279 (N.Y. 1963). *Babcock* is generally considered the beginning of the revolution, even though two earlier contract cases laid the foundation. *See* *W.H. Barber Co. v. Hughes*, 63 N.E.2d 417, 423–24 (Ind. 1945) (adopting a significant-contacts approach); *Auten v. Auten*, 124 N.E.2d 99, 101–03 (N.Y. 1954) (adopting a center-of-gravity approach, but also examining the interests of the competing jurisdictions).

117. This number includes the District of Columbia and the Commonwealth of Puerto Rico. The number was the same as of 2015.

118. *See infra* Part III.B.

CHART 2. THE REVOLUTION IN TORTS AND CONTRACTS

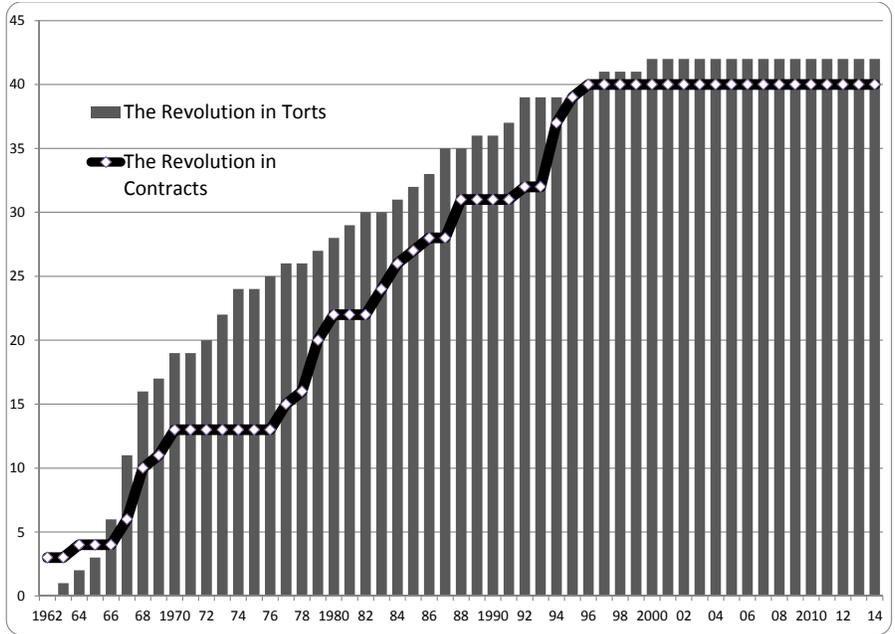


TABLE 1. CHRONOLOGICAL TABLE OF DEPARTURES FROM THE *LEX LOCI DELICTI* RULE

<i>Lex loci</i> states	Departures from the <i>lex loci delicti</i> rule					
1962	52					
1963	51	1	New York			
1964	50	1	Pennsylvania			
1965	49	1	Wisconsin			
1966	46	3	Minnesota	New Hampshire	Puerto Rico	
1967	41	5	California	Dist. of Columbia	Kentucky	New Jersey Oregon
1968	36	5	Alaska	Arizona	Iowa	Mississippi Rhode Island
1969	35	1	Missouri			
1970	33	2	Illinois	Maine		
1971	33					
1972	32	1	North Dakota			
1973	30	2	Colorado	Louisiana		
1974	28	2	Oklahoma	Washington		
1975	28					
1976	27	1	Massachusetts			
1977	26	1	Arkansas			
1978	26					
1979	25	1	Texas			
1980	24	1	Florida			
1981	23	1	Hawaii			
1982	22	1	Michigan			
1983	22					
1984	21	1	Ohio			
1985	20	1	Idaho			
1986	19	1	Connecticut			
1987	17	2	Indiana	Nebraska		
1988	17					
1989	16	1	Utah			
1990	16					
1991	15	1	Delaware			
1992	13	2	South Dakota	Tennessee		
1993	13					
1994	13					
1995	13					
1996	12	1	Nevada			
1997	11	1	Vermont			
1998	11					
1999	11					
2000	10	1	Montana			
2001	10					
2002	10					
2003	10					
2004	10					
2005	10					
2006	10					
2007	10					
2008	10					
2009	10					
2010	10					
2011	10					
2012	10					
2013	10					
2014	10	42				
2015	10					

Remaining states: Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, Wyoming.

Table 1 permits the following observations:

Most of the departures from the *lex loci delicti* rule (a total of seventeen) occurred in the 1960s, thus establishing the 1960s as the decade of the choice-of-law revolution. Twelve of those departures occurred in the period of 1966–1969, during which the ALI published the Official Proposed Drafts of the Restatement (Second).<sup>119</sup> Of the seventeen jurisdictions that abandoned the *lex loci delicti* rule in the 1960s: (1) nine juris-

119. Symeon C. Symeonides, *The American Choice-of-Law Revolution in the Courts: Today and Tomorrow*, 298 RECUEIL DES COURS 1, 66 (2003).

dictions adopted an approach based largely on the draft Restatement (Second);<sup>120</sup> (2) five jurisdictions opted for interest analysis;<sup>121</sup> (3) two jurisdictions opted for Professor Leflar's better-law approach;<sup>122</sup> and (4) one jurisdiction opted for the significant contacts approach.<sup>123</sup> Table 2, below, shows these jurisdictions, in chronological order, with the approaches they adopted then and the approaches they follow today.<sup>124</sup>

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120. In chronological order, see *Balts v. Balts*, 142 N.W.2d 66 (Minn. 1966); *Kopp v. Rehtzigel*, 141 N.W.2d 526, 527–28 (Minn. 1966); *Myers v. Gaither*, 232 A.2d 577, 583 (D.C. 1967); *Wessling v. Paris*, 417 S.W.2d 259, 260–61 (Ky. 1967); *Casey v. Manson Constr. & Eng'g Co.*, 428 P.2d 898, 904–05 (Or. 1967); *Armstrong v. Armstrong*, 441 P.2d 699, 702–03 (Alaska 1968); *Schwartz v. Schwartz*, 447 P.2d 254, 257 (Ariz. 1968); *Fuerste v. Bemis*, 156 N.W.2d 831, 832 (Iowa 1968); *Mitchell v. Craft*, 211 So. 2d. 509, 510 (Miss. 1968); *Kennedy v. Dixon*, 439 S.W.2d 173, 184 (Mo. 1969).

121. In chronological order, see *Babcock v. Jackson*, 191 N.E.2d 279, 279 (NY 1963); *Griffith v. United Air Lines, Inc.*, 203 A.2d 796, 805 (Pa. 1964); *Wilcox v. Wilcox*, 133 N.W.2d 408, 415 (Wis. 1965); *Reich v. Purcell*, 432 P.2d 727 (Cal. 1967); *Mellk v. Sarahson*, 229 A.2d 625, 626 (N.J. 1967). Classifying *Babcock* as an interest analysis case is debatable. Because the New York court's approach was a combination of the center of gravity approach with a type of policy analysis that was similar, but not identical to interest analysis, it would be more accurate to classify *Babcock* as following a mixed approach. In any event, the New York Court of Appeals later switched to a mixed approach when it adopted the *Neumeier* rules. See *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972).

122. See *Clark v. Clark*, 222 A.2d 205, 210 (N.H. 1966); *Woodward v. Stewart*, 243 A.2d 917, 923 (R.I. 1968). For Professor Leflar's approach, see Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966).

123. See *infra* Table 2.

124. Eight of the seventeen jurisdictions subsequently switched to another approach. (1) Minnesota switched to Leflar's better-law approach. See *Milkovich v. Saari*, 203 N.W.2d 408, 413, 416–17 (Minn. 1973). (2) The District of Columbia switched to interest analysis. See *Kaiser-Georgetown Cmty. Health Plan, Inc. v. Stutsman*, 491 A.2d 502, 509–11 (D.C. 1985). (3) Oregon switched to a mixed approach by adopting a new choice-of-law statute in 2009. See *infra* note 161 and accompanying text. (4) Kentucky switched to a *lex fori* approach. See *Foster v. Leggett*, 484 S.W.2d 827, 829 (Ky. Ct. App. 1972). (5) Pennsylvania switched to a mixed approach. See *Miller v. Gay*, 470 A.2d 1353, 1357, 1360 (Pa. 1984) (Spaeth, J., dissenting) (interest analysis and Restatement (Second)); *Cipolla v. Shaposka*, 267 A.2d 854, 855–57 (Pa. 1970) (following *Cavers*). (6) Wisconsin switched to Leflar's better-law approach. See *Lichter v. Fritsch*, 252 N.W.2d 360, 363–64 (Wis. 1977); *Heath v. Zellmer*, 151 N.W.2d 664, 672 (Wis. 1967). (7) California modified interest analysis by adding to it the comparative impairment approach. See *Bernhard v. Harrah's Club*, 546 P.2d 719, 723 (Cal. 1976). (8) New Jersey switched to the Restatement (Second). See *P.V. v. Camp Jaycee*, 962 A.2d 453, 455, 459–60 (N.J. 2008).

TABLE 2. THE 1960s

YEAR	STATE	APPROACH THEN	APPROACH TODAY
1963	New York	Interest analysis	Mixed
1964	Pennsylvania	Interest analysis	Mixed
1965	Wisconsin	Interest analysis	Better-Law
1966	Minnesota	Restatement (2d)	Better-Law
	New Hampshire	Better-Law	Better-Law
	Puerto Rico	Significant contacts	Signif. contacts
1967	California	Interest analysis	Interest analysis*
	District of Columbia	Restatement (2d)	Interest analysis
	Kentucky	Restatement (2d)	<i>Lex fori</i>
	New Jersey	Interest analysis	Restatement (2d)
	Oregon	Restatement (2d)	Mixed
1968	Alaska	Restatement (2d)	Restatement (2d)
	Arizona	Restatement (2d)	Restatement (2d)
	Iowa	Restatement (2d)	Restatement (2d)
	Mississippi	Restatement (2d)	Restatement (2d)
	Rhode Island	Better-Law	Better-Law
1969	Missouri	Restatement (2d)	Restatement (2d)

During the 1970s, ten more jurisdictions abandoned the *lex loci delicti* rule. Of those: (1) six jurisdictions opted for the Restatement (Second);<sup>125</sup> (2) two jurisdictions opted for a mixed approach;<sup>126</sup> (3) one jurisdiction opted for Leflar's approach;<sup>127</sup> and (4) one jurisdiction opted for a significant contacts approach.<sup>128</sup> Table 3, below, shows these jurisdictions, in chronological order, with the approaches they adopted then and the approaches they follow today.<sup>129</sup>

125. See *First Nat'l Bank in Fort Collins v. Rostek*, 514 P.2d 314, 320 (Colo. 1973); *Ingersoll v. Klein*, 262 N.E.2d 593, 595–96 (Ill. 1970); *Beaulieu v. Beaulieu*, 265 A.2d 610, 616–17 (Me. 1970); *Brickner v. Gooden*, 525 P.2d 632, 634–37 (Okla. 1974); *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979); *Johnson v. Spider Staging Corp.*, 555 P.2d 997, 1000 (Wash. 1976); *Werner v. Werner*, 526 P.2d 370, 376 (Wash. 1974).

126. See *Jagers v. Royal Indem. Co.*, 276 So. 2d. 309, 311–13 (La. 1973); *Pevoski v. Pevoski*, 358 N.E.2d 416, 417–18 (Mass. 1976).

127. See *Wallis v. Mrs. Smith's Pie Co.*, 550 S.W.2d 453, 456 (Ark. 1977).

128. See *Issendorf v. Olson*, 194 N.W.2d 750, 755–56 (N.D. 1972).

129. All of these jurisdictions follow the same approaches today.

TABLE 3: THE 1970S

YEAR	STATE	APPROACH THEN	APPROACH TODAY
1970	Illinois	Restatement (2d)	Restatement (2d)
	Maine	Restatement (2d)	Restatement (2d)
1972	North Dakota	Significant contacts	Signif. contacts
1973	Colorado	Restatement (2d)	Restatement (2d)
	Louisiana	Mixed	Mixed
1974	Oklahoma	Restatement (2d)	Restatement (2d)
	Washington	Restatement (2d)	Restatement (2d)
1976	Massachusetts	Mixed	Mixed
1977	Arkansas	Better-Law	Better-Law
1979	Texas	Restatement (2d)	Restatement (2d)

The equipoise point between the old and the new approaches was 1977, at which time as many jurisdictions (twenty-six) adhered to the *lex loci* rule as had abandoned it.

During the 1980s, nine more jurisdictions abandoned the *lex loci* rule. Of those: (1) six jurisdictions opted for the Restatement (Second);<sup>130</sup> (2) one jurisdiction opted for the significant contacts approach;<sup>131</sup> (3) one jurisdiction opted for a *lex fori* approach;<sup>132</sup> and (4) one jurisdiction adopted a mixed approach.<sup>133</sup> Table 4, below, shows these jurisdictions, in chronological order, with the approaches they adopted then and the approaches they follow today.<sup>134</sup>

130. See *O'Connor v. O'Connor*, 519 A.2d 13, 21–22 (Conn. 1986); *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980); *Johnson v. Pischke*, 700 P.2d 19, 24 (Idaho 1985); *Crossley v. Pac. Emp'r Ins. Co.*, 251 N.W.2d 383 (Neb. 1977) (relying alternatively on the Restatement (Second) and the *lex loci delicti* with the same result); *Harper v. Silva*, 399 N.W.2d 826, 827 (Neb. 1987) (interpreting *Crossley* as having adopted the Restatement (Second)); *Morgan v. Biro Mfg. Co.*, 474 N.E.2d 286, 288–99 (Ohio 1984); *Forsman v. Forsman*, 779 P.2d 218, 220 (Utah 1989).

131. See *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071, 1073–74 (Ind. 1987) (holding that “when the place of the tort is an insignificant contact,” the court will turn to the Restatement (Second), but stop short of embracing the policy analysis component of the Restatement (Second) or abandoning the *lex loci* rule in general).

132. See *Sexton v. Ryder Truck Rental, Inc.*, 320 N.W.2d 843, 854 (Mich. 1982).

133. See *Peters v. Peters*, 634 P.2d 586, 593 (Haw. 1981) (applying a blend of interest analysis and Leflar’s choice-influencing considerations).

134. All of these jurisdictions follow the same approaches today.

TABLE 4. THE 1980S

YEAR	STATE	APPROACH THEN	APPROACH TODAY
1980	Florida	Restatement (2d)	Restatement (2d)
1981	Hawaii	Mixed	Mixed
1982	Michigan	<i>Lex fori</i>	<i>Lex fori</i>
1984	Ohio	Restatement (2d)	Restatement (2d)
1985	Idaho	Restatement (2d)	Restatement (2d)
1986	Connecticut	Restatement (2d)	Restatement (2d)
1987	Indiana	Significant contacts	Signif. contacts
	Nebraska	Restatement (2d)	Restatement (2d)
1989	Utah	Restatement (2d)	Restatement (2d)

During the 1990s, five more jurisdictions followed suit in abandoning the *lex loci* rule. Of those: (1) four jurisdictions opted for the Restatement (Second);<sup>135</sup> and (2) one jurisdiction adopted a *lex fori* approach.<sup>136</sup> Finally, in the year 2000, one more jurisdiction abandoned the *lex loci* rule in favor of the Restatement (Second).<sup>137</sup> Table 5, below, shows these jurisdictions, in chronological order, with the approaches they adopted then and the approaches they follow today.<sup>138</sup>

TABLE 5. THE 1990S AND LATER

YEAR	STATE	APPROACH THEN	APPROACH TODAY
1991	Delaware	Restatement (2d)	Restatement (2d)
1992	South Dakota	Restatement (2d)	Restatement (2d)
	Tennessee	Restatement (2d)	Restatement (2d)
1996	Nevada	<i>Lex fori</i>	Restatement (2d)
1997	Vermont	Restatement (2d)	Restatement (2d)
2000	Montana	Restatement (2d)	Restatement (2d)

Since 2000, no other jurisdiction has abandoned the *lex loci delicti* rule. Thus, as of 2015:

- A total of forty-two jurisdictions had abandoned the *lex loci delicti* rule; and
- Ten jurisdictions appeared to adhere to it in varying degrees.<sup>139</sup>

135. See *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 40 (Del. 1991); *Chambers v. Dakotah Charter, Inc.*, 488 N.W.2d 63, 69 (S.D. 1992); *Hataway v. McKinley*, 830 S.W.2d 53, 59 (Tenn. 1992); *Amiot v. Ames*, 693 A.2d 675, 677 (Vt. 1997).

136. See *Motenko v. MGM Dist., Inc.*, 921 P.2d 933, 935 (Nev. 1996) (adopting a *lex fori* approach in tort cases unless “[a]nother State has an overwhelming interest”).

137. See *Phillips v. Gen. Motors Corp.*, 995 P.2d 1002, 1004–07 (Mont. 2000).

138. Nevada subsequently switched to the Restatement (Second). See *Gen. Motors Corp. v. Eighth Judicial District*, 134 P.3d 111, 116 (Nev. 2006).

139. These jurisdictions are Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming. See *infra* note 223.

Map 1, below, shows the geographical distribution of these jurisdictions, while Map 2 shows the same with regard to contract conflicts, which are discussed next.

More than half (twenty-six) of the forty-two jurisdictions that abandoned the *lex loci delicti* rule adopted the Restatement (Second), and twenty-four of them continue to follow the Restatement (Second) today.<sup>140</sup>

### *B. The Retreat of the Lex Loci Contractus Rule*

In contract conflicts, the first abandonment of the *lex loci contractus* rule occurred as early as 1945 in the Indiana case of *W. H. Barber Co. v. Hughes*.<sup>141</sup> *Barber* employed “a method used by modern teachers of Conflict of Laws in rationalizing the results obtained by the courts in decided cases,” called the “center of gravity” approach.<sup>142</sup> Nine years later, the New York Court of Appeals employed the same approach in *Auten v. Auten*.<sup>143</sup>

Although *Auten* is generally considered as marking the beginning of the revolution in contract conflicts, it did not garner a following until the 1960s. Even then, dissension against the *lex loci contractus* rule was slow. It took three decades for half of the states to abandon the *lex loci contractus* rule. As of 2015, forty jurisdictions had done the same.<sup>144</sup> The chronological order in which they did so is shown in Charts 1 and 2, above,<sup>145</sup> and Table 2, below, and it is documented in the accompanying text and footnotes.

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140. Three of the jurisdictions that adopted the Restatement (Second) in the 1960s (Minnesota, the District of Columbia, and Kentucky) switched to another approach, but two jurisdictions (New Jersey and Nevada) switched to the Restatement (Second) from another approach.

141. 63 N.E.2d 417, 423 (Ind. 1945).

142. *Id.*

143. 124 N.E.2d 99, 101–02 (N.Y. 1954).

