

Symposium:
Preparing For The Next Century—A New Restatement of Conflicts
Article

A STRUCTURAL REVISION OF THE CONFLICTS RESTATEMENT

75 Indiana L.J. 476 (2000)

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*Ah Love! could thou and I with Fate conspire
To grasp this sorry Scheme of Things entire,
Would not we shatter it to bits-and then
Re-mould it nearer to the Heart's Desire!*¹

I. INTRODUCTION

The question for discussion is whether, as we face the new millennium, the formalisms now widely used by judges in choosing law should be retained. Does the current *Restatement*,² now under wide adoption in both state and federal courts,³ need rethinking? Should it all be swept away and a fresh start made?

In this Article, in order to follow the format of this Symposium, I set to one side the doubts I have expressed in recent work about the conflict-of-laws enterprise.⁴ I try to identify some of the larger theoretical problems presented by the choice-of-law provisions of the *Second Restatement*, and to explain how it can be reconstructed on improved lines. I argue for major changes in the *Restatement's* overall workings. I

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1. EDWARD FITZGERALD, THE RUBAIYAT OF OMAR KHAYYAM, *FIRST EDITION QUATRAIN LXXIII* (Bernard Quarritch printer 1859) (published anonymously).

2. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter SECOND RESTATEMENT].

3. When applying federal law but referring to state law, federal courts resort to the formula of "place of most significant contact" and this is often credited to the *Second Restatement*. See, e.g., *American Home Assurance Co. v. L & L Marine Serv., Inc.*, 153 F.3d 616, 618-19 (8th Cir. 1998).

4. See Louise Weinberg, *Methodological Interventions and the Slavery Cases; or, Night-Thoughts of a Legal Realist*, 56 Md. L. Rev. 1316 (1997) [[hereinafter Weinberg, *Methodological Interventions*].

propose a change in the *Restatement's* master presumption looking to the law of the place of “most significant contact,” and in its further presumptive territorial choices of law. I propose changing the relationship between the whole vast work and its very brief but operative section, section 6. Section 6, of course, is the feature of the *Second Restatement* that contains the list of policy factors that the *Restatement* suggests must ultimately be taken into account in any choice of law. On the thinking that we need to take with us into the future something like section 6, I go on to try to show how section 6 might be retooled to advantage.

If the *Restatement* were to be reconstructed along the lines I suggest here, and a third *Restatement* built on the experience of the *Second Restatement*, the outcome, I (2000) **Indiana L.J. 476** would hope, would reflect more nearly the acknowledged ideals of conflicts law, which are very like the ideals of all law in courts. Interestingly, these seemingly technical questions raise issues generic to all legal theory. Fractal-like,⁵ even on this confined scale the underlying issues have to do with justice and principle.

II. PRELIMINARY REMARKS: THE MISSING PRECONDITION

We should not suppose that a would-be drafter of a new *Restatement* would set about her task with the same sense of crisis, the same conviction of a need for rescue, that attended the decision to abandon the *First Restatement*.⁶ Even before its 1934 publication, the *First Restatement* had come under attack. The late Willis Reese, who was Reporter to the *Second Restatement*, once said that it had become obvious that conflict of laws had not been ripe for *Restatement* in the 1930s.⁷ The laconic and peremptory style of the *First Restatement's* black-letter propositions can be attributed, perhaps, to the intensity of disagreement between members of the advisory group and the Reporter, Joseph Beale—disagreement over even the explanations for the rules that Beale offered in his accompanying notes and comments.⁸ Even the always courteous Reese ventured to say that Beale's fixed and universal territorial rules showed little understanding of “the fluidity and of the complexities and uncertainties of the subject.”⁹ Indeed, Reese went so far as to charge that “many of the rules stated in [the *First*] *Restatement* [[were] wrong or at least so over-simplified as to be misleading.”¹⁰

Very little of that sort of indictment can be leveled at the *Second Restatement*.

5. Fractals are jagged curves or surfaces that retain the same index of jaggedness when examined at any level of minuteness. Coastlines, for example, are fractal; the big bays and inlets will have little bays and inlets of the same general pattern. There may actually be some uses for this information. See BENOIT B. MANDELBROT, *THE FRACTAL GEOMETRY OF NATURE* (1983).

6. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934) (Joseph Beale, Reporter). In this Article I limit discussion to the *Second Restatement's* choice-of-law provisions.

7. See Willis L.M. Reese, *Conflict of Laws and the Restatement Second*, 28 *LAW & CONTEMP. PROBS.* 679, 680 (1963).

8. See *id.* at 679.

9. *Id.* at 680.

10. *Id.*

Whatever its academic critics may think, the *Second Restatement* is working about as well as can be expected. I do not mean to say that the mechanics of the *Second Restatement* are working; quite the contrary. But my sense of the situation is that the very vagueness and open-endedness for which the *Second Restatement* is criticized¹¹ (2000) **Indiana L.J. 477** are enabling judges to follow their good sense and intuition to reach reasonably sound results. So the most we can say is that a third *Restatement* might somewhat improve the rationality and readability of conflicts decisions. Perhaps that is inducement enough to try. On the other hand, since the better is so often the enemy of the good, some risk must attend any such enterprise.

III. MORE PRELIMINARY REMARKS: THE (RUSTY) MECHANICS OF THE *SECOND* *RESTATEMENT*

All that said, if we are going to have a third *Restatement* that truly works, we need to do something about the mechanics of the *Second Restatement*.

No one can really want to stick with the way the *Second Restatement* works. Treating judges like little children, it forces them to print out, over and over, its sterile black-letter lists. For virtually every characterized issue there is a master rule that the law of the place of most significant contact governs that issue. Well, why not just say that, trans-substantively? There then follows a dreary list of likely places, “contacts” of possible significance, no doubt intended to drive home the message that there need be no single territorial choice a la the *First Restatement*. But why drive this home again and again and again and again? The kicker is that, even so, the *Second Restatement* mostly

11. Captured, in effect, by critics of the *Second Restatement*'s open-endedness, the American Law Institute (“ALI”) has only recently emerged from its disastrous struggle over conflicts recommendations for mass torts, see AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT, STATUTORY PROPOSALS AND RECOMMENDATIONS § 6.01 (Proposed Final Draft Apr. 5, 1993), opting by the closest of votes for “rules” so convoluted and hazardous that no court has ever so much as mentioned them. (A summer 1998 Westlaw search for post-1993 federal or state cases mentioning the ALI Complex Litigation Project by title literally turned up zero.) The “closest of votes” to which I refer here came on my motion to amend, which would have converted the proposal from a mandatory hierarchy of tests to a rule of alternative reference. This motion followed even more drastic but unsuccessful motions by Professors Juenger and Trautman. See THE AMERICAN LAW INSTITUTE, PROCEEDINGS OF THE 70TH ANNUAL MEETING 255-80 (1993).

For critical analyses of the ALI's work, see Fred I. Williams, *The Complex Litigation Project's Choice of Law Rules for Mass Torts and How To Escape Them*, 1995 BYU L. REV. 1081 (criticizing the proposal); Friedrich K. Juenger, *The Complex Litigation Project's Tort Choice-of-Law Rules*, 54 LA. L. REV. 907 (1994) (same); Symeon C. Symeonides, *The ALI's Complex Litigation Project: Commencing the National Debate*, 54 LA. L. REV. 843 (1994) (supporting the effort); Donald T. Trautman, *Some Thoughts on Choice of Law, Judicial Discretion, and the ALI's Complex Litigation Project*, 54 LA. L. REV. 835 (1994) (criticizing the proposal); Louise Weinberg, *Mass Torts at the Neutral Forum: A Critical Analysis of the American Law Institute's Proposed Choice Rule*, 56 ALB. L. REV. 807 (1993) (same) [hereinafter Weinberg, *Mass Torts*]. For further discussion, see Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547 (1996); Linda S. Mullenix, *Unfinished Symphony: The Complex Litigation Project Rests*, 54 LA. L. REV. 977 (1994); James A.R. Nafziger, *Choice of Law in Air Disaster Cases: Complex Litigation Rules and the Common Law*, 54 LA. L. REV. 1001 (1994); Gene R. Shreve, *Reform Aspirations of the Complex Litigation Project*, 54 LA. L. REV. 1139 (1994).

winds up with a presumption that that very place, the one the *First Restatement* would have chosen, “governs” after all. Forget the irony of this; just think of the waste motion.

But it will be seen at once that the problem of waste motion is more serious than I have suggested. What if a case presents only a false conflict? Under the *Second Restatement* we are seeing judges wearing themselves out solving false conflicts. This is chronic. I am looking at a 1997 Vermont case, *Miller v. White*.¹² In *Miller*, the choice was between giving the plaintiff access to a full remedy at the forum, which also was the joint domicile of the parties, or remitting the plaintiff to a limited **(2000) Indiana L.J. 478** administrative remedy at the place of injury, Quebec.¹³ Of course the Vermont court very rightly opened its doors.¹⁴ But why did the court have to go through a tiresome analysis under the *Second Restatement* to solve a problem that the veriest rookie could have seen did not exist?¹⁵

Such experiences suggest that a third *Restatement* should find a way to avoid entangling courts in lengthy formulaic incantations in advance of determining the relevant interests of the concerned states in a particular issue on the facts of a particular case. That is especially so when one considers the risk in cases like *Miller*. What if, in the occasionally insensitive court,¹⁶ the parties in a false conflict case wind up with the law of the *uninterested* state?

On a more theoretical level, it will also be appreciated that courts using the *Second Restatement*'s ungainly and doubtful apparatus are chronically falling into the premodern trap of choosing governance in a vacuum. This is most likely to happen in courts failing to reach the policy prompts of section 6. Yet choosing a sovereign to “govern” in the abstract is antithetical to much of what we have learned about the conflict of laws in the *Second* half of this century. We now know that the task is to choose law, not places. “Jurisdiction- selecting” rules,¹⁷ like the presumptive territorial rules of the *Second*

12. 702 A.2d 392 (Vt. 1997).

13. *See id.* at 397.

14. *See id.*

15. I have been asked to explain for the sake of the generalist reader why *Miller* was a false conflict. A “false conflict,” classically, is a case in which there is only one state with any governmental interest in the issue before the court. Thus, a false conflict presents no problem in choosing law. The law that governs is the law of the only interested state. *Miller* was just such a case. The only interests of a place of injury, with no other contact with a case, are diffuse general interests in deterring any such future occurrences there, and in making whole anyone injured on its territory. So a place of injury, without more, can have no interest in impeding adjudication. Since, as the joint domicile, the forum in *Miller* did have an interest in adjudicating the dispute between the parties, and a further interest in seeing its resident made whole, the case was a classic false conflict: The forum was the only “interested” state.

16. We tend to forget that cases are *argued* to judges. By lawyers. There is plenty of blame to go around: The bar examiners should not have cut conflicts from the exam; law students should start taking the course again anyway; professors should give those who do take it the formative study in jurisprudence the course, at its best, has always been.

17. The term was the late Professor Cavers's. *See* DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS *passim* (1965) [hereinafter CAVERS, THE CHOICE-OF-LAW PROCESS]. *See* also his seminal article, David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 194 (1933).

Restatement, never have been in tune with modern conflicts thinking.¹⁸ Such methods are widely criticized as too abstract to reflect what is at (2000) **Indiana L.J. 479** stake.¹⁹ But those of us who feel that, for whatever reason, the *Second Restatement* is working reasonably well, go on pushing these dissonances from our minds, even as they go on irritating and disturbing us.

Judges using the *Second Restatement* do seem to reach decent results in fact. They would do this in any event. Very probably *Restatement* simply gives them some needed cover for what they have to do. But we, and they, should not be fooled into thinking that they are guided by the *Second Restatement*, when obviously they are falling back on their own common sense and intuition.

IV. THE HEART OF THE MATTER: A DISFIGURING RULE

It may come as a shock to some to be asked to consider whether the *Second Restatement's* master rule, in favor of the law of the place of "most significant contact," is not only unwieldy, as I have already suggested, and not only vague and open-ended,

18. *Caveat*: There is no viable alternative method, as yet, to resolve federal-state conflicts. Federal-state ("vertical") conflicts still are resolved by *First* identifying the sovereign that is to "govern." If state law governs, as we say, "of its own force," it does so under *Erie v. Tompkins*, 304 U.S. 64 (1938). Then, under *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), federal courts, like state courts, proceed to identify under the forum state's conflicts rules which state's law "governs," and only then to construe that state's law. *See, e.g.,* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459 (1997). If, on the other hand, federal law "governs," it does so under the Supremacy Clause. But, federal power having been acknowledged, courts then go on to a further stage of analysis, considering whether to pick up whatever the state rule happens to be anyway. Even at this *Second* stage, no true construction of state law takes place. The reason for the existence of the *Second* stage is that there is no federal law on point: if there were, it would apply. In the absence of governing federal law, the court weighs the undesirability of fashioning new federal common law against the utility of general state governance on the particular issue. *See, e.g.,* *DeSylva v. Ballentine*, 351 U.S. 570, 580-82 (1956) (Harlan, J.) (using state law to determine who is a "child" for purposes of federal copyright renewal, in order to avoid fashioning a federal rule that would disturb settled expectations under state intestacy and family laws). On this class of problems see Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743 (1992) [hereinafter Weinberg, *The Federal-State Conflict*], and Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 837-38 (1989) [hereinafter Weinberg, *Federal Common Law*]. For recent work on related material, see, for example, Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895 (1996), and Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996).

