LEGAL PROCESS AND CHOICE OF LAW

WILLIAM L. REYNOLDS*

INTRODUCTION

It may be the problem is the presence of too many academics, whose intellectual interest in the policy issues far exceeds their understanding of the needs of a successful policy-making process.¹

Choice of law today, both the theory and practice of it, is universally said to be a disaster.² The agreement on that proposition, among all branches of the profession, is nearly universal. Scholars trash every judicial effort, propound theories by the score to resolve the confused situation, and then criticize other scholars or judges who choose to follow false gods; even worse, perhaps, some judges are polytheistic, following many gods.³ Courts are thought routinely to engage in rank decisionmaking with thumbs on the scale, commonly favoring plaintiffs (especially local ones) by applying domestic, rather than out-of-state, rules.⁴ The confusion is complete. The poor lawyer who gives advice to clients on choice-of-law matters meets with stares of disbelief.⁵

* Jacob A. France Professor of Judicial Process, University of Maryland School of Law. A.B., Dartmouth College; J.D., Harvard University. My thanks to Bill Richman for reading a draft of this Article.


4. This explains the recent trend by insurance companies to seek a favorable forum by becoming plaintiffs themselves through declaratory judgment actions. See Larry Kramer, Choice of Law in the American Courts in 1990: Trends and Developments, 39 AM. J. COMP. L. 465, 476-80 (1991) (discussing the use of the doctrine of forum non conveniens to obtain favorable choice-of-law decisions).

5. This also happens to the poor "expert" law professor who advises other lawyers. Similar reactions come when one tries to explain the Racketeer Influenced Corrupt Organizations (RICO) or the Robinson-Patman Acts to the uninitiated. At least Congress created those two problems, however. The responsibility for the choice-of-law debacle lies almost entirely with academics.
This Article first examines how the law of choice of law arrived at this apparently sorry state of affairs and then suggests how we might clean up the mess. It begins with a brief history of choice-of-law analysis, from the learned Justice Story through both Restatements and St. Currie and on to contemporary writers. It then examines what went wrong—why the wheels came off the cart. Finally, it suggests an eminently reasonable solution to the problem.

The diagnosis and treatment can be stated simply: The present unhappiness over the practice of choice of law is a consequence, in very large part, of treating choice-of-law questions differently than ordinary questions that common law judges are asked to resolve. The wooden, poorly thought-out choice-of-law opinions that are all too frequent today result from judges straying from their common law roots. In other words, judges issue poor choice-of-law decisions because they do not think openly in terms of reaching the proper result in the case at bar. They do not think that way because the system encourages them to think conceptually (of sovereigns and governmental interests, for example), rather than in terms of policy analysis and application of individual facts—those very factors that they would consider paramount in more ordinary cases.

Expressed somewhat differently, choice of law is marked today by intense theorizing and academic overload. That has happened because judicial input into its development has been weak, leading to an undue occupation of the field by academic writers. The resulting over-conceptualization of choice-of-law questions has made this an extraordinarily difficult field for a novice—like the ordinary judge. The novice, naturally impressed by all of this confusion among the wise initiates, believes that she, too, should resort to incomprehensible concepts and other mumbo-jumbo. But it is exactly that kind of abstract reasoning, not rooted in the facts of the individual case, that betrays the courts. Judges, in other words, should stick to doing what they are trained to do: decide cases fairly and explain why they think the result is correct.

Another way to state the thesis of this Article is that the West Publishing Company got it right. The West "key number" system has no separate entry for choice of law, nor should there be one. Choice of

6. This Article's focus is entirely on legal problems whose choice-of-law issues involve more than one state of our glorious Union. It expressly does not address either international choice of law or federal versus state choice of law, such as Erie questions or preemption.

7. Instead, each substantive area has a separate key number for choice-of-law problems. Thus, torts, key number 6, deals with choice-of-law problems in torts.
law should not be treated as a separate intellectual and legal discipline, as American courts and scholars have done for the past century and a half. Rather, choice-of-law questions should be treated in the same way as other ordinary questions requiring the reconciliation of conflicting precedents or conflicting statutes. In the ordinary case involving conflicting and competing rules of decision, the court first identifies the policies that animate those laws; the court then explains why, in light of the facts, one or the other of the policies should control; the court also explains why the other competing policies were not winners and why arguably applicable precedents were not followed.

This is the method that should be employed to decide cases in which the laws of different states might reasonably be applied. Cases involving competing laws from different jurisdictions should not be treated differently from the model of cases involving competing laws of the same jurisdiction. There should be no talk of vested rights, sovereignty, comity, or governmental interests. At least when dealing with the overwhelming majority of private disputes in which the laws of more than one state might apply, there simply is no reason to deviate from ordinary common law decisionmaking.8

This Article, in short, argues for the routine application of traditional common law decisionmaking techniques to choice-of-law problems. The touchstone for analysis should be explanation of results, not a priori theory. Judge Keeton's observation that "[j]udicial choice, at its best, is reasoned choice, candidly explained,"9 works as well in choice of law as elsewhere. Choice-of-law decisions do not require elaborate theoretical decisional models any more than do decisions in any other common law area. Policy analysis (often called "doctrinal analysis"), done overtly and proudly, should be the goal. Legal process, rather than legal theory, holds the key to good decision-making in choice of law.

The failure to do what comes naturally has had disastrous consequences for American choice-of-law practice. The confusion that has resulted from thinking about theory rather than process created the disarray mentioned in the first paragraph of this Article. That disarray in turn has led scholars and judges to the dubious expedient of limiting discretion by self-denial and the deployment of arbitrary "rules."

---

8. A small percentage of cases involve true sovereign interests. An example would be a tort action in state X seeking to recover damages from state Y (i.e., from the state itself), whose own law of sovereign immunity would bar recovery. This Article does not deal with those cases.

I. A Brief History of Choice-of-Law Theory

A short discussion of choice of law in America will help explain how theory displaced policy analysis. It begins with Justice Story's decision to separate choice of law from the rest of the judicial agenda, moves on to the siren song of certainty propounded by the first Restatement of Conflict of Laws, progresses to the domination of the field by academic writing, and ends with the almost-universally condemned (albeit almost-universally accepted) effort by the Restatement (Second) of Conflict of Laws to restore choice of law to the common law world.

A. Story and Comity

Conflicts law in this country developed from Justice Story's magisterial treatise on the subject. Story addressed fundamental questions, such as why the courts of one country should ever apply the laws of another. (To a common lawyer, this was not an obvious question, for the Royal courts always had applied English law.) Upon reflection, Story proposed two maxims: First, that every state had "exclusive sovereignty and jurisdiction within its own territory," and second, "that no state or nation can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein." These maxims led Story to conclude, not surprisingly, "that whatever force and obligation the laws of one country have in another depend solely upon the laws and municipal regulations of the latter." Story seized the well-known phrase "comity of nations" to "express the true foundation and extent of the obligation of the laws of one nation within the territories of another." These concepts—the "sover-

12. See Joseph Story, Commentaries on the Conflict of Laws (7th ed. 1872). The first edition of Story's treatise was published in 1834.
14. See Theodore F.T. Plucknett, A Concise History of the Common Law 79 (5th ed. 1956) (discussing the history of English law courts). But see id. at 300 ("Even at the present day English courts upon occasion will refer to Roman law . . . in rare cases where the native law gives no guidance.").
15. Story, supra note 12, § 18.
16. Id. § 20.
17. Id. § 23. These principles appear to first have been identified by Ulric Huber, a Dutch jurist of the late seventeenth century. See Yntema, supra note 13, at 306.
18. Story, supra note 12, § 38.
eignty" maxim and the "comity" maxim—have shaped our view of choice of law down to the present.

Three key points emerge from reading Story that bedevil us today. One is that the choice-of-law responsibilities of the forum towards other "states" and towards foreign "nations" are the same; thus, it is possible to justify, as Story himself did, a refusal to follow the law of another jurisdiction because doing so would be "repugnant" to "Christian" nations.\footnote{Id. § 25. Among his examples are polygamy, incest, and "despotic cruelty." Id. One hopes that no American state approves of that trilogy today.} It is not at all clear whether Story thought choice-of-law practice should be the same for each type of case, regardless of sovereign, although he himself mixed interstate authorities with international ones. Nonetheless, the thought that there should be some congruence between the two types of choice of law has persisted throughout our history.\footnote{See, e.g., Douglas Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 Colum. L. Rev. 249, 259 (1992) ("It is a serious mistake to discuss domestic and international choice-of-law cases interchangeably, even though that practice is nearly universal in the conflicts literature.")}. Story's second pernicious and lasting contribution to the current choice-of-law disaster was his introduction of comity and sovereignty into the scheme of things: that is, the idea that a state applies another state's law only to accommodate that other state; in other words, another state's law is chosen only as a matter of comity (or courtesy), not obligation.\footnote{See supra notes 16-18 and accompanying text. A side effect of the emphasis on comity has been an amazingly sterile debate on whether a state that chooses to use another state's law is applying that state's laws \textit{ex proprio vigore}, or is adopting that law as its own in order to resolve the case. \textit{See}, e.g., Elliott E. Cheatham, American Theories of Conflict of Laws: Their Role and Utility, 58 Harv. L. Rev. 361 (1945) (examining major questions surrounding the choice to use foreign law). That anyone would care about such a ridiculous question shows the tenor of much of the choice-of-law debate.} Finally, and perhaps worst of all, is the notion that, in reaching choice-of-law decisions, judges should use techniques different from those normally employed in deciding more traditional cases.\footnote{See, e.g., Singer, supra note 2, at 733 ("[T]he courts borrow from all the modern approaches, using whatever pieces of the analysis seem useful and compelling in a particular case.")}.

All of these developments have had enormous and largely harmful consequences. American courts and scholars today generally believe that following another state's law is an act of grace rather than something done as a matter of routine.\footnote{See William M. Richman & William L. Reynolds, Understanding Conflict of Laws 167 (2d ed. 1993). The conflation of international and interstate choice-of-law theory has diminished (until very recently) the development of ideas about how choice of law fits into
our federal scheme of government. Moreover, the separation of choice of law from "normal" decisionmaking has led to artificial (and bad) decisionmaking.

