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A SURVEY AND EVALUATION OF COMPETING CHOICE-OF-LAW METHODOLOGIES: THE CASE FOR ECLECTICISM

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I. INTRODUCTION

Sweeping changes and acrimonious debate were the order of the day in the choice-of-law field during the years of the sixties and early seventies. Two salient trends stand out: There was widespread rejection of traditional choice-of-law thinking and there was a raging debate over the conflicting theories offered as replacements for traditional thinking. Although it has been asserted that the choice-of-law doctrines of the first *Restatement of Conflict of Laws* were never deeply fixed in our case law,¹ it is nevertheless true that the first *Restatement* was for many years the most influential statement of traditional methodology. In 1963, Professor Brainerd Currie concluded that the battle against the first *Restatement* had been won. He said that the first *Restatement* had been renounced by the American Law Institute and that no responsible scholar was willing to defend it.² These years also witnessed widespread abandonment of traditional choice-of-law concepts by the courts. The most drastic changes came in the tort choice-of-law cases where state after state overturned or modified the *lex loci delicti* rule.³

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1. D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 12 (1965); Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 379 (1966).

2. Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754 (1963).

3. *Armstrong v. Armstrong*, 441 P.2d 699 (Alas. 1968); *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968); *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *Wartell v. Formusa*, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); *Fabricius v. Horgen*, 257 Iowa 268, 132 N.W.2d 410 (1965); *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967); *Schneider v. Nichols*, 280 Minn. 139, 158 N.W.2d 254 (1968); *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968);

Although there was widespread rejection of old concepts,⁴ one is hard pressed to find anything approaching a consensus on new concepts to take their place.⁵ The judge, practitioner, or law student who attempts to survey scholarly thinking in the conflicts field must surely come away from his reading with the impression that the law review articles outnumber the significant cases and that these articles were written by members of countless contending factions, each convinced that it has the only sensible solution to choice-of-law problems.⁶

Although scholars indicate clearly and often rather testily the basis of their disagreements, the courts which have rejected traditional rules often write opinions which mean all things to all people. New York, one of the first states to break away from the traditional approach, has, according to the authors of a leading conflicts casebook, "hopped frenetically from one theory to another like an overheated jumping bean."⁷ The typical judicial opinion which rejects traditional learning does not endorse and consistently rely upon a particular methodology. Instead, the tendency is to combine a reference to significant contacts or relationships—the nomenclature of the *Restatement (Second) of Conflict of Laws*—with a discussion of the policy considerations which the court considers relevant.⁸ The courts' use of terminology and techniques from competing methodologies—what some commentators have aptly described as eclecticism⁹—has enabled scholars of diverse points of view to unite in their praise of some decisions.¹⁰ While praising specific decisions,

Kennedy v. Dixon, 439 S.W.2d 173 (Mo. En Banc 1969); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); Issendorf v. Olson, 194 N.W.2d 750 (N.D. 1972); Fox v. Morrison Motor Freight, Inc., 25 Ohio St. 2d 193, 267 N.E.2d 405, cert. denied, 403 U.S. 931 (1971); Casey v. Manson Constr. & Eng'r Co., 247 Ore. 274, 428 P.2d 898 (1967); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Woodward v. Stewart, 104 R.I. 290, 243 A.2d 917, petition for cert. dismissed, 393 U.S. 957 (1968).

4. Dean Erwin Griswold was a notable exception. See the opinion summarizing his views in *CAVERS*, *supra* note 1, at 20-24.

5. See, e.g., *Comments on Babcock v. Jackson, a Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963); *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 551 (1968); *Symposium on the Restatement (Second) of Conflict of Laws*, 72 COLUM. L. REV. 219 (1972); *Symposium on Cipolla v. Shaposka - An Application of "Interest Analysis,"* 9 DUQUESNE L. REV. 347 (1971).

6. *Id.*

7. R. CRAMTON & D. CURRIE, *CONFLICT OF LAWS* 258-59 (1968).

8. *Id.* at 256.

9. *Id.* at 257; Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 204 (1969).

10. R. CRAMTON & D. CURRIE, *supra* note 7, at 257.

scholars often indicate that there is a need to tie a series of cases together by use of a more coherent methodology. Yet there is much to be said in behalf of the tendency to pick and choose from among competing approaches in fashioning a solution to a particular choice-of-law problem. Eclecticism may be a strength rather than a weakness.

These developments have generated a sharp counterreaction in some quarters.¹¹ Professor Rosenberg has asserted that the bar and lower courts were flabbergasted by the famous case of *Babcock v. Jackson*.¹² Ridgeway K. Foley, Jr. has argued that in many tort cases one will not know the applicable law with any assurance until the case has been decided by the state supreme court.¹³ Professor Juenger has suggested that the undue time expended in using the new methodologies and the lack of guidance provided by judicial opinions which espouse them has resulted in a situation in which “. . . the parties pay more for ‘flexibility’ than they used to pay for rigidity.”¹⁴ In discussing the *Restatement (Second)*, John P. Frank has pointed out that the multiplication of decision points in a case inevitably increases the burden on courts.¹⁵ Professor Rosenberg, an outstanding scholar himself, has suggested that scholars must share some of the blame for what has become an unhappy state of affairs:

Scholars, in their fascination with conflicts, should not forget that the game is not being played so they can flex their jurisprudential muscles, but in order to better the human condition through law.¹⁶

The reaction of scholars to the thrust and counterthrust of the contemporary debate varies according to the point of view of the writer and whether he is defending himself from attack, taking the offensive, or seeking to explain what the tumult is all about. In response to charges that the new functional, state-interest methodologies are unduly complex, it has been asserted that this is simply

11. See, e.g., Foley, *Fragmentation in the Conflict of Laws*, 47 ORE. L. REV. 377 (1968); LaBrum, *The Fruits of Babcock and Seider: Injustice, Uncertainty and Forum Shopping*, 54 A.B.A.J. 747 (1968); Rosenberg, *Two Views on Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459 (1967); Rosenberg, in *Symposium on the Value of Principled Preferences*, 49 TEX. L. REV. 211, 229 (1971).

12. Rosenberg, *Two Views on Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 460 (1967). The citation to the *Babcock* case is 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

13. Foley, *supra* note 11, at 386.

14. Juenger, *supra* note 9, at 217.

15. J. FRANK, *AMERICAN LAW: THE CASE FOR RADICAL REFORM* 95-105 (1969).

16. Rosenberg, in *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 641, 644 (1968).

not true.¹⁷ Implicit in such answers to criticism is the suggestion that the critics do not fully understand the new methodology or that the criticism is motivated by an unwillingness or inability to discard old ways of thinking about choice-of-law problems. Another reaction one finds in the literature is a concession that the present situation is less than satisfactory, coupled with a suggestion that the choice-of-law field is in a transitional phase and that the problems will gradually be brought under control.¹⁸ Some of those who hold this view believe that the difficulties in choice-of-law are caused primarily by the youth and fluidity of the subject.¹⁹ One could also point to the vacuum created by the demise of the first *Restatement* as the primary cause. Still others seem to believe that the transition will be completed and the major problems solved when everyone is finally persuaded to adopt one particular methodology.²⁰

An underlying assumption in much of the writing on choice-of-law is that we will gradually perfect our methodologies or our understanding of the subject and eventually arrive at a "fail-safe" system.²¹ Yet absent fundamental changes in our federal system, we will achieve only partial solutions, and any consensus we may achieve will be temporary. The promise of an ultimate solution will only raise false expectations. To be blunt about it, choice-of-law problems are and will continue to be unmitigated nuisances for the judge and practitioner. At the same time, these problems are and will continue to be a source of fascination for the scholar because of the very complexity and intractability that make them a source of discomfort for the bench and bar. The most important causes of this state of affairs are not the youth of the subject, the fascination of scholars with complexity, or the refusal by too many judges and lawyers to rid themselves of outmoded patterns of thought. The basic causes, which will be examined later, are more fundamental than any of these. This is not, however, a counsel of despair. Although the resources of jurisprudence may not be adequate to produce a completely satisfactory methodology, it is possible to decide

17. Weintraub, *John P. Frank's Criticisms of Recent Developments in Conflict of Laws*, 47 TEX. L. REV. 977, 978 (1969).

18. Cheatham and Reese, *Choice of the Applicable Law*, 45 COLUM. L. REV. 959 (1952); Hancock, *Torts Problems in Conflict of Laws Resolved by Statutory Construction: The Halley and Other Older Cases Revisited*, 18 U. TORONTO L.J. 331, 350 (1968); Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679, 680 (1963).