144. This number includes the District of Columbia and the Commonwealth of Puerto Rico.

145. See Charts 1 & 2, *supra*.

TABLE 2. CHRONOLOGICAL TABLE OF DEPARTURES FROM THE *LEX LOCI CONTRACTUS* RULE

<i>Lex loci</i> states	Departures from the <i>lex loci contractus</i> rule				
1944	52				
1945	51	1	Indiana		
1954	50	1	New York		
1961	49	1	Puerto Rico		
1962	49				
1963	49				
1964	48	1	Oregon		
1965	48				
1966	48				
1967	46	2	California	Washington	
1968	42	4	Idaho	New Hampshire	Vermont Wisconsin
1969	41	1	Dist. Columbia		
1970	39	2	Arizona	Delaware	
1971	39				
1972	39				
1973	39				
1974	39				
1975	39				
1976	39				
1977	37	2	Iowa	Kentucky	
1978	36	1	Missouri		
1979	32	4	Arkansas	Colorado	Illinois Minnesota
1980	30	2	Mississippi	New Jersey	
1981	30				
1982	30				
1983	28	2	Maine	Pennsylvania	
1984	26	2	Ohio	Texas	
1985	25	1	Massachusetts		
1986	24	1	North Dakota		
1987	24				
1988	21	3	Hawaii	North Carolina	W. Virginia
1989	21				
1990	21				
1991	21				
1992	20	1	Louisiana		
1993	20				
1994	15	5	Connecticut	Montana	Nebraska Nevada S. Dakota
1995	13	2	Alaska	Michigan	
1996	12	1	Utah		
1997	12				
1998	12				
1999	12				
2000	12				
2001	12				
2002	12				
2003	12				
2004	12				
2005	12				
2006	12				
2007	12				
2008	12				
2009	12				
2010	12				
2011	12				
2012	12				
2013	12				
2014	12				
2015	12	40			

Remaining states 12: Alabama, Florida, Georgia, Kansas, Maryland, New Mexico, Oklahoma, Rhode Island, South Carolina, Tennessee, Virginia, Wyoming.

As Charts 1 and 2<sup>146</sup> and Table 2 indicate, the revolution spread at a much slower and more even pace in contracts than in torts.

Despite the earlier departures from the *lex loci contractus* rule in Indiana and New York, the revolution did not gain momentum until the 1960s, when nine jurisdictions abandoned that rule. Seven of them did so in the 1967–1969 period, which coincided with the ferment surrounding the publication of the Restatement (Second) drafts. Of the nine jurisdic-

146. See Charts 1 & 2, *supra*.

tions: (1) four adopted the Restatement (Second);<sup>147</sup> (2) three adopted interest analysis;<sup>148</sup> and (3) two adopted a significant-contacts approach influenced by the Restatement.<sup>149</sup> Table 6, below, shows these jurisdictions, in chronological order, with the approaches they adopted then and the approaches they follow today.<sup>150</sup>

TABLE 6. THE 1960S AND BEFORE

YEAR	STATE	APPROACH THEN	APPROACH TODAY
1945	Indiana	Center of gravity	Center of gravity
1954	New York	Center of gravity	Mixed
1961	Puerto Rico	Significant contacts	Signif. contacts
1964	Oregon	Interest analysis	Mixed
1967	California	Interest analysis	Mixed
	Washington	Restatement (2d)	Restatement (2d)
1968	Idaho	Restatement (2d)	Restatement (2d)
	New Hampshire	Restatement (2d)	Restatement (2d)
	Vermont	Restatement (2d)	Restatement (2d)
	Wisconsin	Significant contacts	Better-Law
1969	District of Columbia	Interest analysis	Mixed

During the 1970s, nine additional jurisdictions abandoned the *lex loci contractus* rule, of which: (1) seven jurisdictions opted for the Restatement (Second);<sup>151</sup> (2) one jurisdiction opted for a significant contacts approach;<sup>152</sup> and (3) one jurisdiction opted for Leflar's approach.<sup>153</sup>

147. See *Rungee v. Allied Van Lines, Inc.*, 449 P.2d 378, 382 (Idaho 1968); *Consol. Mut. Ins. Co. v. Radio Foods Corp.*, 240 A.2d 47, 49 (N.H. 1968); *Pioneer Credit Corp. v. Carden*, 245 A.2d 891, 893–94 (Vt. 1968); *Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 425 P.2d 623, 627 (Wash. 1967).

148. See *Travelers Ins. Co. v. Workmen's Comp. Appeals Bd.*, 434 P.2d 992, 995 (Cal. 1967); *McCrossin v. Hicks Chevrolet, Inc.*, 248 A.2d 917, 920–21 (D.C. 1969); *Lilienthal v. Kaufman*, 395 P.2d 543, 545 (Or. 1964).

149. See *Green Giant Co. v. Tribunal Superior*, 4 P.R. Offic. Trans. 682, 693 (1975); *Maryland Cas. Co. v. San Juan Racing Ass'n*, 83 P.R. 538, 546 (1961); *Urhammer v. Olson*, 159 N.W.2d 688, 689 (Wis. 1968). Wisconsin later switched to Leflar's better law approach. See *Schlosser v. Allis-Chalmers Corp.*, 271 N.W.2d 879, 886 (Wis. 1978); *Haines v. Mid-Century Ins. Co.*, 177 N.W.2d 328, 333 (Wis. 1970).

150. Five jurisdictions later switched to another approach. Wisconsin switched to Leflar's approach. See *Schlosser v. Allis-Chalmers Corp.*, 271 N.W.2d 879 (Wis. 1978); *Haines v. Mid-Century Ins. Co.*, 177 N.W.2d 328, 333 (Wis. 1970). California, the District of Columbia, New York, and Oregon switched to a mixed approach. See *Wash. Mut. Bank v. Superior Court*, 15 P.3d 1071, 1077 (Cal. 2001); *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1149 (Cal. 1992); *D.C. Ins. Guar. Ass'n v. Algernon Blair, Inc.*, 565 A.2d 564, 569 (D.C. 1989); *Owen v. Owen*, 427 A.2d 933, 937 (D.C. 1981); *In re Allstate Ins. Co.*, 613 N.E.2d 936, 937 (N.Y. 1993); see also note 161, *infra* (Oregon statute).

151. See *Burr v. Renewal Guar. Corp.*, 468 P.2d 576, 577 (Ariz. 1970); *Wood Bros. Homes, Inc. v. Walker Adjustment Bureau*, 601 P.2d 1369, 1372 (Colo. 1979); *Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc.*, 394 A.2d 1160, 1166 (Del. 1978); *Champagne v. W.E. O'Neil Constr. Co.*, 395 N.E.2d 990, 996 (Ill. App. Ct. 1979); *Joseph L. Wilmotte & Co. v. Rosenman Bros.*, 258 N.W.2d 317 (Iowa 1977); *Lewis v. Am. Family Ins. Grp.*, 555 S.W.2d 579, 581–92 (Ky. 1977); *Fruin-Colnon Corp. v. Missouri*

TABLE 7. THE 1970S

YEAR	STATE	APPROACH THEN	APPROACH TODAY
1970	Arizona	Restatement (2d)	Restatement (2d)
	Delaware	Restatement (2d)	Restatement (2d)
1977	Iowa	Restatement (2d)	Restatement (2d)
	Kentucky	Restatement (2d)	Restatement (2d)
1978	Missouri	Restatement (2d)	Restatement (2d)
1979	Arkansas	Significant contacts	Signif. contacts
	Colorado	Restatement (2d)	Restatement (2d)
	Illinois	Restatement (2d)	Restatement (2d)
	Minnesota	Better-Law	Better-Law

The decisive decade was the 1980s, during which eleven additional jurisdictions abandoned the *lex loci contractus* rule, thus shifting the balance against it in 1985. Of the eleven jurisdictions: (1) five jurisdictions adopted the Restatement (Second),<sup>154</sup> and (2) six jurisdictions adopted a mixed approach that, in most instances, included reliance on the Restatement.<sup>155</sup>

Hwy. Transport. Comm'n, 736 S.W.2d 41, 44 (Mo. 1987) (citing *Nat'l Starch & Chem. Corp. v. Newman*, 577 S.W.2d 99, 102 (Mo. Ct. App. 1978)).

152. See *Standard Leasing Corp. v. Schmidt Aviation, Inc.*, 576 S.W.2d 181, 184 (Ark. 1979).

153. See *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 48–49 (Minn. 1979).

154. See *Baybutt Constr. Corp. v. Commercial Union Ins. Co.*, 455 A.2d 914, 918 (Me. 1983); *Boardman v. United Servs. Auto. Ass'n*, 470 So. 2d 1024, 1030 (Miss. 1985); *Spragins v. Louise Plantation, Inc.*, 391 So. 2d 97, 99–100 (Miss. 1980); *Gries Sports Enters. v. Modell*, 473 N.E.2d 807, 810 (Ohio 1984); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420–21 (Tex. 1984). See also the following West Virginia cases relying heavily on the Restatement (Second) in insurance contract conflicts: *Cannelton Indus., Inc. v. Aetna Cas. & Sur. Co. of Am.*, 460 S.E.2d 1 (W. Va. 1994); *Adkins v. Sperry*, 437 S.E.2d 284, 287–88 (W. Va. 1993); *Clark v. Rockwell*, 435 S.E.2d 664, 668 n.4 (W. Va. 1993); *Nadler v. Liberty Mut. Fire Ins. Co.*, 424 S.E.2d 256, 261 (W. Va. 1992); *Lee v. Saliga*, 373 S.E.2d 345, 350 (W. Va. 1988). See also *New v. Tac & C Energy, Inc.*, 355 S.E.2d 629, 631 (W. Va. 1987) (applying Restatement (Second) § 196 to an employment contract).

155. See *Lewis v. Lewis*, 748 P.2d 1362, 1365 (Haw. 1988) (interpreting *Peters v. Peters*, 634 P.2d 586 (Haw. 1981), a tort conflict, as having adopted a significant-relationship test with primary emphasis on the state with the “strongest interest”); *Bushkin Assocs., Inc. v. Raytheon Co.*, 473 N.E.2d 662 (Mass. 1985); *State Farm Mut. Auto. Ins. Co. v. Estate of Simmons*, 417 A.2d 488, 491 (N.J. 1980); *Boudreau v. Baughman*, 368 S.E.2d 849, 855 (N.C. 1988) (interpreting the phrase “appropriate relation” in the forum’s version of U.C.C. § 1-105 as equivalent to the phrase “most significant relationship” as used in the Restatement (Second)); *Apollo Sprinkler Co. v. Fire Sprinkler Suppliers & Design, Inc.*, 382 N.W.2d 386, 390–91 (N.D. 1986); *Guy v. Liederbach*, 459 A.2d 744, 746 (Pa. 1983).

TABLE 8. THE 1980S

YEAR	STATE	APPROACH THEN	APPROACH TODAY
1980	Mississippi	Restatement (2d)	Restatement (2d)
	New Jersey	Mixed	Mixed
1983	Maine	Restatement (2d)	Restatement (2d)
	Pennsylvania	Mixed	Mixed
1984	Ohio	Restatement (2d)	Restatement (2d)
	Texas	Restatement (2d)	Restatement (2d)
1985	Massachusetts	Mixed	Mixed
1986	North Dakota	Mixed	Mixed
1988	Hawaii	Mixed	Mixed
	North Carolina	Mixed	Mixed
	West Virginia	Restatement (2d)	Restatement (2d)

The twentieth century ended with nine additional jurisdictions abandoning the *lex loci* rule. Of those: (1) seven jurisdictions opted for the Restatement (Second);<sup>156</sup> (2) one jurisdiction opted for a significant contacts approach;<sup>157</sup> and (3) one opted for a mixed approach.<sup>158</sup>

TABLE 9. THE 1990S

YEAR	STATE	APPROACH THEN	APPROACH TODAY
1992	Louisiana	Mixed	Mixed
1994	Connecticut	Restatement (2d)	Restatement (2d)
	Montana	Restatement (2d)	Restatement (2d)
	Nebraska	Restatement (2d)	Restatement (2d)
	Nevada	Significant contacts	Signif. contacts
	South Dakota	Restatement (2d)	Restatement (2d)
1995	Alaska	Restatement (2d)	Restatement (2d)
	Michigan	Restatement (2d)	Restatement (2d)
1996	Utah	Restatement (2d)	Restatement (2d)

Since 1996, no other jurisdiction has abandoned the *lex loci contractus* rule. Thus, as of 2015:

156. See *Williams v. State Farm Mut. Auto. Ins. Co.*, 641 A.2d 783, 789 (Conn. 1994); *Casarotto v. Lombardi*, 886 P.2d 931, 934 (Mont. 1994); *Powell v. Am. Charter Fed. Sav. & Loan Ass'n*, 514 N.W.2d 326, 332 (Neb. 1994) (adopting in explicit terms the Restatement (Second)). An earlier case, *Shull v. Dain, Kalman & Quail, Inc.*, 267 N.W.2d 517, 520 (Neb. 1978), had also applied the Restatement (Second). See also *Palmer G. Lewis Co. v. ARCO Chem. Co.*, 904 P.2d 1221, 1227 n.13 (Alaska 1995) (interpreting *Ehredt v. DeHavilland Aircraft Co. of Can., Ltd.*, 705 P.2d 446, 453 (Alaska 1985), a tort case, as having adopted the Restatement (Second) for contract conflicts as well); *Chrysler Corp. v. Skyline Indus. Servs., Inc.*, 528 N.W.2d 698, 699 (Mich. 1995); *Stockmen's Livestock Exch. v. Thompson*, 520 N.W.2d 255, 257 (S.D. 1994); *Am. Nat'l Fire Ins. Co. v. Farmers Ins. Exch.*, 927 P.2d 186, 190 (Utah 1996).

157. See *Hermanson v. Hermanson*, 887 P.2d 1241, 1244 (Nev. 1994) (a status case reinterpreting earlier contract cases as having adopted a "substantial relationship" test).

158. See LA. CIV. CODE ANN. arts. 3537-40 (1992), *infra* note 160 (providing rules based on the notion that the applicable law should be the law of the "state whose policies would be most seriously impaired if its law were not applied").

- A total of forty jurisdictions had abandoned this rule; and
- Twelve jurisdictions appeared to adhere to it, in varying degrees of commitment.<sup>159</sup>

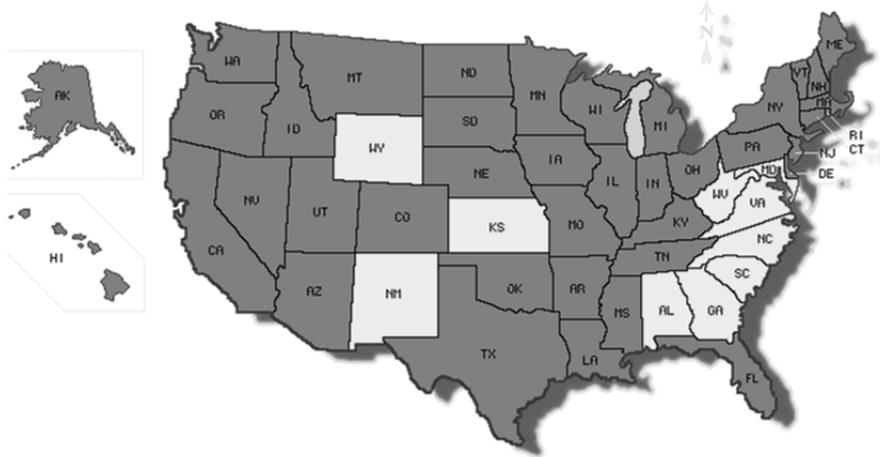
Map 2, below, shows the geographical distribution of these jurisdictions.

More than half (twenty-three) of the forty jurisdictions that abandoned the *lex loci contractus* rule adopted the Restatement (Second) and continue to follow the Restatement today.

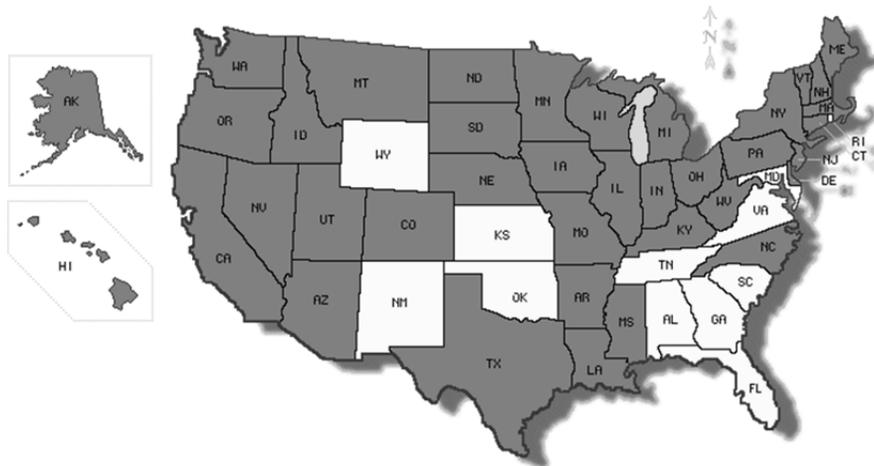
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159. These states are Alabama, Florida, Georgia, Kansas, Maryland, New Mexico, Oklahoma, Rhode Island, South Carolina, Tennessee, Virginia, and Wyoming. *See infra* Part III.C.

MAP 1: THE REVOLUTION IN TORT CONFLICTS



MAP 2. THE REVOLUTION IN CONTRACT CONFLICTS



Finally, mention should be made of the choice-of-law codifications of Louisiana (1991),<sup>160</sup> Oregon (2001 and 2009),<sup>161</sup> and the Puerto Rico

160. See LA. CIV. CODE ANN. arts. 3515–49 (1991). For discussion by its drafter, see generally Symeonides, *The Conflicts Book of the Louisiana Civil Code*, *supra* note 107; Symeonides, *Louisiana Exegesis*, *supra* note 107.

161. The Oregon codification consists of two statutes for contracts and torts enacted in 2001 and 2009, respectively. For contracts, see OR. REV. STAT. §§ 15.300–15.380 (2001). For a discussion, see James A.R. Nafziger, *Oregon's Conflicts Law Applicable to Contracts*, 38 WILLAMETTE L. REV. 397 (2002); Symeon C. Symeonides, *Codifying Choice of Law for Contracts: The Oregon Experience*, 67 RABELSZ 726 (2003); Symeon C. Symeonides, *Oregon's Choice-of-Law Codification for Contract Conflicts: An Exegesis*, 44 WILLAMETTE L. REV. 205 (2007). For torts, see OR. REV. STAT. §§ 15.400–15.460 (2009). For discussion by its drafter, see Symeon C. Symeonides, *Oregon's New Choice-of-Law Codification for Tort Conflicts: An Exegesis*, 88 OR. L. REV. 963 (2009) [hereinafter Symeonides, *Oregon Torts Exegesis*]; Symeon C. Symeonides, *Codifying Choice of Law for Tort Conflicts: The Oregon*

draft codification (1991),<sup>162</sup> all three of which have adopted a combined modern approach.

### C. *The Remaining Traditional States*

As Tables 1 and 2<sup>163</sup> indicate, the revolutionary momentum seems to have stopped in the closing years of the twentieth century. No state has abandoned the traditional system since 1996 in contracts and since 2000 in torts. This leaves twelve states continuing to follow the traditional system in contract conflicts, and ten states doing so in tort conflicts. For the reader's convenience, these states are shown again in Table 10.

TABLE 10: TRADITIONAL STATES

CONTRACTS	TORTS
Alabama	Alabama
Florida	
Georgia	Georgia
Kansas	Kansas
Maryland	Maryland
New Mexico	New Mexico
	North Carolina
Oklahoma	
Rhode Island	
South Carolina	South Carolina
Tennessee	
Virginia	Virginia
	West Virginia
Wyoming	Wyoming
TOTAL 12	TOTAL 10

As Table 10 indicates, the lists for torts and contracts are not identical. Four states (Florida, Oklahoma, Rhode Island, and Tennessee) have abandoned the traditional system in tort conflicts, but not in contract conflicts, while two states (North Carolina and West Virginia) have done

*Experience in Comparative Perspective*, in 12 YEARBOOK OF PRIVATE INTERNATIONAL LAW 201 (Andrea Bonomi & Gian Paolo Romano eds., 2010).