B. Beale and Vested Rights

The next big development in American choice of law was the vested rights theory and its ensuing Reign of Terror. The arch-priest of that theory was Professor Joseph Beale of Harvard, and its Sacred Text was the first Restatement of Conflict of Laws,24 promulgated in 1934. The rigidly dogmatic vested rights theory25 required the application of the law of the jurisdiction where a right "vested." A tort right vested, for example, in the state where the injury occurred (rather than, say, where the wrongful conduct occurred); a contract right vested in the state where the last act necessary to make the contract took place (usually the acceptance), and so on. The system purported to solve all choice-of-law problems by isolating a key fact (such as where the plaintiff was injured); once the location of that fact is identified, the law to be applied follows ineluctably. On the surface, at least, the judge exercises no discretion; choosing applicable law is a routine, humdrum enterprise.26

The vested rights theory was the perfect complement to the then-dominant views of economic due process (which also emphasized a form of "vestedness"), and, indeed, the Supreme Court came very close at times to constitutionalizing the vested rights theory.27 It is a mistake, however, to view the Bealean logic as politically based. Rather, the First Restatement represents the apotheosis of legal formalism,28 as the hundreds and hundreds of rules laid down in the First Restatement contain not a hint of any policy goals—liberal, conserva-

25. Beale did not originate the vested rights theory. It can be traced back to Dicey's great treatise, A.V. Dicey, A Digest of the Laws of England with Reference to the Conflict of Laws 24-26 (1896), discussing the principle of extraterritorial recognition of rights, and, further back, to Huber. See Yntema, supra note 13, at 308 n.29.
26. My colleague, John Brumbaugh, a scholar of jurisprudence, suggests that Beale, who was also a prominent writer on jurisprudence, did have a policy—to establish a system that would permit people to work together efficiently.
tive, or whatever—that the rules might seek to achieve. The *lex loci* rules, as they are known, obviously needed no policy justification—they are because they are. As a result, the elegant, closed system laid down by Beale could be applied without any appearance of an exercise of judicial discretion, something the formalists abhorred. Moreover, the Bealean rules were apparently simple and easy to apply. Certainty and predictability in judicial decisionmaking, the heaven of the formalists, had been brought well within the reach of mortals.

The practice under the *First Restatement*, however, was quite different. Although Bealean logic produced reasonable decisions in most cases, often enough the result defied common sense. In other words, judges had to decide real cases, and occasionally they did not like the result Professor Beale had mandated in his *Restatement*. Judges began to look for ways to avoid the rules in order to do justice. The courts, in short, began to cheat. Judicial deceit became so common that it acquired a name; the judges, it was said, were employing

---

29. Yntema explained that Beale viewed the common law, from which almost all his choice-of-law rules derived, as "a body of scientific principle." Yntema, *supra* note 13, at 313 (quoting Joseph Beale, *The Necessity for a Study of Legal System*, 14 PROC. ASS'N AM. L. SCHS. 31, 38 (1914)). Arthur Sutherland wrote that Beale was as kindly as a man can be; at the same time he was a dialectical swordsman who played for classroom victory. He persuaded himself that some sort of necessity controlled law, that there existed a cosmic logical sequence which could be perceived and stated if only one could think aright.

Arthur Sutherland, *The Law at Harvard* 216 (1967). The *First Restatement* certainly was a heroic attempt at creating "a cosmic logical sequence."

Perhaps another anecdote better illustrates Beale's thought: "[Beale] was a master dialectician. Among his students it was common talk that you could occasionally beat Beale in an argument, but never if you let him state the question." A. James Casner & W. Barton Leach, *The Law of Property* 82 n.3 (2d ed. 1969).

One last story is worth preserving. A member of the Class of 1927 at Harvard once asked Beale a question. "Beale replied: 'If you want to know what the law was, ask Professor Williston. If you want to know what the law will be, ask Professor Frankfurter. If you want to know what the law is, sit down.'" Victor Jacobs, Harv. L. Bull. 48 (Fall 1996).

30. The examples are legion. The following is an easy illustration: Two New Yorkers are on a train to Washington. As the train passes through Delaware, they orally agree on a contract to be performed in New York. Assume that the oral contract is valid under New York law, but that the Delaware statute of frauds requires a writing. The agreement cannot be enforced because the vested rights theory would require that Delaware law—the place where the contract was made—be applied.

31. The most prescient judges sat on the Supreme Court. In a series of cases beginning with *Alaska Packers Ass'n v. Industrial Accident Commission*, 294 U.S. 532 (1935), the Justices retreated from the constitutional implications of the vested rights theory. Instead, the Court gave permission for any state with an "interest" in the problem to apply its law to decide the case, and, as a precursor to modern choice-of-law theory, talked about the interests of the states in regulating the conduct at issue. See generally Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 Harv. L. Rev. 1210 (1946) (discussing Chief Justice Stone's opinions in a series of conflict-of-laws cases).
"escape devices."32 A number of escape devices were available, including characterization, substance, procedure, renvoi, depecage, and public policy.33

The most obvious escape device was characterization. All of the First Restatement rules turned on how one labeled a case, but as Professor Richman has noted, the document utterly fails to tell the reader how to characterize.34 Choice of law in contract, for example, turned on whether the issue is one of contract making (in which the court is to apply lex locus contractus), or of contract performance (calling for application of the law of the place of performance); we are not told, however, how to make the choice between those two competing rules. Is a suit for failure of warranty a problem with contract making (what does the warranty mean) or one of performance (did the goods satisfy the promise)? Another troublesome choice is between "substance" and "procedure." (Forum law generally is applied to questions of procedure.) For example, is a limitations problem one of substance or of procedure? Eventually, the judges discovered the ultimate escape device: "public policy."35 No law would be enforced if doing so would violate a "fundamental public policy" of the forum.36 That makes good sense when dealing with the laws of Nazi Germany, of course, but what about the laws of Connecticut?37

In many cases, it seemed that the court's characterization decision merely reflected a decision made for other reasons. Unfortunately, Bealean logic forbade decisionmaking by reference to facts or policy or, indeed, to anything other than the prescribed rules; thus, real decisionmaking in cases had to be performed sub silentio through the use of escape devices. Because the reasons had to remain unstated, courts embarked on a course of decisionmaking that enhanced neither predictability nor accountability.

32. See generally Richman & Reynolds, supra note 23, at 186-88 (explaining devices used by the courts to avoid the situs rule).
33. See id. § 63, at 64-67.
34. See id. at 152.
35. See id. at 159.
36. See id.
37. The classic comparison is between two New York cases decided two years apart. The first, Mertz v. Mertz, 3 N.E.2d 597 (N.Y. 1936), refused to apply the place-of-injury rule to an accident in Connecticut involving a New York married couple who sued one another. Id. at 600. New York recognized interspousal immunity, but Connecticut did not. Id. at 597-98. Applying Connecticut law, the court said, would violate the public policy of New York. Id. at 599-600. The court, however, was less solicitous of New York's honor in Holzer v. Deutsche Reichsbahn-Gesellschaft, 14 N.E.2d 798 (N.Y. 1938). There, a German national sued his former employer, a German company, for firing him because he was Jewish. Id. at 799. The defendant argued that German law mandated the firing. Id. at 800. The court upheld the defense. Id. I defy anyone to reconcile these two cases on a principled basis.
A major difficulty with escape devices lay in their apparently fortuitous application. They worked only if their deployment was not revealed. The existence of escape devices, therefore, had to remain a secret, thus creating a kind of stealth law. The ideal of the vested rights theory, after all, demanded ritual obeisance to its dictates, hence, the absence of any discussion of how to characterize a problem. Moreover, many (perhaps most) judges and lawyers did not understand this game, played without overt rules. Some judges would not play at all; others became so enamored of their own cleverness that they refused to use escape devices once they realized that their goal was to circumvent the lex loci rules.38

Although the vested rights theory today is thoroughly discredited by scholars,39 as indeed is legal formalism writ large,40 the First Restatement left behind an imposing three-part legacy. The first part may be more in the form of a myth, but it certainly exists. Many students of choice of law still believe (or at least dream) that somewhere lies a set of choice-of-law rules that can decide real cases and cannot be manipulated by result-oriented judges.41 That myth has had an immense and deleterious impact on contemporary thought about choice of law.

The second part of the legacy of vested rights and choice of law is one that, in its own way, has proven as troublesome as the goal of

38. See, e.g., Toledo Soc’y for Crippled Children v. Hickok, 261 S.W.2d 692, 701 (Tex. 1953) (refusing to apply “the fiction of equitable conversion” to conflict of laws); see also DAVID VERNON ET AL., CONFLICT OF LAWS: CASES, MATERIALS, AND PROBLEMS 265 (1990) (stating that the Hickok court was “overwhelmed by its unmasking” of the fiction of equitable conversion).


40. See GRANT GILMORE, THE AGES OF AMERICAN LAW 12 (1977) (discussing the rejection of legal formalism in American legal thought).

41. The First Restatement, however, retains scant potency in the courts. Far fewer than half of the states allegedly follow Professor Beale’s method in all things. See William M. Richman & David Riley, The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts, 56 Md. L. Rev. 1196, 1200 (1997). Whether they actually do so is another matter. Maryland, for example, purports still to follow the First Restatement. See Richard W. Bourne, Modern Maryland Conflicts: Backing into the Twentieth Century One Hauch at a Time, 23 U. Balt. L. Rev. 71, 73 (1993). Nevertheless, through the use of blatant manipulation of characterization and heavy-handed “public policy” exceptions, the Maryland courts exemplify the worst of what happens when formalism is combined with a desire to do justice: the case law is inconsistent, and one can only guess at the real basis for the decision. For a discussion of the Maryland cases, see id.

In addition, the First Restatement remains dominant, perhaps everywhere, in matters involving real property. See RICHMAN & REYNOLDS, supra note 23, at 253 (pointing out that the law of situs “is the rule in contemporary case law”). The potency of the lex sitae rules remains very strong, despite new universal scholarly condemnation of their use in theory and in practice. See, e.g., RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 444-45 (2d ed. 1980) (criticizing the use of the situs rule).
certainty. The second legacy, the converse of the first, is the tradition of scholarly trashing of judicial and academic choice-of-law efforts. This second legacy, discussed in the next section, derives from the assault on the Bealean citadel.

The third legacy is perhaps best described as a kind of counter-legacy. A massive amount of case law under Beale’s system confirms a basic truth: Courts will not be bound by rules at the expense of justice; in other words, when justice requires, the rules will be ignored. If the departure from the rules can neither be acknowledged nor explained, as was true with the vested rights theory, decisions are no longer based on justice under law, but apparently on chance or other equally arbitrary factors. The result, of course, is a mess that is neither just nor law.

