

## SYMPOSIUM ON THE THIRD RESTATEMENT OF CONFLICT OF LAWS

### WHAT A THIRD RESTATEMENT OF CONFLICT OF LAWS CAN DO

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#### *Introduction*

More than forty years after the Second Restatement of Conflict of Laws, the American Law Institute (ALI) has begun work on a Third. Forty years is a long time, and the magnitude of the gap since the Second Restatement is itself a reason to think a Third is appropriate. But there are other reasons that it is time for a Third. In this essay, we want to explain why we think American choice of law has progressed to the point that a new Restatement is appropriate, and also, and relatedly, what we hope the Third Restatement can achieve.

These are our views, not those of the ALI, the Advisers to the Third Restatement, or even the other Reporters. It is simply our understanding of the significance of where we are in American conflicts scholarship and practice and where we might hope to go.

#### *American Conflict of Laws: From Past to Present*

American conflict of laws theory probably should be considered to start with Joseph Story, but for present purposes we may skip ahead to Joseph Beale and the ALI's first foray into the field. Beale was a towering figure in conflicts, the author of a massive multivolume treatise, and also the Reporter for the First Restatement. In both publications, Beale offered a highly structured edifice of rules derived with impressive rigor from some basic principles about the nature of law. First among these was the territorial principle, the idea that a state's law, "[b]y its very nature . . . must apply to everything and must exclusively apply to everything within the boundary of its jurisdiction."<sup>1</sup>

Given this principle, choice of law analysis turned out to be relatively simple—at least as Beale conceptualized it. Since all laws were territorial, there was no possibility that they would overlap and conflict. Each transaction or occurrence would be governed by one and only one law. The task for the choice of law analyst was simply to identify the governing law by determining where a particular transaction or occurrence was located. That place, Beale decided, was where the last act necessary to the existence of a cause of action occurred: the place of injury for a tort claim, the place of contracting for a contract claim, and so on. Thus the venerable Latin principles of *lex loci delicti*, *lex loci contractus*, and so on.

At this point, unfortunately, Beale's theory and the First Restatement collided with reality. Choice of law analysis is necessary because transactions have contacts with more than one state. As Larry Kramer put it, “a

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<sup>1</sup> JOSEPH H. BEALE, 1 *A TREATISE ON THE CONFLICT OF LAWS* § 4.12, at 46 (1935).

tort may be *consummated* where the last act occurs, but it is *being committed* from the first to the last act and thus ‘occurs’ at all these places.’<sup>2</sup> Elevating one contact to *the* location of a tort or contract is neither the pragmatic resolution of a choice of law problem nor logical deduction from a basic principle. It is arbitrary fiat.<sup>3</sup>

Unsurprisingly, Beale’s approach produced results that struck people as perverse—particularly, though not only, in cases in which the decisive last act was the only contact that a case had with a given state.<sup>4</sup> The First Restatement—and Beale himself—were the target of fierce and voluminous criticism, most notably by the legal realists.<sup>5</sup> Relatedly, and perhaps more important, judges sought to avoid the odd results directed by the rules of the First Restatement through the use of “escape devices”—techniques such as characterization, *renvoi*, or the invocation of public policy that could lead creative judges to more sensible outcomes.<sup>6</sup>

Relatively soon after the publication of the First Restatement, then, American conflict of laws entered a phase in which academics pointed out that the Restatement’s prescribed results sometimes made little sense and judges sought to avoid those results. The natural next step was to identify the reasons that judges preferred the results they reached via escape devices. The realists never made it very far down that road, but Brainerd Currie and other scholars, perhaps most notably Robert Leflar, did.<sup>7</sup> Identifying factors such as the policies behind state laws and the reasonable expectations of parties, they came up with accounts of what made choice-of-law decisions sensible, rather than arbitrary.<sup>8</sup>

Inspired by this scholarship, or in some cases anticipating it, many state courts abandoned the First Restatement. In its place they adopted modern approaches that typically did not take the form of rules but instead sought to tell courts what the relevant considerations were and to identify the correct answer not by localizing events but by describing the goal sought: application of the law of the state whose interests would be most impaired if it were not applied, or of the state with the greater interest, or of the state that was the center of gravity of the transaction.<sup>9</sup> The Second Restatement, begun in 1952 and completed in 1971, took this approach to an extreme. In its centerpiece Section 6, it gave a nonexclusive list of seven factors “relevant” to a choice of law decision and instructed to courts to use them to identify the state with the most significant relationship to a particular issue.