162. The Puerto Rico codification was drafted in 1991. See S. SYMEONIDES & A. VON MEHREN, RAPPORTEURS, ACADEMIA PUERTORRIQUEÑA DE JURISPRUDENCIA Y LEGISLACION, PROYECTO PARA LA CODIFICACIÓN DEL DERECHO INTERNACIONAL PRIVADO DE PUERTO RICO 1991. For reasons unrelated to the merits, its introduction to the legislature was delayed until 2002. See Symeon C. Symeonides, *A Bill for the Codification of Puerto Rican Private International Law* (May 25, 2002); *Proyecto de Ley para la Revisión y Reforma del Código Civil De Puerto Rico, Libro Séptimo (Derecho Internacional Privado)*, por Symeon Symeonides, 25 de mayo 2002. For the same reasons, it was withdrawn and reintroduced in 2014. For discussions, see Symeon C. Symeonides, *Codifying Choice of Law for Contracts: The Puerto Rico Project*, in LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 419 (James A.R. Nafziger & Symeon C. Symeonides eds., Transnational Publishers, Inc. ed. 2002); Marta Figueroa-Torres, *Recodification of Civil Law in Puerto Rico: A Quixotic Pursuit of the Civil Code for the New Millennium*, 23 TUL. EUR. & CIV. L.F. 143 (2008); Symeon C. Symeonides, *Revising Puerto Rico's Conflicts Law: A Preview*, 28 COLUM. J. TRANSNAT'L L. 413 (1990) [hereinafter, Symeonides, *Revising Puerto Rico*].

163. See Tables 1 and 2, *supra*.

the reverse. The reasons vary from state to state. For example, of the first four states, only Florida explicitly decided to retain the *lex loci contractus* rule after having abandoned the *lex loci delicti* rule.<sup>164</sup> In Oklahoma, an old statute codifies the *lex loci contractus* and *lex loci solutionis* rules,<sup>165</sup> although the same statute has not prevented the Oklahoma Supreme Court from applying the Restatement (Second) in insurance contract conflicts<sup>166</sup> and conflicts under the U.C.C. involving sales of goods.<sup>167</sup> In Rhode Island<sup>168</sup> and Tennessee,<sup>169</sup> the respective supreme courts simply did not have a good opportunity to reconsider the *lex loci contractus* rule after they abandoned the *lex loci delicti* rule in 1968 and 1992, respectively.

The inevitable, and perhaps intriguing, question is why the remaining states continue to hold onto the old rules after so many sister states have abandoned them. But a better question is whether these states would continue to follow these rules if they could not evade them whenever they did not like their results. The answer is probably not. For example, a perusal of the decisions of the supreme courts of these states reveals many more cases of evading the *lex loci delicti* rule than applying it.<sup>170</sup> The most common evasion tactics are (1) the defensive use of the forum's public policy as an exception from the otherwise applicable foreign law (*ordre public*),<sup>171</sup> and (2) the offensive use of the forum's policy as the affirmative reason for applying forum law.<sup>172</sup>

164. See *Sturiano v. Brooks*, 523 So. 2d 1126, 1130 (Fla. 1988) (reaffirming the *lex loci contractus* rule and specifically refusing to extend to contract conflicts the "most significant relationship" formula earlier adopted for tort conflicts).

165. See *Harvell v. Goodyear Tire & Rubber Co.*, 164 P.3d 1028, 1033–34 (Okla. 2006).

166. See *Bohannon v. Allstate Ins. Co.*, 820 P.2d 787, 797 (Okla. 1991).

167. See *Bernal v. Charter County Mut. Ins. Co.*, 209 P.3d 309, 315 n.25 (Okla. 2009); *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618 (Okla. 2003).

168. In *A.C. Beals Co. v. Rhode Island Hosp.*, 292 A.2d 865 (R.I. 1972), the court held that the law of Rhode Island should govern under "whatever theory we follow," after finding that the contract had been made in that state and that Rhode Island had "the most significant interest[] in th[e] matter." *Id.* at 871. The court also noted that, based on the record before it, the court "need not and do[es] not" decide whether to adopt the modern approach it had earlier adopted for tort conflicts. *Id.* at 871 n.5. Some courts have interpreted this statement as a reaffirmation, e.g., *Soar v. Nat'l Football League Players' Ass'n*, 550 F.2d 1287, 1289 n.5 (1st Cir. 1977), and others as an abandonment of the *lex loci contractus* rule, e.g., *Everett/Charles Contact Prod., Inc. v. Gentec, S.A.R.L.*, 692 F. Supp. 83, 89 (D.R.I. 1988). See also *Gordon v. Clifford Metal Sales Co.*, 602 A.2d 535 (R.I. 1992) (involving security interests alternatively based on the "reasonable relation" language of U.C.C. § 1-105 and Restatement (Second) § 6).

169. In *Ellis v. Pauline S. Sprouse Residuary Trust*, 280 S.W.3d 806 (Tenn. 2009), the Supreme Court of Tennessee applied the *lex loci contractus* rule to a case in which no other law was invoked or could have been applied. *Id.* at 814–15. The court applied Tennessee law to a case involving the question of whether a Tennessee lessee had exercised an option to renew lease of Tennessee farmland. *Id.* at 812.

170. For a discussion of these cases, see SYMEONIDES, REVOLUTION, *supra* note 4, at 51–58. For a discussion of contract conflicts in the eleven traditional states, see *id.* at 58–62.

171. See *Alexander v. Gen. Motors Corp.*, 478 S.E.2d 123, 124 (Ga. 1996); *Boone v. Boone*, 546 S.E.2d 191, 193 (S.C. 2001); *Mills v. Quality Supplier Trucking, Inc.*, 510 S.E.2d 280, 283 (W. Va. 1998); *Paul v. Nat'l Life*, 352 S.E.2d 550, 566 (W. Va. 1986).

172. See *Torres v. State*, 894 P.2d 386, 390 (N.M. 1995); *Braxton v. Anco Elec., Inc.*, 409 S.E.2d 914, 917 (N.C. 1991); *Willey v. Bracken*, 719 S.E.2d 714, 719 (W. Va. 2010); *Russell v. Bush & Burchett, Inc.*, 559 S.E.2d 36, 40 (W. Va. 2001). This use of public policy is also common in cases involving

The first use of public policy (the defensive use) is a permissible exception under the traditional theory, but only when the foreign law is truly repugnant to the forum's sense of justice and fairness.<sup>173</sup> None of these cases met this threshold. They involved common issues of interspousal immunity, comparative negligence, strict liability, and a guest statute.<sup>174</sup> The second use of public policy (the offensive use) differs little from its use in modern approaches, such as interest analysis, but it is obviously incompatible with the content-neutral, jurisdiction-selecting nature of the traditional method. Other escape devices include (1) the selective use or nonuse of *renvoi*,<sup>175</sup> (2) a manipulative characterization of the action as contractual rather than delictual,<sup>176</sup> (3) a peculiar use of comity as a reason for rejecting rather than deferring to foreign law,<sup>177</sup> (4) and a finding that somehow the *locus* state had "no law."<sup>178</sup>

The Supreme Court of West Virginia provided a candid and blunt explanation for the lack of incentive to abandon the *lex loci* rule: the availability of escapes, which the court can employ at will to reach the desired substantive result, which is usually the avoidance of foreign law. In *Paul v. National Life*,<sup>179</sup> the court rejected an appeal to adopt the Restatement (Second), stating: "[I]f we are going to manipulate conflicts doctrine in order to achieve substantive results, we might as well manipulate something we understand. Having mastered marble, we decline an apprenticeship in bronze. We therefore reaffirm our adherence to the doctrine of *lex loci delicti* today."<sup>180</sup>

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employment injuries and worker's compensation issues. See *Powell v. Erb*, 709 A.2d 1294, 1297 (Md. 1998); *Bishop v. Twiford*, 562 A.2d 1238, 1241–42 (Md. 1989); *Hauch v. Connor*, 453 A.2d 1207, 1213–14 (Md. 1983); *Leonard v. Johns-Manville Sales Corp.*, 305 S.E.2d 528, 532 n.1 (N.C. 1983); *Russell*, 559 S.E.2d at 39–40.

173. See *Loucks v. Standard Oil Co. of New York*, 120 N.E. 198, 201–02 (N.Y. 1918) (asking whether the foreign law "shock[s] our sense of justice[,] . . . menaces the public welfare[,] . . . [or] "violate[s] some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal").

174. See *supra* note 171 and accompanying text.

175. See *Erie Ins. Exch. v. Heffernan*, 925 A.2d 636, 653 (Md. 2007) ("choosing" not to employ *renvoi*, because, unlike other cases in which the court employed *renvoi* to avoid undesirable foreign law, in this case the foreign law produced the desired result of allowing recovery to forum residents); *Am. Motorists Ins. Co. v. ARTRA Group, Inc.*, 659 A.2d 1295, 1299 (Md. 1995) (employing *renvoi* and avoiding the application of the *lex loci contractus*).

176. See *Dreher v. Budget Rent-A-Car System, Inc.*, 634 S.E.2d 324, 327 (Va. 2006).

177. See *Russell*, 559 S.E.2d at 40–41 & n.4 (invoking comity—a doctrine of deference—not in order to defer to foreign law, but rather to reject it).

178. See *Leonard v. Johns-Manville Sales Corp.*, 305 S.E.2d 528, 532 (N.C. 1983) (finding that the state of the tort had no "law one way or the other," thus rendering inapplicable the *lex loci delicti* rule and leaving forum law to fill the void).

179. 352 S.E.2d 550 (W. Va. 1986).

180. *Id.* at 556. In this case, arising from an Indiana traffic accident involving only West Virginia parties, the vehicle for reaching the desired substantive result was the *ordre public* exception, which enabled the court to avoid the Indiana guest statute. *Id.*

## IV. THE REVOLUTION TODAY

A. *Methodological Pluralism*

The fact that the majority of states have abandoned the traditional system does not mean that they all follow the same approach in tort and contract conflicts. The scholastic revolution, which instigated and guided the judicial revolution, did not consist of one single movement, but rather encompassed several parallel movements united only in their opposition to the old order. Therefore, it is not surprising that the revolution did not produce a new choice-of-law system, but rather, several alternative approaches vying for judicial following. Among them are Currie's governmental interests analysis and its first cousin, a *lex fori* approach; the Restatement (Second) and its precursor; the center of gravity or "significant contacts" approach; Leflar's choice-influencing considerations or better-law approach; and other mixed approaches that include elements from the above.<sup>181</sup> Table 11, below, depicts the judicial following of these approaches in the fifty states, the District of Columbia, and the Commonwealth of Puerto Rico.<sup>182</sup> It should be read together with the caveats that follow the table.

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181. For a discussion of these approaches, see SYMEONIDES, REVOLUTION, *supra* note 4, at 9–35.

182. For documentation of these classifications, see *id.* at 50–62, 71–121; HAY, BORCHERS, & SYMEONIDES, *supra* note 73, at 96–121.

1. Methodological Camps

TABLE 11. ALPHABETICAL LIST OF STATES AND CHOICE-OF-LAW METHODOLOGIES FOLLOWED

States	Traditional	Signif. contacts	Restate-ment 2d	Interest Analysis	Lex Fori	Better Law	Combined Modern
Alabama	T+C						
Alaska			T+C				
Arizona			T+C				
Arkansas		C				T	
California				T			C
Colorado			T+C				
Connecticut			T+ C?				
Delaware			T+C				
Dist. of Columbia				T			C
Florida	C		T				
Georgia	T+C						
Hawaii							T+C
Idaho			T+C				
Illinois			T+C				
Indiana		T+C					
Iowa			T+C				
Kansas	T+C						
Kentucky			C		T		
Louisiana							T+C
Maine			T+C				
Maryland	T+C						
Massachusetts							T+C
Michigan			C		T		
Minnesota						T+C	
Mississippi			T+C				
Missouri			T+C				
Montana			T+C				
Nebraska			T+C				
Nevada		C	T				
New Hampshire			C			T	
New Jersey			T				C
New Mexico	T+C						
New York							T+C
No. Carolina	T	C					
North Dakota		T					C
Ohio			T+C				
Oklahoma	C		T				
Oregon							T+C
Pennsylvania							T+C
Puerto Rico		T+C					
Rhode Island	C					T	
So. Carolina	T+C						
So. Dakota			T+C				
Tennessee	C		T				
Texas			T+C				
Utah			T+C				
Vermont			T+C				
Virginia	T+C						
Washington			T+C				
West Virginia	T		C				
Wisconsin						T+C	
Wyoming	T+C						
TOTAL 52	Torts 10 Contr. 12	Torts 3 Contr. 5	Torts 24 Contr. 23	Torts 2 Contr. 0	Torts 2 Contr.0	Torts 5 Contr. 2	Torts 6 Contr. 10
T = Torts		C = Contracts					

## 2. Caveats

Determining which approach a particular jurisdiction follows is not an exact science. Difficulties arise from a variety of causes, ranging from the lack or dearth of recent authoritative precedent,<sup>183</sup> to precedents that are either equivocal<sup>184</sup> or exceedingly eclectic.<sup>185</sup> As noted elsewhere:

[F]ew cases rely exclusively on a single policy-based approach. Courts tend to be less interested in theoretical purity and more interested in reaching what they perceive to be the proper result. The majority of cases that have abandoned the traditional approach tend to use modern approaches interchangeably and often as *a posteriori* rationalizations for results reached on other grounds.<sup>186</sup>

To some extent, the separate column called “combined modern” that appears in Table 11, above,<sup>187</sup> reflects this eclecticism. But that column is reserved only for those states that overtly, knowingly, and repeatedly combine more than one modern methodology. If instances of unknowing, latent, or occasional eclecticism were to be included in that column, it would absorb most other columns. Indeed, “[i]f one had to define *the* dominant choice-of-law methodology in the United States today, it would have to be called *eclecticism*.”<sup>188</sup>

Nevertheless, the cases of occasional eclecticism are quite numerous. For example, the Rhode Island Supreme Court described its approach to tort conflicts as follows:

In this jurisdiction . . . [w]e follow . . . the interest-weighting approach. In so doing, we . . . determine . . . the rights and liabilities of the parties ‘in accordance with the law of the state that bears the most significant relationship to the event and the parties. . . . That

183. For example, as noted earlier, the supreme courts of Rhode Island and Tennessee did not have a good opportunity to reconsider the *lex loci contractus* rule after they abandoned the *lex loci delicti* rule in 1968 and 1992, respectively. See *supra* notes 168–69 and accompanying text.

184. For example, in *McMillen v. Winona Nat’l & Savings Bank*, 648 S.W.2d 460, 462 (Ark. 1983), and *Standard Leasing Corp. v. Schmidt Aviation, Inc.*, 576 S.W.2d 181, 184 (Ark. 1979), the Arkansas Supreme Court applied a significant-contacts approach. In *Stacy v. St. Charles Custom Kitchens of Memphis, Inc.*, 683 S.W.2d 225, 227 (Ark. 1985), however, the court appeared to revert to the *lex loci contractus* rule. In *Threlkeld v. Worsham*, 785 S.W.2d 249,251–53 (Ark. App. 1990), a lower court applied the “better-law” approach to a sale contract. More recently, the Arkansas Supreme Court applied the significant relationship test of Restatement (Second) § 188. See *Hoosier v. Interinsurance Exch. of Auto. Club*, 451 S.W.3d 206, 209 (Ark. 2014); *Scottsdale Ins. Co. v. Morrow Land Valley Co.*, 411 S.W.3d 184, 189–90 (Ark. 2012); *Crisler v. Unum Ins. Co. of Am.*, 233 S.W.3d 658, 660–61 (Ark. 2006); *Ducharme v. Ducharme*, 872 S.W.2d 392, 394 (Ark. 1994).

185. See Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L. J. 403, 403 (2000) [hereinafter, Juenger, *A Third Conflicts Restatement?*]

186. SYMEONIDES & PERDUE, *supra* note 90, at 124; Cf. Juenger, *A Third Conflicts Restatement?*, *supra* note 185, at 403 (“[O]ne finds authors who are at doctrinal loggerheads peacefully united in a single footnote; one encounters prose so turgid and stilted that one suspects that the judge (more likely the law clerk who actually drafted the opinion) never really grasped the idea behind the particular conflicts approach the court purports to follow.”).

187. See *supra* Table 11.

188. P. John Kozyris & Symeon C. Symeonides, *Choice of Law in the American Courts in 1989: An Overview*, 38 AM. J. COMP. L. 601, 602 (1990).

approach has sometimes been referred to as a rule of ‘choice-influencing considerations.’

In applying the interest-weighting or choice-influencing considerations, we consider . . . [Leflar’s five choice-influencing considerations and the four factual contacts listed] in Restatement (Second) Conflict of Laws, § 145(2). . . .<sup>189</sup>

In other words, that court follows a blend of three or perhaps five different approaches: an “interest-weighting approach” (which is interest analysis, but is itself combined with the very weighing of interest that Currie proscribed), the Second Restatement, and Leflar’s choice-influencing considerations. But that is not all; the court further suggested that Rhode Island follows a common domicile rule for tort conflicts (perhaps inspired by New York’s *Neumeier* rules<sup>190</sup>), at least when the common domicile is in Rhode Island and the parties have a pre-existing relationship.<sup>191</sup> Ordinarily, such a virtually boundless eclecticism would justify placing Rhode Island in the “combined modern” column. However, because it is unclear whether this decision is an aberration, it is safer to keep Rhode Island in the better-law column, where it has been since 1968.

Similarly, in *Nodak Mut. Ins. Co. v. American Family Mut. Ins. Co.*,<sup>192</sup> a case decided by the Supreme Court of Minnesota—which has been following Leflar’s better-law approach since 1973—the court described its approach as “the significant *contacts* test,”<sup>193</sup> which, however, relies not on contacts, but on Leflar’s five choice-influencing *factors*. But the factors are not really five because the first three of them are merely hortatory and the fifth factor (the better law) has not been employed “in nearly twenty years,”<sup>194</sup> thus, leaving only one true factor: the “[a]dvancement of the *forum’s* governmental interest.”<sup>195</sup> Yet, the court concluded that it was not the forum’s interests but the other state’s inter-

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189. *Cribb v. Augustyn*, 696 A.2d 285, 288 (R.I. 1997) (citations omitted); *see also* *Najarian v. Nat’l Amusements, Inc.*, 768 A.2d 1253, 1255 (R.I. 2001) (blending choice-influencing considerations with the Second Restatement).

190. *See Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972).

191. *See Cribb*, 696 A.2d at 288 (“[I]n situations in which the [Restatement § 146] factors (a) [place of injury] and (b) [place of conduct] are the only ones pointing to the law of another state and factors (c) [parties’ domicile] and (d) [seat of their relationship] point strongly to applying Rhode Island law, the latter two factors trump the earlier two, and Rhode Island law is applied.”). In *Taylor v. Mass. Flora Realty, Inc.*, 840 A.2d 1126 (R.I. 2004), the court added a presumptive *lex loci* rule, without mentioning Leflar’s approach. In *Oyola v. Burgos*, 864 A.2d 624 (R.I. 2005), the court, again without mentioning Leflar, described its approach to tort conflicts as an “interest-weighting test” that seeks to identify the state of the “most significant relationship.” *Id.* at 627. The court considered four contacts, but with a presumption in favor of the state of conduct and injury, which may be rebutted by the parties’ domicile or relationship within Rhode Island. *Id.* at 628.

192. 604 N.W.2d 91 (Minn. 2000).

193. *Id.* at 94, 96. (emphasis added).

194. *Id.* at 96.