C. Currie and Interest Analysis

Even as the First Restatement was being published in 1934, the seeds of its destruction were being sown by the legal realists. Although it took a long time, by the mid-1950s, profound disillusion with the Bealean system had set in. Amazingly, however, it was not until 1958 that the weapons of legal realism were brought fully to bear on the problems of choice of law. Leading the assault was Brainerd Currie. In a series of articles published over half a dozen years, Currie advanced the notion, basic to realism, that all law should be functional; that is, the law applied to a case should consciously advance stated social goals:

Currie and his precursors argued that it is inherently un-sound to choose between competing laws without reference to the content of those laws, as the First Restatement did. . . . [I]n choosing between competing laws, courts should take into account the policies behind those laws and the facts of the particular case.

By 1958, that kind of argument was hardly revolutionary to legal academics, or even to many judges. Nevertheless, Currie’s writings hit the staid conflicts world like a bombshell. There had been harbingers of change before Currie, of course, most notably in writings by Walter


43. See id. at 682-83.

44. Id. at 683.
Wheeler Cook and David Cavers. But conflicts scholars and judges long had been held in thrall by Professor Beale's facially complete and apparently self-contained world. Currie shattered the spell with a vengeance. Beale's structure has never been rebuilt, and Currie's work now stands at the apex of the scholarly conflicts pantheon.

The profound impact of Currie's writings on conflicts law can be traced, at least in part, to the remarkable edifice that Beale had built. It must have been difficult being a conflicts scholar in the early post-War era. On the one hand, the First Restatement appeared to have solved all choice-of-law problems. On the other hand, for those uneasy about the project, it appeared to be an impenetrable fortress, capable of repelling all assaults. It was a structure that could not be nibbled away; it could only be blown up. Only a nuclear strike of a type that Currie launched could demolish the structure: Currie's real genius lay both in seeing the need to fashion a weapon to carry out the necessary destruction, and in being brazen enough to think that he could pull it off. To do this he not only had to expose the silliness of the old system (after all, others had done that), but he also had to invent a new system. He had to build as well as merely destroy. The edifice he designed did just that. Not only did it demolish the citadel of vested rights, but its theoretical concepts remain the basis (or at least the starting point) of virtually all discussion today of choice of law.

The quality of Currie's work (known today as "interest analysis") is truly impressive. Its major theoretical success lay in bringing the lessons of legal realism to bear on choice-of-law issues, by emphasizing that a court could not choose a rule of decision to apply unless it examined the policy served by the law in the light of the facts of the

45. See Walter W. Cook, The Logical and Legal Basis of the Conflict of Laws (1942). Cook had his own problems, however. Among them was a belief that a court "enforces not a foreign right but a right created by its own law." Id. at 315.


47. Conflicts scholarship at this time was very pedestrian. Illustrative of the state of post-War conflicts law are the careers of Paul Freund and Erwin Griswold. Both were hired to teach conflicts at Harvard Law School; both ended up in other, less demanding, areas (respectively, constitutional law and federal taxation).

48. See Posnak, supra note 42, at 701 ("[Currie] utilized the principles of legal realism to develop a functional approach to choice of law.").

case. This led to Currie's major practical contribution: the idea of the "false conflict." Currie pointed out that, if the policies animating the laws of only one jurisdiction were involved in the litigation, then that state's law should be applied; any other result would be perverse. Recognition of a false conflict permits many cases to be resolved easily—the court applies the only law whose policy is implicated by the problem. The merit of this obvious yet radical suggestion is such that almost all scholars and most courts observe it today.

More problematic to Currie (and virtually everyone else) is the proper way to resolve a "true" conflict. This problem occurs when the policies behind the laws of at least two jurisdictions would be furthered if either were to be applied to the case at hand. Currie found the true conflict a difficult nut to crack. His difficulty arose from a fundamental misunderstanding of our legal system:

> [A]ssessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. . . . It is a function which the courts cannot perform effectively, for they lack the necessary resources. . . . This is a job for a legislative committee, and determining the policy to be formulated on the basis of the information assembled is a job for a competent legislative body.

In other words, only the legislature is qualified to perform the "political function" required to adjust competing "legitimate interests of two sovereign states." As a result, only statutory, and not common, law can provide the answer.

The reader who has followed this far will recognize that Currie had been snared in Story's web. The question of judicial ability to resolve "competing legitimate interests of two sovereign states" para-

50. See Posnak, supra note 42, at 683 (noting that "the crux of Currie's approach . . . is that in choosing between competing laws, courts should take into account the policies behind those laws and the facts of the particular case").


52. See Brainerd Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 Duke L.J. 171, 173. This article was Currie's first attempt to present a general theory of choice of law. Unfortunately, Currie died in 1964 while his ideas were still evolving.

53. See id. at 173-76 (explaining the shortcomings of existing political and judicial attempts to resolve true conflict-of-laws issues).

54. Id. at 176-77.
lyzed Currie, as well it should.\textsuperscript{55} Phrased this particular way, the issue does present a high-level political question of the type that we normally expect legislatures rather than courts to solve. The issue, however, could be framed differently and thereby avoid entirely the need for a court to choose between the needs of "competing . . . sovereign states."\textsuperscript{56} One possibility is merely to eliminate the word "sovereign" from the issue. The problem of the true conflict then resolves itself to the simple question of how to accommodate competing rules of decision whose policies are implicated by litigation involving private parties. The vast majority of choice-of-law decisions, in other words, do not implicate "sovereign" interests at all. Rather, each state has established rules of decision to govern private ordering (contracts), and its own version of cost-benefit analysis (torts). That Currie chose to frame the issue as a choice to be made among the commands of competing sovereigns, rather than among competing rules of decisions, is a tribute to the powerful hold that traditional notions of territorialism and sovereignty have in conflicts law.

Currie's legacy remains immense. Thirty years after his untimely death, scholars still actively debate what he said and what he meant. Professors as able and innovative as Lea Brilmayer, Larry Kramer, Bruce Posnak, and Robert Sedler spend a great deal of time trying to figure out what Currie really said and meant.\textsuperscript{57} I know of no other scholars from Currie's era, with the remarkable exception of Hart and Sacks,\textsuperscript{58} who exercise such enormous influence today.\textsuperscript{59} The influ-

\textsuperscript{55} See id. at 174 (stating that judicial "rules so evolved have not worked and cannot be made to work"). Similarly, Currie referred not to "interests," but to "governmental interests." That phrasing makes the judge's task appear to be even more difficult.

\textsuperscript{56} There are other problems with Currie's formulation of the dilemma created by the true conflict. The idea that significant staff work by experts is vital to work out the necessary adjustments of competing laws seems somewhat odd today; our courts are quite confident (perhaps falsely) that they can handle very difficult policy issues, such as products liability. Also out of place is the notion that legislatures, not courts, are the proper bodies to make significant policy decisions. Both ideas were popular at the time Currie was writing, however. See, e.g., Julius Cohen, \textit{Hearing on a Bill: Legislative Folklore?}, 37 M\textsc{inn. L.}\textsc{Rev.} 34, 43 (1952) (advocating "a large, independent [committee] staff of competent investigators").

\textsuperscript{57} See, e.g., \textsc{Brilmayer, supra} note 49 (discussing Currie's governmental interest analysis); Larry Kramer, \textit{More Notes on Methods and Objectives in the Conflict of Laws}, 24 \textsc{Cor\textsc{nell}\textsc{Int'l L.J.}} 245, 246 (1991) ("[T]he best way to get beyond Currie is to debate him one last time in order to put his ideas in perspective."); Posnak, \textsc{supra} note 42; Robert A. Sedler, \textit{Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics,'} 34 \textsc{Mercer L.}\textsc{Rev.} 593 (1983) (defending Currie's governmental interest theory on conflict of laws and responding to the critics of that theory).

\textsuperscript{58} See infra text accompanying notes 70-76.

\textsuperscript{59} There is a vast amount of literature on Currie-inspired topics that would amaze a student of other fields. One example involves the question of whether statutes have some
ence, however, is almost solely in the academy; although judges often mention Currie, they rarely follow his lead. The obvious question that comes to mind is: Why not?

1. The Enfant Terribe.—Part of Currie’s continued appeal must lie in the fact that it was he who slew the Establishment dragon. To the one-time Young Turks of conflicts law who were weaned on Currie’s assault on Beale, the bonding must have been terrific. Many of those Young Turks are still around (and in positions of importance) to keep Currie’s memory bright. Worshipping Brainerd’s sacred writings has had profound consequences, but not always good ones. It certainly has diverted the attention of many enormously talented persons.

2. The Closed Conflicts World.—The world of conflicts scholars is quite small; most of us know each other well. We attend the same conferences and write about the same very small number of select cases, even though hundreds of conflicts cases are decided every year. That kind of incestuous environment encourages people to talk about the same things. Currie is a usual topic because he left so many fascinating and only half-answered questions. Who would not want to talk about the proper solution of the “unprovided-for case,” for example? And the longer Currie dominates the discussion, the harder it is not to talk about his work when writing in the field.

3. The Penalty.—Progress is still, however, whenever the focus of debate is on sacred writings. This has proven particularly harmful with Currie’s writings, for the choice-of-law debate over the past thirty

form of “interest,” when that interest is not expressed in the text of the law. See Larry Kramer, Rethinking Choice of Law, 90 COLUM. L. REV. 277, 292 n.41 (1990). That one or more purposes—actual or constructive—animate statutory text has long been a staple among students of statutory interpretation, and Currie’s failure to recognize that fact can only be described as incredible.

Another example involves Currie’s fixation on a congressional solution to choice-of-law problems. He argued that the Full Faith and Credit Clause empowered Congress to pass such legislation. See Currie, supra note 52, at 177. That issue is still debated, even though it has been absolutely clear since well before Currie wrote that such legislative power—clearly—was available to Congress under the Commerce Clause. See, e.g., Wickard v. Filburn, 317 U.S. 111, 128 (1942) (upholding congressional authority to regulate crop-growing on very small farms).

60. A current hot topic, for example, is Larry Kramer’s variation on Currie’s discussion of Justice Traynor’s opinion in Grant v. McAuliffe, 264 P.2d 944 (Cal. 1953) (in bank). See Kramer, supra note 57, at 269-71.

61. One of the leading conflicts casebooks for many years has been co-authored by Currie’s equally brilliant son David; a more recent co-author, Herma Hill Kay, co-authored several articles with Brainerd Currie. The choice-of-law section of their casebook is virtu-
years has largely been conducted on his terms (and using his terms). This has been helpful in the case of false conflicts, but has been disastrous with true conflicts. Even today, academic writing largely has not advanced conceptually beyond Currie's belief that courts simply should not (or cannot, or both) resolve true conflicts. Scholars, in other words, have accepted Currie's resolution of false conflicts. Unfortunately, their acceptance of his general view on the difficulty of solving true conflicts ultimately has led them down a false trail—the search for a relatively fixed and nondiscretionary method of resolving true conflicts, a method in which no choice must be made between the claim of competing sovereigns. Beale's work may have been discarded, but not his siren song of certainty.