<sup>2</sup> Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1992 SUP. CT. REV. 179, 190 n. 36.

<sup>3</sup> The point here is not that Beale chose the wrong contact, but rather than any approach that gives decisive importance to a single contact (what Lea Brilmayer has called a “single factor” or “stand-alone trigger” approach) will generate arbitrary results in some cases. See Lea Brilmayer & Rachel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 99 IOWA L. REV. 1125 (2009-2010); Lea Brilmayer, *Hard Cases, Single Factor Theories, and a Second Look at the Restatement Second of Conflicts*, 2015 U. ILL. L. REV. 1969; Lea Brilmayer, *What I Like Most about the Restatement (Second) of Conflicts and Why it Should Not be Thrown out with the Bathwater*, 110 AJIL UNBOUND 144 (2016).

<sup>4</sup> For a list and analysis of cases in which courts abandoned the First Restatement, suggesting that abandonment often occurred in cases in which the last act was the only contact, see Brilmayer & Anglin, *supra* note 3, at 1176-1178.

<sup>5</sup> See Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2458-60 (1999); Celia Wasserstein Fassberg, *Realism and Revolution in Conflict of Laws: In with a Bang and out with a Whimper*, 163 U. PA. L. REV. 1919, 1919-21 (2015); Kermit Roosevelt III, *Legal Realism and the Conflict of Laws*, 163 U. PA. L. REV. ONLINE 325 (2015) (responding to Fassberg).

<sup>6</sup> See, e.g., *Grant v. McAuliffe*, 264 P.2d 944 (1953); *Levy v. Daniels’ U-Drive Auto Renting Co.*, 143 A. 163 (1928); see generally, KERMIT ROOSEVELT III, *CONFLICT OF LAWS* 15-29 (2d ed. 2015).

<sup>7</sup> See, e.g., Brainerd Currie, *The Constitution and Choice of Law: Governmental Interest Analysis and the Judicial Function*, 26 U. CHI. L. REV. 9, 9-10 (1958) (describing his “central reliance on the concept of governmental interest?”); Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282 (1966) (listing five factors that explain choice of law decisions).

<sup>8</sup> See Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1585 (1966) (identifying predictability, maintenance of interstate order, simplification of the judicial task, advancement of the forum’s interests, and application of the better rule of law).

<sup>9</sup> See, e.g., *Goulding v. Sands*, 355 F.2d 230, 232 (3d Cir. 1966) (discussing modern approaches); *Bernhard v. Harrah’s Club*, 16 Cal. 3d 313 (1976) (discussing comparative impairment).

The Second Restatement has been received quite differently from the First. It has proven popular with judges—indeed, it is currently the most prevalent approach to choice of law—but it is generally dimly regarded by professors.<sup>10</sup> Academics complain that the Second Restatement is opaque and underdeterminative. It does contain rules—though courts sometimes never even reach the applicable one—but the rules are only presumptions, and the Restatement says explicitly that the presumptions are not intended to bear any weight.<sup>11</sup> In consequence—and this is another strand of academic criticism—it demands a lot of judges. Rather than apply a straightforward rule, they must frequently engage in the open-ended balancing suggested by Section 6, which increases judicial workload, reduces predictability and uniformity, and, depending on how one views the cases, may actually produce considerable error as courts fail to perform the balancing correctly. Last, the Second Restatement has been faulted for not having a theory—for lacking an account of what exactly it means for a state to have the most significant relationship to an issue and of why that should lead to selection of its laws.<sup>12</sup> The different elements of this critique are addressed in the following section, in the context of what the Third Restatement might offer.

### *From Present to Future*

The first and most obvious thing that a Third Restatement can do is to bring greater predictability to choice of law by providing more determinate rules, rather than open-ended balancing. The drafters of the Second Restatement seem to have hoped that this would be the next step. Reporter Willis Reese called the Second Restatement “a transitional document” and described the writing of more definite rules as “the task of future Restatements.”<sup>13</sup> One might, in fact, conceive of the Second Restatement as an attempt to generate data for the Third: by telling courts what factors to consider (but not how to weigh or rank them in particular cases) and setting them loose from the constraints of rules, the Second Restatement seems designed to produce judicial attempts to reach sensible answers to choice of law questions from the ground up. If those answers converge in ways that can be captured by rules, a Third Restatement can encapsulate the wisdom of nearly half a century of judging in a format that can be applied easily and consistently even by judges who are not experts in choice of law. (Our sense at this point is that such is indeed the case.)