195. *Id.* at 94, 96 (emphasis added).

ests that needed advancement,<sup>196</sup> because “when all other relevant choice-of-law factors favor neither state’s law, the state where the accident occurred has the strongest governmental interest. . . .”<sup>197</sup>

Another aspect of the eclecticism phenomenon is that certain courts’ commitment to a particular methodology is half-hearted. This is true of certain states that remain in the traditional camp only in name,<sup>198</sup> or only in part,<sup>199</sup> as well as states that purport to follow the Restatement (Second). For example, some cases use the Restatement solely as an escape from a traditional choice-of-law rule that coexists with the Restatement,<sup>200</sup> other cases use the Restatement as a camouflage for a “grouping-of-contacts” approach,<sup>201</sup> and other cases use it as a vehicle for merely restraining, but not avoiding, interest analysis.<sup>202</sup> One can find examples of such disparate treatment of the Restatement in the same jurisdiction.<sup>203</sup> Finally, some states prefer to use only the general, open-ended, and flexible sections of the Restatement, such as §§ 145, 187, and especially § 6, and to avoid using the specific sections that contain mildly confining presumptive rules.<sup>204</sup>

### 3. *The Relative Inconsequence of Methodology*

The above are only some of the examples of the difficulties and uncertainties encountered in any attempt to draw bright demarcation lines between the various methodological camps. Even if these uncertainties

196. *Id.* at 96. The other state’s law was more favorable to the Minnesota party than was Minnesota law.

197. When the losing litigant characterized this statement as “a return to the doctrine of *lex loci*,” the court responded that “this court . . . ha[s] rejected *lex loci* in favor of the significant contacts approach.” *Id.*

198. See SYMEONIDES, REVOLUTION, *supra* note 4, at 51–62.

199. See, e.g., *Ferrell v. Allstate Ins. Co.*, 188 P.3d 1156 (N.M. 2008) (criticizing the first Restatement and praising the Restatement (Second), but adopting the latter only for multistate contract class actions and apparently not for other contract conflicts).

200. See, e.g., *O’Connor v. O’Connor*, 519 A.2d 13, 21–22 (Conn. 1986) (adopting the Restatement (Second) “for those cases in which application of the doctrine of *lex loci* [delicti] would produce an arbitrary, irrational result”); *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071, 1073 (Ind. 1987) (holding that, “when the place of the tort is an insignificant contact,” the court will turn to the significant contacts—but not necessarily the policy analysis—of the Restatement (Second)).

201. See, e.g., *Palmer G. Lewis Co. v. ARCO Chem. Co.*, 904 P.2d 1221, 1227 (Alaska 1995); *Powell v. American Charter Fed. S. & L. Ass’n*, 514 N.W.2d 326, 332 (Neb. 1994); *Stockmen’s Livestock Exch. v. Thompson*, 520 N.W.2d 255, 258 (S.D. 1994); *Seele v. Pierce*, 494 N.W.2d 634, 638 (S.D. 1993); *Hataway v. McKinley*, 830 S.W.2d 53, 60 (Tenn. 1992); *Am. Nat’l Fire Ins. Co. v. Farmers Ins. Exch.*, 927 P.2d 186, 190 (Utah 1996); *Forsman v. Forsman*, 779 P.2d 218, 220 (Utah 1989).

202. See, e.g., *Williams v. State Farm Mut. Auto. Ins. Co.*, 641 A.2d 783, 790 (Conn. 1994); *O’Connor v. O’Connor*, 519 A.2d 13, 15 (Conn. 1986); *Esser v. McIntyre*, 661 N.E.2d 1138, 1142 (Ill. 1996); *Nelson v. Hix*, 522 N.E.2d 1214, 1218 (Ill. 1988); *Veasley v. CRST Int’l, Inc.*, 553 N.W.2d 896, 899 (Iowa 1996); *Chrysler Corp. v. Skyline Indus. Servs., Inc.*, 528 N.W.2d 698, 706 (Mich. 1995); *Gilbert Spruance Co. v. Pa. Mfrs. Ass’n Ins. Co.*, 629 A.2d 885, 893 (N.J. 1993).

203. Compare *Stockmen’s Livestock Exch. v. Thompson*, 520 N.W.2d 255, 258 (S.D. 1994), and *Selle v. Pierce*, 494 N.W.2d 634, 638 (S.D. 1993) (relying more on state contacts than on state interests), with *Chambers v. Dakotah Charter, Inc.*, 488 N.W.2d 63, 68 (S.D. 1992) (relying more on state interests and less on state contacts).

204. See Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1239–41 (1997).

did not exist, one might have good reason to object to classifying states based on methodology on the ground that such classifications tend to inflate the importance of methodology in explaining, or especially, in predicting court decisions. Reality is much different. As noted elsewhere, “[O]f all the factors that may affect the outcome of a conflicts case, the factor that is the most inconsequential is the choice-of-law methodology followed by the court.”<sup>205</sup> Indeed, methodology rarely drives judicial decisions. The opposite is closer to the truth: “[T]he result in the case often appears to have dictated the judge’s choice of law approach at least as much as the approach itself generated the result.”<sup>206</sup>

For these reasons, one might wonder whether classifications such as the ones reproduced above are more harmful than helpful. This question admits different answers. My view is that, on balance, these classifications are helpful, at least as tentative indications of where a particular jurisdiction stands, *provided* they are used with appropriate caution, keeping in mind the above caveats. The study of any plurilegal system, especially one as vast as that of the United States, would be far more difficult, if not impossible, without a modicum of categorization and sorting out, seeking, and cataloguing the common denominators among the various units. Taxonomy is not an end in itself, but it is a necessary first step in any study of multiple objects. It is also a medium for seeing the forest for the trees.

#### 4. *The Decline of Currie’s Following*

In reviewing Table 11, above,<sup>207</sup> most readers will be surprised to see that it lists only two jurisdictions as following Brainerd Currie’s governmental interest analysis—California and the District of Columbia. Indeed, even at the height of the revolution, interest analysis had relatively little judicial following. Although Currie was the chief protagonist of the choice-of-law revolution, his contribution consisted mostly of debunking the old system and introducing a new way of thinking about conflicts, rather than in persuading courts to adopt his own approach to conflict resolution. In the first two decades of the revolution, five jurisdictions followed interest analysis in tort conflicts (California, the District of Columbia, New Jersey, Pennsylvania, and Wisconsin)<sup>208</sup> and three juris-

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205. Symeon C. Symeonides, *Choice of Law in the American Courts in 1994: A View “From the Trenches”*, 43 AM. J. COMP. L. 1, 2 (1995) (emphasis added).

206. Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 951, 962 (1994) (“[C]itation to academic theory has served more as window dressing than as a dispositive factor in deciding choice of law cases.”); *see also* Sutherland v. Kennington Truck Serv., Ltd., 562 N.W.2d 466, 469 (Mich. 1997) (“[I]n practice, all the modern approaches to conflicts of law are relatively uniform in the results they produce.”).

207. *See supra* Table 11.

208. *See* Reich v. Purcell, 432 P.2d 727, 730 (Cal. 1967); Williams v. Williams, 390 A.2d 4, 5–6 (D.C. 1978); Mellk v. Sarahson, 229 A.2d 625, 629 (N.J. 1967); Griffith v. United Air Lines, Inc., 203 A.2d 796, 807 (Pa. 1964); Wilcox v. Wilcox, 133 N.W.2d 408, 415 (Wis. 1965). This number would rise to six if one includes *Babcock v. Jackson*, 191 N.E.2d 279, 283 (N.Y. 1963), which adopted a mix of policy analysis and center of gravity.

dictions did so in contract conflicts (California, the District of Columbia, and Oregon).<sup>209</sup>

Today, with all benefit of the doubt, only two jurisdictions arguably follow interest analysis in tort conflicts, and none do so in contract conflicts. In tort conflicts, New Jersey abandoned interest analysis in favor of the Restatement (Second),<sup>210</sup> Pennsylvania switched to a mixed approach,<sup>211</sup> and Wisconsin switched to Leflar's better-law approach.<sup>212</sup> In contract conflicts, California,<sup>213</sup> the District of Columbia,<sup>214</sup> and Oregon<sup>215</sup> abandoned interest analysis in favor of a mixed approach. In fact, a more literal classification might place even the two remaining jurisdictions elsewhere, insofar as they engage in the very weighing of state interests that Currie proscribed. The District of Columbia weighs state interests openly and unapologetically,<sup>216</sup> while California prefers to weigh not the interests themselves, but rather the impairment that would result from subordinating them.<sup>217</sup> Thus, a more technical classification might move these states to different columns, leaving completely blank the interest analysis column.

In light of the pivotal role that interest analysis played in the choice-of-law revolution, this development is nothing short of astonishing. This should not suggest, however, that Currie's influence has disappeared. First, an interest analysis traceable to Currie forms the core of most of the "mixed" or "combined modern" approaches followed in other states.<sup>218</sup> Second, interest analysis is often heavily employed in states that generally follow the Restatement (Second), especially in cases in which the factual contacts are evenly divided between the involved jurisdictions.<sup>219</sup> Thus, in the same manner that the high numerical following of

209. See *Travelers Ins. Co. v. Workers' Comp. Appeals Bd.*, 434 P.2d 992, 994–95 (Cal. 1967); *McCrossin v. Hicks Chevrolet, Inc.*, 248 A.2d 917, 920 (D.C. 1969); *Lilienthal v. Kaufman*, 395 P.2d 543, 545 (Or. 1964).

210. See *P.V. ex rel. T.V. v. Camp Jaycee*, 962 A.2d 453, 455 (N.J. 2008).

211. See, e.g., *Cipolla v. Shaposka*, 267 A.2d 854, 856 (Pa. 1970) (Cavers); *Miller v. Gay*, 470 A.2d 1353, 1354, 1360 (Pa. Super. Ct. 1984) (interest analysis and Restatement (Second)).

212. See, e.g., *Lichter v. Fritsch*, 252 N.W.2d 360, 364 (Wis. 1977); *Heath v. Zellmer*, 151 N.W.2d 664, 672 (Wis. 1967).

213. See *Wash. Mut. Bank v. Superior Court*, 15 P.3d 1071, 1078 (Cal. 2001); *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1152 (Cal. 1992); *Frontier Oil Corp. v. RLI Ins. Co.*, 63 Cal. Rptr. 3d 816, 833–34 (Cal. Ct. App. 2007).

214. See *D.C. Ins. Guar. Ass'n v. Algernon Blair, Inc.*, 565 A.2d 564, 568 (D.C. 1989) (applying interest analysis, but also relying on the Restatement (Second)); *Owen v. Owen*, 427 A.2d 933, 937 (D.C. 1981) (mixed approach, described as a search for the "more substantial interest," but reduced to contact counting).

215. See OR. REV. STAT. §§ 15.300–15.380 (2001).

216. See, e.g., *Kaiser-Georgetown Comm. Health Plan, Inc. v. Stutsman*, 491 A.2d 502, 509 (D.C. 1985).

217. See *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 523 (Cal. 2010); *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 925 (Cal. 2006); *Offshore Rental Co. v. Cont'l Oil Co.*, 583 P.2d 721, 726 (Cal. 1978); *Bernhard v. Harrah's Club*, 546 P.2d 719, 723 (Cal. 1976), *superseded by statute on other grounds*, CAL. CIV. CODE § 1714(b) (West 2012).

218. Symeonides, *Oregon Torts Exegesis*, *supra* note 161, at 1033.

219. See Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1262–63 (1997) [hereinafter, Symeonides, *Mixed Blessing*].

the Restatement (Second) tends to inflate its importance in deciding actual cases, the low numerical following of Currie's original approach tends to undervalue the importance of this approach in influencing judicial decisions.<sup>220</sup>

##### 5. *The Popularity of the Restatement (Second)*

Table 11 also confirms the apparent popularity of the Restatement (Second) among judges. Twenty-six of the forty-two jurisdictions that abandoned the *lex loci delicti* rule since the 1960s have adopted the Restatement (Second), and twenty-four jurisdictions continue to follow the Restatement to date.<sup>221</sup> Twenty-three of the forty jurisdictions that abandoned the *lex loci contractus* rule, including seven of the nine that did so in the 1990s, have adopted the Restatement (Second), and twenty-three continue to follow the Restatement to date.<sup>222</sup> Moreover, on the issue of choice-of-law clauses, many states follow § 187 of the Restatement, even if on other issues they follow other approaches, including the traditional approach.<sup>223</sup> Finally, many federal courts follow the Restatement (Second) in federal question cases.<sup>224</sup>

Thus, for better or worse, the Restatement (Second) appears to dominate the American methodological landscape. As explained else-

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220. See *supra* Table 11.

221. By 1969, the year of the Restatement (Second)'s official promulgation, the states that had adopted the draft Restatement slightly outnumbered (seven to eight) the states that had adopted other modern approaches. After 1969, more than twice as many states adopted the Restatement (Second) (seventeen) than adopted other approaches (eight). Five of the six states that abandoned the *lex loci delicti* rule in the 1990s adopted the Restatement (Second). See Symeonides, *Mixed Blessing*, *supra* note 219, at 1252, tbl. 1.

222. By 1969, the states that had adopted the draft Restatement were outnumbered seven to four by the states that had adopted other modern approaches. After 1969, almost twice as many states adopted the Restatement (Second) (nineteen) than adopted other approaches (ten). Seven of the nine states that abandoned the *lex loci contractus* rule in the 1990s adopted the Restatement (Second). See *id.* at 1256, tbl. 2.

223. See, e.g., SBKC Serv. Corp. v. 111 Prospect Partners, L.P., No. 97-3193, 1998 WL 436579, at \*3 (10th Cir. Jul. 30, 1998) (relying on Restatement (Second) §187, even though Kansas follows the traditional rules in both contract and tort conflicts); *Cherry, Bekaert & Holland v. Brown*, 582 So. 2d 502, 506-07 (Ala. 1991) (same with regard to Alabama); *Nat'l Glass, Inc. v. J.C. Penney Prop., Inc.*, 650 A.2d 246, 248 (Md. 1994) (same with regard to Maryland); *Kronovet v. Lipchin*, 415 A.2d 1096, 1106 (Md. 1980) (same).

224. See, e.g., *Alvarez-Machain v. United States*, 266 F.3d 1045, 1061 (9th Cir. 2001) (Federal Tort Claims Act), *vacated*, 374 F.3d 1384 (2004); *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128, 134 (D.D.C. 2001) (Antiterrorist and Effective Death Penalty Act); *Am. Home Assurance Co. v. L & L Marine Serv., Inc.*, 153 F.3d 616, 618-19 (8th Cir. 1998) (admiralty jurisdiction); *Bickel v. Korean Air Lines Co.*, 83 F.3d 127, 130 (6th Cir. 1996) (arising under the Warsaw Convention), *superseded on other grounds*, 96 F.3d 151 (6th Cir. 1996); *In re Lindsay*, 59 F.3d 942, 949-50 (9th Cir. 1995) (bankruptcy proceeding); *Schoenberg v. Exportadora de Sal*, 930 F.2d 777, 782 (9th Cir. 1991) ("Federal common law follows the approach of the Restatement (Second) of Conflict of Laws (1969) [sic]"); *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1295 (1st Cir. 1988) (Edge Act); *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1003 (9th Cir. 1987) (Foreign Sovereign Immunities Act); *Aaron Ferer & Sons v. Chase Manhattan Bank, Nat. Ass'n.*, 731 F.2d 112, 121 (2d Cir. 1984); *Corp. Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 793 (2d Cir. 1980) (Edge Act).

where,<sup>225</sup> however, this high numerical following does not necessarily entail a deep-seated commitment to the Restatement. In many cases, the Restatement simply offers the most convenient, and authoritative-sounding, rationalization for results that the court would have reached under any other modern methodology.<sup>226</sup> The Restatement's relative popularity can be attributed to varied reasons (some of which are not necessarily complimentary), including the following:

- (1) Unlike approaches proposed by individual scholars, whose persuasive powers depend entirely on the inherent soundness of their proposals, the Restatement benefits from the prestige, as well as the longevity, of the ALI;
- (2) In contrast to rival academic approaches, which provide no more than a single, good-for-all, "methodology" for tort and contract cases, the Restatement is a complete document that covers the entire spectrum of conflicts cases;
- (3) In contrast to some rival approaches which are biased in favor of plaintiffs or in favor of the *lex fori*, the Restatement is ideologically neutral, even though it does not reduce the possibility of ideologically biased results—indeed, it provides perfect camouflage for them;
- (4) The Restatement provides judges with virtually unlimited discretion; and
- (5) At least as applied by some judges, the Restatement permits sloppy thinking.<sup>227</sup>

*B. Methodological Changes Brought by the Revolution in Tort Conflicts*

From the perspective of methodology and general philosophy, the choice-of-law revolution instigated significant and, in many respects, beneficial changes.<sup>228</sup> Three of these changes deserve mention here because they form a common denominator among all modern approaches and exemplify the difference between these approaches and the single mindedness of Beale's system. The first two affect both tort and contract conflicts, while the third one affects only torts.

The first change is that the choice of the applicable law no longer depends on a single contact, such as the place of the conduct or injury.

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225. See Symeonides, *Mixed Blessing*, *supra* note 219, at 1261–73 (1997) (explaining the reasons for the Restatement (Second)'s popularity and describing the various gradations of commitment to it).

226. See *id.* at 1261.

227. Cf. Juenger, *A Third Conflicts Restatement?*, *supra* note 185, at 405–06 ("The Second Restatement, vague and unprincipled as it was, had the distinct virtue of suggesting to judges that they are not bound by any hard and fast rules . . . Its eclectic jumble of . . . near rules [and] nonrules . . . furnished courts with any number of plausible reasons to support whatever results they wished to reach. That, no doubt, is the principal reason why judges like it and academics detest it.").

228. For a discussion of these changes, see SYMEONIDES, *REVOLUTION*, *supra* note 4, at 364–421.

Instead, the choice is based on multiple contacts—including the parties' domiciles or other affiliations with a particular state—or the place of their preexisting relationship, if any.<sup>229</sup>

The second change is the acceptance of the notion that, prior to choosing between the laws of the contact states, the court should consider the content of these laws and their underlying policies, as well as other policies and considerations, such as the needs of the interstate and international systems.<sup>230</sup> Thus, the choice of law moved from “jurisdiction selection” to a content-dependent law selection—that is, from the selection of a *state* without regard to the content of its substantive law<sup>231</sup> to the selection of a state's *law* based in part on that law's content.<sup>232</sup>

Related to this is the third change, which is relevant only in tort conflicts. It is the emergence of a distinction, first articulated in *Babcock v. Jackson*,<sup>233</sup> between tort rules whose primary purpose is to deter injurious conduct (hereinafter referred to as “conduct-regulating rules”) and those whose primary purpose is to allocate the economic and social losses resulting from the tort (hereinafter referred to as “loss-allocating” or “loss-distributing” rules).<sup>234</sup> This distinction derives from the two goals of the substantive law of torts: deterrence and reparation/compensation. While each rule of tort law serves both objectives to some extent, it is possible to classify some rules as serving one objective primarily and the other only secondarily. Thus, a rule of tort law may be primarily conduct-regulating<sup>235</sup> or primarily loss-distributing.<sup>236</sup>

Although many academic authors dispute the clarity or usefulness of this distinction, most courts have adopted it, albeit without always using the same terminology and without a consensus on its precise contours.<sup>237</sup> Admittedly, the line between the two categories is not always bright. While some tort rules are clearly conduct-regulating and some are

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229. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

230. See *id.*

231. The term “jurisdiction-selection” was first coined by Professor Cavers. See Cavers, *Critique*, *supra* note 7, at 173, 198.