19. Under the *Second Restatement*, of course, courts choose law by choosing places every day, providing us with some bizarre reading. *See, e.g.,* *Reichhold Chems., Inc. v. Hartford Accident & Indem. Co.*, 703 A.2d 1132, 1138-52 (Conn. 1997). There, the Connecticut court, by its chief justice, purported to perform an interest analysis under section 6, but failed in fact to do so, or in any way to articulate its dilemma in an unprovided-for case. The court wound up with the presumptive choice suggested by section 193 for insurance cases—the place of the insured risk. That "place" was not only almost surreally irrelevant to the issue of notice of claim, but also was ten different places—contamination sites. Moreover, the court actually knew the content of the notice-of-claim rule at only one of these states, Washington (the law of which, unlike New York's, was plaintiff-favoring). *Id.*

the charge under which it has always labored, but actually wrong.

The *Second Restatement* takes the usual real-world presumption that a court is likely to apply its own law, and simply trashes it, leaving everybody wandering about in the wreckage trying to figure out where to go.²⁰ Courts are told to go to the “place (2000) **Indiana L.J. 480** of most significant contact,” but where is that place? The *Second Restatement* does offer the lost soul a compass, but the compass needle is stuck, and is stuck in the wrong place. As we all know, nine times out of ten it gets you to the territory where some underlying event occurred, the very place the *First Restatement* would have chosen. This, although the author of the *Second Restatement* himself, as we have seen, had boldly criticized the territorial choices of the *First Restatement* as simply “wrong.”²¹ This, although eight years into the *Second Restatement* project, Brainerd Currie had demonstrated that the territory where an event occurs may have little or no interest in governing a conflicts case.²² And now the empiricists are telling us that these territorial presumptions are so wrongheaded that courts are simply paying no attention to them.²³ Ladies and gentlemen, surely we can do better than this.

What are territorial presumptions, after all-what is the “place of most significant contact,” after all-but a presumption that the forum will *not* apply its own law? Such twisted thinking can be seen in one of its more acute manifestations in the Supreme Court’s current federal commonlaw rule that acts of Congress are presumed to have no

20. *Caveat*: In the *federal-state* (“vertical”) conflict of laws, the presumption that the forum will apply its own law (i.e., that federal courts will apply federal law and state courts state law) is wrong and would be unconstitutional if tried. Under *Erie*, state law applies, when it applies, in *both* sets of courts; under the Supremacy Clause, federal law applies, when it applies, in *both* sets of courts. Thus, in our system, although interstate forum shopping for better law goes on and is tolerated, federal-state forum shopping for better law is, in theory, futile. The position is spelled out in LOUISE WEINBERG, *FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER* 15 (1994) [hereinafter WEINBERG, *FEDERAL COURTS*]; Weinberg, *The Federal-State Conflict*, *supra* note 18, at 1754-55; Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67-69 (1988) [hereinafter Weinberg, *Place of Trial*]. On the general duty of state courts to hear federal cases, see, for example, Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39; Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 BYU L. REV. 731.

21. *See supra* text accompanying note 10.

22. *See* Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 242-44 (1958) (setting out tables to demonstrate that, among contact states, the place of transaction or occurrence is likely to matter least to the resolution of a conflict of laws); see, e.g., Gordon v. Kramer, 604 P.2d 1153, 1158 (Ariz. Ct. App. 1979) (holding the trial court in error for applying the law of the uninterested place of injury). *Caveat*: The places of the parties’ transaction or occurrence do have certain general or residual interests which may emerge in a given case. *See generally* DAVID H. VERNON ET AL., *CONFLICT OF LAWS: CASES, MATERIALS AND PROBLEMS* 299-309 (1990) (correcting the Currie charts); Weinberg, *Mass Torts*, *supra* note 11, at 846-52 (making the point); Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595, 618-26 (1983-84) (same) [hereinafter Weinberg, *On Departing from Forum Law*].

23. *See* William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417 (2000).

extraterritorial application.²⁴ Notwithstanding the good intentions of lawyers and judges who think such a rule a wise one, in cases in which the disputed conduct clearly falls within the scope of the legislation such a presumption is likely to lead to arbitrary and discriminatory results. Take the Supreme Court's 1991 *Aramco* case. There the Court, setting up this unconsidered presumption against extraterritorial application of forum law, construed Title VII to be without effect abroad.²⁵ But to a **(2000) Indiana L.J. 481** Congress trying to regulate the discriminatory conduct of American employers on behalf of American workers, what difference can the location of the discrimination make? To be sure, in a given transnational case, considerations of foreign policy might, to some minds, trump even civil rights. But those considerations are not generally a feature in the interstate cases the *Second Restatement* addresses. *Aramco*, of course, had the consequence of exposing American employees working abroad for American companies to racial and other obnoxious prejudices, and to the sometimes medieval or barbaric preferences or practices of the host countries. Think especially of what, in Islamic countries-as in *Aramco*-would be the situation of American Jewish employees, or American women employees, once stripped of the protections of American law in American courts. The American employer with impunity could either submit them to Saudi ideas, or simply stop offering them the opportunity of the foreign assignment. *Aramco* was so clearly wrong²⁶ that Congress stepped in and amended Title VII to *require* its extraterritorial application in future, at least in cases in which discriminatory or degrading employment practices are not actually mandatory under the laws of the host country.²⁷

Willis Reese, to his credit, did see that in real life the forum presumes its own law applies, and applies in fact to matters a proper construction brings within their scope. As he put this:

If the purposes sought to be achieved by a local statute or common-law rule would be furthered by its application to an out-of-state occurrence, this is a weighty reason why such application should be made. It is only to be expected that a court will favor its own local policies over those of other states.²⁸

Here Reese was perceiving, I think, the duty of a court to give effect to the positive commands of its own sovereign. The 1984 *Laker* case in the D.C. Circuit²⁹ surely must

24. *See, e.g.*, EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) (holding, based on a presumption against extraterritoriality, that Title VII did not cover Americans working abroad for American companies) (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

25. *Id.*; see Civil Rights Act of 1964, 42 U.S.C. § 2000a-2000h (1994 & Supp. III 1997). This is the basic federal law against discrimination in employment.

26. My reactions to *Aramco* when it was handed down are in Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 73-76 (1991-92) [hereinafter Weinberg, *Against Comity*].

27. *See* Civil Rights Act of 1991, 42 U.S.C. § 1981 (1994). The struggle to enact this legislation is recounted in WEINBERG, FEDERAL COURTS, *supra* note 20, at 353-58.

28. Reese, *supra* note 7, at 683.

29. *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

be one of the more dramatic examples of this perceived judicial duty to enforce forum law. In *Laker*, another transnational case, you will recall that Judge Wilkey of the District of Columbia Circuit applied the Sherman Act to the conduct of the foreign conspirators who had driven Freddie *Laker's* transatlantic air carrier out of service. Judge Wilkey rejected the multi-pronged, “balancing” analyses recommended in famous transnational cases in other circuits,³⁰ adopted by the revisers of the *Foreign Relations Restatement*.³¹ Those other courts, aiming for an **(2000) Indiana L.J. 482** appearance of comity, were seeking, in effect, to discover the place of most significant contact with an international tort. Well, Judge Wilkey seemed to be saying, *that is all very well, ladies and gentlemen*. But I have an act of Congress on my hands.³² And one has to agree with him, that a straightforward construction of the Sherman Act would put the *Laker* conspirators squarely within the act’s scope. In particular, Judge Wilkey rejected that there could be any overriding consideration of comity: “Despite the real obligation of courts to apply international law and foster comity, domestic courts do not sit as internationally constituted tribunals. Domestic courts are created by national constitutions and statutes to enforce primarily national laws.”³³

Laker remains controversial,³⁴ but the Supreme Court seems to be returning to the

30. *Id.* at 948-52. See the influential *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979) (holding that courts considering applying American law in cases with foreign elements should perform a balancing of factors); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 614-15 (9th Cir. 1976) (*semble*).

31. See the then-pending RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (Tentative Draft No. 2, 1981). For an account of the debate between Judge Wilkey, a member of the ALI advisory group on this revision of the *Foreign Relations Restatement*, and its Reporter, see Harold G. Maier, *Resolving Extraterritorial Conflicts, or “There and Back Again”*, 25 VA. J. INT’L L. 7, 36-40 (1984).

32. See *Laker*, 731 F.2d at 945-46 (Wilkey, J.).

Legitimate United States interests in protecting consumers, providing for vindicating creditors’ rights, and regulating economic consequences of those doing substantial business in our country are all advanced under the congressionally prescribed scheme. . . . Congress has been aware of the decades-long controversy accompanying the recurrent assertion of [Sherman Act] jurisdiction over foreign anticompetitive acts [with] effects in the United States dating back nearly forty years but has . . . not yet chosen to limit the laws’ application.

Id. (citations omitted).

33. *Id.* at 951.

34. For criticism of *Laker*, see, for example, Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 289, 318. But see William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L. J. 101, 150-51 (1998) (“I agree with Currie and Wilkey that courts are the wrong institution to reconcile differences between U.S. and foreign regulatory policy. . . . [C]ourts are not the best institutions to resolve regulatory conflicts.”); James M. Grippando, *Declining to Exercise Extraterritorial Antitrust Jurisdiction on the Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine*, 23 VA. J. INT’L L. 395 (1983). For a recent considered discussion, see John H. Chung, *The International Antitrust Enforcement Assistance Act of 1994 and the Maelstrom Surrounding the Extraterritorial Application of the Sherman Act*, 69 TEMP. L. REV. 371, 399-400 (1996).

classic modernist position that the applicability of forum law is a question of construction and interpretation of the law of the forum. The Court also has clarified that it shares Judge Wilkey's view at least in antitrust cases; it holds antitrust cases to be an exception to its general presumption against extraterritoriality.³⁵ More (2000) **Indiana L.J. 483** importantly, in the 1993 *Hartford Fire* case,³⁶ Justice Souter, in his opinion for the Court, made no reference to a presumption against extraterritoriality, and simply performed the lawyerly job of interpreting and construing federal law on the facts before him.³⁷

You can see the desuetude of comity-driven ideas in a recent transnational bankruptcy opinion in the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit, of course, is the very court that has given us perhaps the leading case on comity in this country;³⁸ but here it simply cited and expanded on *Laker*, going so far as to conclude that "the presumption against extraterritoriality is not applicable when the regulated conduct is 'intended to, and results in, substantial effects within the United States.'"³⁹

So how did the concerns of the forum state, acknowledged from the beginning by Willis Reese, come to be displaced by those of other, "significant contact" states, when the *Second Restatement* was taking final shape?

V. THE FORUM AND ITS DISCONTENTS

Judge Wilkey's insight, that it is the forum's duty to apply its own law-if warranted by reasonable construction-is always hard for observers to accept.⁴⁰ It sounds so

35. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993) (holding by Justice Souter, for a divided Court, that the district court should have enforced the Sherman Act against foreign conspirators notwithstanding principles of comity); *Id.* at 814 (Scalia, J., writing for the Court in part, dissenting in part) (explaining that the Sherman Act is an exception to the general presumption against extraterritorial application of acts of Congress) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986)); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945) (L. Hand, J.); see also *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 (1952); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 415, and Reporters' Note 3 (1987).

36. *Hartford Fire*, 509 U.S. at 799.

37. See *id.*

38. See *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 614- 15 (9th Cir. 1976).

39. *Hong Kong & Shanghai Banking Corp. v. Simon*, 153 F.3d 991, 995 (9th Cir. 1998) (quoting *Laker*, 731 F.2d at 925).

40. For the view that there is no necessary presumption in favor of forum law, see Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301 (1989). But see, e.g., *Hurtado v. Superior Court*, 522 P.2d 666, 670 (Cal. 1974) ("[G]enerally speaking the forum will apply its own [law] unless a party litigant timely invokes the law of a foreign state."). Professor Kramer argues that the presumption of sufficiency of a complaint does the necessary work of the presumption in favor of forum law. He apparently would place no tie-breaking value on the commands of the local legislature in cases of true conflict. Professor Kramer's other work has attempted in other ways to create a theory of comity-inspired departure from forum law; my views on these attempts are in Weinberg, *Against Comity*, *supra* note 26. For additional recent writing on forum-law approaches to choice of law, see, for example,

provincial, so biased, so wanting in a due comity. And views favoring comity in choice of law are deeply held, held perhaps by most of us. Comity seems to be as hard to clear away as *lex loci*. We can see that, pulling against the vehemence of such views, Willis Reese barely managed to keep the interests of the forum alive in the *Second Restatement*. He managed to retain a reference to forum interests, but only in section 6's list of overall policy considerations.⁴¹ He could not keep the forum's interests in the *foreground* of the *Second Restatement*.