D. The Second Restatement

Work on the Second Restatement began in the mid-1950s, and it was largely completed by 1967. The work was not heavily influenced by Currie's writings, in part because their impact on the conflicts world really was felt only after the drafting of the Second Restatement was fairly far along. The drafting, however, was strongly influenced by legal process jurisprudence. To understand this, it is necessary to learn how the Second Restatement works.

The Second Restatement combines a curious blend of presumptive rules, reminiscent of those found in the First Restatement, and open-ended policy analysis. It works this way: Each issue in a case must be labeled—it must be called a "contracts" problem or a "torts" problem, for example. Assume the issue is styled a torts problem. Slightly more than three dozen sections of the Second Restatement deal with specific tort situations; most identify a state whose law should be applied on a particular issue, such as defamation. The law referred to by

ally a shrine to the work of the elder Currie. See Roger C. Cramton et al., Conflict of Laws: Cases, Comments, Questions (4th ed. 1987).

62. See Currie, supra note 52, at 176-77.


64. The First Restatement of Professor Beale did not choose law based upon individual problems; rather, it selected one law that would apply to the substantive aspects of the whole case. This is sometimes called a jurisdiction-selecting system; the Second Restatement uses a law-selecting system.


66. Section 150 of the Second Restatement states:

§ 150. Multistate Defamation

(1) The rights and liabilities that arise from defamatory matter in any one edition of a book or newspaper, or any one broadcast over radio or television, exhibition of a motion picture, or similar aggregate communication are determined by
one of those sections, however, is only a presumptive choice; by viewing the presumptively selected laws in light of the general principles enunciated in section 6, and the common tort contacts set forth in section 145, the lawyer or judge will determine whether the presumption has been rebutted.

At first blush, the Second Restatement looks like a curious cross between the vested rights theory and the legal process school. The re-

the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) When a natural person claims that he has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the person was domiciled at the time, if the matter complained of was published in that state.

(3) When a corporation, or other legal person, claims that it has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the corporation, or other legal person, had its principal place of business at the time, if the matter complained of was published in that state.

Id. § 150.

67. Section 6 reads as follows:


(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Id. § 6.

68. Section 145 provides:

§ 145. The General Principle [in Tort Cases]

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. § 145.
semblance to the former, of course, lies in the presumptive law choices;\(^69\) the rights may no longer be vested, but they do have to be displaced. The resemblance to legal process may be harder to see. Legal process jurisprudence is named, of course, for the famous mimeographed casebook released in 1958 by Professors Henry Hart and Albert Sacks.\(^70\) That magnificent work exalts the common law judge. Its heroes are Lemuel Shaw and Benjamin Cardozo, and its exemplar cases are *Riggs v. Palmer*\(^71\) and *The T.J. Hooper*,\(^72\) all ground overt policy analysis in individual cases with real facts, and all are ever alert to the social contract in the form of reasonable expectations.

The touchstone of the judicial craft to Hart and Sacks is what they styled "reasoned elaboration."\(^73\) This requirement imposed a hard-craft discipline on judicial decisionmaking. A legal process judge must *explain* her decision; she must *elaborate* it by showing reasons why society will be better off than it would be if the decision had gone otherwise.\(^74\) That explanation must be tied closely to the facts, and it must reflect shared values. Those values, in turn, can be derived from many sources: precedents, statutes, or deeply held societal beliefs. Hart and Sacks even had a use for presumptions (although they did not use that term); an example is their principle of "clear statement," which states that a federal statute should not be read to encroach on areas generally subject only to state regulation unless it is clear that Congress wanted that result.\(^75\)

Hart and Sacks loathed the first restatements. The didactic, rule-bound, interlocking "scientific system" that characterized so many of the first round of restatements was completely repugnant to them.\(^76\) They believed deeply that law without conscious selection and expla-

---

69. Professor Singer calls these provisions "faulty" and essentially "restatements of the rules in the First Restatement." Singer, *supra* note 2, at 736.


71. 22 N.E. 188 (N.Y. 1889).

72. 60 F.2d 737 (2d Cir. 1932).


74. *See id.* at 147.

75. *Id.* at 1209 (describing the policy of "clear statement" as a requirement on a legislature to say plainly the effect of its statute).

76. Their specific criticism of the first restatements can be found in Hart & Sacks, *supra* note 70, at 735-49. Their explicit criticism of all jurisprudence based on formalism, including the first restatements, permeates their casebook.
nation of policy should not be tolerated. Decisions must examine how the policy that has been selected bears on the particular facts of the case. Let the judge roam free to do justice, they wrote in essence; demand only that the judge explain and that the judge reason.

The linkage between legal process and the *Second Restatement* now should be much clearer. The philosophy animating sections 6 and 145 was to provide guidance for judges by reminding them of things to consider in making a choice-of-law decision. The judge then would weigh the factors in light of the facts and explain why she reached the particular result. The listed factors certainly do not control the decision; rather, they merely suggest items upon which the judges should reflect. In other words, the *Second Restatement* provides judges with a starting point: a set of presumptions and a list of concerns worth addressing. It is then up to the judge to make it all work. The judge has to choose which law to apply, not which theory. Indeed, theory has relatively little to do with decisionmaking under the *Second Restatement*.

The scholars have savaged the *Second Restatement*. It is extremely difficult to find a scholar who has anything good to say of it. Arthur von Mehren’s comment on the work is typical, although milder than many: The *Second Restatement*, he wrote, “does not significantly refine and discipline theory and analysis.” Scholars criticize the *Second Restatement* for its lack of a system and as the consequential invitation to open-ended or indeterminate decisionmaking. Some of those criticisms make good sense. Many of the presumptive selections, for example, are out-dated, and it can be difficult to work among the various techniques of decisionmaking. More important, the work does not explicitly encourage resort to policy analysis or to consideration of what is the better rule of law. Although the framework of

---


81. See Brilmayer, *supra* note 49, § 2.2.3 (criticizing the “three levels of Restatement norms” and the confusion generated in applying the appropriate “level” to the contested issue).

82. See Singer, *supra* note 2, at 736 (criticizing the *Second Restatement*’s “faulty” policy analysis and avoidance of explicit considerations of the better law).
sections 6 and 145 certainly provides room for a willing court to consider the competing policy values, neither section really encourages it to do so. Finally, the manner in which the Second Restatement actually works is somewhat puzzling, especially to hard-pressed judges.83 Larry Kramer, after reading all of the reported choice-of-law decisions handed down in a recent year, wrote: "[I]t hardly comes as news that the Second Restatement is flawed. But one needs to read a lot of opinions in a single sitting fully to appreciate just how badly the Second Restatement works in practice."84

Judges, on the other hand, adore the Second Restatement. It clearly is the dominant choice-of-law methodology in use today in the courtroom.85 Judges love the work for the very reasons that scholars hate it: The Second Restatement permits them to rely on its eminent authority,86 yet it is flexible, guides decisions rather than controls them, and permits judges to avoid unjust results.87 At the same time, it avoids arbitrariness by requiring explanation.

A fundamental disagreement exists, therefore, over the wisdom of the most widely used test for resolving choice-of-law issues. This disparity between court and academy over the Second Restatement does not seem to bother the professors. Clearly, we are right and the courts are wrong; indeed, rare is the scholarly inquiry into why judges willingly follow such a false scent. Judges, however, also do not seem bothered by the "town versus gown" split; equally rare is judicial recognition of the criticism of the Second Restatement. I shall return to this split in Part II, after bringing choice-of-law developments up-to-date.

E. Modern Commentators

The academic trade in Currie's revolution has been quite brisk. The hottest currency by far has been the true conflict. No proposal over how to resolve true conflicts has as yet dominated that field,

83. It is also puzzling to law students.
84. Kramer, supra note 4, at 486-87. One always wonders at the validity of a critique based only on a sample of reported opinions. The success of a system depends in part on how it handles the easy, as well as the difficult, cases. By their very nature, however, the former will not be published, and, therefore, not evaluated by scholars.
A cynic might also wonder if academic hostility to the ubiquity of the Second Restatement is based on pique at the judges having rejected the professors' pet theories.
85. See Borchers, supra note 3, at 373 (noting that twenty-four states purport to follow the Second Restatement).
86. Eminent to other judges and practitioners, at least.
87. See Harold G. Maier, Finding the Trees in Spite of the Metaphorist: The Problem of State Interests in Choice of Law, 56 A.B. L. Rev. 753, 771 (1993) ("[The Second Restatement's] refusal to espouse a universal set of pre-weighed interests may be the reason that [it] appears to have claimed the majority of state adherents . . . .")
although the theories advanced certainly have been creative. Yet the only two that have had any success in the courtroom are variations of either Currie or the Second Restatement. That lack of success certainly has not deterred entry into the field, however.

1. The Quest for Rules.—Professor Willis Reese, the Reporter for the Second Restatement, wrote that the greatest question facing choice of law was whether decisions should be made by "rules" instead of by an "approach." This view, of course, represents a hankering still shared by many for the apparent certainty and ease of decisionmaking of the rules associated with the vested rights theory. There is no shortage of proposed new rules—rules that, of course, would not suffer from the flaws of the First Restatement. The first real example of this revisionism came from the pen of Chief Judge Fuld of the Court of Appeals of New York, a distinguished jurist who also sat as a member of the Advisory Council to the drafting of the Second Restatement. In 1972, in Neumeier v. Keuhner, Fuld persuaded his court to agree to a set of new rules drawn from that court’s experience with guest statute choice-of-law cases. Unfortunately, for all those who advocated the adoption of new choice-of-law rules, however, Fuld’s rules in Neumeier

88. This variation on Currie is called “comparative impairment.” See William F. Baxter, Choice of Law and the Federal System, 16 STAN. L. REV. 1 (1963). Baxter proposed a method for resolving true conflicts which, to anyone but a conflicts scholar, looks like Currie’s call for a “restrained and enlightened” forum. Baxter’s approach has been adopted in California, and needless to say, “comparative impairment” has spawned its own vast literature.

89. See Robert A. Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U. L. REV. 267 (1966). Leflar lists five “considerations” for courts to reflect upon in choice-of-law cases. The first four “considerations” resemble section 6 of the Second Restatement. The last consideration, however, has sparked enormous controversy, for Leflar suggested that courts should also consider which state has the “better law.” Id. at 275. Leflar’s affinity for the unstructured, legal process Second Restatement approach is natural enough, for he is a legal process scholar himself, as well as a long-time teacher at judicial colleges. Leflar’s approach has been adopted in a handful of states. See Borchers, supra note 3, at 373 (noting that five states purport to follow Leflar’s choice-influencing considerations approach).