232. For a full discussion of these concepts, see Symeonides, *At the Dawn of the 21st Century*, *supra* note 41, at 46–60.

233. 191 N.E.2d 279 (N.Y. 1963).

234. See *id.* at 284–85.

235. In the words of the New York Court of Appeals, conduct-regulating rules are those that “have the prophylactic effect of governing conduct to prevent injuries from occurring.” *Padula v. Lilarn Props. Corp.*, 644 N.E.2d 1001, 1002 (N.Y. 1994). Examples include not only “rules of the road,” such as speed limits and traffic light rules, but also rules prescribing civil sanctions for violating rules of the road, including presumptions and inferences attached to the violation; rules prescribing safety standards for work sites, buildings, and other premises; rules imposing punitive damages; and rules defining as tortious certain anti-competitive conduct, or conduct amounting to “interference with contract,” “interference with marriage,” or “alienation of affections.” Symeonides, *Oregon Torts Exegesis*, *supra* note 161, at 1009.

236. Loss-distributing rules are those that “prohibit, assign, or limit liability after the tort occurs.” *Padula*, 644 N.E.2d at 1002. Examples include not only guest statutes, such as the one involved in *Babcock*, which are now virtually extinct, but also rules that prescribe the amount of compensatory damages, as well as rules of interspousal immunity, parent-child immunity, worker's compensation immunity, and loss of consortium.

237. See SYMEONIDES, *REVOLUTION*, *supra* note 4, at 123–29, and authorities cited therein.

clearly loss-distributing, there are many tort rules that do not easily fit in either category, and there are some rules that appear to fit in *both* categories, in that they both regulate conduct and effect or affect loss distribution.

Despite the difficulties in its application in some cases, this distinction provides a useful starting point for determining the potential interests of the involved states and classifying the case accordingly into one of the three categories of conflicts. The starting point is a presumption that conduct-regulating rules are territorially oriented, while loss-distribution rules are not *necessarily* territorially oriented. Consequently, territorial contacts (namely, the places of conduct and injury) remain relevant in conduct-regulation conflicts, while both territorial and personal contacts (i.e., the parties' domiciles) are relevant in loss-distribution conflicts.<sup>238</sup>

### C. *Substantive Outcomes in Tort Conflicts*

While all three of the above methodological changes have been both necessary and beneficial, they have also dramatically increased the complexity of choice-of-law analysis. Fortunately, when one looks beyond methodology and language, and focuses on substantive outcomes in tort conflicts,<sup>239</sup> the picture becomes clearer. At least in the three patterns of tort conflicts described below, the courts that joined the revolution have produced fairly uniform results regardless of methodology.

#### 1. *Common-Domicile Cases*

The first pattern encompasses cases in which the tortfeasor and the victim are domiciled in (or have a similar affiliation with) one state, and they are involved in a tort occurring entirely in another state. If, in such a case, the conflict is confined to loss-distribution (rather than conduct-regulation) issues, then most American courts would apply the law of the parties' common domicile.<sup>240</sup> As documented elsewhere, the vast majority (thirty-three out of forty-two) of cases in which a state supreme court decided to abandon the *lex loci delicti* rule involved such loss-distribution, common-domicile conflicts.<sup>241</sup> All but one of these cases applied the law of the common domicile. Subsequently, an additional eighteen common-domicile cases have reached the highest courts of the states that had previously abandoned the *lex loci* rule, thus increasing the total number of common-domicile cases that have reached state supreme courts in the

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238. A review of the case law, however, reveals that this distinction affects the outcome in only one category of tort conflicts—cases in which the tortfeasor and the victim are domiciled in one state and the tort is committed entirely in another state. See *infra* Part IV.C.1 (common-domicile cases).

239. In contract conflicts, the most important and pervasive change was the wide acceptance of the principle of party autonomy, exemplified by the almost universal following of Section 187 of the Restatement (Second). See *supra* note 223.

240. Symeonides, *Oregon Torts Exegesis*, *supra* note 161, at 1007.

241. For citations and discussion, see HAY, BORCHERS, & SYMEONIDES, *supra* note 73, at 884–92; SYMEONIDES, *REVOLUTION* *supra* note 4, at 145–59.

post-*lex loci* era to sixty. Of these sixty cases, fifty-one cases (85%) have applied the law of the common domicile, *regardless* of the particular choice-of-law methodology the court followed.<sup>242</sup>

The majority of these cases (thirty-four out of sixty) involved the *Babcock v. Jackson* pattern, in which the law of the parties' common domicile favors recovery more than the law of the state of conduct and injury. Under Currie's assumptions, these cases present the classic false conflict paradigm in which only the state of the common domicile has an interest in applying its law. All but one of these cases applied the law of the common-domicile.

The remaining twenty-six cases involved the converse-*Babcock* pattern, in which the law of the common-domicile prohibits or limits recovery more than the law of the state of conduct and injury. These cases are not clearly false conflicts, as *Babcock* was, because the accident state arguably has an interest in applying its law to compensate those injured in its territory and to facilitate recovery of local medical costs. Nevertheless, eighteen of the twenty-six cases (69%) applied the law of the common-domicile.<sup>243</sup>

In sum, a significant majority of cases have applied the law of the parties' common domicile in both the *Babcock* pattern and its converse, thus supporting the emergence of a common-domicile rule that does not depend on the content of the law of the common domicile (i.e., a "jurisdiction-selecting" rule).<sup>244</sup>

The New York Court of Appeals, which led the revolution, has adopted a common-domicile rule (*Neumeier* Rule 1),<sup>245</sup> as have the two American codifications, the Louisiana codification of 1991<sup>246</sup> and the Oregon codification of 2009.<sup>247</sup> Like the *Neumeier* rule, the rules of these codifications are confined to loss-distribution (as opposed to conduct-regulation) issues. Unlike the *Neumeier* rule, however, these rules: (1) are confined to disputes between the victim and the tortfeasor and do not encompass disputes between third-parties or joint tortfeasors;<sup>248</sup> (2) en-

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242. See SYMEONIDES, REVOLUTION *supra* note 4, at 155.

243. See *id.*

244. See *id.* at 150–57.

245. See *Neumeier v. Kuehner*, 286 N.E.2d 454, 457–58 (N.Y. 1972).

246. The Louisiana rule is contained in LA. CIV. CODE ANN. art. 3544 (2014), which provides that the law of the common-domicile applies to "[i]ssues pertaining to loss distribution and financial protection . . . as between a person injured by an offense or quasi-offense and the person who caused the injury." For a discussion of this article by its drafter, see Symeonides, *Louisiana Exegesis*, *supra* note 107, at 715–23. For a similar rule in the Puerto Rico draft code and its origin in Puerto Rico jurisprudence, see Symeonides, *Revising Puerto Rico*, *supra* note 162, at 437–41.

247. The Oregon rule is contained in OR. REV. STAT. § 15.440(2)(a) (2014), which provides that the law of the common domicile of the tortfeasor and the victim applies (as between those parties) to issues other than the standard of care by which the injurious conduct is judged. For a discussion of this provision by its drafter, see Symeonides, *Oregon Torts Exegesis*, *supra* note 161, at 1000–12.

248. Disputes between joint tortfeasors, or between a tortfeasor and a person vicariously liable for his acts, are relegated to the flexible choice-of-law approach of Article 3542 of the Louisiana codification, Sections 15.450, 15.445 of the Oregon codification, and Article 39 of the Puerto Rico draft codification. LA. CIV. CODE ANN. art. 3542 (2014); OR. REV. STAT. §§ 15.445, 15.450 (2014); Puerto Rico draft codification art. 39 (on file with author), respectively.

compass cases in which the tortfeasor and the victim are domiciled in different states whose laws would produce the same outcome;<sup>249</sup> and (3) are subject to escapes, which can prove useful, at least in converse-*Babcock* cases.<sup>250</sup>

In the meantime, a similar development has occurred in the rest of the world. A review of the choice-of-law codifications adopted since the 1960s indicates that: (a) thirty-one national codifications, plus the Rome II Regulation (which is in force in twenty-seven EU countries), have adopted some form of a common party affiliation rule (based on common domicile, habitual residence or nationality) as an exception to the *lex loci delicti* rule; (b) six codifications have adopted a “closer connection exception” to the *lex loci* rule, which is likely to lead to the same result as the common-domicile exception; and (c) nine codifications have adopted a unilateral form of the common-affiliation rule, which is applicable only when both parties are citizens or domiciliaries of the forum state and the tort occurs in another state.<sup>251</sup>

One important difference between these codifications and the American common-domicile rules is that, unlike the American rules which apply only to loss-distribution issues, the foreign common-affiliation rules apply in principle to *both* loss-distribution *and* conduct-regulation issues. In this sense, the foreign rules are overbroad and, as explained elsewhere, this can prove to be a serious handicap in certain cases.<sup>252</sup> This problem is only partly ameliorated in Rome II and the few codifications that contain a special provision for issues of “conduct and safety,”<sup>253</sup> which can function as a weak exception from the common-domicile rule.

## 2. *Split-Domicile Intrastate Torts*

The second pattern of cases in which American courts have produced fairly uniform results, regardless of methodology, are tort cases in which the tortfeasor and the victim are domiciled in different states and

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249. See LA. CIV. CODE ANN. art. 3544(1) (2014); OR. REV. STAT. § 15.440(2)(b) (2014); Puerto Rico draft code art. 41 (on file with author). This legal fiction, which is particularly useful in cases with multiple victims or defendants, enables a court to resolve these *false conflicts* by applying the law of the domicile of either party, unless the general escape of the codification dictates a different result.

250. The Louisiana escape is contained in Article 3547, which authorizes a judicial deviation from the common-domicile rule if such deviation is appropriate under the codification’s general article. LA. CIV. CODE ANN. art. 3547 (2014). The Oregon escape authorizes deviation from the common-domicile rule upon a showing that the application of another law would be “substantially more appropriate” under the codification’s general approach. OR. REV. STAT. § 15.440(4) (2014). The Puerto Rico escape authorizes a deviation from the common-domicile rule if its application “would produce a result that is clearly contrary to the objectives” of Article 39, which enunciates the codification’s general approach. Puerto Rico draft code art. 39 (on file with author).

251. For documentation, tables, and discussion, see SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 59, at 72–81.

252. See *id.* at 91–92.

253. See *id.* at 92.

in which both the conduct and the injury occur in one of those states—namely, in the domicile of either the tortfeasor or the victim.

Here, the distinction between conduct-regulation and loss-distribution makes a difference only in classifying the case into one of the three conflicts categories established by Currie. If the case involves only conduct-regulation issues, it will fall into the false conflict paradigm because the only interested state will be the state of conduct and injury. In all of these cases, the courts have applied the law of that state.<sup>254</sup> If the case involves conflicting loss-distribution rules, then the case will present either the true conflict or the no-interest paradigm, depending on whether the law of each state favors the domiciliary of that state or the domiciliary of the other state.<sup>255</sup> According to Currie, the law of the forum *qua* forum should govern all true conflicts and no-interest cases.<sup>256</sup> Nevertheless, in the majority of these cases, American courts have applied the law of the state with the three contacts: (1) even when it was not the forum state; and (2) regardless of whether its law favored the tortfeasor or the victim.<sup>257</sup>

The *Neumeier* rules authorize the same result,<sup>258</sup> as does the Louisiana codification.<sup>259</sup> The Oregon codification likewise does so, but it also takes it a step further by providing that, if both the injurious conduct and the resulting injury occurred in a state *other than* the state in which either the victim or the tortfeasor were domiciled, the law of the state of conduct and injury still governs.<sup>260</sup> This rule is subject to an escape, however, that depends on a showing that the application of that law to a disputed issue under the circumstances of the particular case “will not serve the objectives of that law,” in which case, that issue will be governed by the law selected under the codification’s general approach.<sup>261</sup>

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254. See SYMEONIDES, REVOLUTION, *supra* note 4, at 213–20.

255. For tables and discussion, see *id.* at 163–78 (true conflicts), 178–91 (no-interest cases).

256. See CURRIE, SELECTED ESSAYS, *supra* note 9, at 182.

257. See SYMEONIDES, REVOLUTION, *supra* note 4, at 163–91, for loss-distribution conflicts, and 213–20 for conduct-regulation conflicts. Courts also tend to apply the same law even in the less common cases in which the state of conduct and injury does not coincide with the domicile of either party, although exceptions are possible if the conflict involves only loss-distribution issues and that state’s contacts are transient or otherwise fortuitous.

258. *Neumeier* rule 2 applies to cases in which a state’s law favors the domiciliary of that state, while rule 3, which consists of a presumptive *lex loci* rule, applies to cases in which each state’s law favors the domiciliary of the other state. *Neumeier v. Kuehner*, 286 N.E.2d 454, 457–58 (N.Y. 1972).

259. See LA. CIV. CODE ANN. arts. 3544(2)(a), 3543 (2014) (applicable to loss-distribution issues and conduct-regulation issues, respectively). For the corresponding Puerto Rico provisions, see Puerto Rico draft code arts. 40–41 (on file with author).

260. OR. REV. STAT. § 15.440(3)(b) (2014).

261. *Id.* §§ 15.440(3)(b), 15.445. In contrast, the Louisiana and Puerto Rico codifications do not provide a dispositive rule for these conflicts, relegating them instead to the codification’s general residual approach. See LA. CIV. CODE ANN. art. 3542 (2014); Puerto Rico draft code art. 39 (on file with author).

### 3. *Split-Domicile Cross-Border Torts*

The third pattern of tort conflicts in which American courts have reached uniform results encompasses split-domicile cross-border torts (other than products liability).<sup>262</sup> These are cases in which: (1) the parties are domiciled in different states with different laws; (2) the conduct occurs in one state (usually the tortfeasor's home state); and (3) the injury occurs in another state (usually the victim's home state). In these cases, American courts are almost evenly split between applying the law of the state of conduct and the law of the state of injury.<sup>263</sup> In the vast majority of cases (eighty-six percent), however, courts have applied whichever of the two laws favored the *plaintiff*.<sup>264</sup>

The Louisiana codification authorizes the same result in conduct-regulation conflicts by providing that the law of the state of conduct governs, unless the state of injury has a higher standard of conduct and the occurrence of the injury in that state was objectively foreseeable, in which case the law of the state of injury governs.<sup>265</sup> For loss-distribution conflicts, this codification takes a cautious position by providing a dispositive rule for only one subpattern of cross-border torts—those in which the victim is domiciled in the state of injury and in which that state has a higher standard of financial protection for the victim.<sup>266</sup> In such a case, the law of that state governs, subject to an objective foreseeability proviso.<sup>267</sup> Cross-border torts that fall outside the scope of this narrow rule are relegated to the codification's general flexible approach.<sup>268</sup>

In contrast, the Oregon codification provides dispositive rules for all categories of cross-border torts.<sup>269</sup> The default law is the law of the state of conduct.<sup>270</sup> But, the law of the state of injury governs if the occurrence of the injury in that state was objectively foreseeable and the victim formally requests the application of that state's law by a pleading or amended pleading.<sup>271</sup> Presumably, the victim will make this request only when

262. For products liability conflicts, see *infra* Part IV.C.4.

263. Symeon C. Symeonides, *Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should*, 61 HASTINGS L.J. 337, 380 (2009).

264. For documentation and discussion, see *id.* at 379–81.

265. See LA. CIV. CODE ANN. art. 3543 (2014). The Louisiana article also contains a “home-town justice” exception protecting Louisiana parties acting in Louisiana. *Id.* This exception is justifiably criticized in Russell J. Weintraub, *The Contributions of Symeonides and Kozyris to Making Choice of Law Predictable and Just: An Appreciation and Critique*, 38 AM. J. COMP. L. 511, 515–16 (1990). For a muted response, see Symeonides, *Louisiana Exegesis*, *supra* note 107, at 713–14.

266. LA. CIV. CODE ANN. art. 3544(2)(b) (2014).

267. See *id.*; Puerto Rico draft code art. 41(b)(2) (on file with author).

268. See LA. CIV. CODE ANN. art. 3542 (2014) (calling for the application of the law of “the state whose policies would be most seriously impaired if its law were not applied to [the particular] issue”); Puerto Rico draft code art. 39 (on file with author) (calling for the application of the law of the state that, “with regard to the particular issues, has the most significant connection to the parties and the dispute”).

269. See OR. REV. STAT. §§ 15.440(3)(c), 15.450 (2014).

270. See *id.* § 15.440.

271. See *id.* § 15.440(3)(c)(B). In such a case, the request “shall be deemed to encompass all claims and issues against [the particular] defendant,” *id.*, thus preventing an inappropriate dépeçage. This provision is subject to an exception if a party demonstrates that the application to a disputed issue

the conduct in question does not violate the standards of the state of conduct, but does violate the standards of the state of injury.

In the rest of the world, many of the choice-of-law codifications enacted in the last fifty years have adopted the same rule, albeit under a different rationale—the *favor laesi* principle. They directly authorize the application of the law of either the state of conduct or the state of injury, whichever favors the victim. Specifically:

- (1) Nine codifications directly authorize the victim to choose the applicable law in all cross-border torts;
- (2) Twelve codifications authorize the court to choose the law that is more favorable to the victim in all cross-border torts; and
- (3) Twenty-three codifications, including Rome II (which is applicable to twenty-seven EU countries), contain an express *favor laesi* rule applicable only to some cross-border torts.<sup>272</sup>

It is worth noting that: (1) while the American solutions to cross-border torts (including those of Louisiana and Oregon) are based primarily on state interests and considerations of “conflicts justice,” the above foreign rules are based directly on the substantive principle of favoring the victim; and (2) unlike the American solutions, in many (but not all) of the foreign codifications, the application of the law of the state of injury is not accompanied by a foreseeability proviso.

#### 4. *Other Tort Conflicts and Products Liability*

In tort conflicts involving different alignments of contacts and laws other than those described above, American case law does not reveal decisional patterns that are uniform enough to be expressed in the form of descriptive rule. This is particularly true of products liability conflicts. A comprehensive review of American products liability conflicts cases failed to reveal uniform results, other than to support the rather intuitive conclusion that the more contacts a state has with a case, the more likely it is that its law will be applied. For example:

- (1) In forty-two percent of the cases, the victim’s domicile and injury, and the product’s acquisition, were in the same state. The majority of those cases (seventy-nine percent) applied that state’s law, but in

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of the law of another state “is substantially more appropriate under the principles of OR. REV. STAT. § 15.445” (which articulates the codification’s residual choice-of-law approach), in which case the law of the other state applies to that issue. *Id.* § 15.440(4).

272. For documentation and discussion, see SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 59, at 60–63. In addition, at least eight other codifications contain provisions that have been, or can be, interpreted as authorizing the application of the law most favorable to the victim. *See id.* at 62.

- the majority of those cases (seventy-six percent) that law favored the defendant; and
- (2) Seventy-seven percent of all cases applied the law of a state that had only plaintiff-affiliating contacts, but in fifty-six percent of those cases, that state had a prodefendant law.<sup>273</sup>

The study also produced some surprising negative findings, which dispel certain widely held assumptions about the current state of American conflicts law. Specifically, the study found that American courts did *not* unduly favor plaintiffs, local litigants (plaintiffs or defendants), or the law of the forum as such.<sup>274</sup> Only fifty-two percent of the cases applied a proplaintiff law; only forty-one percent of the cases applied a law that favored a local litigant; and only fifty-five percent of the cases applied the law of the forum.<sup>275</sup>

### 5. Summary

This brief description of American case law in tort conflicts suggests that the initial (and arguably continuing) appearance of chaos and anarchy created by the multiplicity of diverse and malleable approaches employed by the courts that joined the choice-of-law revolution no longer translates into an unusual degree of disuniformity of results. Indeed, although the revolution brought major methodological changes, it brought significantly fewer changes in terms of the final choice of the law governing tort conflicts.