Meanwhile, what had appeared in Reese's writing as only one among several "policies" a court ought to take into account, a policy that "[t]he court should seek to (2000) Indiana L.J. 484 apply the law of the state of dominant interest,"⁴² became transformed into the broad, initial, core presumption of most of the *Second Restatement*: the law of the place of "most significant contact." The familiar story is that Professor Reese and Judge Fuld, of the New York Court of Appeals, built on each other's thinking to develop the new concept, peculiar to their period, of what the English would call the "proper law" of a tort or contract—the "center of gravity" of, or "place of most significant contact" with, a transaction.⁴³

Further to downplay the concerns of the forum state, Reese idealistically accepted the lofty view that law should be chosen with disinterestedness if not downright altruism. He came to endorse a phenomenon that has virtually zero existence in real life, as Reese himself acknowledged:⁴⁴ a "neutral" forum.⁴⁵ You may well wonder how the typical

John T. Cross, *A Defense of Kentucky's Approach to Choice of Law*, 25 N. KY. L. REV. 553 (1998); Stanley E. Cox, *Razing Conflicts Facades To Build Better Jurisdiction Theory: The Foundation-There Is No Law but Forum Law*, 28 VAL. U. L. REV. 1 (1993-94).

41. See SECOND RESTATEMENT, *supra* note 2, § 6(2)(b).

42. Reese, *supra* note 7, at 688 (emphasis omitted).

43. *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954) (Fuld, J.) (choosing the unidentified law of England to govern a support agreement where New York law might have terminated the obligation). Of course the choice-of-law "revolution" was more complicated than this. The seminal works of Walter Wheeler Cook, David Cavers, and, in the late '50s, Brainerd Currie, must be taken into account. Then there are the great interest-analytic Supreme Court cases of the '30s, '50s, and '60s. For a theoretical synthesis of the constitutional cases, see Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982), reprinted in part in GENE R. SHREVE, A CONFLICT-OF-LAWS ANTHOLOGY 339 (1997). Certainly the work of other state courts, notably California, needs to be factored in. For a recent glimpse of another judicial chapter in a complex story, see Geri Yonover, *The Golden Anniversary of the Choice of Law Revolution: Indiana Fired the First Shot*, 29 IND. L. REV. 1201 (1996).

Among the tentative drafts of the *Second Restatement*, the earliest resort to the place of "most significant relationship" occurs, as far as I can tell, in 1959, in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332(b) (Tentative Draft No. 6, 1959) (on "Contracts"). In 1959 the validity of a contract was presumptively governed by the law of place of making if it was also the place of performance. See *id.* § 332b(a). If not, then it was governed by the place of "most significant relationship." *Id.* § 332n(b). *Auten v. Auten* is cited in the Reporter's notes, but as only one among other cases. *Id.* at 36. The "place of most significant relationship" formula then shows up in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379(1) (Tentative Draft No. 8, 1963) (on "Wrongs"). The rule is in substantially the same form today.

44. See Reese, *supra* note 7, at 692-93 ("It can, of course, be said in criticism that cases rarely arise in truly neutral forums. . . . Yet . . . even an interested forum will usually be guided by what it conceives

forum state in this country can be considered neutral and still overwhelmingly be the place where the plaintiff resides. For that matter, how can the typical forum state in this country be considered neutral and still be a place with power over a defendant which has purposefully availed itself of the benefits and burdens of forum law? Yet the *Second Restatement* perversely assumes a noble disinterestedness at the forum, as if the parties were adjudicating their squabble on Mars.

(2000) Indiana L.J. 485 The consequence is that the *Second Restatement* fails to give the interests of the forum state *their actual weight*. Rather, the *Second Restatement* substitutes a presumption of foreign governance quite antithetical to common usage and disrespectful of the positive commands of a sovereign in its own courts. These sovereign commands it demotes to section 6, where spuriously equivalent value is assigned to the interests of other states and to the needs of the interstate and international systems.

So it is among the least of the ills associated with the *Second Restatement's* presumptive subordination of the law of the forum to the law of some more “significant” contact state, that it sends judges off on wild goose chases. It is among the least of these ills even that, deflected from section 6’s salubrious list of real choice-of-law policies, forced to find the place “of most significant contact,” judges must trudge through pages of rigmarole before they can begin to apply the law of some interested state. It is only a little more troubling that, in cases of false conflict, those judges who understandably fail to reach the comparatively safe ground of section 6 run the risk of also failing to see what it is that they have on their hands, and so of choosing the law of the uninterested state.

But it is profoundly wrong and very dangerous for a court to ignore the commands of its own legislature, on matters within its constitutional competence.⁴⁶ When the *Second Restatement* devalues the interests of the forum it devalues the interests of justice. Injured plaintiffs, often lacking deep pockets, tend to sue at home—in other words, in states “interested” in enforcing their ordinary tort law to compensate those plaintiffs; and such resident plaintiffs cannot be turned away as “forum shoppers.” Yet the *Second Restatement* disregards their legitimate claims under home law. To the extent that even nonresident plaintiffs can be considered private attorneys general enforcing legal norms, comity-inspired departures from forum law can, if widespread, create a problem of global nonenforcement of shared legal norms, and, ultimately, global lawlessness.⁴⁷

to be correct rules of choice of law.”).

45. *Id.* at 692 (“The Restatement is written from the viewpoint of a neutral forum which has no interest of its own to protect and is seeking only to apply the most appropriate law.”) The fantasy of a neutral forum in interest analysis is implicit in both Cavers, works cited *supra* note 17, and William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 19-21 (1963).

46. For the argument that judges in an “interested” state cannot disregard its law without grave dysfunction, see generally Weinberg, *Against Comity*, *supra* note 26; Weinberg, *Place of Trial*, *supra* note 20, at 84; Weinberg, *On Departing from Forum Law*, *supra* note 22. Such dysfunction includes discrimination between similarly situated residents in different cases; the undermining of local policy; enforcement of explicitly disfavored law; subversion of the rule of law; and, when widespread under spurious theories of comity and reciprocity, global denials of access to justice, with concomitant global lawlessness.

47. This is a main argument of Weinberg, *Against Comity*, *supra* note 26. For recent related argumentation, see Dodge, *supra* note 34. *But see* Scott Fruehwald, *A Multilateralist Method of Choice of Law*, 85 KY. L.J. 347 (1996- 97). For interesting commentary see Jeffrey Brand-Ballard, *Legitimacy*,

If these reflections have any merit, the *Second Restatement*'s formula, the "law of the place of most significant contact," and its further presumptive territorial choices, have been very wrong turns indeed.

I will return to the subject of the forum and its discontents very shortly, in discussion of section 6, with which the rest of this paper is concerned. (2000) INDIANA L.J. 486

VI. THE BIRTH OF SECTION 6

Let us acknowledge, at the outset, that section 6 has been the saving of the *Second Restatement*. After the characteristic waste motion of spelling out the substantive sections and subsections, judges turn with obvious relief to the operative feature of the *Second Restatement*, section 6. This list of general choice-of-law considerations is what gives judges access to modern analysis. Judges can consider the policies and interests of the forum and of other concerned states.⁴⁸ Their way is cleared at least to identify and eliminate false conflicts.

Where does this saving feature come from? Section 6 is often traced to a 1952 article by Elliott Cheatham and Willis Reese, discussing enumerated "major policies" of choice of law.⁴⁹ Reese had become Reporter of the proposed new *Second Restatement* in 1951. But, oddly, section 6 does not emerge in the *Restatement* in anything like its current form until some fifteen years after the Cheatham and Reese essay. Section 6 as we know it appears out of the blue in the penultimate 1967 draft.⁵⁰ Nothing like section 6 is in any earlier draft.

The successive drafts of the *Second Restatement*, over the course of twenty years from 1951 to 1971, were not, typically, rewrites. Rather, new drafts usually covered previously unaddressed substantive areas of law. Reese typically took counsel from leading scholars in the various substantive fields. In 1965, as he approached the end of this enormous labor, Willis Reese returned to the beginning of the *Second Restatement*,

Consequentialism, and Conflict of Laws: Lea Brilmeyer's Rights-Based Theory, 30 NEW ENG. L. REV. 39 (1995).

48. SECOND RESTATEMENT, *supra* note 2, § 6, "Choice-of-Law Principles," provides in pertinent part: "[T]he factors relevant to the choice of the applicable rule of law include . . . (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"

49. Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952). The list appears as section headings: "I. The Needs of the Interstate and International Systems," *Id.* at 962, "II. A Court Should Apply Its Own Local Law Unless There Is Good Reason For Not Doing So," *Id.* at 964, "III. A Court Should Seek to Effectuate the Purpose of Its Relevant Local Law Rule in Determining a Question of Choice of Law," *Id.* at 965, "IV. Certainty, Predictability, Uniformity of Result," *Id.* at 969, "V. Protection of Justified Expectations," *Id.* at 970, "VI. Application of the Law of the State of Dominant Interest," *Id.* at 972, "VII. Ease in Determination of Applicable Law, Convenience of the Court," *Id.* at 976, "VIII. The Fundamental Policy Underlying the Broad Local Law Field Involved," *Id.* at 978, "IX. Justice in the Individual Case," *Id.* at 980.

50. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (Proposed Official Draft 1967). Although the *Second Restatement* reached publication in 1971, the final approved and "promulgated" draft appeared two years earlier in 1969, and was concerned with matters not having to do with section 6.

with a new general introduction. This introduction covered “The Reason for Rules of Conflict of Laws; Its Subject Matter and Meaning” and also “Basic Principles.”⁵¹ The Director of the Institute, Herbert Wechsler, provided a Foreword to this, explaining: “When the Conflict of Laws *Restatement, Second*, was begun, it was wisely thought that the revision of the introductory chapter should be postponed until the body of the work had been completely re-examined. This draft signals the **(2000) Indiana L.J. 487** arrival of that stage”⁵² Yet all section 6 amounted to at that time was this: “In formulating rules of Conflict of Laws, a state will give consideration to the interests of other states as well as to its own interests.”⁵³ In the comments accompanying this laconic bromide, Reese said nothing about the Cheatham and Reese “policies.” He spoke briefly of a need for consideration of sister-state interests, but, interestingly, warned against the notion of tit-for-tat reciprocity.⁵⁴ “In formulating common law rules of conflict of laws,” he explained, “the courts are rarely guided by considerations of reciprocity. Private parties, it is felt, should not be made to suffer for the fact that the courts of the state from which they come give insufficient consideration to the interests of the state of the forum.”⁵⁵

We do not know why, suddenly, in 1966, in discussion among Reese’s advisers of the forthcoming 1967 draft, Roger Traynor, Chief Judge of the California Supreme Court, a member of the advisory group, made a strong pitch for inclusion of something like the section 6 we have today. We do know that at the 1967 meeting of the Institute, something resembling the 1952 Cheatham and Reese “policies” *First* made its way into the “black letter” of the *Second Restatement*. Introducing this 1967 reformulation, Reese somewhat misleadingly suggested more of a pre xistence for section 6 than, strictly speaking, can be traced:

The *First* change that I would like to draw your attention to in the draft, if I can go to Section 6, on Page 12, is Choice of Law Principles. I think the matter contained in this section was mentioned considerably more briefly in the comments to one of the sections in the introductory chapter that was before you two years ago.^[56] However, the Advisers, and particularly Chief Justice Traynor, felt that this matter was of some importance, and that it should be put in black letter form.⁵⁷

At this point, a vigorous, prolonged, but unrelated interruption by a person from Porlock, as it were,⁵⁸ in the form of the late Myres McDougal,⁵⁹ deflected the attention of

51. RESTATEMENT (SECOND) OF CONFLICT OF LAWS i, 1, 16 (Tentative Draft No. 12, 1965).

52. *Id.* at vii.

53. *Id.* at 16.

54. *See id.* at 16-17.

55. *Id.*, § 6 cmt. b, at 16.