90. Willis L.M. Reese, Choice of Law: Rules or Approach, 57 CORNELL L. REV. 315, 315 (1972) [hereinafter Reese, Rules or Approach]. Professor Reese later made clear his preference for rules in areas in which the common law had experimented enough to be sure of the correctness of the rule (e.g., situs law should control transfers of interests in real property), and that a more flexible “approach” should be used in areas in which a consensus had not emerged. See Willis L.M. Reese, A Suggested Approach to Choice-of-Law, 14 VT. L. REV. 1, 3-4 (1989) [hereinafter Reese, A Suggested Approach] (stating a preference for choice-of-law rules and their retention “until it is evident that harm that they create outweighs the benefits that they promote”).


92. Fuld advocated the new rules because the otherwise applicable rules would fail to “advance the relevant substantive law purposes” of New York. Id. at 458.
were an immediate disaster, greeted with derision by judges\textsuperscript{93} and scholars alike\textsuperscript{94}—even by those who favor rules. This rejection occurred even though the Neumeier rules were expressly limited to the specific and familiar area of guest statutes.\textsuperscript{95} This criticism, however, has not diminished academic interest in writing a set of "good" rules.\textsuperscript{96} As Professor Gary Simson observes, "if these are the kind of rules that courts formulate when they are well-versed in a particular area, there is much reason for trepidation when they formulate rules in areas in which their background is relative meager."\textsuperscript{97}

2. **Territorialism.**—One surprising development has been strong advocacy based on geographic determinants.

\textit{a. Some Academic Exponents.}—Attempts at counter-revolution on behalf of the territorial theories embodied in the \textit{First Restatement} began not long after Currie started writing. A leading exponent of the territorial theories was Professor David Cavers, who presented a sophisticated combination of policy, party expectations, and territorialism.\textsuperscript{98} These new theories were based on the notion that individuals have expectations based upon the territory in which certain actions take place.\textsuperscript{99} These "Principles of Preference," as Cavers styled them, resemble fairly closely the statements in sections 6 and 145 of the \textit{Sec-

---

\textsuperscript{93} See Richman & Reynolds, \textit{supra} note 23, at 205 (noting "'free-wheeling [judicial] use' of the 'fundamental policy' loophole in order to reject choice-of-law clauses"); see also Labree v. Major, 306 A.2d 808 (R.I. 1973). \textit{Labree}, a case factually similar to \textit{Neumeier}, was decided only one year after \textit{Neumeier}. \textit{Id.} at 808; see also Chila v. Owens, 348 F. Supp. 1207, 1209-10, 1211 n.18 (S.D.N.Y. 1972) (distinguishing \textit{Neumeier}, although bound by its rules, to avoid achieving an absurd result).


\textsuperscript{95} Judge Fuld never explained why there should be rules for cases involving guest statutes that might be different from rules that might be applied to cases involving other kinds of torts; as every common lawyer knows, one cannot create rules for one specific area of the law without explaining by reference to external standards why they are limited to that area.

\textsuperscript{96} Cooney v. Osgood Mach., Inc., 612 N.E.2d 277, 281-84 (N.Y. 1993) (reaffirming the validity of the \textit{Neumeier} rules). For additional discussion of the \textit{Neumeier} rules, see \textit{infra} text accompanying note 128.

\textsuperscript{97} Simson, \textit{supra} note 94, at 927. According to Simson, the \textit{Neumeier} rules do not even achieve "consistency in decisionmaking." \textit{Id.} at 916.


\textsuperscript{99} See \textit{id.} at 134-36.
on Restatement concerning policy objectives to be sought in choice-of-law cases. To be sure, Cavers emphasized party expectations a good bit more than did the drafters of the Second Restatement, but there is still a strong family resemblance. As a result, Cavers’s work does not go very far towards alleviating the problems perceived with the Second Restatement.

Others have tried to create territorial solutions to choice-of-law questions. Some have tried to confine judges by combining territorialism and rules. Professor Harold Korn, for example, has introduced an elaborate system of rules based on the domicile of the parties. As Professor Bruce Posnak has convincingly demonstrated, however, Korn’s quest for certainty and predictability with his rules is as chimeric as Beale’s. Korn’s scheme, for example, requires the court to characterize the problem as a tort or contract, a herculean task as all critics of the First Restatement understand. Moreover, because Korn’s system—like Beale’s—deliberately and completely ignores policy and the facts of individual cases, it can—and would, if adopted—lead to absurd results.

b. The American Law Institute Rules.—Korn’s method, however, has won an important adherent. The recently completed Complex Litigation Project of the American Law Institute (ALI) also employs a domicile-driven rule selection process. Those rules, an integral part of the ALI’s recommendations concerning complex litigation, flatly reject the balancing approach of the Second Restatement—promulgated by the same Institute only two decades earlier.

The ALI proposals have the advantage of kicking in only when there is a true conflict. In other words, the proposed choice-of-law rules are only used to resolve a situation in which policies of more than one state would be furthered if its law were to be applied. Nevertheless, the failure to consider the facts and policies of the particular case in the decisionmaking process means that the ALI rules necessar-

100. Compare id. at 114-38, with Restatement (Second) of Conflict of Laws §§ 6, 145 (1971).
103. See Posnak, supra note 42, at 696-711.
104. See id. at 701 (describing Korn’s treatment of conflicts relating only to torts).
105. See American Law Institute, Complex Litigation: Statutory Recommendations and Analysis § 6.01 (1994).
106. See id. at 398. The reporters of the project obviously felt compelled to address choice of law; the need to do so, however, is questionable. See Sedler, supra note 57, at 597-98.
ily will be applied at some time in an arbitrary manner; they will be applied in a manner that will serve no policy goal other than internal consistency. That does not mean, of course, that the results always will be wrong—after all, the proposals reflect what is likely to be the “correct” decision in the most likely cases. Nevertheless, in any particular case, the result will be correct only fortuitously. 107

3. Substantive Rules.—Another possible solution is deliberately to select a law that leads to a specified result. Many have tried this route. 108 Professor Weintraub, for example, has urged that the law favoring the plaintiff generally be applied. 109 Professor Kramer has suggested that all contracts be held valid. 110 Professor Weinberg has argued that forum law should always be applied in the case of a true conflict. 111 The problems with those suggestions should be readily apparent. Weintraub’s policy is based on a trend in substantive law that he believed favored plaintiffs; now that the tide in torts apparently has turned in favor of defendants, should his proposed solution also flip-flop? Kramer’s rule of validation, although generally useful enough, ignores the many valid (and strongly held) policy reasons for why a court will refuse to enforce some contracts (such as those containing overly restrictive clauses restraining competition). 112 Weinberg’s lex fori rule would encourage forum shopping and increase the number of perverse results that happen any time decisionmaking is separated from policy. 113

107. For powerful academic criticism of the ALI rules, see Weinberg, supra note 94.

108. These proposals are related to the “True Rules” identified by Professor Ehrenzweig. See Albert A. Ehrenzweig, Conflicts in a Nutshell 322-23 (2d ed. 1970). A True Rule identifies a result that judges will generally strive to reach, no matter what the underlying (and alleged) choice-of-law methodology. See id. at 323. Thus, judges will try to validate contracts, legitimate children, and uphold marriages.


110. See Kramer, supra note 59, at 331-34.


112. See George F. Carpinello, Testing the Limits of Choice of Law Clauses: Franchise Contracts As a Case Study, 74 Marq. L. Rev. 57, 80-83 (1990). Carpinello concludes: “Because contract law itself contains an inherent conflict between the rights of the parties to choose the terms and conditions of their relationship, and the need of the state to override those wishes under certain circumstances, choice of law principles must also explicitly recognize and accommodate that inherent conflict.” Id. at 88.

113. I have chosen to illustrate modern choice-of-law commentary by referring to scholars who attempt to limit the exercise of judicial discretion in choice-of-law cases. There are writers who seek balancing solutions, but they appear to be in the minority. As the ALI Rules show, the ball is definitely in the court of those who favor rules over reasoning.
II. Why the Town Versus Gown Split?

The choice-of-law triad of a conflicts course is usually organized along the lines of the first part of this Article: It begins with the *First Restatement*, then explores Currie, continues with the *Second Restatement*, and concludes with solutions proposed by contemporary writers. Students immediately see the inadequacies of the Bealean system, and they eagerly await the solution to the dilemma of reconciling policy with predictability. Of course, they wait in vain. This eagerness for a solution is quickly replaced by a hankering for a return to the rules of the vested rights theory. Students understand that, although those rules can be manipulated, at least they are rules; they produce, therefore, apparent answers, unlike the endless classroom debates over the modern theories; moreover, the students easily understand the process of manipulation required by the *Second Restatement* pigeonholes.

Some judges agree. Several courts in recent years have examined modern developments and decided to stay with Professor Beale and his system because they did not like the incoherence and result orientation they saw in modern choice of law. Others profess adherence to Beale, but engage in systematic and unembarrassed use of the characterization and public policy escape routes.

Most courts, however, have gone over to the *Second Restatement*. Those courts also may not like indeterminacy very much, but the methods available for achieving justice are much more comfortable under the *Second Restatement* and its demand only for reasoned elaboration, rather than the manipulation (and the deceit) required by its predecessor. Moreover, the open-ended nature of the *Second Restatement*...
STATEMENT permits courts to use all of conflicts scholarship to try and understand what result to reach. Of course, academics routinely chastise judges who combine more than one decisionmaking technique (for example, Second Restatement and interest analysis), as though the judges were students who had messed up on the final exam. Of course, academics routinely chastise judges who combine more than one decisionmaking technique (for example, Second Restatement and interest analysis), as though the judges were students who had messed up on the final exam. The academic quest seems to be doctrinal purity—that of the judges' sensible decisionmaking.

Why have courts rejected the work of highly respected scholars, to the point of embracing a work condemned by the scholarly community? There are several answers. A couple go to the nature of conflicts scholarship; but there also are more important reasons derived from the nature of the judicial process itself.

A. Academic Reasons

1. Turgid Writing.—Most articles on choice of law are very long and difficult to read. Most scholars not only want to reinvent the wheel, but to show why everyone else is wrong; consequently, they feel the need to discuss all choice-of-law theories. There seems to be an insatiable scholarly urge to use new vocabulary (or to redefine old). Teutonic phrases like "loss-distributing regulation" dot many a page. The articles usually, but not always, suffer heavily from scholarly honesty, the ability to see all sides of an argument—and to state them at length. Their conclusions and recommendations cannot easily be summarized. Their application to a particular case is doubtful. The Second Restatement, in contrast, is well written and short; it is user friendly. No wonder judges prefer it.