Table 12, below, depicts the results reached in tort conflicts (other than products liability) by American courts that have joined the revolution. In this table, the letters A and B represent states. The use of capital letters represents a state with a proplaintiff law, and the use of lower-case letter represents state with a prodefendant law. The dash (—) means that the content of that state's law is immaterial. The shaded cells represent the state of the applicable law.

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273. SYMEONIDES, REVOLUTION, *supra* note 4, at 325.

274. *Id.* at 332–37.

275. *Id.* at 332–33.

TABLE 12. APPLICABLE LAW IN TORT CONFLICTS

	#	Plaintiff's domicile	Injury	Conduct	Defendant's Domicile
Common-domicile intra-state torts	1	<b>A</b>	<b>b</b>	<b>b</b>	<b>A</b>
	2	<b>a</b>	<b>B</b>	<b>B</b>	<b>a</b>
Split-domicile intra-state torts	3	A	<b>A</b>	<b>A</b>	b
	4	a	<b>a</b>	<b>a</b>	B
	5	a	<b>B</b>	<b>B</b>	B
	6	A	<b>b</b>	<b>b</b>	b
Cross-border torts	7	---	<b>A</b>	b	---
	8	---	a	<b>B</b>	---

As Table 12 indicates, American courts that have joined the revolution continue to apply the law of the *locus delicti* in several patterns (and a significant number) of tort conflicts, despite using different rationales from each other and from the traditional theory. Specifically:

- (1) Courts continue to apply the law of the state in which both the conduct and the injury occurred, if that state is also the domicile of either the victim (cases 3-4 in Table 12) or the tortfeasor (cases 5-6) (the intrastate split-domicile cases described above), regardless of which party that law favors and regardless of whether the conflict involves conduct-regulation or loss-distribution issues.<sup>276</sup> Thus, these cases are compatible with the old *lex loci delicti* rule, even if they base the choice of law on additional contacts and factors;
- (2) In cross-border torts in which the parties are not domiciled in the same state, or states with identical laws (cases 7-8), courts apply the law of either the state of conduct or the state of injury, whichever favors the plaintiff:

276. *Id.* at 344-45.

- (a) When courts apply the law of the state of injury (case 7), they reach the same result as that dictated by the American version of the *lex loci delicti* rule (more precisely *lex loci damni*), even when invoking a different rationale;
  - (b) When courts apply the law of the state of conduct (case 8), they deviate from the American version of the *lex loci* rule, which mandated the application of the law of the state of *injury*. But because the place of conduct is a territorial contact rather than a personal one, these cases are consistent with the principle of territoriality, which is the foundation of the *lex loci* rule. Thus, if these cases represent a change, it is an “intraterritorial” and nondramatic change, especially from the perspective of foreign systems, which did not subscribe to the first Restatement’s notion of always applying the law of the place of injury in cross-border torts; and
- (3) The only major departure from both the philosophy and the results of the traditional system has occurred in one pattern of tort conflicts—namely, common-domicile cases (cases 1-2 in Table 12, above). In these conflicts, the distinction between conduct-regulation and loss-distribution makes a difference:
- (a) In loss-distribution conflicts, all the American courts that joined the revolution have almost unanimously applied the law of the common-domicile, thus switching from territoriality to personality; and
  - (b) In contrast, in conduct-regulation conflicts, American courts continue to apply the law of the state of conduct and injury (see the cells with the diagonal lines in Table 12).<sup>277</sup>

One may agree or disagree with the above results, but this is what the courts have been doing. One can also easily recast these results into a few descriptive choice-of-law rules.<sup>278</sup> In fact, two states (Louisiana and Oregon) have already taken the bolder step of recasting them into prescriptive rules, with appropriate modifications and escape clauses.<sup>279</sup> Additionally, but independently, most of the eighty-four countries that have codified or recodified their conflicts law during the same fifty-year period have arrived at similar results, but *without* a revolution.<sup>280</sup> The question now is whether American conflicts law should move in the same direction, continue with the status quo, or adopt a middle position of adopting new but “soft” choice-of-law rules, i.e., Restatement rules. This question is explored below.

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277. *Id.* at 341–42.

278. For such descriptive rules, see *id.* at 207–08, 235, 259–60; HAY, BORCHERS, & SYMEONIDES, *supra* note 73, at 950–51, 973–74.

279. See *supra* note 250.

280. See SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 59, at 52–108.

## V. TIME FOR AN EXIT

A. *The Status Quo*

The fact that the case law has gradually converged into uniform and, indeed, sensible results in several patterns of tort conflicts may lead many to conclude that there is nothing wrong with the current state of affairs. Such a conclusion would be mistaken, if only because this uniformity (1) does not cover all patterns of tort conflicts; (2) has been achieved *despite* the revolution, rather than because of it; and (3) comes at great costs to courts and litigants.<sup>281</sup> It is an *after-the-fact, statistical* uniformity, *not* assured in advance by agreed upon uniform standards, which can provide predictability to litigants and guidance to courts. Although, in the end, courts tend to converge around the same substantive results, a litigant cannot count on that end.<sup>282</sup> In deciding these cases, courts have to employ very complex and laborious analyses and essentially have to reinvent the wheel in each case. As Russell Weintraub observed, “[c]hanges in court personnel can cause a new court to reinvent the wheel that was invented at least a decade earlier, but this time not get it quite right.”<sup>283</sup>

This may partially explain Fritz Juenger’s claim that “one cannot even trust judicial opinions to adhere faithfully to the doctrines they claim to follow.”<sup>284</sup> But the major reason for which many observers characterize the case law as “incoherent,”<sup>285</sup> “sad,”<sup>286</sup> or “unsophisticated, unthoughtful, and often unreasoned,”<sup>287</sup> is the complexity of the modern choice-of-law approaches and our failure to provide more specific, practical guidance to judges.

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281. See *Kaczmarek v. Allied Chem. Corp.*, 836 F.2d 1055, 1057 (7th Cir. 1987) (Posner, J.) (“The new, flexible standards, such as ‘interest analysis,’ have caused pervasive uncertainty [and a] higher cost of litigation . . . .”); *In re Air Crash Disaster at Stapleton Int’l Airport*, Denver, 720 F. Supp. 1445, 1455 (D. Colo. 1988) (“Uncertainty on the choice of law question requires a considerable expenditure of time, money and other resources . . . by litigants and counsel.”).

282. See Patrick J. Borchers, *Empiricism and Theory in Conflicts Law*, 75 IND. L.J. 509, 509 (2000) (“[T]he extreme flexibility of the modern approaches probably brings increased litigation costs, in particular through the need to prosecute appeals. Because cases settle (at least for economically rational litigants) when the parties’ assessments of the value of the case converge to within the expected cost of pursuing the case to judgment, the ever-present wild card of choice of law may discourage settlement.”); see also Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1152 (2000); Shirley A. Wiegand, *Fifty Conflict of Laws “Restatements”*: *Merging Judicial Discretion and Legislative Endorsement*, 65 LA. L. REV. 1, 2 (2004).

283. Russell J. Weintraub, *The Restatement Third of Conflict of Laws: An Idea Whose Time Has Not Come*, 75 IND. L.J. 679, 680 (2000) [hereinafter Weintraub, *The Restatement Third*].

284. Juenger, *A Third Conflicts Restatement?*, *supra* note 185, at 410.

285. Weintraub, *The Restatement Third*, *supra* note 283, at 679.

286. Juenger, *A Third Conflicts Restatement?*, *supra* note 185, at 404.

287. Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 466 (1991) (“[I]t is hard to read a lot of choice of law opinions without being terribly disappointed in the quality of the analysis, which tends to be unsophisticated, unthoughtful, and often unreasoned.”); see also Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 MICH. L. REV. 2134, 2149 (1991) (finding that choice-of-law decisions are characterized by “confused and misguided thinking”).

My own assessment of the case law is not quite as bleak, although it is far from cheerful. One reason is that, after reading thousands of choice-of-law cases in the last twenty-eight years,<sup>288</sup> my patience has grown, and, I suspect, my standards have declined.<sup>289</sup> Another reason is that I am no longer looking for impeccable reasoning or methodological consistency, but rather for sound holdings. More often than not, I find the courts' holdings to be better than their reasoning. To quote Weintraub once again, "[j]udges are not stupid, just busy."<sup>290</sup> Most of them encounter conflicts cases only infrequently, and thus, they do not have the opportunity or the incentive to develop the necessary expertise.<sup>291</sup> Now more than ever, they need our help;<sup>292</sup> they need at least a road map to navigate what they call the "murky maze"<sup>293</sup> or "veritable jungle"<sup>294</sup> of conflicts law.

Thirty years ago, John Kozyris noted that American conflicts law had become "a tale of a thousand-and-one-cases,"<sup>295</sup> in which "each case is decided as if it were unique and of first impression."<sup>296</sup> Since then, the yearly number of conflicts cases has quadrupled<sup>297</sup> and their complexity has increased, but we have done nothing to lighten the courts' choice-of-law burden.<sup>298</sup> If we listen to the courts, we will learn that the status quo

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288. In preparing the annual survey of choice-of-law cases for the Association of American Law Schools Section on Conflicts Law, I have read several thousands of choice-of-law cases decided by American state and federal courts since 1987. These surveys are published in volumes 37 through 63 of the *American Journal of Comparative Law*.

289. I have the same feeling after grading student papers for the last thirty-six years.

290. Russell J. Weintraub, *Courts Flailing in the Waters of the Louisiana Conflicts Code: Not Waving but Drowning*, 60 LA. L. REV. 1365, 1366 (2000).

291. See Arthur Taylor von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 966 (1975) ("Judicial experience with any given choice-of-law problem is usually more episodic than with analogous domestic-law problems . . ."); Weintraub, *The Restatement Third*, *supra* note 283, at 680 ("[A]ll courts, but especially state courts, encounter choice-of-law problems haphazardly at infrequent intervals.").

292. "Courts need and are entitled to more guidance than the iconoclastic literature has provided." HAY, BORCHERS, & SYMEONIDES, *supra* note 73, at 125.

293. *Am. Motorists Ins. Co. v. ARTRA Grp., Inc.*, 659 A.2d 1295, 1313 (Md. 1995) (Raker, J., dissenting).

294. See *infra* note 299 and accompanying text.

295. P. John Kozyris, *Interest Analysis Facing Its Critics—And, Incidentally, What Should Be Done About Choice of Law for Products Liability?*, 46 OHIO ST. L.J. 569, 578 (1985) [hereinafter Kozyris, *Interest Analysis Facing Its Critics*].

296. *Id.* at 580.

297. The number of choice-of-law cases grew from 1,729 in 1985, to 4,961 in 2014. Search conducted on January 12, 2015, on Westlaw's "All States" and "All Federal" databases using the query "advanced: (170bvi 360i(b) 'choice #of law' 'conflict #of law' 'what law governs' 'lex loci' 'lex locus' 'most significant relationship' 'lex rei' extraterritorial extraterritoriality territoriality depeceage renvoi 'forum selection' 'choice #of forum') & da (1985) and (2014)."

298. See Gene R. Shreve, *Conflicts Altruism*, in *LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN* 383, 390 (James A.R. Nafziger & Symeon C. Symeonides eds., Transnational Publishers, Inc. ed. 2002) ("[T]he conflicts academy has not demonstrated . . . more curiosity and concern about how lawyers and judges are faring as they grapple with the subject. . . . Many appear indifferent to the workaday problems that lawyers and judges have with conflicts law."); Patrick J. Borchers, *Back to the Past: Anti-Pragmatism in American Conflicts Law*, 48 MERCER L. REV. 721, 724–25 (1997); P. John Kozyris, *The Conflicts Provisions of the ALI's Complex Litigation Project: A Glass Half Full?*, 54 LA. L. REV. 953, 956 (1994) ("Conflicts theorists . . . have

is not acceptable to them. They describe American conflicts law as “a veritable jungle, [in] which, if the law can be found out, leads not to a ‘rule of action’ but a reign of chaos dominated in each case by the judge’s ‘informed guess.’”<sup>299</sup> This is why many judges, especially federal judges who often adjudicate complex multidistrict cases, routinely advocate the enactment of federal choice-of-law legislation for such cases to “eliminate costly uncertainty and create uniformity.”<sup>300</sup>

### B. *The Next Step: An Exit Strategy*

To “eliminate [this] costly uncertainty,” or at least reduce it, we need to close this long revolutionary interlude and begin building a new system. The revolution was necessary for its time, but it went too far and it lasted too long. It went too far when, following Currie’s hyperbolic aphorism, it denounced *all* choice-of-law rules, not just the rules of the first Restatement.<sup>301</sup> It is time to recognize that, just as Beale’s Restatement had gone too far in insisting on certainty to the exclusion of all flexibility, the revolution has gone too far in embracing flexibility to the exclusion of all certainty. To be sure, flexibility is preferable to uncritical rigidity, but too much flexibility can be as bad as no flexibility at all. Even Leflar, one of the revolution’s protagonists, admitted that “flexibility is not a virtue for every type of conflicts case.”<sup>302</sup> *A fortiori*, it is not a virtue for *all* cases. A correction is needed, and a new equilibrium should be sought between these two perpetually competing needs.

The revolution has also lasted too long.<sup>303</sup> Fifty years of freewheeling experimentation with the new approaches is more than enough. It is time to develop an exit strategy that consolidates and preserves the gains of the revolution and turns its numerical victory into a substantive and lasting success. I have argued for some time that American conflicts law is ripe for, and needs, some process of consolidation and standardization.

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been notoriously indifferent to the issue of efficiency, treating every case as a unique specimen calling for custom-made handling on the tacit assumption that litigational resources are infinite.”)

299. *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732, 739 (C.D. Cal. 1975).

300. *In re Air Crash Disaster at Stapleton Int’l Airport, Denver*, 720 F. Supp. 1445, 1454–55 (D. Colo. 1988) (“The choice of law problems inherent in air crash and mass disaster litigation cry out for federal statutory resolution. . . . Federal law would eliminate costly uncertainty and create uniformity. This approach would lead to a quick and efficient resolution of mass disaster cases.”); Jack B. Weinstein, *Mass Tort Jurisdiction and Choice of Law in a Multinational World Communicating by Extraterrestrial Satellites*, 37 WILLAMETTE L. REV. 145, 153 (2001) (“A federal statute would help. An international treaty would be even better.”).

301. See CURRIE, SELECTED ESSAYS, *supra* note 9, at 183 (“We would be better off without any choice-of-law rules.”); *id.* at 180 (“The rules [of the traditional theory]. . . have not worked and cannot be made to work. . . . But the root of the trouble goes deeper. In attempting to use the rules we encounter difficulties that stem not from the fact that the particular rules are bad, . . . but rather from the fact that we have such rules at all.”).

302. Leflar, *supra* note 68, at 952.

303. “The conflicts revolution has been pregnant for too long. The conflicts misery index, which is the ratio of problems to solutions, or of verbiage to result, is now higher than ever.” P. John Kozzaris, *Symposium on Interest Analysis in Conflict of Laws: An Inquiry into Fundamentals with a Side Glance at Products Liability*, 46 OHIO ST. L.J. 457, 458 (1985).

It is now *necessary and possible* to articulate a new breed of smart, evolutionary choice-of-law rules that will accomplish both objectives: (1) to restore a proper equilibrium between certainty and flexibility; and (2) to preserve the substantive and methodological accomplishments of the revolution.<sup>304</sup>

Although statutory rules are rarely welcome in the orchard of the common law, and much less in the garden of conflicts law, some judges have advocated the enactment of federal legislation<sup>305</sup> as have several academic authors.<sup>306</sup> I am certainly not adverse to federal legislation. Three decades ago, I criticized as excessive the “anti-rule syndrome” that, in my view, characterized American choice-of-law thinking after the revolution.<sup>307</sup> Besides drafting three codifications at the state level, I supported the ALI’s Complex Litigation Project at the national level.<sup>308</sup> As the subsequent fate of that Project demonstrates, however, the enactment of federal legislation is bound to encounter insurmountable obstacles, even under the best of circumstances.

### C. *Exiting Through a New Restatement*

Because of the political difficulties—indeed the virtual impossibility—of enacting statutory choice-of-law rules, one has to settle for the second best option. This is why, in 1997, I was the first to propose a much softer option—indeed, the primary example of what has come to be known as “soft law”—a new Restatement for choice of law.<sup>309</sup> Unlike statutory, or even judicially established rules, the rules of a Restatement are nonbinding, and thus they are essentially risk-free. If they are bad,

304. For a full exposition of this view, see SYMEONIDES, *REVOLUTION*, *supra* note 4, at 423–37.

305. See *supra* note 300 and accompanying text.

306. See, e.g., Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991); Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 MICH. L. REV. 2134 (1991); Ralph U. Whitten, *Curing the Deficiencies of the Conflicts Revolution: A Proposal for National Legislation on Choice of Law, Jurisdiction, and Judgments*, 37 WILLAMETTE L. REV. 259 (2001); Shirley A. Wiegand, *Fifty Conflict of Laws ‘Restatements’: Merging Judicial Discretion and Legislative Endorsement*, 65 LA. L. REV. 1 (2004).

307. See Symeon C. Symeonides, *Exception Clauses in American Conflicts Law*, 42 AM. J. COMP. L. SUPP. 813, 815–18 (1994); Symeonides, *Middle Ground*, *supra* note 15, at 550–52.

308. See Symeon C. Symeonides, *The ALI’s Complex Litigation Project: Commencing the National Debate*, 54 LA. L. REV. 843, 844 (1994) [hereinafter *The ALI’s Complex Litigation Project*]. Professor Weinberg gives me too much credit for having influenced the rules and methodology of this Project. See Louise Weinberg, *A Radically Transformed Restatement for Conflicts*, 2015 U. ILL. L. REV. (discussing “Dean Symeonides’ impressive codifications”). The Project’s drafters were not as generous. The truth is that I had no involvement in the Project’s drafting, although I supported it after the fact, despite its deficiencies, because I was persuaded by the courts’ pleas for rules (even imperfect ones) in complex litigation cases. At the ALI meeting Weinberg describes, I supported hers and Professor Trautman’s motion to inject flexibility and policy analysis into the Project. See Symeonides, *The ALI’s Complex Litigation Project*, *supra*, at 864 n.141. Weinberg criticizes the Project on several grounds, with some of which I would agree. But I would not agree that the Project is as similar to the Louisiana codification as Weinberg seems to assume. For the specifics and my disagreements with the Project, see *id.* at 864–66.

309. See Symeonides, *Mixed Blessing*, *supra* note 219, at 1280 (“I submit that the next natural step is to begin the process of preparing for a third conflicts restatement.”).

courts will ignore them. If they are good, courts will adopt them, with or without modifications.