56. I cannot find what Reese is referring to here.

57. AMERICAN LAW INSTITUTE, PROCEEDINGS OF THE 44TH ANNUAL MEETING 395 (1967).

58. The “person from Porlock,” of course, is the universally regretted interloper who knocked on Samuel Taylor Coleridge’s door, interrupting him in the throes of composing his wildly romantic but fragmentary poem, “Kubla Khan.” The poem had been inspired by an opium dream. See Coleridge’s own 1798 account, written at the suggestion of Lord Byron, in THE POETICAL WORKS OF SAMUEL TAYLOR

the members. No discussion of section 6 took place at that meeting or indeed, at any meeting. Remarkably, regrettably, section 6 was never the subject of floor debate. (2000) INDIANA L.J. 488

VII. CUTTING TO SECTION SIX

The biggest problem we have had with section 6 is that too many judges never actually *get* to it. Our enormous *Restatement* interposes between a problem and the tools for solving it the clumsy and misleading apparatus I have already described.⁶⁰

For reasons that will appear, I am particularly interested in the example of the recent Sixth Circuit case of *Cole v. Mileti*.⁶¹ *Cole* raised a question of the statute of limitations. It was an action in Ohio by the resident widow of an investor in a California movie. The widow alleged that the California producer had failed to repay her husband's loan. A choice-of-law clause in the parties' Ohio agreement stipulated for California law. The action was time-barred in California; Ohio, on the other hand, had a fifteen-year limitations period for cases of this kind. The Court of Appeals, affirming the judgment of the District Court,⁶² held for the widow.⁶³ There was a sharp dissent pointing out that the defendant may have lacked even minimum contacts with Ohio;⁶⁴ but, again, I do not quarrel with the result; only the method.

Cole is among the frequent cases that apply the *Restatement's*⁶⁵ revised section covering the limitation of actions, section 142,⁶⁶ to permit actions under the forum's

COLERIDGE 295 (Ernest Hartley Coleridge ed. 1912), *reprinted in* 2 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 353 (M. H. Abrams et al. eds., 5th ed. 1986).

59. McDougal was worried about a want of coordination between the *Second Restatement* and the *Foreign Relations Restatement*.

60. *See supra* text accompanying notes 12-39.

61. 133 F.3d 433 (6th Cir. 1998).

62. *See id.* at 437-38. There is no reported opinion below.

63. *See id.*

64. *See id.* at 438.

65. The federal court here was sitting as an Ohio court, Ohio having adopted the *Second Restatement* in 1984. *See Morgan v. Biro Mfg. Co.*, 474 N.E.2d 286 (Ohio 1984).

66. SECOND RESTATEMENT, *supra* note 2, § 142 (as amended May 19, 1988):

Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in § 6. In general, unless the exceptional circumstances of the case make such a result unreasonable:

(1) The forum will apply its own statute of limitations barring the claim.

(2) The forum will apply its own statute of limitations permitting the claim unless:

(a) maintenance of the claim would serve no substantial interest of the forum; and

(b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

longer statute.⁶⁷ I mention this phenomenon because we are finding that in these cases, some courts, the *Cole* court among them, are applying section 142 without following section 142's clear directive to consult section 6. Indeed, the *Cole* court did not even read the black-letter qualifications contained in section 142 itself.⁶⁸ **(2000) Indiana L.J. 489**

These limitations cases are particularly unfortunate examples of deflection from section 6, because Willis Reese, late in his life, made a special effort to get courts to look at section 6, at least on the limitations issue. Early in the 1980s, Reese offered to remodel a few sections of the *Second Restatement*, finally limiting himself to the issue of limitation of actions. With this late endeavor, it became obvious that *all Reese had come to care about*, certainly in that context, was section 6. To be sure, in his revision of the limitations section, section 142, he made a show of conforming to the mechanics already laid out in the *Second Restatement*. The user was expected to resort, initially, to section 142, not to section 6. Section 142 provides particularized black-letter rules for choosing law on the limitation of actions, rules of the familiar kind. But what should interest us is what happened in this revision of section 142 to *Restatement's* standard reference to the "place of most significant contact." Reese, now older and wiser, quietly *dropped* the "place of most significant contact,"⁶⁹ and instead moved the user at once, directly and without further hindrance, to section 6. This is very like the structural revision I have in mind.

I do not want to overstate Reese's decision to jettison the "place of most significant contact" here. Reese had a special reason for doing so. Courts had been choosing limitations law by *First* choosing law for the underlying claim, on the ineradicable belief of theorists of the previous generation that limitations law was inherently and always "substantive."⁷⁰ Reese was quite rightly trying to disentangle the two issues,⁷¹ and to

67. In the debate over the revision of section 142, I offered an amendment from the floor which carried. This amendment is codified at section 142(2). *Id.* It enables the forum, in a proper case, to apply its own longer statute. (Professor Reese originally had created a loophole for the longer statute of a sister state, but none for the longer statute of the forum.) See AMERICAN LAW INSTITUTE, PROCEEDINGS OF THE 65TH ANNUAL MEETING 329-37 (1988).

68. The *Cole* court considered section 142(2), but omitted subsections 142(2)(a) and (b). The court held itself authorized by *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988) (holding, under the Due Process Clause, that a state is free to apply its own statute of limitations, even if the result is to reopen a case dead in all other interested states, if the forum's reason for doing so is adherence to the traditional rule that limitation of actions is a procedural matter and therefore one for the forum to govern). *Cole*, 133 F.3d at 436-37. For discussion of *Wortman*, see Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. ILL. L. REV. 683, 694-705 (1991) [hereinafter Weinberg, *Choosing Law*].

69. The revised section 142 treats "significant contact" residually only, by suggesting that the forum ordinarily apply its own longer statute unless it lacks a "substantial interest" in hearing the case *and* there is another state with "a more significant relationship to the parties and the occurrence" that would bar the claim. SECOND RESTATEMENT § 142(2)(a)-(b), *supra* note 2 (as amended May 19, 1988). For discussion of technical difficulties with Reese's revision of section 142, see Weinberg, *Choosing Law*, *supra* note 68, at 705-10. For recent discussion, see *New England Tel. & Tel. Co. v. Gourdeau*, 647 N.E.2d 42 (Mass. 1995) (opting for functional desiderata in choosing limitations law, rather than for an automatic choice of forum law for matters "procedural").

70. See, e.g., UNIF. CONFLICT OF LAWS LIMITATIONS ACT, 12 U.L.A. § § 60-61 (Supp. 1991). Our

restore to the field the more lawyerly separation of issues characteristic of the *Second Restatement*.

But beyond this more modest aim, Reese did plan from the beginning to assimilate choice-of-limitations law to choice of law generally. As he put this in 1986: “Now, (2000) *Indiana L.J.* 490 what we’re suggesting here is to say that the issue of statute of limitations should be determined just the same way as any other issue of choice of law.”⁷² Reese’s revision of section 142 could help courts choose limitations law rationally. By moving the user at once to section 6, Reese lay on the table, for immediate consideration, the functional desiderata enumerated there. Courts choosing limitations law this way could proceed straightforwardly to the essential task of exploring the interests of the forum and of the other concerned states.

Now this is the very sort of transformation I am urging here. We could have a new third *Restatement* that would simply stick to the actual job of choosing law. Our new *Restatement*, building on Willis Reese’s 1988 model, could provide a realistic presumption in favor of forum law. For the job of considering whether the presumption is overcome, our new *Restatement* could offer a useful formalism for courts, since they seem to want one, in an improved section 6 laundry list of functional desiderata, to which courts would be allowed unimpeded access.

If such a change were to encourage interest analysis,⁷³ the third *Restatement* would become *more* faithful, rather than less, to the original thinking behind the *Second Restatement*. It should give us pause in designing a third *Restatement* that, for Elliott Cheatham and Willis Reese, writing in 1952, “[a]pplication of the Law of the State of Dominant Interest,” that is, of “most significant contact,” was only another “major policy”—the sixth, in fact—on their original laundry list.⁷⁴ Writing six years before Brainerd Currie’s *Married Women’s Contracts*,⁷⁵ Cheatham and Reese insisted that the

English cousins, falling into the trap, have adopted an outmoded “substantive” approach as well. See Foreign Limitation Periods Act, 1984, ch. 16, § 1(1) (Eng.). The “substantive” approach also temporarily reared its head in a tentative draft on choice of law by the Reporters of the recent ALI Project on Complex Litigation. See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT § 6.5, ch. 6 (Preliminary Draft No. 3, 1990) (on “Statutes of Limitations”). In *Wortman*, Counsel for Sun Oil argued to an incredulous Supreme Court that the “substantive” approach was a requirement of due process—that the Constitution requires courts to choose the limitations law of the “claim state.” See Weinberg, *Choosing Law*, *supra* note 68, at 701-05.

71. For an earlier rejection of the “substantive” approach to choosing limitations law, see, for example, *Tomlin v. Boeing Co.*, 650 F.2d 1065, 1070 (9th Cir. 1981) (holding that Washington State would choose limitations law directly and analytically; rejecting the view that the law governing liability must also govern the issue of limitations).

72. AMERICAN LAW INSTITUTE, PROCEEDINGS OF THE 63RD ANNUAL MEETING 54 (1987).

73. For discussions of the relation between the *Second Restatement* and interest analysis, see Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 *BUFF. L. REV.* 329 (1997); David E. Seidelson, *Interest Analysis or the Restatement Second of Conflicts: Which is the Preferable Approach to Resolving Choice-of-Law Problems?*, 27 *DUQ. L. REV.* 73 (1988).

74. Cheatham & Reese, *supra* note 49, at 972 (discussing list of subject headings that later became the factors in section 6 of the *Second Restatement*).

75. Currie, *supra* note 22 (laying out the rationales for what came to be called governmental interest

law of the place of most significant contact could be found only by including in one's reasoning a process very like what would later become known as "interest analysis." Among the factors without which the law of the "state of dominant interest" could not be ascertained, Cheatham and Reese included "the purposes or policies underlying the competing laws"⁷⁶ That is, of course, the heart of the interest-analysis method. **(2000) Indiana L.J. 491**

VIII. ZEROING IN ON SECTION 6: AN UNFORTUNATE PRONG

Turning, now, to section 6 itself, I have to say that I am not as enamored of every item on the section 6 laundry list⁷⁷ as section 6's other admirers might be. One of the *First* things I would do with it would be to take "the needs of the interstate and international systems"⁷⁸ from the top of the list of factors to be taken into account in choosing law and bump it to the bottom, where I would post it with warnings.⁷⁹

Mind you, I am prepared to acknowledge as fully as I can that the needs of the system are very important. I do not know what "the interstate system" is, but I am willing to assume that the system has something to do with the federal Union, and with

analysis).

76. Cheatham & Reese, *supra* note 49, at 972. The authors went on to illustrate their point with an analysis of *Gordon v. Parker*, 83 F. Supp. 40 (D. Mass. 1949) (Wyzanski, J.), *affirmed sub nom.* *Parker v. Gordon*, 178 F.2d 888 (1st Cir. 1949). *See* Cheatham & Reese, *supra* note 49, at 974.

77. I guess you really want to read through one more printout of section 6 of the *Restatement (Second) of Conflict of Laws*:

§ 6. Choice-of-Law Principles

(2) . . . [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.

Second Restatement, supra note 2, § 6 (1971).

78. *Id.* § 6(2)(a). Willis Reese was here influenced by Roger Traynor, *Is This Conflict Really Necessary*, 37 TEX. L. REV. 657, 675 (1959). *See* Reese, *supra* note 7, at 682 & n.10.

79. I refrain here from urging that this "needs of the system" factor be deleted, as I have argued elsewhere. *See* Weinberg, *Methodological Interventions, supra* note 4, at 1362. *But see* Luther L. McDougal III, *Toward the Increased Use of Interstate and International Policies in Choice-of-Law Analysis in Tort Cases under the Second Restatement and Leflar's Choice- Influencing Considerations*, 70 TUL. L. REV. 2465 (1996) (for arguments favoring this factor).

the market, as free a market as a well-regulated country can support. I am willing to assume that the system has to do with free trade and prosperity. Closer to Cheatham and Reese, I am willing to assume that the needs of the system have to do with fairness and convenience for persons crossing state lines. And, further, I am willing to extend the beneficence of these views over the whole globe, to “the international system,” and eventually, for that matter, “the intergalactic system.” No one could be “against” such great goods and useful arrangements, any more than anyone could be “against” mothers or the Fourth of July.