Moreover, much of the academic writing is irrelevant. A vast amount of current literature, for example, still focuses on old cases involving guest statutes, a problem that has virtually disappeared from the American legal marketplace. A comparatively small amount of writing discusses topics such as statutory caps on recovery for malprac-

119. See id. at 368 (characterizing those states that combine approaches as "problematic").

120. Conflicts, of course, is not the only field in which academic writing is more focused on what other academics are doing rather than what is happening in the real world. See, e.g., Jerry L. Mashaw, "Textualism, Constitutionalism, and the Interpretation of Federal Statutes," 32 Wm. & Mary L. Rev. 827, 828 (1991) (observing that literature on statutory interpretation is "prompted largely by the actions or analyses of other commentators").


122. For a brilliant demonstration, see Singer, supra note 2 (eighty-eight detailed pages).
tice damages—an issue that judges might find relevant. Very little of the literature is devoted to classical dissection and recasting by scholars of what judges do in fact.\textsuperscript{128}

2. Academic Squabbles.—There is also the problem of which theory to choose. There are so many theories,\textsuperscript{124} and they are so often at odds with one another. Scholars bitterly disagree over the results in individual cases, and they are often unwilling even to admit that there are cases about which reasonable persons could differ. How can a court disentangle this information overload? Perhaps the best course for a wise (and busy) judge to follow is to ignore these distractions. The Second Restatement, in contrast, takes the judge to familiar territory. Its use of discrete policy and fact analysis encourages judges to do that which they have been trained to do.

3. Fear of Failure.—Post-Bealean conflicts scholars are particularly sensitive to the charge of incoherence. Even before the Critical Legal Studies movement made most of us extremely sensitive to that label, it had particular relevance for those writing about choice of law. The attack on Beale and his First Restatement was based not so much on theory (the silliness of applying law without inquiring into underlying policy) as it was on the incoherence of the results: Bealean judges were playing fast and loose with the rules laid down, and we scholars were able to prove it. This discovery led to an avalanche of critical writing attacking the purity of choice-of-law decisions.\textsuperscript{125} Effective criticism on the basis of incoherence in results is relatively easy to pull off, as even the Crits were able to demonstrate. Elaborating one’s own theory is far more difficult, in large part because the interesting choice-of-law cases are really difficult. In other words, the results in those cases are often indeterminate in the sense that they present no easy answers, as the lack of consensus among the scholars discussing those cases readily reveals. Anyone setting forth a theory of choice-of-law decisionmaking, therefore, must worry about being subjected to serious criticism. No wonder, then, that much of the focus of writing on choice of law has been on attacking the work of others. Many of


\textsuperscript{124} Today’s dean of conflicts scholars, Professor Weintraub, writes: “[T]he commentators . . . deforest the land with their mountains of conflicts articles . . . .” Id.

these critics are brilliant and their criticisms telling; yet a surprising number of authors are unwilling to put their necks on the chopping block with positive theories of their own. Far better to take pot shots at a target that cannot respond easily than to stick out one’s own neck.¹²⁶ Many scholars, as a result, are destructive only—they have nothing positive to add to the debate. This has led to resentment recently, and it has also led to scholarly irrelevance. Judges are not interested in what is wrong, but rather in what works.

4. Trendy Post-Modernism.—This search for a set of rules that would lead to decisionmaking without discretion mirrors the recent resurgence of academic interest in formalism.¹²⁷ In this, at least, conflicts scholars were clearly ahead of the curve, for our interest in identifying and following rules in the post-realist period can be traced back to 1972 and Judge Fuld’s decision in Neumeier v. Keuhner.¹²⁸ Because judges distrust rules, however, this trend does not help the judicial reception of choice-of-law scholarship.

Indeed, the search for choice-of-law theory itself has proved destructive. To quote Professor Reese again: “One of the amazing things about choice of law, both in the past and in the present, is the tendency to resort in all situations to one all-embracing theory.”¹²⁹ One is reminded of the search for a philosopher’s stone in medieval alchemy, or the unified field theory in modern physics. The problem, of course, is that law is not science. As Holmes, the legal equivalent of Einstein, wrote: “The life of the law has not been logic, it has been experience.”¹³⁰

B. Judicial Process Reasons

The most important explanations for judicial reliance on the Second Restatement involve the nature of the judicial process. Caseload

¹²⁶ See Posnak, supra note 42, at 689 n.52 (“This writer has already lost one head from a self-inflicted wound . . . .”).
¹²⁷ See, e.g., PATRICK S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW (1987). In their preface, Atiyah and Summers state:

[This book’s] principal focus is on what we believe to be major differences . . . between . . . ‘formal’ and ‘substantive’ [legal reasoning] . . . . In the process of identifying and explaining these differences, we have found it necessary to construct a fairly elaborate theoretical apparatus about ‘formality’ as an attribute or property of legal systems, and we hope that this itself constitutes an original contribution to legal theory.

Id. at v.
¹²⁸ 286 N.E.2d 454 (N.Y. 1972); see supra notes 92-97 and accompanying text.
¹²⁹ Reese, A Suggested Approach, supra note 90, at 9.
¹³⁰ OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).
pressure makes it more difficult for judges to develop or work with theory. Even more telling is the extreme reluctance of judges to follow rules that do not lead to justice.

1. Caseload Pressures.—Choice of law, at its best, presents judges with difficult decisions. Many courts see only one or two serious choice-of-law cases every year. It is hard for the judges, therefore, to develop expertise in the field. Because an aura of mystery and magic surrounds choice of law, the judges feel uncomfortable doing what otherwise would come naturally—engaging in simple policy analysis based on the facts of the case. Thus, they turn to the academic experts, but the welter and density of available advice only bewilders them further. Their law clerks are of no help, either; the clerks, after all, also have been mystified by the academic doctrine. In those circumstances, the clear language of the Second Restatement, with its basic invitation to openness in decisionmaking, naturally pleases those who actually must make the decisions. Unfortunately, the literature (and probably the judges' clerks as well) have convinced the judges that it cannot be that easy. Hence, all of the bland and unhelpful references in the opinions to Currie and other scholars that draw such derision from academic commentators. Professor Weintraub wrote recently and wisely: “Alas, there is no magic powder, no rule, no theory, that will guarantee that every judicial opinion will be a model of clear analysis. Judges are not dumb, just busy, and it is not fair to criticize their opinions without being mindful of that reality.”

2. Rules and Common Law Judges.—The common law abhors rules. This observation is universally true. In contract law, for example, the basic notion of consideration could not possibly be thought of as a “rule”; it is more properly conceived of as a myth or perhaps as a goal. Other contract principles that might be styled “rules” are also balanced by the estoppel principle, or by the use of well-known, contract-style, escape devices.

131. To put it more succinctly: scholars ponder hypos; judges decide cases.
132. Weintraub, supra note 123, at 704.
133. Consider the use of the doctrines of “promissory estoppel,” “third party beneficiary,” or “modification” to leaven the harshness of consideration; at the other end of the spectrum, the gift-promise distinction can be used to manipulate the question of whether any contract ever has been formed.
134. Thus, the Restatement (Second) of Contracts permits estoppel to override the statute of frauds when there has been reasonable reliance by the promisee. See Restatement (Second) of Contracts § 139 (1979).
135. Although the hornbook rule is that one must literally comply with contract conditions, the law has provided a number of escape routes for judge and litigants. These in-
Negligence, the basic doctrine in torts, can hardly be called a rule; indeed, the great leavener of the negligence doctrine is the jury system, the most antirule factor in all of our law. Thus, the question in most tort cases is not whether there was negligence, but rather whether a reasonable juror could have found that the defendant had acted reasonably under the circumstances.

Similar examples can be found throughout all of the common law. Statutory law also is subject to the same relaxation of apparently rigorous rules. Basic notions of fairness are commonly tacked onto the plain language of statutes. Maxims abound for use by the creative judge; perhaps the most common asserts that statutes should be read in the light of common law principles. Thus, courts routinely ignore the clear linguistic command of statutes of descent and distribution in order to prevent a murderer from profiting by his own wrong.

The truth of the matter is that judges bitterly resist being bound by "rules" that prevent them from reaching sensible results. Hart and Sacks and the legal process school really did get it right: The common law is built upon notions of judicial elaboration of well-known principles in light of specific facts. Legal formalism is dead and buried, and that battle need not be fought again—except, it seems, in choice of law.

The common law's refusal to use a rule-based theoretical system of judging stems from two sources. First, any theoretical system, such as the vested rights theory, instructs judges to ignore both policies and the facts of the individual cases. That demand is so antithetical to all modern legal training that it is almost impossible to conceive of a rule system successfully being imposed upon today's judiciary. More-
over, a rule-based system makes it much more difficult for judges to achieve the sensible result in individual cases. By “the sensible result,” I do not necessarily mean what is often referred to as a “result-oriented” decision; I mean simply that judges try hard to reach decisions that make sense given the relevant facts and policies. The result has to sound right in the heart as well as in the brain. The American legal system, in other words, believes in much more than predictability; it also believes in reaching the right decision. Thus, predictability, as a raw tool, will generally lose out to sensibleness.

That victory may be costly, however. Judges may like to do justice, but they also like to pay obeisance to the “rules laid down.” Thus, there will be ritual references to the stated law, but the real decisions will be made out of sight. The effect, of course, can be quite harmful. Justice, unlike politics and sausage-making, should never be done in the dark. Making the decisionmaking public (in the form of a reasoned opinion) helps ensure even treatment of litigants and provides proper guidance to those judges and lawyers who must use the decisions in the future.

This simple truth about the extreme reluctance of our legal system to follow rules has enormous implications for solving our choice-of-law dilemma. If what I have written is accurate, any attempt to impose a rule-based solution is doomed to failure. Worse, the need to manipulate doctrine covertly to achieve justice will lead to uneven decisionmaking and obscure the development of the law. This, of course, was exactly the experience with the rules of the First Restatement and escape devices.

III. CUTTING THE GORDIAN KNOT

By now my proposed solution to choice-of-law issues should be obvious. Before revealing nirvana in detail, however, I shall discuss several other possible solutions to the choice-of-law problem. First, those that will not work.