Although my proposal was met with deafening silence, the AALS Conflicts Section revisited the question two years later and devoted its 1999 annual meeting to discussing it.<sup>310</sup> I spoke again at that meeting, and, in addition to reiterating my plea for a third Restatement, I provided samples of certain rules that might be included in such a Restatement.<sup>311</sup> The proceedings of that meeting, as well as subsequently submitted papers on the same topic, have been published in the *Indiana Law Journal*.<sup>312</sup> Although four of the authors clearly opposed a new Restatement, more than ten authors supported it.<sup>313</sup> In 2009, I followed up with another article, which: (1) explained what is broken with the Restatement (Second), despite its popularity among judges;<sup>314</sup> (2) identified the problems resulting from its old age and many gaps;<sup>315</sup> (3) addressed the possible arguments against a new Restatement;<sup>316</sup> and (4) described the desired attributes of the new Restatement's rules.<sup>317</sup>

In November 2014, almost two decades after my first plea for a new Restatement, I was thrilled to read the ALI announcement authorizing work for a Third Conflicts Restatement.<sup>318</sup> This is as good a way as any to close the revolutionary cycle that began in the 1960s. It is an end and a beginning. There is every reason to hope that the new Restatement will become the exit strategy that I have been advocating. The process of drafting a new Restatement will provide an excellent opportunity: (1) to extract, articulate, and evaluate the lessons of the choice-of-law revolution, both positive and negative; and (2) to reexamine the organizing

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310. See Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 IND. L.J. 437, 438 (2000).

311. *Id.* at 449–74. For subsequent refinements of, or additions to, these rules, see SYMEONIDES, REVOLUTION, *supra* note 4, at 207–10, 233–36, 259–63, 346–64.

312. See Symposium, *Preparing for the Next Century—A New Restatement of Conflicts*, 75 IND. L.J. 399–686 (2000) (containing articles by Shreve, Juenger, Richman, Reynolds, Symeonides, and Weinberg, as well as comments by Borchers, Dane, Gottesman, Hill, Maier, Peterson, Posnak, Reimann, Reppy, Sedler, Silberman, Lowenfeld, Simson, Singer, Twerski, and Weintraub).

313. The four authors who opposed a new Restatement were Professors Juenger, Sedler, Simson, and Weintraub. For other writings discussing a possible new conflicts Restatement, see Symposium, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1–298 (2001) (containing articles by Symeonides, Juenger, Kay, von Mehren, Weinstein, and Weintraub, as well as commentaries by Cox, Nafziger, Sedler, Shreve, and Whitten); Symposium, *The Silver Anniversary of the Second Conflicts Restatement*, 56 MD. L. REV. 1193–1410 (1997) (containing articles by Borchers, Reynolds, Richman, Symeonides, Weinberg, and Weintraub); Michael Traynor, *The First Restatements and the Vision of the American Law Institute, Then and Now*, 32 S. ILL. U. L.J. 145 (2007).

314. See Symeon C. Symeonides, *A New Conflicts Restatement: Why Not?*, 5 J. PRIV. INT'L L. 383, 394–97, 405–06 (2009).

315. See *id.* at 398–405.

316. See *id.* at 414–22.

317. See *id.* 409–11.

318. The Reporter for the Third Restatement will be Professor Kermit Roosevelt III, of the University of Pennsylvania. Professors Laura E. Little, of Temple University, and Christopher A. Whytock, of U.C. Irvine, will serve as associate reporters.

principles and fundamental philosophical and methodological precepts of the law of choice-of-law and help shape its future direction.<sup>319</sup>

#### *D. Recommendations*

##### *1. Summary*

For what they may be worth, I have three *minimum* recommendations for the drafters of the new Restatement. The new Restatement should:

- (1) Provide for the many conflicts that the Restatement (Second) failed to cover, either because those conflicts were uncommon in the 1960s or for other reasons;
- (2) Revisit the areas for which the Restatement (Second) provides wrong-headed black letter rules, such as the situs rule for all matters involving immovables; and
- (3) Seek a new and proper equilibrium between the conflicting needs of certainty and flexibility by providing more specific guidance for areas such as torts and contracts.

##### *2. Coverage*

Before explaining these recommendations, a few words are in order regarding the new Restatement's coverage. I believe that considerations of economy, speed, and likely impact suggest that the new Restatement should cover only choice-of-law. It need not cover the other parts of conflicts law—namely, jurisdiction and recognition/enforcement of foreign judgments—where its impact is likely to be minimal.

Jurisdiction is primarily a matter of constitutional law and secondarily of state and federal statutory law. It is doubtful that a new Restatement will do much to influence the way the Supreme Court—at least this Court—reassesses its jurisprudence on this subject. Federal law is also preeminent in the area of recognition of sister-state judgments, where the Full Faith and Credit clause as interpreted by the Supreme Court leaves little room for ambiguity or judicial discretion.

This leaves the recognition and enforcement of foreign-country judgments. But that subject is covered by two other ALI projects—

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319. This vehicle has the potential of being far more effective in influencing judicial opinion than the writing of treatises or law review articles that fewer and fewer judicial clerks tend to read. As the success of the Restatement (Second) in influencing judicial opinion demonstrates—especially when compared to the rather slim judicial following of other alternative choice-of-law methodologies advanced by academic commentators—courts are much more likely to pay attention to a document that bears the imprimatur of the ALI than to any law review article, even one authored by an intellectual giant. The examples of Brainerd Currie, David Cavers, Arthur von Mehren, and Fritz Juenger—to mention only four of the giants who are no longer with us—are sufficient to make this point.

namely, the proposed federal statute<sup>320</sup> and the Restatement (Third) of the Foreign Relations Law,<sup>321</sup> the latter of which is already in the process of being replaced by a Restatement (Fourth). Moreover, the majority of states (thirty-five) have adopted either the old or the new Uniform Act on the same subject.<sup>322</sup> Finally, if the current negotiations at The Hague succeed in producing a new convention on this subject, and if the U.S. Senate ratifies it, a new federal law implementing the convention will preempt the entire field.<sup>323</sup> Of course, it is possible that the negotiations will fail once again or that the Senate will not ratify the convention. But, even so, the two ALI projects and the Uniform Acts are capable of serving this field reasonably well.

### 3. *Filling the Gaps and Updating the Content of the Restatement (Second)*

Because the drafting of the new Restatement is likely to begin—but hopefully not end—with a revision of the Restatement (Second),<sup>324</sup> it is useful to identify the areas in which the forty-six-year-old Restatement is in urgent need of updating. The Restatement (Second) did a decent job in providing for conflicts that were common during, and prior to, the time of its drafting. It has plenty to say regarding conflicts arising out of traffic accidents, or involving guest statutes, intrafamily immunities, charitable immunities, and the like. But, while some of these conflicts have all but disappeared in recent years,<sup>325</sup> other types of conflicts have begun to

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320. See RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: THE FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT (Proposed Official Draft 2006).

321. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481–86 (1987).

322. Twenty jurisdictions have adopted the (new) Uniform Foreign-Country Money Judgments Recognition Act of 2005. See *Uniform Foreign-Country Money Judgments Recognition Act*, NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS (July 21–28, 2005), [http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra\\_final\\_05.pdf](http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf). All but two of those jurisdictions (Alabama and Indiana) had previously adopted the old Uniform Foreign Money Judgments Recognition Act of 1962. Fifteen other jurisdictions adopted the old Act, but not the new one. Thus, thirty-five jurisdictions have adopted either the old or the new Act. *Id.*

323. The objective of these negotiations, which are conducted under the auspices of the Hague Conference of Private International Law, is to produce a new worldwide convention on recognition and enforcement of foreign judgments. This is the second round of negotiations on this subject. The first round began in 1992 and ended with a narrower convention, the Hague Convention of 30 June 2005 on Choice of Court Agreements. For the text of this convention, as well as all related documents, see *Welcome to the Choice of Court Section*, HAGUE CONFERENCE ON PRIVATE INT'L LAW, [http://www.hcch.net/index\\_en.php?act=text.display&tid=134](http://www.hcch.net/index_en.php?act=text.display&tid=134) (last visited Sept. 25, 2015). For the status of the second round, see *The Judgments Project*, HAGUE CONFERENCE ON PRIVATE INT'L L., [http://www.hcch.net/index\\_en.php?act=text.display&tid=149](http://www.hcch.net/index_en.php?act=text.display&tid=149) (last visited Sept. 25, 2015). The author is a member of the Working Group that is drafting the preliminary text of the new convention.

324. For a proposal for a “radically new” Restatement, see Louise Weinberg, *A Radically Transformed Restatement for Conflicts* (Feb. 15, 2015) (paper presented at annual meeting of the Association of American Law Schools) [hereinafter Weinberg, *A Radically Transformed Restatement for Conflicts*].

325. For example, at the time of the Second Restatement's drafting, more than thirty states had a guest statute. See SYMEONIDES & PERDUE, *supra* note 90, at 106. Today, only three states have such a statute—Alabama, Indiana, and Nebraska. See *Liability for Injury or Death of a Guest* ALA. CODE

emerge, such as cyberspace conflicts, conflicts arising from same-sex relations, or covenant marriage conflicts. Understandably, the Restatement (Second) has little to say about these new conflicts, which have increasingly occupied American courts in the last two decades (and which will continue to do so in the future). The new Restatement should address these new conflicts.

The Restatement (Second) is lacking, however, even with regard to more traditional conflicts that existed at the time of its drafting, even if some of them were not as frequent then as they are today. Examples include maritime conflicts, conflicts involving stolen works of art or cultural property, and conflicts arising from interstate arbitration.<sup>326</sup>

Conflicts involving insurance coverage for multiple risks situated in multiple states, such as insurance for environmental pollution, provide another example. During the last three decades, we have witnessed a virtual explosion in litigation involving such cases, most of which are as complex as they are important, if only because they implicate the interests of parties other than those bound by the insurance contract.<sup>327</sup> The Restatement (Second) contains only one brief section on the whole subject of “fire, surety or casualty insurance”: section 193 provides a presumptive rule in favor of the law of the state of “the principal location of the insured risk.”<sup>328</sup> The fact that this section speaks of a “risk” in the singular reveals only some of the problems one encounters in applying this section to the mega-conflicts arising in today’s multisite and multistate disputes. The comments accompanying section 193 anticipate the possibility of an insurance contract covering multiple risks, and they suggest treating each risk as if it were covered by a separate contract.<sup>329</sup> Besides being merely a suggestion, however, this notion offers insufficient guidance for courts encountering these mega-conflicts.

The Restatement (Second) is equally inadequate to handle the complex choice-of-law issues arising in many of the “mega torts” that have been the object of extended and protracted litigation during the last three decades. Among them are the asbestos cases, the Agent Orange cases, the DES cases, the breast implant cases, and the numerous cases arising from airplane disasters.<sup>330</sup> The ALI has recognized the need for choice-of-law rules for these cases and has proposed its Complex Litigation Project.<sup>331</sup> That Project presupposes structural changes in the federal system that are unlikely to materialize in the foreseeable future. Further,

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§ 32-1-2 (1975); Transportation of Guests, IND. CODE § 34-30-11-1 (1998); NEB. REV. STAT. § 25-21,237 (repealed 2010), respectively.

326. The ALI recently began work on a Restatement on the U.S. Law of International Commercial Arbitration, but apparently, that Restatement will not cover domestic interstate arbitration, which has seen a dramatic increase in recent years.

327. See SYMEONIDES & PERDUE, *supra* note 90, at 478–90.

328. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193 (1971).

329. See *id.* at § 193 cmt. f.

330. See SYMEONIDES, REVOLUTION, *supra* note 4, at 268–69.

331. See *id.* at 271.

the Project, if adopted, will apply only to cases that are consolidated for trial by federal courts under the Multidistrict Litigation Statute.<sup>332</sup> Nothing has been done, or has been proposed, for nonconsolidated cases handled by federal or state courts or for class action cases.

In fact, the Restatement (Second) is inadequate even for single cases arising from products liability conflicts or conflicts involving the issue of punitive damages.<sup>333</sup> One could argue that section 145, the general section for tort conflicts, is as available for products liability conflicts as it is for other tort conflicts. But, that is precisely the problem. Section 145 may be workable in guest-statute conflicts, but not in the more complicated and *sui generis* products liability conflicts. Similarly, one could argue that section 171, which applies to “damages” in general, also applies to punitive damages in particular.<sup>334</sup> But, again, this is precisely the problem. Punitive damages involve different policies than compensatory damages. The former are designed to punish and deter tortfeasors, whereas the latter are designed to repair the harm by compensating the victim. A choice-of-law rule that is focused on the domicile of the parties (as section 171 seems to be)<sup>335</sup> may be sound for compensatory damages, but not for punitive damages.

Perhaps the most glaring omission is the failure of the Restatement (Second) to address international conflicts. As Mathias Reimann noted, the Restatement contains “very few references to, and even fewer rules about, international conflicts,” and it “allocates less than two percent (about 20 of its over 1200 pages) of text and comment to issues involving foreign countries.”<sup>336</sup> Especially its choice-of-law part is “almost completely devoid of international perspectives.”<sup>337</sup> The reasons for this omission are: (1) the Restatement’s assumption that international conflicts do not differ qualitatively from intranational conflicts; (2) the low number of international conflicts at the time of the Restatement’s drafting; and (3) the insularity that characterized American conflicts scholarship at that time.

Much has changed since then. For instance, a perusal of the annual choice-of-law surveys published every year in the *American Journal of Comparative Law* shows a dramatic increase in the number and im-

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332. 28 U.S.C. § 1407 (2012).

333. For a discussion of such conflicts, see SYMEON C. SYMEONIDES, *RESOLVING PUNITIVE DAMAGES CONFLICTS* (2004); Symeon C. Symeonides, *Choice of Law for Products Liability: The 1990s and Beyond*, 78 TUL. L. REV. 1247 (2004).

334. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 171 cmt. d (1971) (providing that this section applies to “exemplary damages”).

335. Like many other sections in the Second Restatement’s chapter on “Wrongs,” section 171 is not self-executing but simply refers to the “law selected by application of the rule of § 145” as the law that will determine the measure of damages. The comments accompanying section 171, however, suggest that the parties’ common domicile is likely to be the state of the most significant relationship. See *id.* at § 171 cmt. e.

336. Mathias Reimann, *A New Restatement—For the International Age*, 75 IND. L.J. 575, 576–577 (2000).

337. *Id.* at 577.

portance of cases dealing with international conflicts.<sup>338</sup> This increase is also reflected in the creation of new courses on transnational litigation, as well as an equally dramatic increase in the literature on subjects such as human rights and international economic conflicts, including the extra-territorial reach of federal statutes on subjects like antitrust, copyrights and patents, employment, environment, and other subjects.

The Restatement has little to say about any of these conflicts. As Reimann pointed out, the Restatement is “hopelessly behind the times with respect to the internationalization of private law and litigation,”<sup>339</sup> and it “simply fails to address most of the problems that currently plague the courts in international cases.”<sup>340</sup> To be sure, the Restatement (Third) of Foreign Relations addresses some of these problems. But, as Reimann noted, these issues are “not issues of American foreign relations (though they touch on them), but of international civil litigation . . . [and] have become part of the conflicts menu.”<sup>341</sup> In short, “[a]s the importance of international issues keeps growing, the Second Restatement keeps falling further behind.”<sup>342</sup> The new Restatement, if done properly, can close this gap.

In the area of contract conflicts, the Restatement (Second) appears to have fewer gaps and to be less deficient than in other areas. In particular, section 187, which provides the test for enforcing choice-of-law clauses, is one of the Restatement’s most successful, and popular, provisions. Even there, however, the need for an update is evident. For example, a good case can be made for differentiating between consumer contracts and employment contracts, on the one hand, and business-to-business contracts, on the other hand, and subjecting party autonomy to stricter limitations in the former than in the latter contracts. In this respect, the European experience exemplified by the Rome Convention<sup>343</sup> and now the Rome I Regulation<sup>344</sup> can be instructive, as can the ill-fated

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338. See, e.g., Symeon C. Symeonides, *Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey*, 62 AM. J. COMP. L. 223, 281–96 (2014); Symeon C. Symeonides, *Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey*, 60 AM. J. COMP. L. 291, 357–67 (2012); Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 306–20 (2011); Symeon C. Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMP. L. 227, 202–304 (2010); Symeon C. Symeonides, *Choice of Law in the American Courts in 2008: Twenty-Second Annual Survey*, 57 AM. J. COMP. L. 269, 317–29 (2009).

339. Reimann, *supra* note 336, at 581.

340. *Id.* at 582; see also *id.* (concluding that, “[f]rom the perspective of modern transnational litigation, the Second Restatement is . . . close to useless[.]” because “[i]t tells the bench and bar nothing about the degree of due process protection for foreign defendants, service of process abroad, arbitration of transnational disputes, suits against foreign sovereigns, human rights claims, international conventions, antitrust enforcement overseas, injunctions against foreign litigants from proceeding in their own courts, or discovery of evidence in foreign countries.”).

341. *Id.*

342. *Id.* at 583.

343. *Convention on the Law Applicable to Contractual Obligations*, 1980 O.J. (L 266) (EC).

344. Commission Regulation No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177/6). For a discussion from the American perspective, see Symeon C. Symeonides, *Party Autonomy in Rome I and II*

attempt to revise the pertinent provision of the Uniform Commercial Code in 2001.<sup>345</sup>

Secondly, section 187 speaks of the “law of the *state* chosen by the parties,”<sup>346</sup> and thus it does not contemplate the possibility of the parties choosing nonstate norms, such as the various types of “soft law” that have become so ubiquitous in recent years.<sup>347</sup> On closer examination, the Restatement permits the choice of nonstate norms with regard to issues that the parties “could have resolved by an explicit provision in their agreement directed to that issue”<sup>348</sup> (doctrine of incorporation), but not with regard to other issues. Perhaps this is a distinction that should be maintained, perhaps not.<sup>349</sup> The drafting of a new Restatement will provide an excellent opportunity to address this issue, as well as all other issues regarding the role of nonstate norms in contract conflicts.

Thirdly, section 187 speaks of the law of the state chosen by the parties to govern their “*contractual* rights and duties.”<sup>350</sup> The quoted phrase raises a question regarding the parties’ power to choose in advance the law that will govern *noncontractual* issues (such as tort or tort-like issues, time limitations, and the like) arising from their contractual relationship. The case law on this question is divided. While some cases apply section 187 literally and hold that the parties’ power to choose the applicable law is confined to contractual issues, other cases assume that parties are free to submit to the chosen law noncontractual issues, provided that the parties use clear language expressing such an intent.<sup>351</sup> At the same time, these cases also tend to scrutinize clauses that purport to encompass noncontractual issues than clauses confined to purely contractual issues much more closely, and, more often than not, they hold that the clause did not include tort issues, or that it is unenforceable as contrary to public policy.<sup>352</sup> In contrast, the European Union’s Rome II Regulation allows predispute choice-of-law agreements for noncontractual issues if: (a) the parties are “pursuing a commercial activity”; (b) the agreement is “freely negotiated”; and (c) the contractually chosen law does not derogate from the mandatory rules of a state in which “all the elements rele-

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*from a Comparative Perspective*, in CONVERGENCE AND DIVERGENCE IN PRIVATE INTERNATIONAL LAW – LIBER AMICORUM KURT SIEHR 513, 522–30 (K. Boele-Woelki et al. eds., 2010).

345. See U.C.C. § 1–302 (2001 Revision) (withdrawn in 2009).

346. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1982) (emphasis added).

347. For a collection of the literature on this issue, see Symeon C. Symeonides, *Party Autonomy and Private Law-Making in Private International Law: The Lex Mercatoria that Isn’t*, in FESTSCHRIFT FÜR K.D. KERAMEUS, 1239 (2006).

348. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1).

349. Article 3 of The Draft Hague Principles on Choice of Law in International Commercial Contracts authorizes the choice of nonstate norms (called “rules of law”) that are “generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.” For critical discussion, see Symeon C. Symeonides, *The Hague Principles on Choice of Law for International Contracts: Preliminary Commentss*, 61 AM. J. COMP. L. 873, 894 (2013).

350. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971) (emphasis added).