19. Cheatham and Reese, *supra* note 18, at 959.

20. Hancock, *supra* note 18, at 350.

21. The term "fail-safe" was taken from Nadelmann, *Marginal Remarks on the New Trends in American Conflicts Law*, 28 LAW & CONTEMP. PROB. 860 (1963).

cases in an informed manner while developing choice-of-law principles which take account of the needs of the various persons, groups, and institutions affected by the choice-of-law process. Moreover, to argue that we will not perfect a "fail-safe" system is not to argue that improvement is impossible. Improvements have been and are being made. But it is essential to remember that the choices that must be made are not between alternatives that are clearly good or clearly bad, or between methodologies that are essentially defective or completely satisfactory. Professors Cheatham, Reese, and Leflar have demonstrated that a number of values are at stake in the choice-of-law process.²² Some values can be advanced only by sacrificing others. Some problems can be solved only by ignoring others. In the final analysis, the acceptance of a particular methodology usually involves a decision that some values are more important than others and that some problems must be dealt with while others can be tolerated.

If this is an accurate assessment of the situation, the judge, practitioner, or law student may well ask whether the study of choice-of-law methodologies is worthwhile. The answer must be an emphatic yes. Scholars have been more influential in this field than in most. Contemporary judicial opinions are replete with references to scholarly works, and attorneys are expected to deal with contending methodologies in their briefs. Moreover, since conflicts cases occur relatively infrequently, members of the bench and bar are not able to devote the time to the subject that is necessary to acquire real expertise. When they are confronted by a choice-of-law problem, they often find that the case law does not provide adequate guidance. Not only is it difficult to find precedent to cover the multitude of different cases that can arise, but it is also difficult to reconcile and make use of the precedent which exists. What is needed is a set of assumptions that will assist in determining which facts are significant, provide a method of evaluating the relative importance of the pertinent facts, and illuminate the issues. Given the complexity of the subject, it is also important to develop a method of inquiry that will break problems down into their component parts and indicate the manner in which decisions should be made. In short, the lawyer confronted with a choice-of-law problem needs a model that will provide a framework for decision making. The methodologies developed by conflicts scholars provide such

22. Cheatham and Reese, *supra* note 18; Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. Rev. 267 (1966).

models. In order to make an intelligent choice among the available models and intelligent use of the model chosen, one needs to have some knowledge of the principal schools of thought and an understanding of the essential differences among them.

Several theses are advanced in this article. First, it is a mistake to assume that there is or ever will be a permanently acceptable "fail-safe" methodology. Arguments by conflicts scholars that they will come up with acceptable solutions if they are given more time should be greeted with skepticism. It will help to understand what is involved if one views the methodological debate in conflicts as analogous to the continuing tension between such fundamental values as excellence and equality. The tension between these two values arises in many contexts and is never completely resolved. By the same token, the tension between the competing values at stake in the choice-of-law process will never be completely resolved. Although this is not a particularly profound or original point, one can become confused or unduly upset by a failure to keep it in mind. Second, an eclectic approach is preferable to consistent adherence to a particular methodology, because the importance of advancing certain values varies with changes in the law-fact patterns in conflicts cases and because different methodologies emphasize different values. Finally, it is a thesis of this article that the *Restatement (Second) of Conflict of Laws*, although clearly imperfect, is the most desirable model currently available for use as a framework for making choice-of-law decisions. Although it would be a mistake to accept all of its recommendations, its basic approach is sound because it recognizes that eclecticism is the proper response to the many competing values at stake in the choice-of-law process. Wholly aside from the theses advanced, the article is designed to serve as an introduction to the principal competing choice-of-law methodologies. An understanding of the various alternatives and some of their strengths and weaknesses can contribute substantially to the ability of judges, practitioners, and law students to deal with choice-of-law problems.

II. A SURVEY OF CHOICE-OF-LAW METHODOLOGIES

There are many ways of classifying the various methodologies found in the legal literature.²³ Any attempt to simplify and pigeon-

23. Compare D. CAVERS, *supra* note 1, at 63-64; Hancock, *Three Approaches to the Choice-of-Law Problem: The Classificatory, the Functional and the Result-Selective*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 365 (1961); with Juenger, *supra* note 9, at 205-14.

hole will contain flaws because there will be important omissions and categories will overlap. The richness and sophistication of the contributions of individual scholars and schools of thought make it difficult to summarize their methodology, and it is even more difficult to force them into a few categories. Even so, a number of useful distinctions and methods of classification have been developed. Professor Cavers illuminated the difference between traditional and modern approaches when he distinguished between jurisdiction-selecting conflicts rules and those which choose between specific rules of law.²⁴ He commented on the same dichotomy in somewhat different terms when he observed that the past forty years had been marked by tension between the “quest for simple rules designed to yield uniform, predictable choices of law and the effort to develop principles capable of producing choices that would be meaningful in terms of the interests of the parties and states involved.”²⁵ Professor Freund succinctly distinguished between two fundamentally different approaches to choice-of-law when he praised an opinion by Chief Justice Stone as “noteworthy for renouncing a geographical test in favor of a teleological one in the choice-of-law. Not place but purpose was decisive.”²⁶ Seeking categories that would aid in thinking about problems or hypotheses in the conflicts field, Professor Hancock divided choice-of-law methodologies into three categories: classificatory, functional, and result-selective.²⁷ He used the term “classificatory” to refer to the traditional approach of selecting the applicable choice-of-law rule through the process of classification or characterization.²⁸ He included in the functional and result-selective categories those approaches which “proceed directly, without benefit of choice-of-law rules, to a consideration of the policies of the competing domestic laws in order to make a choice between them.”²⁹ Professors Reese and Rosenberg view the contemporary conflicts debate as being between two groups. Rosenberg and Reese have both suggested that the battle lines should be drawn between those who believe that relatively narrow conflicts rules can be drawn and those who would eschew any rules in favor of a method of

24. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

25. Cavers, *Re-Restating the Conflict of Laws: The Chapter on Contracts*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 349 (1961).

26. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1214 (1946).

27. Hancock, *supra* note 23, at 365.

28. *Id.* at 367.

29. *Id.*

analysis designed to solve choice-of-law problems.³⁰ Professor Reese has also stated that there are two chief rival approaches at the present time: governmental interest analysis and an approach that he described as consideration of all the objectives.³¹ He included in the second category the approaches of Professor Robert Leflar and the *Restatement (Second) of Conflict of Laws*.³²

Although the distinctions adverted to above provide useful insights, they do not provide as full a picture as is desirable to illustrate the range of modern alternatives that are available for use by the courts. A more useful survey can be made by following the approach taken by Professor Cavers in *The Choice-of-Law Process*,³³ in which Cavers described several choice-of-law methodologies and identified each with a modern conflicts scholar or the first *Restatement*.³⁴ This article will summarize six different methodologies, which will make it possible to indicate the principal models available for use in the analysis and solution of choice-of-law problems. In some cases, the decision to discuss a particular approach was influenced more by the insights such a discussion would provide than by a belief that it represents a viable methodology for use today.

A. *The First Restatement of Conflict of Laws*

It is appropriate to discuss at the very outset the methodology of the first *Restatement*. Although the first *Restatement* is in dispute in scholarly circles and the extent of its influence even during its heyday may have been exaggerated,³⁵ some sections of the *Restatement (Second) of Conflict of Laws* borrow from it³⁶ and a number of courts have shown considerable reluctance to repudiate its doctrines.³⁷ Moreover, a case can be made on functional grounds

30. Reese, *Recent Developments in Torts, Choice of Law Thinking in the United States*, 8 COLUM. J. TRANSNAT'L L. 181, 184 (1969); Rosenberg, in *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 551, 641-42 (1968).

31. Reese, *supra* note 30, at 185-90.

32. *Id.* at 188.

33. D. CAVERS, *supra* note 1, chs. II and III.

34. *Id.* at 63-75.

35. *Supra* note 1.

36. *E.g.*, notes 164, 165 and 169 *infra*.