A. Utopian Proposals

1. Abolish the States.—The dilemma would resolve itself, at least for interstate matters, if there were no states. This solution has the elegance of Occam’s razor, but it also has the political feasibility of eliminating television in order to improve the reading scores of children. And given the last couple decades’ experience with government from Washington, we may not even want this to happen.
2. Federal Choice of Law.—There can be no doubt that Congress possesses legislative authority \(^{140}\) to create federal statutory choice-of-law solutions. \(^{141}\) The federal government, however, does not seem likely to bestir itself in this area. \(^{142}\) Moreover, statutory solutions almost always take the form of territorially based rules. \(^{143}\) That is understandable; legislators like to think (if that is the right word) in terms of specific problems. Any territorial choice-of-law solution, of course, necessarily raises questions of exalting predictability, assuming that ever can be achieved, over policy development and proper factual resolution. \(^{144}\) The ALI Complex Litigation Project provides an apt example. \(^{145}\) Although territorial resolutions no doubt work in some circumstances in which a definite solution enhances efficiency and can be achieved without policy cost, examples are quite limited. \(^{146}\) For those of us who prefer flexible, fact-based law, however, territorial, and, therefore, statutory, solutions should be avoided.

3. Limiting the Sweep of Judicial and Legislative Jurisdiction.—The problems of choice of law would diminish considerably if the Supreme Court were to cut back significantly on the scope of personal and legislative jurisdiction. If this were done, the number of choices that would need to be made necessarily would diminish. The world would become a simpler, if not necessarily better, place. Many commenta-

---

140. The constitutionality of judicially created solutions is discussed ably and at length in Douglas Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundation of Choice of Law, 92 COLUM. L. REV. 249 (1992). Because the Supreme Court has required federal courts sitting in diversity to apply the choice-of-law rules of the forum, see Klaxon Co. v. Stentnor Elec. Mfg. Co., 313 U.S. 487, 496 (1941), it is difficult to imagine the Court's authorizing judicially created choice-of-law solutions.

141. The Commerce Clause of the Constitution provides ample authority for congressional action, although Brainerd Currie and others have spent an inordinate amount of time arguing about whether the Full Faith and Credit Clause also provides Congress with the authority. See, e.g., Laycock, supra note 140, at 289 (discussing the Full Faith and Credit Clause and choice-of-laws decisions). In any event, Congress certainly could adopt solutions to interstate (or international) choice-of-law problems if it wished.

142. There has been periodic movement in a few areas, especially products liability, but adoption seems unlikely. See, e.g., Edward Brunet, The Triumph of Efficiency and Discretion over Competing Complex Litigation Policies, 10 REV. LITIG. 273, 291 (1991) (discussing proposed reforms involving "mass tort" situations). There are other side effects, of course, to a federal choice-of-law solution. See id. at 293. Plaintiffs' autonomy would be reduced, for example. Id. The desirability vel non of these effects is beyond the scope of this Article.

143. The Uniform Commercial Code (U.C.C.) is a prime example.

144. See supra notes 29-30 and accompanying text (discussing predictability and policy development in a rules-based system).

145. See Brunet, supra note 142, at 292.

146. Workable territorial solutions are exemplified by document location statutes such as U.C.C. § 9-313 (1994). In those instances, both the difficulty of judicial manipulation and the economic value of certainty justify a hard-and-fast rule.
tors favor this solution.\textsuperscript{147} This hope does not seem likely to be realized, however; indeed, the most recent decisions by the Court have done nothing to diminish the scope of either judicial or legislative jurisdiction.\textsuperscript{148} It is unlikely, therefore, that the Supreme Court will provide the necessary restraint.

4. \textit{Forum Non Conveniens}.—Almost all states, as well as the federal courts, have adopted broad standards of dismissal for reasons of forum non conveniens.\textsuperscript{149} Eminent authorities have suggested that the popularity of forum non conveniens is due in part to the very broad authorization of long-arm jurisdiction and legislative jurisdiction by the Supreme Court in the past fifty years.\textsuperscript{150} Forum non conveniens, in other words, could be an effective antidote to broad choice-of-law possibilities. Unfortunately, even if that were true, the use of forum non conveniens is merely a back-door way of handling the problem. If our choice-of-law system leads to bad decisions, those problems should be addressed directly rather than through the use of subsidiary doctrines such as forum non conveniens. Courts should address the real problem rather than its side effects.

5. \textit{Legislative Uniformity}.—Congress could preempt entire substantive fields, such as products liability, leaving no choice to be made between conflicting laws.\textsuperscript{151} Similarly, the states could adopt uniform laws dealing with particular problems.

Once again, experience teaches that neither solution is likely to work pervasively. A recent federal attempt to adopt substantive products liability laws has proven fruitless, due largely to the lobbying efforts of the American Trial Lawyers Association.\textsuperscript{152} The impact of

\textsuperscript{147} See generally Allan R. Stein, \textit{Erie and Court Access}, 100 \textit{Yale L.J.} 1935, 1991 (1991) (arguing that the Supreme Court would have an easier time in choice-of-law cases if it were not as concerned with questions of litigant equality and substantive-procedure distinctions when establishing the scope of federal jurisdiction).

\textsuperscript{148} See, \textit{e.g.}, Burnham v. Superior Court, 495 U.S. 604, 622 (1990) (upholding personal jurisdiction achieved through in-state service on a nondomiciliary).

\textsuperscript{149} See, \textit{e.g.}, Fox v. Board of Supervisors, 576 So. 2d 978, 990 (La. 1991) (arguing that article 123 of the Code of Civil Procedure of Louisiana provides authority to dismiss a suit under the doctrine of forum non conveniens).


\textsuperscript{151} On the recent tendency of federal statutory law to preempt state tort law, see S. Candice Hoke, \textit{Preemption Pathologies and Civic Republican Values}, 71 \textit{B.U. L. Rev.} 685, 687 (1991) (noting that "there is hardly a political question that is not sooner or later turned into a federal preemption question for the judiciary").

\textsuperscript{152} See \textit{For the Record}, \textit{Wash. Post}, May 16, 1996, at M5.
uniform laws in choice of law has been dubious; when courts do not like the rules laid down, they will cheat the mandate of a uniform law in order to reach a just result153 as readily as they will cheat judge-made rules.


So what will work? A good first step is to learn from the lessons of mistakes past. From Story we learned that a focus on comity—applying the law of another state as an act of grace—will not work.154 From Beale and the First Restatement we learned that judges will not obey rigid rules and the futility of a search for a unified theory of choice of law.155 From Currie we learned not to focus on “governmental” interests and hand-wringing over difficult problems.156 From the Second Restatement we learned that judges should be encouraged to focus on policies, and that all solutions, even “presumptions,” need to be updated and treated lightly.157 Finally, academic squabbling has taught us that the fine print is not as important as the outline.

Imagine a bright attorney schooled in the common law whose mind is a tabula rosa when it comes to choice of law. Imagine further that she has been presented with what we would identify as a potential choice-of-law problem. How would our counselor approach it? I am confident that she would find the task easy and would apply what might be called the “legal process rule.” A dispute with multistate dimensions should not be treated differently than a case located solely in one state. The competing rules of decision (whether from different sovereigns or not) should be isolated, and the policies that animate them should be identified. If those policies do not conflict, there is no problem. If they do conflict, then the case should be resolved in the same way that a purely domestic matter would be resolved. There would be no talk of “sovereignty” or of “comity” or of “vested rights.”158 Rather, in this legal process world, the sole concern

154. See supra note 21 and accompanying text.
155. See supra notes 30-41 and accompanying text.
156. See supra notes 44-59 and accompanying text.
157. See supra notes 63-87 and accompanying text.
158. Cf. Maier, supra note 87, at 759 (making a similar argument with the addition that judges should consider “systemic” interests).
would be with application of identified policy in light of the facts of the case.\(^{159}\)

Eliminating consideration of choice-of-law theory will focus judicial attention on the real issues involved in almost all choice-of-law cases—policy analysis and fact development. That is the way our judges are accustomed to think and act; it is the failure to follow instinct and training that causes most of the perceived problems in choice-of-law decisionmaking today. In other words, judges do best when they focus on the facts at hand; trouble arises when they believe that they must also think about such issues as sovereignty. It is those beliefs that have contributed significantly to the sub-standard quality of choice-of-law decisions.

This method of approaching choice-of-law problems also comports with the role of the fifty states in our federal scheme. That is not to suggest that my proposal is compelled by the Constitution. The origins of the Full Faith and Credit Clause are too obscure and lost in history to warrant such a sweeping mandate.\(^{160}\) On the other hand, it seems that we have reached a point in our history as a nation where it no longer makes sense to think of the decision to apply the law of another state as an act of grace. Comity may well be proper in the international sphere, but it has no place in our federal system.

Perhaps this has not always been true. After all, within the memory of many millions of us alive today, state laws segregated public schools and forbade marriage between whites and blacks. Today, however, the Supreme Court’s imposition of equal protection, due process, and other constitutional limits on the ability of the states to act unfairly is relatively complete. How then can the highest court of a state refuse to apply an otherwise applicable rule of decision of another state on the ground that the rule violates the forum’s “public policy”? “Comity” should not be a matter of grace, as Story had it;\(^{161}\) rather, comity should be universal, and, therefore, not worth mentioning.\(^{162}\)

\(^{159}\) See Kramer, supra note 59, at 296 (discussing how to identify whether a law has a multistate dimension). As Kramer points out (in good legal process manner), this merely “depends on the purpose of the law in question.” Id.

\(^{160}\) But see Laycock, supra note 140, at 250 (arguing that choice-of-law questions are controlled by the Constitution because they deal with the allocation of governmental authority).

\(^{161}\) See supra text accompanying note 21.

\(^{162}\) It will be hard to abandon the notion that one state applies another state’s law only as an act of grace. This concept has betrayed Currie and many others; there seems to be something about “sovereignty” that causes otherwise reasonable scholars to jettison common sense in favor of theory. How else can one explain Currie’s argument that the resolution of a true conflict requires political skills of the highest order, skills that courts, by
A focus on the application of competing rules of decision that happen to arise in different states does not necessarily mean that territorial concerns will not be present in choice-of-law decision-making. The expectations of the parties, of course, may be based on where they live or work. Once those expectations have been identified, the judge will have to accommodate the laws competing for supremacy with those expectations. That can be an extraordinarily difficult task, but it should not be made more difficult merely because an interstate case presents the problem. Nor should it be made more difficult by choosing, as did the ALI Complex Litigation Project, a rigid, yet elusive, concept such as domicile to serve as a surrogate for expectations. Expectations can arise in many different ways, and the court should be free to explore the full range of possibilities.

No doubt there will be some tendency to favor forum law. After all, when opposing doctrines do come into conflict, it will be natural enough for the court to favor those doctrines that it helped develop. But there will be less tendency to favor forum law if considerations requiring the formal consideration of sovereign interests of the judge’s own state are not involved in the process. After all, it must be emotionally difficult to subordinate your own state’s “sovereign interests” to those of another; it should be far easier to defer to a competing policy that just happens to have been articulated by another sovereign. Moreover, keeping the court on the familiar policy-and-fact track will inevitably improve the quality of decisionmaking simply because that method is familiar.