But the care and fostering of the “system,” whatever it is, is not what courts are *for*. Courts are where you go when the “system” breaks down. Courts are the resort of individuals who find themselves at the short end of a breach of regular duty. These are people for whom neither the market nor the political system can furnish a practical remedy. They come to court, sometimes exhausting their energies and resources, not to further the needs of the “system” (which is a matter, after all, we leave to legislatures), but rather, to obtain justice in their particular cases. Courts of equity were founded in an analogous insight. If the courts of law could not provide justice, then it became understood that some court must be open to provide it. Today (2000) **Indiana L.J. 492** it is fair to say that all courts are courts of equity, in the sense that the taxpayer who supports them expects them to do justice in her individual case.⁸⁰

Judicial tenderness for a “system” strikes me a priori as all wrong. In all the talk one hears these days about “communitarian” values and “civic republicanism,”⁸¹ why is so little revulsion expressed for such notions?⁸² After all, group-think is one of the things that made twentieth-century communist and fascist countries unfree. Those wrong systems should make us think twice before subordinating the legal protections of individuals to the needs of a system. One of the accepted scientific ways of testing a theory is to take it to a limiting case, an extreme instance, and to see what happens. At the extreme, in an immoral state or in a state with seriously wrong law, judicial deferences to the needs of the “system” become obviously wrong.⁸³ Nazi courts were characterized by judicial disregard of the requirements of individualized justice, and

80. To take a nice recent example of this expectation, see Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501, 525 (1996) (“To discuss habeas purely in systemic terms, focusing on federalism implications . . . and such aggregate issues, is to ignore the narrowest, least controversial and most crucial role of the federal courts—the duty to do justice in the individual case.”).

81. *E.g.*, Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN.L.REV. 29, 30-31 (1985) (stating the aim of reviving republican or communitarian virtues).

82. *See generally* Richard H. Fallon, Jr., *What Is Republicanism, And Is It Worth Reviving*, 102 HARV. L. REV. 1695, 1715-20 (1989) (explaining that the new civic republicanism may seem attractive because it tends to be “liberal” civic republicanism, incorporating liberal ideals, or, rather, libertarian ideals); Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987) (using “liberalism,” as is common, to mean classical liberalism, i.e., libertarianism).

83. For discussion of internal judicial struggles in wholly domestic cases in “wicked” societies, see RONALD DWORKIN, *LAW’S EMPIRE* 101-13 (1986); Weinberg, *Methodological Interventions*, *supra* note 4, at 1321-27 (same; “immoral law” and “unjust societies”).

heavy judicial emphasis on the needs of the Nazi system.⁸⁴ In the antebellum period in this country courts in the southern slave states concerned themselves with the needs of the slave system when they denied justice to slaves otherwise legally entitled to freedom.⁸⁵

In the conflict of laws, concern for the interstate or international systems is reflected in an impulse toward “comity.” Yet such superficially attractive abstractions can yield accommodations to immoral law even in good societies.⁸⁶ The northern **(2000) Indiana L.J. 493** judges that denied justice to slaves filled their opinions with their concern for the survival of the Union itself as they extended an immoral comity to the law of slave states. Federal courts in those times, under the delusion that they could save the Union by denying justice to kidnapped blacks, enforced the notoriously unconstitutional Fugitive Slave Acts.⁸⁷ Today we look back at those tragic denials of justice and feel only horror and shame. And if today a court chooses seriously wrong law-law discriminating, for example, against homosexuals-even in consideration of the needs of comity and the interstate system-that court will have failed at what it sits to do. I have already given an example of the mischief such thinking can do in my discussion of the appalling decision in the *Aramco* case.⁸⁸

How, then, given the wrongheadedness of such reasoning, did we get saddled with section 6’s conspicuous recommendation to judges to consider “the needs” of the “interstate and international” systems? This premier prong, like most of section 6, had its origin in the 1952 article I have already mentioned, by Elliott Cheatham and Willis Reese.⁸⁹ Cheatham and Reese, too, topped their list with it, arguing that “the smooth functioning of the interstate and international systems in private law matters should be the basic consideration in the decision of every choice of law case.”⁹⁰ They pointed out

84. See generally Symposium, *Nazis in the Courtroom: Lessons from the Conduct of Lawyers and Judges Under the Laws of the Third Reich and Vichy France*, 61 BROOK. L. REV. 1121 (1995); David Luban, *A Report on the Legality of Evil: The Case of the Nazi Judges*, 61 BROOK. L. REV. 1139, 1145 (1995) (arguing that the Nazi judges were trained to apply law with the greater good of the state in mind rather than woodenly or positivistically, as had been supposed). Article 2 of the German Criminal Code of 1935 stated: “Punishment is to be inflicted on persons who commit an act which has been declared punishable by the Criminal Code, or which deserves to be punished according to the spirit of a rule of criminal law and healthy folk-feeling.” See also RICHARD LAWRENCE MILLER, *NAZI JUSTIZ: LAW OF THE HOLOCAUST* (1995).

85. See generally Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (1981); Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (1975); Weinberg, *Methodological Interventions*, *supra* note 4.

86. For this argument, see generally Weinberg, *Methodological Interventions*, *supra* note 4.

87. See *id.* at 1334-36 (describing ways in which northern courts in the early antebellum period withheld freedom from slaves in transit, asserting reasons of comity and concern for the needs of interstate travel); *id.* at 1346-47 (describing ways in which federal courts unjustly enforced the Fugitive Slave Act out of concern for the survival of the Union-as if rendition of a slave could save the Union).

88. See *supra* text accompanying notes 24-27.

89. See Cheatham & Reese, *supra* note 49.

90. *Id.* at 962.

that “[i]n no country are the needs of the interstate system more important than in the United States where business and social activities almost ignore state lines.”⁹¹ Cheatham and Reese recognized that a smooth-functioning-of- the-system factor was somewhat superfluous, often finding vindication in their other “policies.” But they thought that this directive needed an explicit statement on its own because it was more than the sum of the others.⁹² To illustrate their meaning, they explained that “the needs of the interstate and international systems normally require that foreigners should not be the subject of discrimination.”⁹³

Cheatham and Reese also believed that rights enforceable in one state generally should be enforceable in another,⁹⁴ as may be gathered from their citation of the still much anthologized case of *Hughes v. Fetter*,⁹⁵ a then-recent Supreme Court decision striking down as a violation of the Full Faith and Credit Clause⁹⁶ a choice of law that did not recognize this principle. As another illustration of their meaning, they pointed to the possibility of an act which, although compelled in one state, would be tortious (**2000**) **Indiana L.J. 494** in another.⁹⁷ For a final illustration, they pointed to the once much-discussed English case of *Cammell v. Sewell*,⁹⁸ holding valid a sale of lumber which, although unauthorized, nevertheless gave good title where effected. Of *Cammell*, Cheatham and Reese approvingly remarked: “Commercial intercourse among the states of this country, or among the nations of the world, would be seriously hindered if title to a chattel, vested under the law of the place where it was at the time, could be successfully questioned upon its transportation elsewhere.”⁹⁹ In a later article, again advertent to the needs of the interstate system, Willis Reese pointed out, as another example, the convenience of choosing the law of the place of incorporation to govern shareholders’ rights.¹⁰⁰ Since “stockholders of a single corporation are often scattered among several states,” “it would be inconvenient indeed if [their] rights and liabilities were not governed by a single law.”¹⁰¹ Taken all in all, then, if Cheatham and Reese had an overriding single idea in mind here, they were thinking of the practical needs of businesses as transactions move in interstate commerce.

“Exactly,” I can hear you agreeing. “Forget about the extreme cases, with their Nazis and slaves. The finest accommodations in the field have come about when courts

91. *Id.*

92. *See id.* at 963 (“It is most unlikely that the lesser policies, when grouped together, form a complete whole.”).

93. *Id.*

94. *See id.*

95. 341 U.S. 609 (1951).

96. U.S. CONST. art. IV, § 1.

97. *See* Cheatham & Reese, *supra* note 49, at 963.

98. 157 Eng. Rep. 1371 (1860) (Ex. Ch.).

99. Cheatham & Reese, *supra* note 49, at 964.

100. *See* Reese, *supra* note 7, at 682-83.

101. *Id.* at 683.

have considered the needs of the interstate system. Think of that grand old classic case, *Milliken v. Pratt*.¹⁰² Chief Judge Gray of Massachusetts was moved to decide that celebrated case as he did by his understanding of the needs of interstate commerce. In denying the benefit of forum law to a resident debtor, the *Milliken* court gave justice to the nonresident creditor and facilitated interstate commerce at the same time.

Well, that is the standard perception of *Milliken*. I am properly wary of saying anything at all about a classic that has been a subject of discussion for 125 years. But there is another way of seeing *Milliken*. Recall that Sarah Pratt, the debtor in *Milliken*, was a married woman, who, on the importunings of her husband, had agreed to stand surety for him.¹⁰³ Today we might not be so quick as the *Milliken* court to impose liability on an inexperienced debtor whom a third party, with undue influence over her, has persuaded, without consideration, to guarantee his debts. Consideration in *Milliken*, after all, went to Sarah's husband, Daniel, not to Sarah.¹⁰⁴ Concepts of marital property do not help to convert this into consideration flowing to the promisor, when the money Sarah "agreed" to put at risk for Daniel was her separate property.

Of course Chief Judge Gray was correct, in a general way, that commerce between Massachusetts and other states would not be helped by putting out-of-state creditors at their peril to learn the domicile of every debtor, and to study the laws at that **(2000) Indiana L.J. 495** domicile.¹⁰⁵ But surely the creditor in *Milliken*, engaged as it was in interstate commerce, was aware or ought to have been aware that Daniel Pratt's surety was only his wife, Sarah, in 1873 a married woman under coverture. Indeed, the officers and agents of Deering, *Milliken & Co.* had grown to manhood in a world in which married women nearly always lacked capacity to contract. On Chief Judge Gray's fine theory about the needs of commerce, Sarah, weak and ignorant, was stripped of the protections with which her state legislature had shielded her from invasion of her separate property by her luckless husband-separate property no doubt settled on her by her family to provide a competency for her whatever the demands of her husband's creditors. It might have been this disregard of the forum's interest in Sarah's maintenance that struck Oliver Wendell Holmes, when he characterized *Milliken* as going to extremes.¹⁰⁶ Even

102. 125 Mass. 374 (1878).

103. *See id.* at 376.

104. Recall that, in effect, Deering, *Milliken & Co.* promised Sarah that if she would promise to stand surety for Daniel, they would extend credit to Daniel for his purchase of goods from them. *See id.* at 374-75.

105. *See id.*

106. "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. This principle was carried to an extreme in *Milliken v. Pratt*." *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (citation omitted). Perhaps Holmes was simply reacting to the insistence of the *Milliken* court that the law of the place of making trumps the forum-domicile, even on the issue of capacity. For an example of Holmes's characteristic willingness to bow to the positive commands of forum law, see the famous case of *Emery v. Burbank*, 39 N.E. 1026 (Mass. 1895) (applying Massachusetts law, under which an oral promise to provide by will was unenforceable). The contract in *Emery* was arguably a Maine contract. But Holmes reasoned that, even on that view of the case, Massachusetts, as the place where the estate was being administered, had a fundamental duty to protect the assets of the testator under Massachusetts's

Cheatham and Reese might not have gone so far, even for interstate commerce. Recall that Cheatham and Reese would give a nonresident plaintiff only what forum law would.¹⁰⁷ No antidiscrimination principle of interstate commerce expounded by Cheatham and Reese would justify lifting from an out-of-state creditor's shoulders the burden of a defense to which every in-state creditor was subject. Their further idea, derived from *Cammell v. Sewell*, that an instrument should be held valid if valid where made, did not compel *Milliken*, either. No matter what Chief Judge Gray said to persuade you that this was a unilateral contract made in Maine,¹⁰⁸ any lawyer from either state would have told you that the contract in *Milliken*, being more naturally understood as a bilateral exchange of promises, was made in Massachusetts, where Sarah signed and posted her **(2000) Indiana L.J. 496** acceptance.¹⁰⁹ And, at the time of making, the contract was invalid at the place of making because Sarah had no capacity to contract there.

Did justice triumph in *Milliken*? I do not know. The repeal in *Milliken* clouds that issue. We accept what happened to Sarah Pratt, perhaps, in part because the legislature in Massachusetts itself had interveningly become willing to strip Sarah of the protections of its laws, and had repealed its married woman's incapacity statute before the time of decision.¹¹⁰ In the long run, of course, other women if not Sarah stood to benefit much more from having contractual rights than from having "protective" legislation. But I am surer about the propriety of the result in *Lilenthal v. Kaufman*,¹¹¹ the Oregon case that went the other way on analogous facts. *Lilenthal* is a familiar object of casebook reproach, since, as everyone knows, *Lilenthal* flouted the "needs" of the "interstate system"; but for reasons similar to those I have given in my discussion of *Milliken*, I am among the few hardy souls¹¹² who think the Oregon court did the right thing in *Lilenthal*.

own laws excluding late-blooming oral claims.

107. See *supra* text accompanying note 93.

108. Gray's tortured theory was that this was a unilateral contract which kicked in when Deering, *Milliken & Co.* began to ship goods on credit to Daniel Pratt. See *Milliken*, 125 Mass. at 376. But this conclusion, in turn, and even less elegantly, depended on the terms of the sale as to shipment and the passing of title.

109. *Id.* at 374. From another point of view, Daniel was applying for a charge account. *Milliken* essentially said: "We will open an account for you, but you need a co-signer to guarantee payment. Your wife would be fine, if she can guarantee payment." Looked at in this way, Sarah and Daniel mail from Massachusetts only a co-signed application for credit-an offer to deal. But it also may be more natural even on this view to see a bilateral exchange of promises: Sarah promising to guarantee Daniel's obligations if the company promises to extend credit.