If we understand the Second Restatement in this way, of course, we might question whether the game was worth the candle. If the Third Restatement is going to provide definite rules in a manner similar to the First or to European codifications, why the detour through the Second? Would it not have saved enormous effort to have simply gone from one set of rules directly to another? What, in short, was the point of the choice-of-law revolution?

This question is raised most pointedly outside the United States. While the choice-of-law revolution swept through American courts, in foreign states “it was wholeheartedly and unequivocally rejected.”<sup>14</sup> Other countries moved from one codification regime to another without any realist interregnum, to say nothing of the decades-long dominance of the Second Restatement. Non-U.S. scholars thus often view the choice-of-law revolution as a frolic.

<sup>10</sup> See Roosevelt, *The Myth of Choice of Law: Rethinking Conflicts*, *supra* note 5, at 2466. Judges may like the Second Restatement because it affords them the discretion to reach answers that seem correct. It would still be better, however, to deliver those answers in a simpler and easier fashion.

<sup>11</sup> In the words of the Restatement, they are “empirical appraisals rather than purported rules.” RESTATEMENT OF THE LAW (SECOND) CONFLICT OF LAWS viii (AM. LAW INST. 1971).

<sup>12</sup> See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 321 n. 149 (1990).

<sup>13</sup> Willis L.M. Reese, *Conflict of Laws and the Restatement, Second*, 28 LAW & CONTEMP. PROBS. 679, 699 (1963)

<sup>14</sup> Fassberg, *supra* note 5, at 1932.

But there are two reasons to think otherwise. First, the Reporters and Advisers for the Third Restatement are in a much better position than they would have been had the ALI simply tried to modify the First to reduce perverse results. What the choice-of-law revolution and the long experience with the Second Restatement have given us is years of thought, both academic and judicial, about why the First Restatement's results were perverse and what factors drove judges to avoid them. We have the fruits of experimentation with different approaches, from California's ambitious attempt to maximize aggregate policy satisfaction via comparative impairment to New York's more modest retreat to territorially-focused rules via *Neumeier* and its progeny.<sup>15</sup> We have extensive information about how different approaches work in the real world: not just academic speculation but judicial application. This is more than most codifiers could hope for. It is the inherent advantage of the Restatements as compared to model laws or even actual legislation.

Second, the attacks on the First Restatement and the development of different approaches contributed greatly to the theoretical advancement of conflicts. American choice of law theory is not highly valued by the rest of the world.<sup>16</sup> But theory matters. What we think is going on in a choice of law decision matters. Is choice of law procedural, a matter of identifying the correct law in a manner similar to identifying the correct forum? Or is it substantive, a matter of reconciling conflicts between rights and obligations created under the laws of different states? Who determines whether a state's law creates such rights or obligations? What effect should be given to the choice of law rules of other states? How do constitutional requirements such as Due Process and Full Faith and Credit interact with and restrain state choice of law? All these questions have practical significance, and all can be answered by theory.

They could also be answered by fiat. The Third Restatement could simply provide rules with no underlying theory or explanation. But there would be some value in trying to come up with a theoretical framework within which the questions could be addressed consistently. First, such a theory might allow the Third Restatement to be better understood than the Second. Academics disparage the Second Restatement for lacking a theory, they present it to their students as a formless mess, and the next generation of lawyers and judges takes this view into the world of practice. (Reese's important point that the Second Restatement was intended as a transitional document appears in four law review articles, three of which were part of a symposium on the need for a Third Restatement, and zero judicial decisions.<sup>17</sup>) A theoretical perspective that could be taught might produce future generations who actually understood what the Third Restatement aspired to achieve.

But perhaps more important, a theoretical perspective might make choice of law more intelligible to nonspecialists. One way to do this would be to describe it, to the extent possible, in terms that are familiar from ordinary legal discourse. For example, most lawyers and judges do not know what is meant by a state interest. They do, however, know what is meant by the scope of a statute or other state law. Speaking in terms of the scope of state law, rather than state interests, makes it possible to present at least part of choice of law analysis as something familiar and ordinary, rather than esoteric and inaccessible.