351. See *id.* at cmt. b.

352. For citations, see SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW 212–14 (2008).

vant to the situation . . . are located,” or, in certain cases, from the mandatory rules of Community law.<sup>353</sup> Although I believe that this provision does not adequately protect weak parties in certain commercial relationships, such as franchises,<sup>354</sup> it is certainly worth considering in drafting a new Restatement.

Finally, American courts continue to be divided in determining which law governs the validity and interpretation of choice-of-forum clauses, especially—but not only—when those clauses are part of a contract that also contains a choice-of-law clause.<sup>355</sup> The Hague Choice of Court Convention may provide some useful ideas,<sup>356</sup> but there is every reason to expect that the new Restatement can come up with much better solutions.

#### 4. *Breaking the Situs Taboo*

The drafters of the new Restatement should also revisit the few black letter rules of the Restatement (Second). Although these rules are few in number, they are vast in scope. Not surprisingly, most of them are found in the area that the Restatement (Second) calls “Property”<sup>357</sup>—which includes successions and marital property—and particularly in the part dealing with land.<sup>358</sup> These rules restate the traditional dogma by assigning to the law of the situs of the land<sup>359</sup> virtually all questions involving *inter vivos* conveyances,<sup>360</sup> marital property,<sup>361</sup> and intestate<sup>362</sup> or testate<sup>363</sup> succession.

Ironically, these rules simply demonstrate that when the Restatement (Second) is not too equivocal, it is plainly wrong. The adherence to tradition, which the situs rule exemplifies, might have been understandable in the 1960s, but it has now become an impediment to progress. To

353. See Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations (*Rome II*), 2007 O.J. (L 199) 40, art. 14.

354. See Symeon C. Symeonides, *Rome II and Tort Conflicts: A Missed Opportunity*, 56 AM. J. COMP. L. 173, 216 (2008).

355. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Survey*, 63 AM. J. COMP. L. (forthcoming 2015).

356. See Arts. 5(1) and 6 of The Hague Convention on Choice of Court Agreements (2005).

357. See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 222–66 (1971).

358. See *id.* at §§ 222–43. For other black-letter rules, see *id.* §§ 245–55 (*inter vivos* transactions involving movables); §§ 260–65 (succession to movables). For other unilateral choice-of-law rules, see *id.* at § 285 (divorce), § 286 (nullity of marriage), and § 289 (adoption).

359. The applicable law is almost invariably the “law that would be applied by the courts of the situs.” *Id.* §§ 223, 225–32, 236, 239–42. The above quoted phrase is often accompanied by the prediction that these courts will “usually” apply their own law.

360. See *id.* at § 223 (subjecting to situs law all issues affecting validity of conveyance, including issues of capacity and formal sufficiency).

361. See *id.* at § 234 (providing that situs law determines the effect of marriage upon land owned by a spouse at the time of marriage or acquired during marriage).

362. See *id.* at § 236 (subjecting to situs law all issues of intestate succession to land); *id.* at § 237 (addressing legitimacy as affecting succession); *id.* at § 238 (addressing adoption as affecting succession).

363. See *id.* at § 239 (addressing validity and effect of will); *id.* at §§ 241–42 (addressing interest of surviving spouse).

day, it is difficult to find a sound policy reason for inexorably subjecting all issues involving land to the law of the situs. While the situs state has a legitimate interest in matters of land utilization and matters involving clarity and security of title, that state has no interest in controlling issues such as the capacity of the disposer, the capacity or worthiness of an heir or legatee, the interests of the surviving spouse, the order of succession, or the formal validity of a will or a transaction involving land.<sup>364</sup> The time for debunking the “situs taboo” is long overdue, and the new Restatement provides a perfect opportunity for doing so.

##### 5. *Finding the Golden Medium Between Certainty and Flexibility*

The new Restatement should seek a new and proper equilibrium between the perpetually conflicting needs for certainty and flexibility.<sup>365</sup> It should provide more specific guidance for areas such as torts and contracts, for which the Restatement (Second) provides insufficient guidance through its “near-rules,” “pointers,” or “non-rules.”<sup>366</sup> In my view, a new Restatement that leaves intact the non-rules of the Restatement (Second)—or replaces them with equally wishy-washy near-rules—is not worth undertaking.

It is worth recalling that even the legendary Willis Reese, the chief drafter of the Restatement (Second), believed that “the formulation of rules should be as much an objective in choice of law as it is in other areas of law.”<sup>367</sup> Because at that time the case law on tort and contract conflicts was too fluid to yield such rules, however, Reese opted instead for “formulations” that were “broad enough to permit further development in the law,”<sup>368</sup> but which, in due time, would permit the development of “more definite”<sup>369</sup> or “precise”<sup>370</sup> choice-of-law rules. As the discussion in Part III.C, *supra*, demonstrates, Reese’s hope has materialized

364. See, e.g., Moffatt Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, in *STUDIES IN MODERN CHOICE-OF-LAW: TORTS, INSURANCE, LAND TITLES* 293–390 (1984); Peter Hay, *The Situs Rule in European and American Conflicts Law—Comparative Notes*, in *PROPERTY LAW AND LEGAL EDUCATION - ESSAYS IN HONOR OF JOHN E. CRIBBET* 109 (Peter Hay & Michael H. Hoeflich eds., 1988); WEINTRAUB, *supra* note 108, at 543–46, 560–94; William F. Baxter, *Choice of Law and the Federal System*, 16 *STANFORD L. REV.* 1, 15–17 (1963); William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 *IND. L.J.* 417, 424–26 (2000); Symeon C. Symeonides, *Exploring the ‘Dismal Swamp’: The Revision of Louisiana’s Conflicts Law on Successions*, 47 *LA. L. REV.* 1029, 1052–54, 1062–64, 1090–97 (1987).

365. For the perpetual tension between these needs in international conflicts law, see SYMEONIDES, *CODIFYING CHOICE OF LAW*, *supra* note 59, at 171–217.

366. For examples and discussion of the quoted terms, see SYMEONIDES & PERDUE, *supra* note 90, at 166–69.

367. Willis L.M. Reese, *General Course on Private International Law*, 150 *RECUEIL DES COURS* 1, 61 (1976) [hereinafter, Reese, *General Course*].

368. Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 *MERCER L. REV.* 501, 518–19 (1983).

369. *Id.* at 518.

370. Reese, *General Course*, *supra* note 367, at 62 (arguing that the conflicts experience since the revolution had “reached the stage where most areas of choice of law can be covered by general principles which are subject to imprecise exceptions. We should press on, however, beyond these principles to the development, as soon as our knowledge permits, of precise rules.”).

in large part: American courts have produced uniform results in several patterns of cases.<sup>371</sup> These results should be the basis, or the starting point, for “more definitive” rules in the new Restatement.

Predictably, any mention of “definite” rules will encounter opposition. Some of the reasons are innate in the common law tradition in general, and some grow from the dismal experience with the rules of the first Restatement.<sup>372</sup> It is time to overcome this anti-rule syndrome, however. To assume that the only rules possible are those drafted eight decades ago by Joseph Beale is not only to ignore the rich rulemaking experience gained in the interim, but also to severely underestimate the capacity of American conflicts law to renew itself. Thanks to Beale’s Restatement, we know what to avoid—broad, all-embracing, inflexible, monolithic rules, based on a single connecting factor chosen on metaphysical grounds. Thanks to the choice-of-law revolution, we also know what to aim for—narrow, flexible, content-oriented, and issue-oriented rules, based on experience, with occasional built-in escape clauses that would allow these rules to grow and to adjust to changing needs and values.<sup>373</sup> In the twenty-first century, the choice is not between excessive rigidity and excessive flexibility, or between prefabricated mechanical prescriptions and *ad hoc* individualized dispensations.<sup>374</sup> It is possible to have our cake and eat it too—namely, to have certainty tempered with flexibility.<sup>375</sup> While reasonable people will disagree on the exact dosages that can produce the optimum equilibrium, it is far more constructive to devote our energies to this task than to assume in advance that such equilibrium is unattainable.

Those interested in examples of how to accomplish this equilibrium may want to have a look at the Louisiana and Oregon codifications,

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371. See *supra* Part III.C.

372. In contrast, most other countries answer easily and affirmatively the question of whether choice-of-law rules are necessary. As a recent comprehensive study documents, during the same fifty-year period, eighty-four countries have enacted choice-of-law codifications. See SYMEONIDES, *CODIFYING CHOICE OF LAW*, *supra* note 59, at 1–34. This is much more than in all the preceding years in the history of conflicts law. In addition, in the last two decades, the European Union, which technically is not even a federation, has enacted fifteen Regulations dealing with choice-of-law. See *id.* at 26–30.

373. See Leflar, *Choice-of-Law Statutes*, *supra* note 68, at 952 (recognizing that “flexibility can be built into a statute . . . just as it can be and is more often prescribed in the common law”); Kozyris, *Interest Analysis Facing Its Critics*, *supra* note 295, at 580 (“[F]ixed but revisable rules which lead to good results in the overwhelming majority of the cases, and which are supplemented by some general corrective principles to mitigate injustice in the remaining cases, are superior to, and incredibly more efficient than, a system in which each case is decided as if it were unique and of first impression.”).

374. As Cavers noted, “The pursuit of justice in the individual case does not require the abandonment of rules but rather the formulation of rules with their just operation in particular situations in view.” David F. Cavers, *Legislative Choice of Law: Some European Examples*, 44 S.C. L. REV. 340, 360 n.177 (1971).

375. See Edgar Bodenheimer, *The Need for a Reorientation in American Conflicts Law*, 29 HASTINGS L.J. 731, 745 (1978) (“Is it possible to find a solution to the problem which proceeds from the basic assumption that certainty and elasticity in legal methodology are not polar opposites, between which a clearcut [sic] choice must be made but complementary values, which in some fashion must be meshed together?”).

which have survived the sobering realities of the legislative process.<sup>376</sup> They contain narrow, issue-oriented rules that take into account the content of the conflicting substantive laws. They do not cover the entire spectrum of conflicts cases, but only those cases or issues for which existing experience permitted the articulation of safe, relatively uncontroversial rules. Even so, these rules provide an appropriate degree of flexibility because, although they designate the applicable law in a straightforward fashion, they are accompanied by escape clauses that permit courts to deviate from the rules in exceptional cases. Cases or issues not covered by these rules are referred to a general formula similar to that contained in section 6 of the Restatement (Second).<sup>377</sup>

I know it is immodest to cite my work as an example of others. By no means do I claim that these codifications are perfect, although the Louisiana codification, which has been in force for a quarter of a century, seems to have stood the test of time.<sup>378</sup> I am also gratified to see that scholars like Professor Singer find much to praise in the Oregon codification.<sup>379</sup> The only reason I mention these codifications here is to illustrate that it is *feasible* to construct a new breed of choice-of-law rules that combine certainty with flexibility and embody the lessons learned from the American conflicts experience.

In any event, I do not suggest that the new Restatement should adopt the above rules. But neither do I suggest that we should return to the first Restatement. The most important lesson from the first Restatement is that broad and inflexible rules, based on dogma rather than experience, are bound to fail. Conversely, the experience with the Restatement (Second) teaches us that courts need more guidance than a mere laundry list of factors and contacts. Achieving the golden medium between the two extremes of the First and Second Restatement should be the aspiration of the drafters of the new Restatement. Our task is

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376. See *supra* note 248.

377. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (1971).

378. Professor Borchers found that, before the enactment of the Louisiana codification, Louisiana appellate courts reversed trial court decisions at a rate of almost 50 percent, which meant “a trial court’s decision had no more predictive value than flipping a coin.” Patrick J. Borchers, *Louisiana’s Conflicts Codification: Some Empirical Observations Regarding Decisional Predictability*, 60 LA. L. REV. 1061, 1068 (2000). In contrast, after the codification’s enactment, the reversal rate dropped below 25 percent. See *id.* at 1068–69. Borchers concluded that, besides improving “the predictability of decisions in conflicts cases,” *id.* at 1068, “the Louisiana conflicts codification . . . is a hopeful indication that statutory solutions can allow for the reconciliation of predictability and other values in multistate cases.” *Id.* at 1070. Professor Weinberg seems to suggest that Louisiana courts tend to ignore this codification. She identifies two cases in which Louisiana intermediate courts employed “something like interest analysis, or at least . . . [a] public policy [analysis]” instead of undertaking the laborious policy analysis the codification requires. See Weinberg, *A Radically Transformed Restatement for Conflicts*, *supra* note 308, at 46. Weinberg agrees with the substantive results of these cases, and so would I. But I would add that: (1) a proper application of the codification would produce the same results; (2) the policy analysis the codification requires is not incompatible with an unselfish interest analysis; and (3) these two cases are not representative of the way Louisiana courts have applied the codification.

379. See Joseph W. Singer, *Multistate Justice: Better Law, Comity, and Fairness in the Conflict of Laws*, 2015 U. ILL. L. REV.

simply to offer our suggestions. The following are my suggestions, in summary form.<sup>380</sup>

I believe that the experience from the two Restatements and the lessons of the choice-of-law revolution suggest that the new Restatement rules should possess the following attributes:

- (1) They should only cover patterns, cases, or issues for which the accumulation of judicial experience permits the articulation of tested and uncontroversial rules based on judicial precedent. The remaining cases or issues should be relegated to an open-ended “approach,” perhaps similar to that provided by the combination of sections 6 and 145 of the Second Restatement for tort conflicts, or sections 6 and 188 for contract conflicts.<sup>381</sup> In due time, this approach will produce new rules, either through judicial application and the doctrine of *stare decisis*, or through a future revision of the new Restatement.<sup>382</sup>
- (2) Unlike the rules of the First Restatement, the new rules should be narrow rules built around individual issues rather than broad rules covering entire causes of action. In other words, the new rules should provide for and facilitate an issue-by-issue analysis, which is one of the breakthroughs of the American choice-of-law revolution.<sup>383</sup>
- (3) When necessary, they should take into account the content of the conflicting substantive laws and their underlying policies.<sup>384</sup>
- (4) In appropriate and well-defined cases, the new rules should allow consideration of the substantive result that the chosen law will produce;<sup>385</sup> and
- (5) The new rules should be accompanied by escape clauses anchored by the new Restatement’s general approach, and authorizing judicial deviation from the rules in appropriate, exceptional cases.<sup>386</sup>

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380. For extensive discussion of these suggestions, see SYMEONIDES, *REVOLUTION*, *supra* note 4, at 435–37 and references therein.

381. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 6, 145, 188 (1971).

382. For the advantages of combining rules with an open-ended approach, see Symeonides, *The Conflicts Book of the Louisiana Civil Code*, *supra* note 107, at 1065–67.

383. For the benefits of issue-by-issue analysis and the reputed but exaggerated risks of *dépeçage*, see Symeon C. Symeonides, *Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect*, 45 U. TOL. L. REV. 751 (2014).

384. For a discussion of the benefits and limitations of content-oriented choice-of-law rules and how to draft them, see SYMEONIDES, *REVOLUTION*, *supra* note 4, at 394–404.

385. For a discussion of how to define these cases, see *id.* at 409–11, 437. See also SYMEONIDES, *CODIFYING CHOICE OF LAW*, *supra* note 59, at 285–88.

386. For a discussion of the need for such escapes, see SYMEONIDES, *REVOLUTION*, *supra* note 4, at 415–19. For a comparison with the much tighter escapes found in European codifications, see Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons*, 82 TUL. L. REV. 1741, 1773–82 (2008).

The above list of suggestions is open to many criticisms.<sup>387</sup> One objection may be that the list appears designed to “please everybody.” That is not my intention. Another criticism may be that the list is too eclectic in that it combines elements from different philosophical approaches. Indeed, point (3) above brings to mind the approach of Cavers and secondarily Currie, while point (4) sounds like Leflar’s approach. Although I have elsewhere explained the respective differences from these approaches,<sup>388</sup> and although the suggestions in points (3) and (4) contain built-in limitations (indicated by the phrases “when necessary” and in “appropriate cases”) which, *inter alia*, would prevent their cumulative use in the same cases, I have no qualms defending the eclectic, but careful, combination of diverse, but compatible, approaches originating from different sources.

Eclecticism is not a mortal sin. Eclecticism is bad when it is the result of subservient imitation or intellectual laziness. Uncritical, undigested, and uncoordinated “picking and choosing” can lead to internal contradictions and incoherence. But a studied, adapted, and thoughtful eclecticism can combine the “best of both worlds.” It can live up to the true meaning of this Greek word, which literally means “choosing well.”

Conversely, methodological or philosophical purity should not be an end in itself when dealing with complex multistate problems that by definition implicate conflicting national and societal values. We need look no further than the First Restatement to realize that such purity does not guarantee success. Virtually no contemporary conflicts system can claim methodological purity,<sup>389</sup> it is doubtful that any system yearns for it, or that it should.

After centuries of intellectual combats between rival theories, such as unilateralism and multilateralism, jurisdiction-selection and content-oriented law-selection, and “conflicts justice” and “material justice,” it is time to realize that no single school of thought has a monopoly on wisdom, and none of them alone has the answers to all conflicts problems. When properly coordinated with each other, ideas derived from different schools can produce a much better system than any school alone.

Admittedly, even if everybody agrees that the rules of the new Restatement should possess the attributes described in the above list, there will still be many disagreements about the precise content and shape of these rules and of the new Restatement in general. Such disagreements, however, are both inevitable and healthy. If the process of drafting the new Restatement will be as open as that of the Restatement (Second), most of these disagreements can be resolved. In any event, it is certainly

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387. One criticism that I find inaccurate is that I advocate for “a return to jurisdiction-selecting rules.” Weinberg, *supra* note 308, at 43.

388. See SYMEONIDES, REVOLUTION, *supra* note 4, at 394–404 (Cavers), 369–84, 389–94 (Currie), 404–11 (Leflar).

389. See SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 59, at 45–51.

preferable to air such disagreements in an open and frank debate, rather than to sit around lamenting the current state of affairs, which both the proponents and the opponents of a new Restatement condemn.

## VI. CONCLUSIONS: FROM VICTORY TO SUCCESS

Fifty years ago, Brainerd Currie, the leader of the American choice-of-law revolution, passed away, but his revolution continued for another fifty years. Judging from the number of states that have joined it, the revolution has *prevailed* over the traditional system, even if Currie's particular version did not. But to prevail is one thing and to *succeed* is another. Success should not be judged by numbers alone. Instead, one should ask whether the revolution has produced a new *system* to replace the old one and whether it attends to the basic needs and aspirations of the choice-of-law process, such as predictability, administrability, rationality, and uniformity of decisions. Although the revolution has changed American conflicts law in many beneficial ways, it has not succeeded in producing a new system. In fact, it did not aspire to do so.

From Currie's perspective, this was a perfectly understandable sentiment. But five decades later, it is no longer acceptable. American conflicts law can ill afford more years of "open-ended and endless soul-searching on a case-by-case basis."<sup>390</sup> It is time to develop an exit strategy that consolidates and preserves the gains of the revolution and turns its victory into success. American conflicts law is ripe for, and needs, some process of consolidation and standardization. The experience accumulated in these fifty years makes it possible to articulate a new breed of smart, evolutionary choice-of-law rules that will accomplish both objectives: (1) restore a proper equilibrium between certainty and flexibility; and (2) preserve the substantive and methodological accomplishments of the revolution.

Thankfully, the ALI's decision to authorize a new choice-of-law Restatement, although belated, provides an excellent vehicle for this exit. It is up to us to use it wisely.

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390. Kozyris, *Interest Analysis Facing Its Critics*, *supra* note 295, at 580 ("[A]ny system calling for open-ended and endless soul-searching on a case-by-case basis carries a high burden of persuasion.").