110. See *id.* at 383.

111. 395 P.2d 543 (Or. 1964) (reluctantly holding that forum law would apply to protect an Oregon debtor's family from his improvident out-of-state contracts, since the family fell within the scope of the protections of Oregon's "spendthrift" legislation). For my views on *Lilenthal*, see Weinberg, *On Departing from Forum Law*, *supra* note 22, at 603-05.

112. For other recent writers comfortable with *Lilenthal*, see Stanley E. Cox, *The Interested Forum*, 48 MERCER L. REV. 727, 750 (1997); Shaman, *supra* note 73, at 352-53. *Lilenthal* is one of the subject cases in a roundtable discussion in Choice-of-Law Symposium, *Choice of Law: How it Ought To Be*, 48 MERCER L. REV. 623 (1997).

Even if shoring up interstate commerce, or “the interstate system,” were a thoroughly laudable goal, and even if we could advance that goal by sacrificing the rights of individuals to it, I wonder if that game would be worth the candle. To be sure, judicial decisions in the aggregate can impact on the commercial or travel decisions of the public in a counterproductive way. Judges, of course, do take such general policy considerations into account. But in a case not directly challenging the interstate commercial power of a state, background concerns about interstate commerce are at best remote, general, and speculative. Courts sit, precisely, to protect the rights of individuals, and it would seem to be the antithesis of that duty for courts to subordinate the rights of individuals to general considerations not constitutionally or legally controlling their cases.¹¹³

But if I am wrong about this, it might be helpful, rather than to delete or demote the “needs of the interstate and international systems,” to think, instead, about a reformulation that would less hazardously capture Reese’s actual concerns: something along the lines of “the practical needs of businesses as transactions move **(2000) Indiana L.J. 497** in interstate or international commerce.” In addition, it would not be amiss to insert an antidiscrimination principle into section 6, counseling courts to avoid the particular discriminations Reese described in his work under the heading of the “needs of the interstate and international systems.”¹¹⁴ It might also be helpful to those who are reluctant to put this hitherto beloved *First* “prong” in the shade in any way, to remember that in any event the prong is to a considerable extent redundant. Courts are alerted to the interests of other states, the expectations of the parties, and the convenience of needed uniform rules, elsewhere in the section 6 laundry list.

IX. THE GREAT LOST BEHEST

We have been recalling the Cheatham and Reese article in which a prototype of section 6 *First* began to take shape. The authors set this forth as a list of “some of the major policies underlying choice of law.”¹¹⁵ The fascinating thing about the proto-list, for all its similarity to section 6, is how *different* it really is from section 6. Here I want to direct your attention to one particularly significant difference, one that is closely related to the discussion thus far.

In the two decades the *Second Restatement* was aborning, one of Cheatham and Reese’s “major policies” seems to have been left by the wayside. In section 6 we find no trace of Cheatham and Reese’s “[j]ustice in the individual case.”¹¹⁶ It is a mysterious disappearance, and one that has not escaped notice.¹¹⁷ Yet we do know that Reese, as

113. See also Weinberg, *Methodological Interventions*, *supra* note 4, at 1359-61.

114. Cheatham & Reese, *supra* note 49, at 962. I return to the possibility of incorporating an antidiscrimination principle shortly in further discussion of section 6.

115. *Id.* at 961; see also *id.* at 961-81 (enumerating and discussing “some of the major policies” in choice of law). For the full enumeration, see *supra* note 49.

116. Cheatham and Reese, *supra* note 49, at 980.

117. See Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1238 (1997) (noting this omission but not pursuing the point);

Reporter of the *Second Restatement*, felt strongly about individualized justice. At least twelve years after undertaking the writing of the *Second Restatement*, Reese was still so committed to “justice in the individual case” that he used it to conclude another proto-section 6 that he published at that time.¹¹⁸ Nor was Reese’s view an isolated one. David Cavers, a leading commentator in that day, agreed with Reese that a choice of law must be evaluated from “the standpoint of justice between the litigating individuals,” as well as from “broader considerations of social policy.”¹¹⁹

It appears that a torrent of criticism fell upon Reese over this issue of justice. In the minds of his opponents, Reese’s was a prescription for “Khadi justice.”¹²⁰ Reese (2000) **Indiana L.J. 498** readily acknowledged that “[u]sually, it will be difficult to tell where true justice lies.”¹²¹ But by far the more serious problem with “justice in the individual case” was that it was, for most of Reese’s critics, the very antithesis of principle.

Justice versus principle. Here was the essential jurisprudential knot. Reese bowed to his critics on the point, conceding that “justice in the individual case, if it were given the most significant role, would be totally disruptive of all legal rules.”¹²² But his accommodation to his critics was only to continue to deny top billing to “justice in the individual case.” The great thing is that Willis Reese was not ready to delete “justice in the individual case.” His stubborn reply to his critics was that, notwithstanding the conflict between justice and principle, “no judge will willingly reach a result which he deems to be unjust.”¹²³ But, just the same, somewhere between then and the final draft the heart went out of Reese’s fight. He capitulated. “Justice in the individual case” simply disappeared.

Willis Reese’s insight about the justice-seeking impulse is as important and true today as it was when he was guided by it. Today some of us are rediscovering the moral thrust of law; some of us are taking up a renewed philosophical commitment to rights

Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 817 (1983) (same).

118. Reese, *supra* note 7, at 690 (“The court should seek to attain justice in the individual case.”).

119. CAVERS, THE CHOICE-OF-LAW PROCESS, *supra* note 17, at 86.

120. Paul H. Neuhaus, *Legal Certainty Versus Equity in the Conflict of Laws*, 28 LAW & CONTEMP. PROBS. 795, 802 (1963) (“In a democratic and pluralist society, the standards for judgment cannot be purely personal or irrational; the judge must be guided by generally recognized standards capable of rational cognition. This is the essential difference between a democratic legal order and a so-called Khadi justice which decides individual cases in accordance with the judge’s sense of equity and without reliance on any objective standards.”). *But see, e.g.*, Robert A. Leflar, *The Nature of Conflicts Law*, 81 COLUM. L. REV. 1080, 1088 (1981) (“Recent argument has centered on the propriety of including ‘justice in the individual case’. . . . The argument cannot turn on whether courts in fact have employed this consideration in deciding conflicts cases; they always have.”)

121. Reese, *supra* note 7, at 690.

122. *Id.* at 690; *see also* CAVERS, THE CHOICE-OF-LAW PROCESS, *supra* note 17, at 86 (arguing that to ask a judge to choose law solely on the basis of justice would be to abolish “our centuries-old subject”).

123. Reese, *supra* note 7, at 690. It was on this ground of the need for “justice in the individual case” that Professor Leflar, too, justified his equally controversial “choice-influencing consideration” of “the better law.” Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1588 (1966).

taken seriously, to a Constitution which is interpreted as “justice-seeking.”¹²⁴

What did Reese have in mind, when he spoke of “justice in the individual case?” It appears that Reese was worried about a choice of bad law. In his thinking, it would be unjust to saddle the parties in conflicts cases with the substandard law¹²⁵ of states (2000) **Indiana L.J. 499** with minority positions “out of tune with the times.”¹²⁶ For this reason Reese bestowed his reluctant blessing, if not his praise, on the New York Court of Appeals’s resort to a choice-of-law rule “of dubious merit”¹²⁷ in *Kilberg v. Northeast Airlines, Inc.*,¹²⁸ to permit full recovery to a New York widow in a wrongful death suit. (The law of the other state in *Kilberg* provided a cap on actual damages in wrongful death cases.) Of course Willis Reese was not the *First* or last author to voice concern over substandard law.¹²⁹ Paul Freund had famously suggested that law diverging from the

124. The term “justice-seeking” in constitutional theory is now generally linked with Professor Sager. Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 415-16 (1993) (arguing for a “justice-seeking” interpretation of the Constitution that acknowledges the judge’s inevitable sense of political justice); see also RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1-38, 72-83 (1996) (taking a moralist view of the Constitution); SOTIRIOS A. BARBER, *THE CONSTITUTION OF JUDICIAL POWER* (1993) (same); SOTIRIOS A. BARBER, *ON WHAT THE CONSTITUTION MEANS* (1984) (same); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 15 (1995) (same). *But see* Anthony J. Sebok, *The Insatiable Constitution*, 70 S. CAL. L. REV. 417, 420 (1997) (arguing that justice-seeking interpretations inevitably collapse into natural law). For an accommodationist view, see James Audley McLaughlin, *Conflict of Laws: The New Approach to Choice of Law: Justice in Search of Certainty, Part Two*, 94 W. VA. L. REV. 73, 89 (1991) (“It is not absurd to suggest that rights analysis can be combined with policy analysis no matter how vehemently each camp might protest.”).

125. The term “substandard law” is, I believe, Professor Juenger’s. For his most recent discussion, see Friedrich K. Juenger, *Choice of Law: How It Ought Not To Be*, 48 MERCER L. REV. 757, 762 (1997) (referring to “substandard foreign rules that [offend the forum’s] sense of justice”) [hereinafter Juenger, *Choice of Law*]. His first usage of the term in the Westlaw database is in Friedrich K. Juenger, *What Now?*, 46 OHIO ST. L.J. 509, 515 (1985).

126. Reese, *supra* note 7, at 690.

127. *Id.*

128. 172 N.E.2d 526 (N.Y. 1961). The reader will recall that the *Kilberg* court chose its own law on damages, on the spurious ground that damages were “procedural,” and on the recognition that New York’s policy favored unlimited recovery. The *Kilberg* court relied on this last as “public policy”; that is, as furnishing a barrier to otherwise applicable law. But “public policy,” of course, under New York’s own illustrious case law, could not effectuate a simple policy preference. See *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918) (Cardozo, J.) (reserving the limitation of “public policy” for foreign law that offends “some deep-rooted tradition of the common weal”).

129. See Paul Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1216 (1946) (suggesting that law which the main stream of cases has passed by might be disregarded); Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 298-99 (1966) (arguing that obsolescent law can be “a drag on the coat-tails of civilization”); Cheatham & Reese, *supra* note 49, at 980 (describing “a situation in which one of the possibly applicable laws is in tune with the times and the other is thought to drag on the coat tails of civilization”). Professors von Mehren and Trautman suggested that forum law that is “regressing,” rather than “emerging,” be avoided. ARTHUR TAYLOR VON MEHREN & DONALD THEODORE TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 377

(2000) **Indiana L.J. 500** main stream of cases might with advantage be passed by.¹³⁰

What was Reese's concern over inferior law, but a preference for "better law"? Robert Leflar, the exponent of "better law,"¹³¹ made the association between *better law* and *justice* even more explicit.¹³² Both authors were saying only that a good rule is a rule that furthers rather than impedes the interests of justice. What was confusing about Reese's own understanding, representative of a common mistake in his generation, I think, was his assumption that *new* law would be "better" than old. He thought newer law would tend to be more progressive, and thus more just. This easy equating of "new" and "progressive" seems to me less helpful in our own day. I think Reese was implicitly assuming that new law would tend to be more *remedial*. I draw this inference in some measure from the extrinsic evidence of section 6(2)(e), in which Reese urges the forum to

(1965). Professor Weintraub early suggested a similar disregard of forum law that is "aberrational" or "anachronistic." RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 346 (2d ed. 1980); see also RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 359-60 (3d ed. 1986). Among current commentators, see, for example, Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 334-36 (1990) (arguing that the forum should reject "obsolete" nonforum law), and Juenger, *Choice of Law*, *supra* note 125 (discussing how judges use concepts such as "policy" or "interests" to avoid applying substandard laws). See, e.g., *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721 (Cal. 1978) (ruling for the defendant under Louisiana law; pointing out that the plaintiff's claim was "attenuated and anachronistic"); *Yazell v. Yazell*, 382 U.S. 341, 351-53 (1966) (describing the doctrine of coverture as "peculiar and obsolete" and expressing "distaste" for it); see also *Clark v. Clark*, 222 A.2d 205, 209 (N.H. 1966).

For further arguments identifying typical substandard laws as defenses, and, given forum shopping, characterizing substandard law as typically nonforum law, see Weinberg, *Against Comity*, *supra* note 26, at 65-66.

Because defenses subordinate . . . fundamental policy concerns underlying a whole field of law, they tend to be disfavored both as a matter of substantive law and of conflicts law. Moreover, defenses, because of their arbitrariness, disparateness, and specificity, are vulnerable to equal protection and due process attacks. [Thus] it is hard to argue that foreign law is not systematically different from, and less regulatory than, forum law. . . . [Forum] law is indeed generally "better."

Id. (footnotes omitted).