37. *See, e.g.*, *Quandt v. Beech Aircraft Corp.*, 317 F. Supp. 1009 (D. Del. 1970); *Bible v. Chevron Oil Co.*, 308 F. Supp. 312 (E.D. La. 1969), *aff'd*, 460 F.2d 1218 (5th Cir.), *cert. denied*, 409 U.S. 984 (1972); *Browning v. Shackelford*, 196 So.2d 365 (Miss. 1967); *Petrea v. Ryder Tank Lines, Inc.*, 264 N.C. 230, 141 S.E.2d 278 (1965); *Cherokee Laboratories, Inc. v. Rogers*, 398 P.2d 520 (Okla. 1965), *overruled*, *Brickner v. Gooden*, 525 P.2d 632, 637 (Okla. 1974); *Marmom v. Mustang Aviation, Inc.*, 416 S.W.2d 58 (Tex. Civ. App. 1967), *aff'd*, 430

for continued use of some of its provisions. Perhaps the most important reason why such a discussion is appropriate is that the principal common characteristic of modern conflicts thinking is opposition to the first *Restatement*.³⁸ One must understand the first *Restatement* and some of the objections to its methodology to understand the current situation in the choice-of-law field.

Seeking rules that would secure the same result in a particular case in whatever forum the case might be brought, the drafters of the first *Restatement* recommended a few all-embracing rules designed to allocate each case to the legal system of a single state.³⁹ The allocation is accomplished by isolating for each category of cases a connecting factor, such as the place where the tort occurred⁴⁰ or the place of contracting.⁴¹ Thus a court arrives at the applicable law in a conflicts case by deciding which category a case falls into—tort, contract, property, etc.—and then ascertaining the state in which the connecting factor for the category is located. In following this method, it is unnecessary to consider the specific content of the conflicting rules or the policies which prompted their adoption.

In Hancock's terms, the first *Restatement's* methodology is classificatory;⁴² in Professor Freund's terms, it is geographical.⁴³ At least on the surface, the first *Restatement* seemed to offer a method that would prove easy to apply and that would achieve the uniformity which its proponents considered so important. Yet scholarly opposition to the first *Restatement* began developing even before its drafters completed their work. Professor Lorenzen of Yale resigned as an adviser after the first sections were written and began speaking out against the approach taken.⁴⁴ Professor Walter Wheeler Cook joined the attack early and persisted in his efforts for years.⁴⁵ Other scholars, as well as some courts, later joined the foray, turning the stream of criticism into a raging torrent.

Several objections to its methodology have produced the pre-

S.W.2d 182 (Tex. 1968).

38. D. CAVERS, *supra* note 1, at 12.

39. An excellent short summary of the methodology of the first *Restatement* can be found in D. CAVERS, *supra* note 1, at 65-66.

40. RESTATEMENT, CONFLICT OF LAWS § 378 (1934).

41. *Id.* at § 332.

42. See text accompanying note 27 *supra*.

43. See text accompanying note 26 *supra*.

44. R. LEFLAR, AMERICAN CONFLICTS LAW 1 (2d ed. 1968).

45. See the summary of Cook's ideas and work in Lorenzen, Book Review, 52 YALE L.J. 680 (1943).

vailing consensus on the first *Restatement*. It is said that the multitude of choice-of-law problems that arise cannot be dealt with satisfactorily by a few rules of broad applicability.⁴⁶ It is argued, for example, that when consideration is given to the many different issues that arise in tort cases and the multitude of rules that have been developed to deal with these issues it would be surprising if socially desirable results were attained by an invariable reference to the law of the state where the tort occurred. A broad consensus has developed behind the notion that choice-of-law problems cannot be handled satisfactorily by a few all-embracing rules.⁴⁷ In addition, whereas the first *Restatement* tended to refer all issues in a case to the law of a single state, there is general agreement now that the governing law should, in some cases, shift from issue to issue.⁴⁸

One of the most important objections to the approach of the first *Restatement* was developed by Professor Cavers.⁴⁹ He used the phrase "jurisdiction-selecting" to describe rules which locate the state whose law is to be applied without consideration of the substantive content of that law. He pointed out that the choice-of-law rules of the first *Restatement* resulted in a choice between the legal systems of two jurisdictions rather than a choice between two specific substantive rules of law, thus ignoring the special facts of cases and the purposes of the conflicting laws.⁵⁰ There is now widespread agreement that the content of the relevant rules should be considered in fashioning a solution to choice-of-law problems,⁵¹ although there is continuing debate on the degree of importance that should be attached to such consideration.⁵² Modern scholars urge an examination of the policies embodied in the competing rules and a weighing of the other values at stake in a choice-of-law problem, rather than a conceptual analysis of rules and exceptions to rules.⁵³

It is asserted that the first *Restatement's* approach leaves to chance whether the law applied is that of the state with the greatest

46. Cheatham and Reese, *supra* note 18, at 959; Reese, *supra* note 18, at 681.

47. Reese, *supra* note 30, at 181.

48. *Id.* at 182.

49. Cavers, *supra* note 24.

50. See *id.* at 192-93 for a summary of the alternative approach proposed by Professor Cavers.

51. RESTATEMENT (SECOND), CONFLICT OF LAWS § 145, comment *c* at 416 and Reporter's Note (adopted 1969; pub. 1971) (hereinafter cited as RESTATEMENT (SECOND)); Reese, *supra* note 30, at 182.

52. Compare Currie, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1212, 1233, 1235-40 (1963) with RESTATEMENT (SECOND), *supra* note 51, at § 6, comments at 415-16.

53. See, e.g., Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1598 (1966).

interest and whether the result reached produces justice in the particular case.⁵⁴ This is said to be a by-product of the failure to consider the content of the conflicting laws and the technique of choosing the applicable law by classifying disparate types of cases into a few all-embracing categories. Brainerd Currie sought to illustrate what he thought was the capricious nature of this approach by suggesting that the values of uniformity and certainty could be achieved by a rule which governed all matters relating to tort liability by the law of Alaska.⁵⁵ In his article on married women's contracts,⁵⁶ Professor Currie pointed out the consequences of applying the first *Restatement* methodology in all the possible variations of a case such as *Milliken v. Pratt*,⁵⁷ in which a married woman executed a guaranty of her husband's credit in favor of a partnership doing business in another state. Professor Currie assumed that one state allowed such contracts and that the other did not, and that the choice-of-law rule to be applied was the first *Restatement's* place of contracting rule. He concluded that there were four factors of significance in such cases: the creditor's place of business, the married woman's domicile, the place of contracting, and the place where the cause of action was brought. Sixteen different cases could arise as a result of the various combinations of these four factors. Only fourteen of these cases would produce choice-of-law problems since one case would be purely domestic (all four factors occurring in the forum state) and one case would be purely foreign (all four factors occurring in the other state).⁵⁸ After analyzing the fourteen possible conflicts cases, Currie concluded that consistent application of the law of the place of contracting would produce the following results:

. . . in six of the fourteen possible cases the interests of one state are defeated without advancement of the interests of the other, and that in two additional cases the interests of the forum are made to yield to foreign interests. In only four cases are the interests of one state advanced without impairment of a foreign interest. In two cases the interests of the forum are given preference over foreign interests.⁵⁹

54. D. CAVERS, *supra* note 1, at 77.

55. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 699 (1963).

56. Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958), reprinted in B. CURRIE, *supra* note 55, at ch. 2.

57. 125 Mass. 374 (1878).

58. Currie, *supra* note 56, at 232-33.

59. *Id.* at 246.

In sum, if a desirable result is measured in terms of advancing the interests of the states whose laws are potentially applicable, Currie believed that the methodology of the first *Restatement* did not reach desirable results in a high percentage of the cases that arise.

Scholars have also argued that the uniformity and certainty claimed of the first *Restatement*, the grounds of its alleged strength, have not been achieved in practice.⁶⁰ When broad and mechanical choice-of-law rules lead to undesirable results, the courts often find ways of avoiding their application.⁶¹ In some cases courts have refused to apply the otherwise applicable law of another state because such a law was considered contrary to local public policy.⁶² The traditional distinction between substance and procedure can be manipulated so as to change the applicable law. Direct action statutes, for example, have been labeled as substantive in some jurisdictions and procedural in others.⁶³ The process of characterizing a problem to ascertain the applicable connecting factor is another tool available to a court determined to avoid the consequences of a particular choice-of-law rule. Faced with a suit in which characterization as a tort would require one result, another result can often be achieved by characterizing the suit as one primarily involving a contract.⁶⁴ Similar opportunities exist in litigation involving mortgages, because the cases usually can be characterized as sounding either in property or in contract.⁶⁵

B. *The Rheinsteinst Method*⁶⁶

Professor Max Rheinsteinst of the University of Chicago believes that much of the difficulty in choice-of-law arises because "writers came to regard it as the task of conflicts law to demarcate from each other the spheres of proper exercise of the power of sovereign states to regulate human activities."⁶⁷ He asserts that the true task of conflicts law is to mitigate the hardships for individuals which re-

60. D. CAVERS, *supra* note 1, at 66.

61. *Id.*

62. This concept is discussed in Paulsen and Sovern, "Public Policy" in the *Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

63. See McPheeters, *Choice of Laws—New Missouri Approach?*, 32 MO. L. REV. 392, 393 nn.9 & 10 (1967).

64. See, e.g., *Levy v. Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 143 A. 163 (1928).

65. See the cases collected in R. CRAMTON & D. CURRIE, *supra* note 7, at 83-85.

66. Discussed in D. CAVERS, *supra* note 1, at 63, 67-69.

67. Rheinsteinst, *Ehrenzweig on the Law of Conflict of Laws*, 18 OKLA. L. REV. 238, 240 (1965).

sult from diversity in the rules of decision by which the conduct of private individuals is measured.⁶⁸ He recognizes that other policies influence the shaping of conflicts rules. For example, inasmuch as a primary goal in shaping norms of decision is the determination of behavior, conflicts rules may be consciously shaped to facilitate a harmonious coexistence of states pursuing different policies toward behavior.⁶⁹ He maintains, however, that the primary purpose of choice-of-law rules—indeed the very reason for having such rules—is to protect the justified expectations of private individuals.⁷⁰ In his view, the ideal situation would be one in which each individual could know in advance by what state's law his conduct will be measured.