Finally, some (probably many) will object to the legal process rule because it apparently enhances judicial discretion and reduces predictability. One answer is that recent years have seen a strong trend in favor of discretion in procedural areas. A better answer, of course, is that experience has taught us that rules really do not cabin
discretion; they merely hide its exercise. An even better answer (and
the one that Hart and Sacks would approve) is that the requirement
of reasoned elaboration of opinions itself significantly limits judicial
discretion and produces the only real predictability possible in a falli-
ble, multi-variate world. In any event, it is better that the exercise of
discretion be explored openly in the decisionmaking process than
that it be hidden, as is the case when theory does not lead to justice.

1. Exceptions.—The legal process rule should not apply automat-
ically in three relatively rare situations: (1) when the problem involves
the possible application of the law of a foreign nation; (2) when the
forum legislature has expressly compelled a result; or (3) when the
true sovereign interests of a state are directly implicated.

a. Foreign Nations.—The legal process rule should generally
be used even when the law of foreign nations might be applied. This
rule cannot be absolute, however, because the law of the foreign na-
tion might be “unconstitutional”—in the sense that it is despotic, bar-
baric, discriminatory, or worse. The system always must have an
escape valve to avoid those results; the escape valve is not needed
purely for domestic litigation, of course, because the Supreme Court
ensures (we hope) that no American laws are despotic.\(^{167}\)

b. A Compelled Result.—Some state legislation expressly com-
pels the application of a particular law.\(^{168}\) If the compulsion comes
from the legislature of the forum state, then, under normal principles
of separation of powers (that is, legislative supremacy), that result
must be followed.

c. True Sovereign Interests.—A few cases actually implicate the
sovereign interests of a government. There are, for example, some
cases in which the government \textit{qua} government has a direct stake in
the litigation. In these cases, the forum has been asked to impinge on
another state’s sovereign rights. An example is \textit{Nevada v. Hall}.\(^{169}\)

167. See Laycock, \textit{supra} note 140, at 259-60 (making a somewhat similar argument that
domestic and international choice-of-law problems should be treated differently).
168. See, \textit{e.g.}, \textbf{DEL. CODE ANN.} tit. 10, \S\ 8121 (1975) (prescribing the \textit{lex loci delicti} rule
regarding statute of limitations). Because it is doubtful that legislatures often consider
problems of extraterritoriality, a court should be very careful in this area. Nevertheless,
statutes rarely contain express choice-of-law provisions, and it is unlikely that the legislature
very often has \textit{any} implied “intent” with respect to their relationship to choice of law. That
leaves purpose (in the sense of goals, objectively defined) as the source of statutory mean-
ing in choice-of-law cases.
That case involved an accident in California between a car driven by an employee of the University of Nevada and a California resident.\textsuperscript{170} Nevada limited its liability in those circumstances to $25,000; California, however, did not recognize the doctrine of sovereign immunity.\textsuperscript{171} The jury, after finding the Nevada driver negligent, awarded $1,150,000 in damages.\textsuperscript{172} The Supreme Court upheld the award.\textsuperscript{173} The case clearly involved the direct financial interest of the State of Nevada and, therefore, posed the stark question of whether California could override the sovereign interest of Nevada.\textsuperscript{174} The Supreme Court said that it could.\textsuperscript{175} Such cases are not susceptible to the analysis suggested here. These are rare cases, however, and they usually can be identified easily and treated in some other fashion. Their proper resolution is not essential to this Article.

IV. SOME EXAMPLES

An article on how to decide cases should provide examples. Here are two:

\textit{Lilienthal v. Kaufman}\textsuperscript{176} is the older example. The facts are simple. The plaintiff and the defendant entered into a contract in California.\textsuperscript{177} The defendant refused to perform, and suit was brought against him in his home state, Oregon.\textsuperscript{178} The only defense was that the defendant had been declared a spendthrift under Oregon law.\textsuperscript{179} This should have been an easy case. The first step obviously is to construe the Oregon spendthrift statute. Does a fair construction of that statute compel a result in favor of the spendthrift? If so, then an Oregon court must follow the command of its legislature. If not, then the court must resolve the issue as one for its own development of statutory and common law principles.\textsuperscript{180} Expressed quite differently, the court must resolve a conflict between the plaintiff's legitimate expectations.
tations that courts will enforce promises supported by consideration and the Oregon policy of protecting spendthrifts from their own folly.

To answer that question, the court would have to consider whether the plaintiff's expectations were legitimate: Had the plaintiff made a proper credit check on the defendant in both California and Oregon? If he had, then the court should ask whether the purpose of Oregon's protective policy overrode the more fundamental social policy of enforcing contracts. The answer to that question might require the court to make difficult decisions. They are not difficult, however, in any theoretical sense. Indeed, one can say that this kind of case is routine grist for the judicial mill.

The later example is *Schultz v. Boy Scouts of America, Inc.* *Schultz* also should have been an easy case; unfortunately, the court's fascination with conflicts methodology, as well as the sorry history of the New York courts in choice of law, led to a bad decision. The facts of *Schultz* are horrible. The plaintiffs were parents of two boys who, while on a scouting trip in New York State, were molested by their Scoutmaster, a Franciscan Brother, who was also their classroom teacher. The parents sued both the Boy Scouts and the Franciscan Brothers; the former was domiciled in New Jersey at the time of molestation, but had later moved to Texas. New Jersey was also the plaintiffs' domicile. The Franciscan Brothers were domiciled in Ohio. The issue up for resolution was charitable immunity. Of those four states, only New Jersey recognized charitable immunity.

The decision should have been relatively straightforward. A child had been molested in the state of New York, a clear and significant violation of both the criminal and civil laws of that state. It would be difficult, indeed, for a person not schooled in conflicts law to devise a rationale for applying the law that would permit the molester to escape liability, but that is just what the court did. Perhaps bemused by its own bad record in choice-of-law cases, or by its fascination with developing the purported interests of the various jurisdictions,

---

181. There is some evidence to the contrary. See Cramton et al., *supra* note 61, at 253.
183. See infra note 187 and accompanying text.
185. *Id.* at 682. Ohio recognizes some form of limited charitable immunity, but the Franciscan Brothers did not contend that Ohio law applied. *Id.*
186. *Id.* at 689.
187. The Court of Appeals of New York was notorious for its early decisions in choice-of-law cases involving guest statutes, a pattern of decisions that led one commentator to assert: "A New York lawyer with a guest statute case has more need of an ouija board . . . than a copy of Shephard's citations." Maurice Rosenberg, *Two Views on* Kell v. Henderson, 67 *COLUM. L. REV.* 459, 460 (1967).
the court, quite amazingly, was able to conclude that "New York's deterrent interest is considerably less [than the New Jersey interest] because none of the parties is a resident and the rule in conflict is loss-allocating rather than conduct-regulating."188

The court is stating that New York does not have a strong interest in deterring child molestation within its borders simply because none of the parties is a resident. That cannot be correct. Surely, New York has a strong interest in dealing with serious criminal conduct occurring within its borders.189 Indeed, as Professor Weinberg has pointed out, it certainly would be a flagrant violation of the Constitution for New York police to devote less effort to preventing child molestation when either the child or the molester was from another state.190 The court only compounded its error by comparing the New York interest with that of New Jersey, the only state with charitable immunity.191 It is almost impossible to conceive of what policy would be furthered if the New Jersey immunity rule were to be applied in a situation in which the conduct occurs elsewhere, and the charity seeking protection is no longer located in New Jersey.192 The court merely states—rather lamely—that applying the law of the common domicile of the parties will reduce forum shopping, reduce bias in favor of the forum, enhance reciprocity, and finally produce a rule that is easy to apply.193

None of those institutional reasons compels the perverse result.194 To take them in reverse order, ease of application is hardly the major goal of our legal system; otherwise, the content of this law would be far different. Again, reciprocity is a fine goal to seek, but it does not lead to any particular result; one might as well ask why New Jersey would not apply New York law in order to further reciprocity. Finally, forum shopping and forum bias may exist no matter what the court does; at least, the court can try and combat charges of forum bias by explaining its decisions with reasons that explain something, and the elimination of forum shopping is not the sole end of the law. Even if combatting forum bias were an important goal, the New York court has assumed that its rule must give way to that of New Jersey—a

188. Schultz, 480 N.E.2d at 686.
189. Id. at 690 (Jasen, J., dissenting).
190. See Weinberg, supra note 111, at 89.
191. See Schultz, 480 N.E.2d at 690 (Jasen, J., dissenting) (arguing that the majority could have taken a more balanced approach, instead of understating or overlooking the significance of New York's interests).
192. Id.
193. Schultz, 480 N.E.2d at 687.
conclusion that has hardly been demonstrated properly to balance the interests involved.\footnote{195}

\textbf{Conclusion}

Choice of law needs to shed its past. The decision to apply one law over another should not be thought of as an arcane mystery, something that can only be attempted by the High Priests of the Temple Currie; nor should choice-of-law problems be treated as delicate political problems requiring the wisdom of Kissinger or the younger Pitt. The question of law application presents no difficult conceptual problem: The court identifies relevant policies and decides which should control on the facts before it. Grand theory is not needed, although common sense is.

The siren song of rules should be avoided. The history of choice of law surely teaches that efforts to hobble judges with preordained results is doomed to failure and that the resulting harm will be magnified by the hidden nature of escape devices.\footnote{196} Judges, rather, should be encouraged to explain why their search for truth leads them to a result. At least then the focus will be on why. Better decisionmaking can only be the result.\footnote{197}

\footnote{195. Even fans of the Neumeier rules find Schultz hard to swallow. See, e.g., Peter Hay & Robert B. Ellis, \textit{Bridging the Gap Between Rules and Approaches in Tort Choice of Law in the United States: A Survey of Current Case Law}, 27 Int'l. Law. 369, 382-83 (1993) (arguing that applying the Neumeier rules directly is better than applying the Schultz distinction, which is "more trouble than it is worth").}

\footnote{196. \textit{See supra} notes 31-38 and accompanying text.}

\footnote{197. \textit{See} Peter C. Schanck, \textit{Understanding Postmodern Thought and Its Implications for Statutory Interpretation}, 65 S. Cal. L. Rev. 2505, 2595 (1992) ("Postmodernism may not tell us how to construe statutes, but it very definitely tells us how not to interpret them: That is, one should not employ a foundational theory or a transcendent methodology of interpretation if one adheres to postmodern tenets." (footnote omitted)).}