130. See Freund, *supra* note 129, at 1216.

131. Recent critiques of the "better law" principle include, for example, Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT'L L. 975, 1014 n.159 (1994) (arguing that discretion qualified only by the adjective "better" would be government not by laws but by Khadis). For the more extreme view that "better" law violates not only the Full Faith and Credit Clause but the principle of *Erie Railroad Co. v. Tompkins*, see Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 312-13 (1992). But see Weinberg, *Methodological Interventions*, *supra* note 4, at 1367-69 (pointing out that the interested forum always has constitutional power to adopt any rule as its own, and that courts typically do fashion new rules for themselves in part from influential rules developed in other jurisdictions).

132. See ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW § 107 (3d ed. 1977). I would prefer, however, that a revised section 6 be explicit about the desirability of "better law," in addition to the desirability of "justice in the individual case." I think these are two separable notions, even if thinking about them tends to lead to the same conclusion.

consider the policies underlying the field of law. Such foundational policies are always remedial (being compensatory, deterrent, validating, and so forth), unlike the policies underlying particular defenses. At bottom, all states seek to remedy injuries and enforce legal norms. And so Reese, with Cheatham, stressed that it was important that a court choosing law strive to find the *most fundamental* policies underlying law.¹³³ We ought to understand this to be an emphasis upon remedial as opposed to defensive or prudential policy. But today it seems even less plausible than it was when Reese was writing that law becomes *increasingly* remedial. We have passed through one too many waves of tort reform to have any such confidence.¹³⁴ The most we can say is that all states continue to share underlying legal norms, whatever the reasonable limitations that local litigational “reforms” place on underlying policy.¹³⁵ One might suppose it fairer to say **(2000) Indiana L.J. 501** that widely shared policies are reflected in “better law,” while defensive and prudential policies tend to be more local, isolated, and aberrational. This retains a grain of truth, but the popularity of particular tort reforms weakens the force of the observation.¹³⁶

Reese was right, in any event, that as a practical matter, in a given case it is going to be very hard to see where justice lies.¹³⁷ Reese’s more troublesome concession, that justice-seeking could undermine all principle,¹³⁸ also contains more than a grain of truth. What Reese meant was that, although judges would maintain the appearance of applying received formalisms, they would, in fact, strive for a just result, even if this put pressure on their formalisms. The only problem I have with this understanding is Reese’s blaming only justice-seeking for judicial manipulation of rules. In *Milliken v. Pratt*, recall, Chief Judge Gray was seeking to further the needs of the interstate system, rather than the interests of justice; it was in the interest of the interstate system, not of justice, that Gray manipulated the rules of contract law to transmute the contract in that case from a very ordinary bilateral exchange of promises clinched in Massachusetts into a surprisingly unilateral contract transported to Maine. There is Khadi injustice as well as Khadi justice.

I cannot help following Reese to his conclusion. Even if we can never discern where justice lies, and even if courts may have to struggle with their formalisms to achieve it, the search for justice seems fundamental to choosing law, as it must be to all adjudication. I would restore this great lost behest to section 6, and put it at the head of all the rest.

133. See Cheatham & Reese, *supra* note 49, at 978.

134. For a more extended discussion of the problem, see Weinberg, *Federal Common Law*, *supra* note 18, at 824-26.

135. See the famous language from *The Sea Gull*, 21 F. Cas. 909, 910 (C.C.D. Md. 1865) (No. 12,578) (Chase, J.): “[Certainly] it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.”

136. For a more extended discussion of this problem, see Weinberg, *Federal Common Law*, *supra* note 18, at 824-26.

137. See Reese, *supra* note 7, at 690.

138. See *id.* at 690 (“disruptive of all legal rules”).

X. ADOPTING ADOPTION

There is another key addition I would make to section 6. I would add a policy that has not yet been suggested but that might make a constructive contribution to the way interstate cases are administered. The new policy would encourage the forum to “adopt” identified better law, rather than to “choose” it.

Recently I have discussed the difference between these two techniques, the method of choosing, and the method of adopting, law.¹³⁹ I believe that that discussion helps to reconcile my positions with the view of Professor Juenger, with whom I tend to agree, that the forum should choose the best law available.¹⁴⁰ In essence, I am **(2000) Indiana L.J. 502** reasoning from the old Legal Realist insight that the forum always applies its own law, whatever it says it is doing. I am arguing that, given this reality, when the forum is considering a departure from its own law, the better method, where it is available, is for the forum to adopt the chosen law as its own rule of decision for this and all subsequent similar cases at the forum.¹⁴¹ Although critics have charged¹⁴² that

139. See Weinberg, *Methodological Interventions*, *supra* note 4, at 1367- 69 (explaining the differences between “choosing” and “adopting” nonforum law); Weinberg, *On Departing from Forum Law*, *supra* note 22, at 610-17.

140. FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 195-97, 213 (1993); see Joachim Zekoll, *Choice of Law and Multistate Justice*, 69 TUL. L. REV. 1099 (1995) (reviewing Juenger, *supra*). For discussion of Professor Juenger’s views, see Stanley E. Cox, *Back to Conflicts Basics: Choice of Law and Multistate Justice*, 44 CATH. U. L. REV. 525 (1995) (also reviewing Juenger, *supra*); Russell J. Weintraub, *Choosing Law with an Eye on the Prize*, 15 MICH. J. INT’L L. 705 (1994) (same); Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79 (1993); Luther L. McDougal III, *The Real Legacy of Babcock v. Jackson: Lex Fori Instead of Lex Loci Delicti and Now It’s Time for a Real Choice-of-Law Revolution*, 56 ALB. L. REV. 795 (1993). For related analyses, see William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371 (1997); Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949 (1994). For my discussion of Professor Juenger’s views, see Weinberg, *Methodological Interventions*, *supra* note 4, at 1368-69.

141. See, e.g., *Pevoski v. Pevoski*, 358 N.E.2d 416 (Mass. 1976) (reasoning that forum law should apply to a case between residents; adopting the “better” New York rule denying interspousal tort immunity); see also Weinberg, *On Departing from Forum Law*, *supra* note 22, at 601 (arguing that “a court that has found the law of a sister state to be ‘better’ than its own, in so doing has inescapably discerned its own current policy. Once that happens, the cleaner, more direct approach would be to make a change in local law.”).

142. See, e.g., Laycock, *supra* note 131, at 312 (arguing that the forum cannot choose better law rather than the law otherwise applicable without creating the sort of general common law that Erie struck down). *But see* Weinberg, *Methodological Interventions*, *supra* note 4, at 1367-69 (arguing that the interested forum always has constitutional power to adopt any rule as its own; pointing out that courts typically do fashion new rules for themselves in part from influential rules developed in other jurisdictions). See also JUENGER, *supra* note 140, at 165-69 (unfortunately suggesting a need to overrule *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and restore *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), to permit federal courts to develop a separate body of substantive law for two-state cases).

choosing the best rule available would violate the requirements of positivism laid down in *Erie Railroad Co. v. Tompkins*,¹⁴³ that criticism becomes irrelevant once the forum adopts the better rule as its own. The forum always has full constitutional power in a case before it to make law for all issues in which it has legitimate governmental interests.¹⁴⁴ Indeed, as I have argued elsewhere, an interested forum cannot depart from its own law without dysfunction.¹⁴⁵ **(2000) Indiana L.J. 503**

Adopting a foreign rule as the forum's own brings with it substantial benefits. Not the least of these must be the improved protection it obviously offers against the appearance of "Khadi justice." A court that is prepared to apply a new rule in all like cases is surely less likely to have made a lawless or willful application in the case before it.

To this advantage must be added the greater honesty and directness of the approach. The forum would not, after all, have reached for foreign law that inadequately reflected its own policies. Moreover, in embracing a rule identified as better, the forum can avoid the difficulty of having to undermine its own rule and then having to enforce the undermined rule in a later case. Then, too, adopting rather than applying a foreign rule helps to ensure the evenhandedness of the forum's justice in like domestic cases. Finally, the local legislature would thereby gain power to override the announced rule on its merits.

XI. AN ANTIDISCRIMINATION PRINCIPLE

For some time now, diehard anti-modernists have been criticizing modern methods of choice of law as discriminatory.¹⁴⁶ While I believe the anti-modernists are wrong

I believe that neither Kramer, Larry Kramer, *Appendix D: Letter from Larry Kramer to Harry C. Sigman, Esq., August 29, 1994*, 28 VAND. J. TRANSNAT'L L. 475 (1995), nor Borchers, *supra* note 140, should be read as having such concerns. The same probably holds true for Cox, *supra* note 140, at 533 ("This does not mean, however, that the forum should seek law outside of its own sphere of influence or should try to apply law to situations outside of its proper sphere of influence.").

143. 304 U.S. 64 (1938) (holding that the Constitution requires rules of decision attributable to some sovereign that can be identified). For recent skeptical discussion, see Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998).

144. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (employing the test announced in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981)) ("[The] State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."); see also *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939) (holding that the law of either interested state can constitutionally apply in a case of true conflict).

145. See *supra* text accompanying note 46.

146. For responses to this class of argument, see, for example, Dodge, *supra* note 34; Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271, 291-94 (1996); Jeffrey Brand-Ballard, *Legitimacy, Consequentialism, and Conflict of Laws: Lea Brilmayer's Rights-Based Theory*, 30 NEW ENG. L. REV. 39 (1995); Bruce Posnak, *Interest Analysis: They Still Don't Get It*, 40 WAYNE L. REV. 1121, 1151 (1994) [hereinafter Posnak, *They Still Don't Get It*]; Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 9 (1989); Bruce Posnak, *Interest*

about this, I think we should take from them a reminder of the importance of the antidiscrimination principle in the administration of law in courts.

Recently my colleague, Doug Laycock,¹⁴⁷ has taken up the argument. Professor Laycock decries what he perceives as the core evil of modern methods: discriminatory denials of forum law to “visitors from sister states.”¹⁴⁸ On this account he urges the abandonment of forum preference in favor of territorial rules.¹⁴⁹ The appeal of such reasoning is suggested by the fact that although Laycock’s article is well-cited, it has received little critical attention.¹⁵⁰ Laycock acknowledges that when the forum departs from its own law there is discrimination between similarly situated **(2000) Indiana L.J. 504** residents in like cases; but he is more disturbed by the discrimination he perceives when a court would apply its local law to benefit its own resident, but would not do so to benefit a nonresident.¹⁵¹ Professor Laycock underscores the point by reminding us that the Privileges and Immunities Clause of Article IV¹⁵² prohibits “discrimination” against “visitors,”¹⁵³ while it does not prohibit discrimination between forum residents.¹⁵⁴ But of course the Equal Protection Clause does.

I suspect Professor Laycock is struggling here with a straw man.¹⁵⁵ It is very rare in my experience to see a case in which courts discriminate against visitors. For obvious reasons, modern choice-of-law methods tend to treat all persons acting or injured at the forum identically. Those persons understand very well that they have come within the sphere of the forum’s governmental concerns. The key to Professor Laycock’s conundrum is that the Constitution protects against discrimination among those who are similarly situated only. When persons come within the forum’s sphere of governmental

Analysis and Its “New Critics”, 36 AM. J. COMP. L. 681 (1988); Weinberg, *Place of Trial*, *supra* note 20, at 87-90; Russell J. Weintraub, *Interest Analysis in the Conflict of Laws as an Application of Sound Legal Reasoning*, 35 MERCER L. REV. 629, 630-34 (1983-84); Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the ‘New Critics’*, 34 MERCER L. REV. 593 (1983).

147. See Laycock, *supra* note 131, at 276-78; see also Lea Brilmayer, Carolene, *Conflicts, and the Fate of the “Inside-Outsider”*, 134 U. PA. L. REV. 1291 (1986); John Hart Ely, *Choice of Law and the State’s Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); P. John Kozyris, *Reflections on Allstate-The Lessening of Due Process in Choice of Law*, 14 U.C. DAVIS L. REV. 889 (1981); James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980).

148. Laycock, *supra* note 131, at 276.

149. “Eliminating forum preference altogether is the only constitutional solution.” *Id.* at 311.

150. One exception is Posnak, *They Still Don’t Get It*, *supra* note 146, at 1151-70.

151. See Laycock, *supra* note 131, at 278, 311.

152. U.S. CONST. art. IV.

153. Actually, in the case of corporate parties, the Commerce Clause would better have served the argument. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177-78 (1869) (holding that corporations are not “citizens” for purposes of the Privileges and Immunities Clause of Article IV).