Professor Rheinstein's emphasis on justified expectations leads inexorably to a rejection of the approach taken by the governmental interest analysis school of thought. Like Professor Ehrenzweig, Rheinstein believes that the government interest school is mistaken in its view that the purpose of conflicts law is to decide which of competing entities of government shall prevail.⁷¹ Because law is a complex of norms which are enforced by the state, it is natural to think of law as rules of conduct addressed by the sovereign to individuals. This, in turn, makes it natural to view conflicts law as providing guidance as to which sovereign's command shall prevail. Rheinstein points out that it is possible to view law differently.

We can just as well say that the rules of law are commands to certain officers of the state, telling them under what circumstances they ought to go into action against individuals by seizing their property, depriving them of life or liberty, or subjecting them to other detriments.⁷²

If law is viewed in this way, the rules of law which appear to be addressed to judges as rules of decision can be thought of as being addressed to individuals as rules of conduct. This makes a difference in conflicts thinking because the emphasis shifts from accommodating the conflicting demands of sovereigns to a more important consideration—the parties' expectations.

68. *Id.* at 241.

69. Rheinstein, Book Review, 32 U. CHI. L. REV. 369, 375 (1965).

70. See Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 17-31 (1944), for a detailed exposition of the reasons why primary emphasis should be given to justified expectations.

71. Rheinstein, *supra* note 69, at 371.

72. *Id.* at 373.

The protection of justified expectations can best be accomplished, according to Rheinstein, by relying on narrow jurisdiction-selecting choice-of-law rules developed to deal with specific problems. For example, where the first *Restatement* looked to the law of the place of wrong for the governing law on the issue of charitable immunity, Rheinstein suggests that the applicable law should be that of the state of incorporation.⁷³ If the broad categories of the first *Restatement* were broken down into narrow categories based upon specific problems, he believes that narrow rules could be developed that would make sense in the context of the particular problem at hand. Professor Rheinstein's approach is similar to that of the first *Restatement* in the sense that it is classificatory and jurisdiction-selecting.⁷⁴ It differs, however, in the method by which the categories and rules are developed. The first *Restatement* was conceptualistic. Its rules were thought to be derived by logical necessity from such postulates as a right vested in one state must be protected everywhere.⁷⁵ Rheinstein would develop rules and categories through a functional approach, analyzing the problems raised by narrow situations and fashioning rules based upon policy judgments.

Rheinstein believes that much of contemporary American conflicts thinking is based upon a misconception of the classificatory approach. The misconception, in his opinion, is the idea that the object of the classification is the statute or rule of law in question. Rheinstein would classify problems instead of statutes. He suggests that this has been the long-accepted approach in European conflicts law, especially in Germany.⁷⁶

Rheinstein's ideas bear some resemblance to those of Professor Willis Reese, the Reporter for the *Restatement (Second)*. Both believe that one of the chief shortcomings of the first *Restatement* was the attempt to fashion a few all-embracing rules rather than a number of narrow rules, and that one of the chief shortcomings of the

73. See the opinion by Rheinstein, J., in D. CAVERS, *supra* note 1, at 24-26. For examples of other rules urged by Rheinstein, see Rheinstein, *supra* note 70, at 30-31; Rheinstein, *How to Review a Festschrift*, 11 AM. J. COMP. L. 632, 660 (1962).

74. Rheinstein makes the following statement:

How can one classify facts or legal categories? What one can classify are either problems to be decided, or rules of law by which to decide problems. Direction of conflicts law toward the latter leads to chaos toward the former to workable and stable rules of jurisdiction selection.

Rheinstein, *How to Review A Festschrift*, 11 AM. J. COMP. L. 632, 662 (1962).

75. Rheinstein, *supra* note 69, at 369.

76. Rheinstein, *How to Review a Festschrift*, 11 AM. J. COMP. L. 632, 660 (1962).

governmental interest school is a willingness to jettison all rules.⁷⁷ Both Rheinstein and Reese could be said to advocate a classificatory approach in which narrow rules are adopted after analysis of all relevant policies. Although Professor Reese believes that justified expectations are important,⁷⁸ he does not give this policy the prominent position it has under the approach advocated by Professor Rheinstein.

C. *The Currie Method*

Professor Brainerd Currie of Duke University developed an approach to choice-of-law that has come to be known as governmental interest analysis.⁷⁹ He sought to determine the applicability of competing rules of law by ascertaining the purpose behind the rules. Rejecting classificatory and territorial approaches, he proposed an approach that in Professor Freund's terms could be considered teleological.⁸⁰ When asked to apply the law of a state other than the forum, he thought the court should employ the ordinary techniques of construction and interpretation to ascertain whether, in light of the policies behind the forum and foreign state rules, the forum or foreign states have an interest in having their law applied. States have an interest when the policies underlying their laws would be furthered by the application of their own laws. These policies are furthered when the legal rule in question is applied to the kinds of cases it was intended to deal with.⁸¹ If only one state has an interest, its law should be applied. When there is an apparent conflict between the interests of the forum and one or more other states, the court should first seek to avoid the conflict by a moderate and restrained interpretation of state policies. When a conflict cannot be avoided in this fashion, forum law should be applied. When the forum is disinterested and two other states are interested, Currie was more equivocal in his recommendations.⁸² He believed, however, that this was not a crucial problem because disinterested forums are relatively rare.⁸³

77. See the articles by Professor Reese cited notes 18 and 30 *supra*.

78. See RESTATEMENT (SECOND), *supra* note 51, at § 6; Cheatham and Reese, *supra* note 18, at 970-72.

79. For summaries of Currie's choice-of-law approach, see Currie in *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1233, 1242-43 (1963); Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171.

80. *Supra* note 26.

81. Comment, *False Conflicts*, 55 CALIF. L. REV. 74, 80 (1967).

82. See Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754 (1963).

83. R. CRAMTON & D. CURRIE, *supra* note 7, at 295.

The search for interests through the process of construction and interpretation is the crucial step in Professor Currie's approach. It can be illustrated by reference to his discussion of *Grant v. McAuliffe*,⁸⁴ a 1953 decision by the Supreme Court of California. The case involved a collision between two automobiles in Arizona. All parties in the case were from California. The driver of one car died, and the driver and passengers in the other car sued the administrator. Under Arizona law, torts did not survive the death of the tortfeasor. Under California law, causes of action did survive.

To Currie, the policy behind California law was not difficult to formulate. Damages for personal injuries were thought of as compensation to the injured party. Any local interests in insulating the estate of the tortfeasor from liability were subordinate to the interest in compensation of both the injured party and the public. In light of the compensatory purpose behind California law, California would have an interest in the application of its law when the injured person was one toward whom that state had a governmental responsibility. This would include residents and domiciliaries of California and those present in California at the time of injury.⁸⁵

Currie believed that it was more difficult to formulate the policy behind Arizona law because he thought Arizona law was probably the result of inertia rather than a considered decision. He concluded, however, that the most rational policy that could be attributed to Arizona was that the living—the heirs and creditors of the tortfeasor—should not pay for the wrongs of the dead. Recognizing that it would complicate matters to treat Arizona policy as directed specifically toward actual heirs and creditors, Currie resorted to a fiction and looked for a factor other than actual connection between the state and a protected person. He concluded that either domicile of the deceased tortfeasor within Arizona or the administration of property in Arizona would suffice. Thus, Arizona was thought to have an interest in the application of its law whenever the deceased tortfeasor was domiciled there or whenever an action was brought in Arizona against an ancillary representative.⁸⁶

Many modern scholars part company with Currie when he suggests that forum law should always be applied in a "true-conflict" situation.⁸⁷ But his suggestion that an analysis of many problems

84. 41 Cal. 2d 859, 264 P.2d 944 (1953).