In fact, as several scholars have argued, choice of law analysis can generally be described in terms familiar to ordinary legal thought, as a two-step process.<sup>18</sup> Choice of law questions require us first to determine the scope of state laws and then to assign priority to one law in cases of conflict. The first step is, as Brainerd Currie

<sup>15</sup> *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972)

<sup>16</sup> See Fassberg, *supra* note 5, at 1935 (stating that "American scholarship was no more influential on the theoretical level" and that its "enormous intellectual effort . . . was considered neither necessary nor helpful in the task of rationalizing and developing choice of law.").

<sup>17</sup> This is based on a Westlaw search for "second restatement" /s transitional, performed 9/14/2016, which shows four hits in the Secondary Sources library and none in Cases.

<sup>18</sup> See, e.g., ROOSEVELT, *supra* note 6, at 43-45, Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 1013-1021 (1991).

argued, simply ordinary interpretation, the bread and butter of ordinary legal analysis.<sup>19</sup> The second step is also familiar: lawyers and judges understand that we have rules that tell us that federal law prevails in a conflict with state law, that statutes prevail in a conflict with common law, that treaties prevail in conflicts with executive agreements, and that later statutes prevail in conflicts with earlier ones. We can write similar rules for conflicts between state laws—we can, for instance, write rules that give priority to the law of common domicile for loss-allocating issues in tort cases and to the law of the place of conduct and injury for conduct-regulating issues.

Using this two-step process as a framework, the Third Restatement can offer both rules derived from forty years of experience with the Second Restatement and an intelligible foundation for these rules. Framing the discussion in terms of conventional legal concepts will, it is true, take away some of the ground on which choice of law scholars indulged their fancies. Once we start talking about the scope of state law rather than state interests, for instance, it follows that state courts and legislatures are authoritative as to that scope and other states cannot contradict them. Choice of law will turn out to be bound by the same rules that apply in every other context of American law. But this process—the domestication of choice of law—is something that should be welcomed. The greatest thing the Third Restatement could achieve would be to make choice of law look ordinary.

<sup>19</sup> An important distinction: lawyers and judges may not be familiar with *how* to determine the geographical or personal scope of a statute or other rule of law (though the U.S. Supreme Court does exactly this in determining the extraterritorial reach of U.S. law). But they understand the *concept* of determining scope in marginal cases in the purely domestic context—that is ordinary interpretation. In our view, determining geographic and personal scope in the multistate context is the same in principle. We are not suggesting that the Third Restatement should ask the courts to determine scope, only that it should tell them that determining scope is part of what the drafters have done in creating its choice of law rules.

It warrants emphasis that while we agree with Currie that determining scope is a matter of interpreting law, we do not necessarily agree with the interpretations he suggested. Lea Brilmayer, in her contribution to this symposium, suggests that we “retain . . . the least defensible aspects of governmental interest analysis.” Brilmayer, *supra* note 3, at 144. We are puzzled by this assertion. Brilmayer has long criticized Currie’s methods and conclusions in the determination of scope, and we find much of what she says persuasive. The Restatement draft does not follow Currie’s assumptions about state interests or his conclusions as to the scope of state laws, much less his views on how to resolve conflicts between them. What it clings to is the idea that there are some factual scenarios that are within the reach of a law and some that are not. When a statute refers to pedestrians, for example it clearly includes walkers, clearly excludes drivers, and perhaps requires more interpretation to decide the status of rollerbladers. This is less governmental interest analysis than a basic concept in all areas of American law.

Ralf Michaels, likewise, seems to have concerns that are driven more by specific features of Currie’s analysis than the idea that laws have a scope. It may well be, for instance, that foreign nations find alien the idea that private laws express governmental interests. *See* Ralf Michaels, *The Conflicts Restatement and the World*, 110 *AJIL UNBOUND* 155, 158 (2016). We still believe it likely that they understand that some factual scenarios will give rise to liability under a law and others will not. And unless they believe that their laws violate the restrictions on prescriptive jurisdiction imposed by international law, they understand some of these scope limitations in terms of geography and persons.