154. See Laycock, *supra* note 131, at 278.

155. For an argument that such views are without foundation, see Weinberg, *On Departing from Forum Law*, *supra* note 22, at 596-97 (concluding that forum discrimination is a “bugbear” that “need never have engaged the intellect”).

interest, of course forum law must govern them, whether they are residents or not. Thus, to find an example of the alleged problem, Laycock has to rely upon the notoriously wrong case of *Schultz v. Boy Scouts of America, Inc.*,¹⁵⁶ a case he is certainly right to deplore. Although the safety of a territory is ultimately secured for the benefit of those living there, that policy cannot rationally be effectuated without extending its benefit to everybody present there. Potholes of unsafety hurt visitors and residents alike.¹⁵⁷

Professor Laycock gives another example of forum discrimination against nonresidents: the case in which the nonresident is *not* at the forum when injured or acting. In Professor Laycock's example, the plaintiff is the nonresident and the defendant is the resident. (We recognize this case, of course, as one configuration of the classic unprovided-for case.) In such cases Professor Laycock believes that the interest-analytic forum would withhold its law from the nonresident.¹⁵⁸

For some reason Professor Laycock seems not to have noticed that if the forum does withhold its law from the nonresident in such a case, it is because the forum is **(2000) Indiana L.J. 505** applying the law of the place of injury,¹⁵⁹ the very thing he says he wants it to do.¹⁶⁰ But set that to one side. Professor Laycock rightly presents this example as a hypothetical case, because in this situation American courts not infrequently *do* extend their protections to nonresidents, even as against their own residents, even

156. 480 N.E.2d 679 (N.Y. 1985) (holding erroneously that New York lacked an interest in remedying a tort to a visiting tourist, a minor), *cited in* Laycock, *supra* note 131, at 329 n.449. *Cf.* Weinberg, *Against Comity*, *supra* note 26, at 89 (pointing out the irrationality of New York's declaring "open season on visiting Boy Scouts" in the midst of New York's "I love New York" campaign to promote tourism).

157. The position is explained in Weinberg, *Place of Trial*, *supra* note 20, at 79. The current attraction of courts to spurious distinctions between conduct-regulating rules and other rules has distracted them from the straightforward analysis which might have preserved the *Schultz* court from embarrassment.

158. *See* Laycock, *supra* note 131, at 276 n.158.

159. This was the preferred solution, for example, in the much-criticized case of *Neumeier v. Kuehner*, 286 N.E.2d 454 (1972), which denied an otherwise meritorious claim under the irrelevant law of the place of injury.

160. I identify this and other inconsistencies of the typical anti-modernist critique in Weinberg, *Place of Trial*, *supra* note 20, at 88.

They [anti-modernists] demand the benefit of forum law for all, while insisting that it is parochial if the forum in fact applies forum law. They demand the benefit of forum law for all, while deploring forum shopping. They demand the benefit of forum law for all, while insisting that only the law of the place of injury (or other "neutral," event-based, territorially chosen law) be applied. They demand the benefit of forum law for all while deploring the "export" of burdensome forum law to nonresidents acting abroad-even though the forum may be the place of injury in such cases. These positions, taken together, are so entertaining one almost hopes the anti-modernists will go on insisting on them.

Id. (citations omitted) (emphasis in original).

when their regulatory policies cannot easily be engaged.¹⁶¹ It is common experience that courts tend to (and should, where feasible) choose law that will allow the plaintiff to go to the jury.¹⁶² (2000) *Indiana L.J.* 506

But if the forum does withhold its law in an unprovided-for case, nothing in that can violate the Constitution. To the contrary, a court applying its own law when it has no interest in doing so in any other case would be violating the Due Process Clause;¹⁶³ we tolerate arbitrary forum law in the unprovided-for case only because the other state's law is equally arbitrary. Nor is any antidiscrimination principle offended when a nonresident with a foreign cause of action seeks favorable forum law and does not get it. If Professor Laycock were right, forum non conveniens where the defendant resides would be

161. See, e.g., *Bushkin Assocs., Inc. v. Raytheon Co.*, 473 N.E.2d 662 (Mass. 1985) (approving an action for a finder's fee by a New York broker against a Massachusetts customer, where the place of contracting was New York; New York, but not Massachusetts, would have barred suit on an oral contract). For a case in which a resident and a nonresident were both injured out of state in the same car, see the concern expressed in *Tooker v. Lopez*, 249 N.E.2d 394, 408 (N.Y. 1969) (Burke, J., concurring). The difficulty came to a head in New York in *Neumeier*, in which the court, announcing a set of choice rules for future such tort cases, treated the place of injury as tie breaker. My analysis of *Neumeier* can be found tucked away in Weinberg, *Mass Torts*, *supra* note 11, at 841-44.

The *Neumeier* court's (and Professor Laycock's) territorial tie-breaker does have the merit that, in the case in which the underlying event occurred where the defendant resides, the forum has an easier time enlisting that state's regulatory policies. The classic casebook example is probably *Milkovich v. Saari*, 203 N.W.2d 408 (Minn. 1973) (applying plaintiff-favoring forum law against the resident defendant driver, when the place of injury, which would have barred suit, was the plaintiff's residence). For a case in which the forum's regulatory policies worked against its resident plaintiff, see *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 248 N.E.2d 576, 582 (N.Y. 1969). In an action on an oral agreement by a New York broker claiming a finder's fee, the court held for the New Jersey defendant customer. The court reasoned that New York law, unlike New Jersey law, requires a brokerage agreement to be in writing, and that New York has an interest in applying this rule to protect "foreign principals who utilize New York brokers," in order to give foreign principals confidence in dealing with New York agents). See also *Bushkin Assocs.*, 473 N.E.2d at 664-65, for a version of *Daystrom* in which the New York broker went to Massachusetts to sue his customer at her home. The Massachusetts court allowed the plaintiff broker to go to the jury under forum law. *Id.* at 671.

162. The extended argument for this proposition is in Weinberg, *Mass Torts*, *supra* note 11, at 819-23 (arguing that plaintiff-favoring choices of law are the only "neutral" choices: "[W]hen the law chosen on an issue of liability is favorable to a plaintiff, a likely result is only that she will be allowed to try to prove her case, and that the defendant will have a chance to be heard. On the other hand, when the law chosen on an issue of liability is favorable to a defendant, a likely result is dismissal, with prejudice."). Elsewhere on several occasions I have made the extended argument that the American litigational system is structured in a plaintiff-favoring way. See, e.g., Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 463-68 (1982). For detailed critical discussion of these views, see George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. Rev. 649 (1993).

163. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (striking down forum law in a class action adjudicating nonresidents' rights to out-of-state natural gas interests); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (striking down forum law in an action between parties nonresident at all relevant times, in a case on out-of-state facts).

unconstitutional. (Perhaps it should be, but that is another matter.¹⁶⁴)

Although the anti-modernists' allegations of discrimination are easily answered, there is every reason a revised section 6 should articulate an explicit antidiscrimination policy. This is not merely to lend comfort to the anti-modernists. They rightly remind us that the antidiscrimination principle is too fundamental and too important to have been omitted from section 6. Repairing this omission should help to alert courts to those concededly rare situations in which a risk of discrimination might be presented.

The principle is so important in itself that its omission seems perplexing. My hunch is that an explicit antidiscrimination principle became a practical impossibility when section 6 was drafted. That is because "the law of the place of most significant contact" had meanwhile become the overarching choice of the *Second Restatement*. Nothing could be more discriminatory than departures from the law of the forum in cases within its scope, properly construed.¹⁶⁵

XII. ENVOI

In the end, the past generation's retrograde retreat into jurisdiction-selecting techniques and presumptive territorial rules can be seen for what it was. It was a fear of cutting loose from moorings in the past, a fear of flying. But we can build upon that generation's intellectual achievements in interest analysis, including the early interest analysts' understanding of the ordinary presumption in favor of forum law.

Of course, an interest analysis will produce unjust results if there is seriously wrong law either at the interested forum or at the only interested state.¹⁶⁶ Professor Reynolds (2000) *Indiana L.J.* 507 argues, "Weinberg's *lex fori* rule would . . . increase the number of perverse results that happen any time decisionmaking is separated from policy."¹⁶⁷ Of course, the law of "the place of most significant contact," or any other place away from the forum, if chosen without regard to policy, is equally perverse. As for the perverse law of the interested forum, the obvious solution for the forum applying identified "better" foreign law is to adopt it as its own, rather than to purport to "choose" it.¹⁶⁸ In the case in which the technique of adoption of better law is unrealistic or unavailable, the presumption of forum law can and should be overcome in the interests of justice.¹⁶⁹ Indeed, this ancient rule of the common law is a longstanding "true rule" in the conflict of laws.¹⁷⁰ It explains a good share of the naive departures from forum law familiarly

164. For the view that forum non conveniens is irrational at the defendant's home state, see Louise Weinberg, *Insights and Ironies: The American Bhopal Cases*, 20 TEX. INT'L L.J. 307, 308-15 (1985).

165. See, for example, the discussion of the *Aramco* case, *supra* text accompanying notes 24-27.

166. For a general consideration of this class of problems, see Weinberg, *Methodological Interventions*, *supra* note 4.

167. Reynolds, *supra* note 140, at 1393. To similar effect, see also Patrick J. Borchers, *Back to the Past: Anti-Pragmatism in American Conflicts Law*, 48 MERCER L. REV. 721, 726 (1997).

168. See *supra* text accompanying notes 139-45.

169. See *supra* text accompanying notes 115-38.

170. Albert A. Ehrenzweig, *Choice of Law, Current Doctrine and "True Rules"*, 49 CAL. L. REV. 240, 241 (1961) (empirically identifying "true rules" of choice of law that are reliably predictive of actual

anthologized in the casebooks.¹⁷¹

We have been designing here a third conflicts *Restatement* that owes much to the *Second Restatement*. But our new third *Restatement* owes as much to the newer model the *Second Restatement's* reporter himself supplied in 1988.¹⁷² I cannot say that Willis Reese would have favored extending his 1988 model to the *Restatement* as a whole, but the arguments for doing so are convincing. Our third *Restatement* would strip the *Second Restatement* of its volumes of particularized rules and definitions, and would give courts direct and immediate access to its improved version of section 6. The salient features of our third *Restatement* would be trans-substantive and therefore few.¹⁷³ They would include¹⁷⁴ presumptions:¹⁷⁵

—That ordinarily a court will apply its own laws and policies, properly construed, to an issue falling within their scope;

—That in comparing the interests of the forum and of other concerned states, if it becomes apparent that there is only one interested state, a court will presumptively apply the law of that state; and **(2000) Indiana L.J. 508**

—That a court will determine whether the foregoing presumptions can be overcome in accordance with the choice-of-law “policies” listed in (an improved version of) section 6.

The proposed revision would not only give courts faced with a choice of law immediate access to the functional desiderata in section 6, and would not only obviate any intervening need for characterization of issues, and lists of “contacts”; but also would preserve courts from struggles to “solve” false conflicts, and from the danger of “solving” them irrationally.

As for the redesign of section 6 itself, the proposal would continue to include prominent references to the essential tools of interest analysis:

—The interests of the forum and

—The interests of other concerned states.

But a redesigned section 6 would de-emphasize systemic “needs.” Instead, it would restore Willis Reese’s focus on:

outcomes in a way formal rules might not be).

171. *See, e.g.*, *Haumschild v. Continental Cas. Co.*, 95 N.W.2d 814 (Wis. 1959) (choosing the law of the state of domicile to govern the issue of interspousal tort immunity where nonforum law would not permit the plaintiff to go forward); *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954) (choosing English law to govern a separate support agreement where forum law would leave the forum family without maintenance).

172. *See supra* text accompanying notes 69-72; SECOND RESTATEMENT, *supra* note 2, § 142 (as amended 1988).

173. Where more particularized directives may prove to be indispensable, they can be subsumed under a general reference to exceptions, which in turn can be illustrated in the commentary accompanying the black letter.

174. Other primary directives would deal with such matters as, for example, the effect of a choice-of-law clause.

175. In these proposals I use descriptive, rather than drafting, language.

- Justice in the individual case; and
- Better law.

Finally, an upgraded section 6 would embrace two new policies:

- An antidiscrimination principle, and
- A principle favoring adoption rather than “choice” of nonforum law identified as “better law.”

One obstacle to any such reform, I am afraid, is the nature of *Restatements* themselves. A *Restatement*, as we all know, has to be a compendium of particularized rules accompanied by voluminous notes. Without this, what would members of the American Law Institute debate at annual meetings? Yet each of the section 6 “policies,” after all, could still ground its own voluminous notes, if that is any comfort. Is it necessarily a vain hope that the Institute could, just once, find the courage for a pamphlet instead of a set of telephone books—could, just once, find the courage of brevity?

Streamlined, reconceptualized, and refocused along the lines suggested here, a redesigned *Restatement* can recall courts now distracted by mind-numbing contact-counting and iteration of black letter to their essential tasks: affording reason in the application of law, and justice in the individual case. Reason and justice, after all, are what courts are all about. In this special sense, principle and justice converge.

Other writings by Louise Weinberg are available at
http://www.utexas.edu/law/faculty/pubs/lw482_pub.pdf