85. The matters discussed in this paragraph are covered in B. CURRIE, *supra* note 55, at 141-45.

86. *Id.* at 143-46.

87. R. CRAMTON & D. CURRIE, *supra* note 7, at 287.

will reveal that only one state has an interest—what has come to be known as the “false-conflict” case—is accepted by a broad spectrum of commentators.⁸⁸ The false-conflict concept has been called the “abiding cornerstone of governmental-interest analysis.”⁸⁹

In terms of the scholarly debate over methodology, it is important to note that Professor Currie rejected all choice-of-law rules which were not statutory.⁹⁰ Discussing *Babcock v. Jackson*,⁹¹ he said:

The question will inevitably be asked: If the governmental-interest analysis of *Babcock v. Jackson* is to prevail, must all choice-of-law problems be solved on an *ad hoc* basis, or will new generalizations be possible? My response is that, for the time being at least, new efforts to find short cuts and syntheses should be sternly discouraged. We are beginning to recover from a long siege of intoxication resulting from overindulgence in generalities; for a while, at least, total abstinence should be enforced.⁹²

As a corollary to his willingness to substitute *ad hoc* analysis for rules, he was prepared to abandon the search for uniformity of result irrespective of forum.⁹³ Scholars such as Professors Reese and Rosenberg have suggested that this rejection of rules is the most important factor which distinguishes governmental interest analysis from most other contemporary methodologies.⁹⁴

D. *The Cavers Method*

David Cavers of Harvard advocates an approach that is similar in many respects to Professor Currie's. The most complete statement of his position was given in the 1964 Cooley Lectures at the University of Michigan Law School. These lectures were the basis of his 1965 book, *The Choice-of-Law Process*. Both Cavers and Cur-

88. See D. CAVERS, *supra* note 1, at 91-92; Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process*, 46 TEX. L. REV. 141, 144 (1967). For criticism of the false-conflict concept, see Leflar, *True "False Conflicts," Et Alia*, 48 BOSTON U. L. REV. 164 (1968).

89. Baade, *supra* note 88, at 144.

90. Although he conceded that a statutory choice-of-law rule must be followed, he was not enthusiastic about the efficacy of such statutory rules. Baade, *supra* note 88, at 150-51; Currie, Book Review, 1964 DUKE L.J. 424-25.

91. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

92. Currie, in *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1233, 1241 (1963).

93. Baade, *supra* note 88, at 145.

94. See Reese, *Choice-of-Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972); Rosenberg, in *Symposium on the Value of Principled Preferences*, 49 TEX. L. REV. 211, 229 (1971).

rie agree that an analysis of the purpose of competing laws will often reveal a false conflict, although Cavers seems to expect fewer solutions from this type of analysis than Currie.⁹⁵ In Cavers' view, the difficulty in interest analysis is not in ascertaining the purpose behind laws, but rather results from the fact that laws often have multiple purposes which may point in opposite directions.⁹⁶

Cavers and Currie differ most sharply when interest analysis does not reveal a false or readily avoidable conflict. Currie at this point asserted that an interested forum should apply its own law. Cavers, however, believes that it is the responsibility of the court:

. . . to seek a rule for choice of law or a principle of preference which would either reflect relevant multistate policies or provide the basis for a reasonable accommodation of the laws' conflicting purposes. A principle of preference would be applicable to all cases having the same general pattern of law and fact and would identify a preferred result on choice-of-law grounds. If the case could not thus be generalized, the court should state the reasons leading it to prefer one result to the other on choice-of-law grounds. In either case it should apply the law leading to the preferred result.⁹⁷

The use of a principle of preference to resolve a true conflict can be illustrated by a hypothetical variant of *Grant v. McAuliffe*⁹⁸ posed by Professor Cavers. Cavers suggests that a true conflict would be presented if the facts are changed so that Arizona was the tortfeasor's domicile and California was the place of the accident and the domicile of the plaintiff.⁹⁹ Arizona would have an interest in applying its law to protect the estate of its deceased domiciliary. If suit were brought in Arizona, Currie's methodology would result in the application of Arizona law unless the court resorted to a "moderate and restrained interpretation."¹⁰⁰ Cavers, however, believes that the court should apply California law, relying upon the following principle of preference:

Where the liability laws of the state of injury set a *higher* standard of conduct or of financial protection against injury than do the laws of the state where the person causing the injury has acted or had his home, the laws of the state of injury should determine the

95. D. CAVERS, *supra* note 1, at 73-74, 108.

96. *Id.* at 108.

97. *Id.* at 64.

98. 41 Cal. 2d 859, 264 P.2d 944 (1953).

99. D. CAVERS, *supra* note 1, at 141-42.

100. *See* Currie, *supra* note 82, at 759-61.

standard and the protection applicable to the case, at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing their relationship.¹⁰¹

Cavers asserts that this principle of preference reaches a desirable result because Californians should not be put in jeopardy by someone coming into California from a state whose law provides a lower standard of financial protection.¹⁰² He believes the defendant has no basis to complain because he receives the benefits at the same time that he assumes the burdens of the state's law.¹⁰³

This principle illustrates what Cavers says is a territorialist bias in his principles of preference.¹⁰⁴ Although he recognizes that there are situations where it would be desirable to assume that a citizen carries the law of his state about with him, he believes with Judge Wyzanski that "departures from the territorial view of torts ought not to be lightly undertaken."¹⁰⁵ Among the reasons for this belief is the fact that the territorial organization of states and state legal systems has created customary attitudes toward law which would result in a feeling of having been wronged if the resulting expectations were defeated.¹⁰⁶ In addition, he believes that the identification of an individual's rights with the laws of a single state is attenuated by the great mobility of our citizens and the fact that we are citizens of the United States as well as of a single state.¹⁰⁷ Subsequent to the original statement of his principles of preference, Cavers modified his original position on their use in cases involving false conflicts. He originally thought they should be used only in cases involving true conflicts. He now believes the principles of preference can be useful in deciding whether a conflict is false or avoidable.¹⁰⁸

101. D. CAVERS, *supra* note 1, at 139.

102. *Id.* at 142.

103. *Id.* at 141. The second principle of preference deals with the situation where the liability laws of the state in which the defendant acted and caused an injury set a lower standard of conduct or of financial protection than the laws of the home state of the person suffering the injury. For an interesting discussion of the application of this principle of preference, see Cavers, *Cipolla and Conflicts Justice*, 9 DUQUESNE L. REV. 360 (1971).

104. D. CAVERS, *supra* note 1, at 134, 139. See also Twerski, *Enlightened Territorialism and Professor Cavers-The Pennsylvania Method*, 9 DUQUESNE L. REV. 373 (1971).

105. D. CAVERS, *supra* note 1, at 134-35, quoting from *Gordon v. Parker*, 83 F. Supp. 40, 42 (D. Mass. 1949).

106. D. CAVERS, *supra* note 1, at 135.

107. *Id.* at 136.

108. Cavers, in *Symposium on the Value of Principled Preferences*, 49 TEX. L. REV. 211, 220-21 (1971).

Just as his 1933 article on choice-of-law¹⁰⁹ was a pioneering effort, Cavers' 1965 book broke new ground. Although he has not developed principles of preference for all or even a substantial portion of the areas in which conflicts problems arise, he hopes that those he has suggested will serve as an example of the direction in which work should proceed.¹¹⁰ Professor Horowitz of U.C.L.A. believes that principles of preference "will surely be the form which the choice-of-law rules of the future will take."¹¹¹ Cavers' methodology places him somewhere between the problem-oriented jurisdiction selection advocated by Professor Rheinstein and the ad hoc interest analysis of Professor Currie. If one focuses on the territorial orientation of the principles of preference, he can see parallels to the problem-oriented rules designed to further justified expectations advocated by Rheinstein. If one focuses on the false-conflict analysis and the phrasing of principles to reflect the substantive content of competing rules, the methodological kinship with Currie stands out. Cavers' principles of preference also place him somewhere between the narrow rules argued for by Professors Reese and Rosenberg and the ad hoc analysis advocated by the governmental interest school. Although the principles of preferences are rather general, they are rules. On the other hand, Cavers uses governmental interest analysis in searching for false conflicts, and he deals expressly with the substantive content of competing laws. Cavers' approach blends domiciliary and territorial factors¹¹² and forges a link between geography and teleology. Having staked out a middle ground in the current debate, he is both praised and criticized by those on either side.¹¹³

One of the interesting things to watch in conflicts scholarship will be whether Cavers himself or someone else will build on his insights and develop a comprehensive set of principles of preference. Another interesting issue is whether the principles of preference will be considered a halfway point or the end product in a comprehensive methodology. Professor Reese has suggested that the principles of preference will be a useful guide pending development of more precise rules.¹¹⁴ Cavers, on the other hand, believes that general

109. Cavers, *supra* note 24.

110. D. CAVERS, *supra* note 1, at 136.

111. Horowitz, *The Law of Choice of Law in California-A Restatement*, 21 U.C.L.A. L. REV. 719, 780 (1974).

112. Felix, *The Choice-of-Law Process at a Crossroads*, 9 DUQUESNE L. REV. 413, 415 (1971).

113. Compare Baade, *supra* note 88, with Rosenberg, *supra* note 94.

114. Reese, *supra* note 94, at 324.

principles of preference, because of their broader applicability, will be more useful in the long run than narrow rules. He suggests that long intervals are likely to elapse between reported decisions involving narrowly defined conflicts rules.¹¹⁵

E. *Leflar's Choice-Influencing Considerations*

Professor Leflar of the University of Arkansas and New York University says that his choice-influencing considerations do not represent a new program for choice-of-law adjudication. Instead they provide “. . . a somewhat idealized description of the present system . . . designed to accept substantially what happens now, together with current trends, and to give the real reasons (which on the whole are good reasons) for the law as it currently operates.”¹¹⁶ Leflar's choice-influencing considerations are an effort to state in as few words as possible the motivating reasons behind choice-of-law rules and the actual decisions implementing these rules. He believes that choice-of-law adjudication will work best if the true reasons for decision are identified and discussed openly. He views the frank, reasoned discussion of the fundamental values at stake in a case as an alternative to the use of mechanical rules, reliance on forum preference, or a resort to fictions to reach socially desirable results. Although Professor Leflar makes rather modest claims on behalf of his choice-influencing considerations, his approach to choice-of-law can fairly be thought of as a comprehensive methodology when the full implications of his views are understood. In addition to describing one of the major contemporary methodologies, a discussion of his approach will serve to summarize the basic values at stake in the contemporary debate.

Leflar maintains that the considerations which follow have always influenced common law choice-of-law decisions.¹¹⁷

1. Predictability of Results¹¹⁸

This consideration is based upon two related values: (1) cases should be decided the same way regardless of forum, and (2) parties to a consensual transaction should be able to assume that the legal consequences of their agreement will be the same regardless of

115. D. CAVERS, *supra* note 1, at 133.

116. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 327 (1966).

117. *Id.* at 282.

118. This consideration is discussed *id.* at 282-85.

where disputes about the transaction occur. Pointing away from forum shopping, this consideration emphasizes the values underlying Rheinstein's emphasis on justified expectations.

2. Maintenance of Interstate and International Order¹¹⁹

In cases involving international choice-of-law, this consideration recognizes the claims of sovereignty. Where the choice is between the laws of states in the United States, it emphasizes the need to further the free movement of people and goods across state lines and to provide a fair and expeditious settlement of problems created by the existence of our federal system. The case of *Texas v. New Jersey*,¹²⁰ involving escheat to the states of choses in action abandoned by their owners, is cited by Leflar as an example of a case raising issues involving maintenance of interstate order.¹²¹

3. Simplification of the Judicial Task¹²²

Although Professor Leflar recognizes that law exists for the convenience of society as a whole rather than courts, he points out that this consideration is important because delays and inconvenience resulting from undue complexity create problems for everyone—courts, litigants, and society as a whole.

4. Advancement of the Forum's Governmental Interests¹²³

Leflar believes that it is legitimate for a court to seek to effectuate the state interests reflected in its legislative or judge-made law. He rejects Currie's automatic preference for the law of the interested forum, however, believing that too often the search for governmental interests is unreasoning because interests are equated with any old law that may be on a state's books. He believes that a state's governmental interests include not only its interests as a sovereign, but also its broader concern as a repository of justice in particular lawsuits.

5. Application of the Better Rule of Law¹²⁴

Leflar says that the superiority of competing rules of law should

119. This consideration is discussed *id.* at 285-87.

120. 379 U.S. 674 (1965).

121. Leflar, *supra* note 116, at 286.

122. This consideration is discussed *id.* at 288-90.

123. This consideration is discussed *id.* at 290-95.

124. This consideration is discussed *id.* at 295-304.

be evaluated “. . . in terms of socio-economic jurisprudential standards.”¹²⁵ Included in this consideration is the notion of justice in the individual case, because a choice in favor of the better of two competing rules of law will probably approximate justice between the litigating parties. Although he suggests that the search for the better rule of law often will lead a court to its own lawbooks, Leflar does not believe that an automatic preference for forum law would either occur or be justifiable. This consideration is the one most often challenged by other scholars.¹²⁶

Recognizing that the choice-influencing considerations include opposing values, Professor Leflar says that there must be frank recognition of some contradiction.¹²⁷ This does not disturb him because he believes such contradictions are inherent in conflicts problems. Because the relative importance of the considerations will vary with the issue presented, the order in which Leflar lists them is not meant to indicate their order of priority.¹²⁸

Implicit in Leflar's approach is an assumption that most conflicts cases can be decided on the basis of the developed body of choice-of-law precedent.¹²⁹ The function of the considerations is to provide a means by which precedent can be used more thoughtfully and can be continually reexamined and improved on a case-by-case basis. They provide a method by which the sound portion of choice-of-law precedent can be separated from outmoded doctrine, aberrations, and mistakes.

Although it could be argued that their generality, comprehensiveness, and internal inconsistency will prevent the choice-influencing considerations from being widely used to decide specific cases,¹³⁰ Professor Leflar has made it clear that he believes they can be so used.¹³¹ He has spelled this out in some detail in articles and his treatise through discussion of actual and hypothetical cases.¹³² He has conceded that the considerations will not often furnish rules

125. *Id.* at 296.

126. *See, e.g.,* Cavers, *supra* note 108, at 213-15; Cavers, *supra* note 103, at 361; Maier, *Coordination of Laws in a National Federal State: An Analysis of the Writings of Elliott Evans Cheatham*, 26 VAND. L. REV. 209, 256-61 (1973).

127. Leflar, *supra* note 116, at 281.

128. R. LEFLAR, *supra* note 42, at 245.

129. Leflar, *supra* note 116, at 304.

130. *Cf.* A. EHRENZWEIG, *CONFLICT OF LAWS* § 122, p. 349 (1962).

131. Leflar, *supra* note 116, at 304-09.

132. R. LEFLAR, *supra* note 42, at 261-64; Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1588-98 (1966); Leflar, *supra* note 116, at 310-34.

of thumb; but because he assumes that the mass of existing choice-of-law precedent will continue to serve its normal precedential function, he does not believe that rules of thumb are necessary.¹³³ What he is suggesting is that a dialectic between the choice-influencing considerations and existing choice-of-law precedent will provide a complete and workable choice-of-law system. Leflar bolsters his case by pointing to several judicial opinions which have expressly relied upon the choice-influencing considerations.¹³⁴

Professor Leflar was not the first scholar to seek to identify the major considerations that should influence choice-of-law decisions. In 1952, Professors Cheatham and Reese identified and analyzed nine policies relevant to the solution of choice-of-law problems.¹³⁵ Section 6 of the *Restatement (Second)* is based upon the policies identified by Cheatham and Reese.¹³⁶ In a 1957 article, Professor Yntema identified seventeen factors relevant to the choice-of-law process,¹³⁷ concluding that the essential policy considerations could be subsumed under two categories: security and comparative justice. It is accurate, however, to consider Leflar as the foremost contemporary exponent of choice-influencing considerations as a distinct conflicts methodology, because his formulation has been used most often by the courts,¹³⁸ and choice-influencing considerations occupy a less exalted place in Professor Reese's approach to choice-of-law. Whereas Leflar emphasizes the way that particular cases can be decided by use of the considerations,¹³⁹ Reese stresses the desirability of using the general principles of section 6 to develop narrow choice-of-law rules.¹⁴⁰ Despite what appear to be significant differences, however, Reese is correct in asserting that he and Leflar are in the same camp.¹⁴¹ Underlying both approaches is an emphasis on a dialectic between the general policies which underlie the choice-of-law process and more specific rules. The tension between general and specific which arises by continuing reference back and forth is relied upon by both Leflar and Reese to improve the law and assist

133. Leflar, *supra* note 116, at 304.

134. *E.g.*, Leflar, Conflict of Laws, in 1972-73 ANNUAL SURVEY OF AMERICAN LAW 12-13.

135. Cheatham and Reese, *supra* note 18.

136. Compare RESTATEMENT (SECOND), *supra* note 51, § 6 with Cheatham and Reese, *supra* note 18.

137. Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721, 734-35 (1957).

138. Juenger, *supra* note 9, at 214.

139. See note 132 *supra*.

140. See Reese, *supra* note 94.

141. Reese, *supra* note 30, at 188.

in the decision of litigated cases. Leflar's dialectic occurs between the choice-influencing considerations and the existing body of precedent in the choice-of-law field. Reese's dialectic occurs between the principles in section 6 of the *Restatement (Second)* and both the specific rules included in the *Restatement (Second)* and the additional narrow rules which Reese hopes will develop with the passage of time. Although Leflar emphasizes the general and Reese emphasizes the specific, both place their ultimate reliance on a dialectic between the two.

Professor Leflar's advocacy of the better rule of law as a valid choice-influencing consideration merits separate discussion for several reasons. It is the most controversial of the considerations. The presence of this factor in Leflar's list of considerations distinguishes him from other scholars who have sought to identify the fundamental policies relevant to the solution of choice-of-law problems.¹⁴² Separate consideration also permits discussion of the role of result selection in choice-of-law adjudication. It is not completely clear whether Professor Leflar would accept classification of the better rule consideration as a form of result selection. He has said that it is result selective ". . . only in the same sense that in any nonconflicts case a determination of what the law is (presumably the 'better law,' if there was argument about the law) controls the results of litigation."¹⁴³ Although it would be possible to argue about a definition of result selection, it seems fair to conclude that the better rule consideration is result selective in the usual sense in which the term is used. Leflar asserts that use of the better rule consideration will tend to achieve a just result in particular cases, and such an effort is a form of result selection.

Professor Hancock has said that if a classificatory approach is rejected, we are limited in a true-conflict case to a choice between a rule of forum preference or some form of result selection.¹⁴⁴ Result selection can take a number of different forms. Professor Juenger has advocated selection of the better law in tort choice-of-law cases.¹⁴⁵ Professor Weintraub has argued for a rule in tort cases that would impose liability if one would be ". . . liable under the law of any state whose interests would be advanced significantly by imposing liability, unless imposition of liability would unfairly surprise

142. Compare Cheatham and Reese, *supra* note 18, with Yntema, *supra* note 137.

143. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1588 (1966).

144. Hancock, *supra* note 23, at 378-79.

145. Juenger, *supra* note 9, at 233-35.

the actor."¹⁴⁶ The approaches of Leflar, Juenger, and Weintraub are result selective in that they all provide a means of avoiding the application of what are generally thought to be outmoded limitations on liability. The alternative reference rules employed by the *Restatement (Second)* in the areas of trusts¹⁴⁷ and usury¹⁴⁸ are result selective in that they are designed to further the policy considerations underlying what Professor Ehrenzweig has called the rule of validation.¹⁴⁹ The frequent use by courts of such "escape devices" as characterization to reach what are thought to be just results in particular cases¹⁵⁰ can fairly be called result selection.

Leflar advances several reasons why courts should be influenced in conflicts cases by their judgment as to which of the competing rules is the better rule.¹⁵¹ He says that courts always have been and always will be influenced by this consideration. That being the case, he suggests that we will be much better off to encourage open discussion; otherwise, courts will resort to manipulation and reliance on gimmicks to accomplish the same thing. He also argues that courts have always sought to achieve a rational, just result in the litigation before them, and that reliance on the better rule consideration will help accomplish this goal because a choice in favor of the better rule will most often approximate justice between the litigating parties. Because a part of the search for justice in the individual case is the effort to avoid application of anachronistic rules, Leflar believes that one of the desirable features of the better rule consideration is the greater freedom it gives courts to avoid the application of such rules.¹⁵² He further asserts that application of the better rule will not defeat "justified expectations." At this point he seems to be engaging in circular reasoning, since he appears to justify his assertion by maintaining that expectations are not justified when they can only be fulfilled by applying inferior law.¹⁵³

Given the lack of support by courts and scholars for a wholly

146. Weintraub, *A Method for Solving Conflict Problems - Torts*, 48 CORNELL L.Q. 215, 249 (1963).

147. RESTATEMENT (SECOND), *supra* note 51, § 269(b)(ii). See also § 270, comment *d* at 165.

148. *Id.* at § 203.

149. A. EHRENZWEIG, *supra* note 130, at § 124.

150. R. LEFLAR, *supra* note 44, at 216-18. See also Morse, *Characterization: Shadow or Substance*, 49 COLUM. L. REV. 1027 (1949).

151. See the discussion in Leflar, *supra* note 116, at 295-304; and Leflar, *supra* note 143, at 1587-88.

152. Leflar, *supra* note 116, at 299, 300.

153. *Id.* at 297-98.

classificatory conflicts methodology, it seems inevitable that some form of result selection will be part of any acceptable approach to choice-of-law. The question is not whether, but how and how much. The problem is one of finding a way of channeling result selection so that it does not degenerate into wholly ad hoc decision making. There is a significant difference between the type of result selection which occurs because of an instinctive reaction to a particular case and that which occurs because of a reasoned preference for a general policy such as that of upholding contracts over a narrower policy such as limiting interest rates. One also must distinguish between recognition of the way things are and something advocated as an ideal.¹⁵⁴ Professor Leflar has performed a service by raising these issues through his forthright espousal of the better rule of law consideration. Whether his formulation is wholly satisfactory is a question that will be dealt with in a subsequent section.

F. *Professor Reese and the Restatement (Second)*

It has been suggested that the *Restatement (Second) of Conflict of Laws* does not really represent a consistent conflicts methodology.¹⁵⁵ This statement is accurate in the sense that the *Restatement (Second)* does not fit neatly into one of Professor Hancock's three categories of classificatory, functional, or result selective.¹⁵⁶ Yet the *Restatement (Second)* does represent a coherent conception of the choice-of-law process. The clearest notion of this conception can be ascertained by reading the *Restatement (Second)* in the light of the writings of its reporter, Professor Willis Reese of Columbia.¹⁵⁷ Not only does the *Restatement (Second)* represent a coherent approach to choice-of-law, but it may in the long run prove to be the most enduring methodology of those currently vying for acceptance. Before describing the methodology of the *Restatement (Second)*, it will be necessary to summarize some of its provisions.

Section 6, entitled Choice-of-Law Principles, includes seven factors relevant to the choice of the applicable law when there is no forum statutory directive. These principles, which are a modified version of the list of policies set out in a 1952 article by Professors Cheatham and Reese,¹⁵⁸ are similar to and are designed to serve the

154. See Cavers, *supra* note 108, at 215.

155. Cavers, *supra* note 25, at 364.

156. Hancock, *supra* note 23.

157. See the articles by Professor Reese cited notes 18, 30, 94 *supra*.

158. Cheatham and Reese, *supra* note 18, at 959.

same purposes as Professor Leflar's choice-influencing considerations. The major differences are the greater number of factors in section 6 and the omission of Leflar's better rule of law consideration. Section 6 can be used in determining which state's local law will be applied to determine a particular litigated case.¹⁵⁹ It can also be used in the reexamination and improvement of choice-of-law precedent. References to section 6 can be found throughout the *Restatement (Second)*. For example, in the tort¹⁶⁰ and contract¹⁶¹ sections, we are told that the law to be applied is that of the state which has the most significant relationship under the principles stated in section 6. The commentary often illustrates the manner in which the black letter rules were developed to further the policies in section 6. For example, the first comment to section 223 asserts that the adoption of a situs rule in cases involving conveyances of interests in land furthers the needs of the interstate and international systems, results in application of the law of the state of dominant interest, promotes justified expectations and predictability, and results in greater ease in the determination of the applicable law.¹⁶² Although writers have not often commented on the importance of section 6, it seems clear that the choice-of-law approach of the *Restatement (Second)* includes a strong emphasis on fashioning rules and reexamining precedent through continuous consideration of the policies in section 6.

Turning to the *Restatement (Second)*'s treatment of particular problem areas, one finds sections that recommend specific rules and sections that recommend broad, flexible rules which leave a great deal to be worked out by the courts in specific cases. Professor Reese has said that in deciding upon the treatment for a given area,

. . . one obvious goal of the *Restatement Second* must be not to mislead. Care must be taken not to state rules that will prove wrong when applied to new problems. . . . Hence, as a general proposition, it is probably better to err on the side of a rule that may be too fluid and uncertain in application than to take one's chances with a precise and hard-and-fast rule that may be proved wrong in the future.¹⁶³

One can also find rules which are classificatory, rules which are

159. RESTATEMENT (SECOND), *supra* note 51, § 6, comment c at 12.

160. *Id.* at § 145.

161. *Id.* at § 188.

162. *Id.* at § 223, comment a at 10.

163. Reese, *supra* note 18, at 681.

result selective, and rules which at least have the potential of being applied in the manner of the governmental interest school.

The *Restatement (Second)*'s provisions dealing with land are the prime examples of rules which are both definite and classificatory. The law that would be applied by the courts of the situs is looked to for the resolution of issues ranging from the validity and effect of conveyances of interests in land¹⁶⁴ to the validity and effect of wills of land.¹⁶⁵ There are, however, some specific exceptions to the situs rule.¹⁶⁶ In other sections, one finds a combination of jurisdiction-selecting rules and more flexible rules. Depending on the issue, questions relating to chattels are resolved by reliance on a fluid rule (most significant relationship under the principles of section 6), combined with an indication that situs law will normally be applied,¹⁶⁷ or by an outright reference to the situs.¹⁶⁸ Issues involving corporations are dealt with by reference to the state of incorporation,¹⁶⁹ by reference to the state with the most significant relationship with an indication that this usually will be the state of incorporation,¹⁷⁰ or by reference to the state of incorporation with the qualification that in unusual cases another state may have a more significant relationship.¹⁷¹ The different formulations appear to be designed to indicate varying degrees of adherence to the state of incorporation rule. Presumably, one is aided in determining the likelihood that an exception will be made by the way the choice-of-law rule is phrased. The rules dealing with chattels and corporations are examples of what one commentator has called a tendency toward the formulation "the result is X unless it is Y."¹⁷² It would be accurate to refer to some of these rules as displaceable presumptions.

The sections dealing with usury¹⁷³ and the validity of testamentary trusts of movables¹⁷⁴ are examples of alternative reference rules designed to uphold the validity of transactions, if this is possible, under one of several potentially applicable laws. In order to protect

164. RESTATEMENT (SECOND), *supra* note 51, at § 223.

165. *Id.* at § 239.

166. *Id.* at §§ 224(1), 237(2), 238(2), 240(1).

167. *Id.* at § 244.

168. *Id.* at § 246.

169. *Id.* at §§ 296, 298-99.

170. *Id.* at § 302.

171. *Id.* at §§ 303-04.

172. Lowenfeld, "*Tempora Mutantur . . .*"—*Wills and Trusts In the Conflicts Restatement*, 72 COLUM. L. REV. 382, 384 (1972).

173. RESTATEMENT (SECOND), *supra* note 51, at § 203.

174. *Id.* at § 269(b)(ii). *See* § 270, comment *d* at 165-67.

the justified expectations of the parties and to make it possible for them to predict accurately their rights and liabilities under a contract,¹⁷⁵ section 187 provides that, within limits, the parties to a contract are permitted to choose the applicable law.¹⁷⁶ These sections are result selective in the sense that the rule is phrased so as to promote policies thought to be desirable. They are examples of *Restatement (Second)* rules which are rather clearly linked with some of the specific policies set forth in section 6.

Most commentators identify the *Restatement (Second)* with its treatment of torts and contracts.¹⁷⁷ With the exception of contract cases in which the parties have made an effective choice, the tort¹⁷⁸ and contract¹⁷⁹ sections state that the applicable law is that of the state with the most significant relationship under the principles of section 6. This general statement is followed by a list of contacts thought to be of particular significance. The contract and tort sections also give more specific treatment to particular issues and to particular kinds of torts and contracts. Very often, however, the black letter treatment of specific problems is simply a reference back to the general rule with more specific suggestions in the comments or a formulation along the lines of "the result is X unless it is Y."¹⁸⁰

The *Restatement (Second)* has never lacked critics.¹⁸¹ There have been objections to the idea of even attempting a restatement. Some scholars have been skeptical of the feasibility of reducing choice-of-law principles to the *Restatement* format of black letter rules followed by comments.¹⁸² Another objection has been a fear that a new conflicts restatement might place the subject in a deep freeze again before a truly satisfactory methodology could be developed.¹⁸³ Some criticisms have focused on those sections of the *Restatement (Second)* which retain older approaches. For example, the sections in which a jurisdiction-selecting approach is retained have been described as "often simply the heritage of decisions left behind by mechanical rules of the sort from which the Restatement

175. *Id.* at § 187, comment *e* at 565.

176. *Id.* at § 187.

177. *E.g.*, D. CAVERS, *supra* note 1, at 69-72.

178. RESTATEMENT (SECOND), *supra* note 51, at § 145.

179. *Id.* at 188.

180. *See, e.g., id.* at § 168 (charitable immunity).

181. *E.g.*, Cavers, *supra* note 25; Ehrenzweig, *supra* note 1; Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for its Withdrawal*, 113 U. PA. L. REV. 1230 (1965).

182. D. CAVERS, *supra* note 1, at 11.

183. Currie, *supra* note 82, at 755.

Second is seeking to escape."¹⁸⁴ The sections which depart from tradition have evoked a mixed response. The most significant relationship test has been criticized as misleading and contrary to existing law¹⁸⁵ and as not providing a standard by which to determine "significance."¹⁸⁶ Professor Cavers has suggested that the listing of contacts in the tort and contract sections could lead to a quantitative, contacts-counting approach. He argued, however, that a possible and more desirable interpretation of these sections would be incorporation of interest analysis and principles of preference.¹⁸⁷ Viewing the *Restatement (Second)* as a whole, even those who lack enthusiasm for the final product have not reacted with the vehemence of the critics of the first *Restatement*. Professor Baade's reaction is fairly typical:

The Second Restatement does not claim to be infallible; neither does Professor Reese. And the critics, I am confident, will feel no overwhelming urge this time to devote a lifetime of scholarship to largely destructive criticism.¹⁸⁸

Those commentators who have praised the *Restatement (Second)* have tended to be those who admire flexibility rather than consistency and coherence of methodology. Professor Nadelmann, for example, has said that indicating all possible angles to be considered at least has the virtue of not misleading judges and that a grouping of contacts can help appraisal even if complete precision can never be attained.¹⁸⁹ Although Leflar has criticized various parts of the *Restatement (Second)*,¹⁹⁰ he has suggested that it is, on the whole, successful in attempting to reconcile the various new approaches to choice-of-law.¹⁹¹

Before attempting generalizations about the *Restatement (Second)*'s methodology, it will be helpful to review some of Professor Reese's ideas. He says the recent cases show that simple, all-embracing rules such as those advocated by the first *Restatement*

184. D. CAVERS, *supra* note 1, at 72.

185. Ehrenzweig, *The "Most Significant Relationship" in the Conflicts Law of Torts*, 28 LAW & CONTEMP. PROB. 700, 701 (1963).

186. Currie, *supra* note 92, at 1233.

187. D. CAVERS, *supra* note 1, at 69-72.

188. Baade, *Marriage and Divorce in American Conflicts Law: Governmental-Interests Analysis and the Restatement (Second)*, 72 COLUM. L. REV. 329, 381 (1972).

189. Nadelmann, *Marginal Remarks on the New Trends in American Conflicts Law*, 28 LAW & CONTEMP. PROB. 860, 861-62 (1963).

190. Leflar, *The Torts Provisions of the Restatement (Second)*, 72 COLUM. L. REV. 267, 269-70, 274 (1972).

191. *Id.* at 277.

are increasingly unacceptable.¹⁹² The task facing the courts in the conflicts field, he believes, is to free themselves from the straightjacket of a few general rules based upon notions of vested rights, and to proceed to develop a large number of relatively narrow rules.¹⁹³ These should be developed through analysis and application of the policy considerations set out in section 6.¹⁹⁴ However, since conflicts is a relatively young field,¹⁹⁵ we need greater experience in order to construct such narrow rules.¹⁹⁶ Pending the development of large numbers of narrow rules, particular cases can be decided by reliance on the considerations in section 6,¹⁹⁷ and we can experiment with choice-of-law principles of different degrees of generality.¹⁹⁸ He recognizes that the significant relationship rule is very general, but views it as being useful in inducing courts to depart from concepts such as the place of injury rule in torts.¹⁹⁹ He seems to view this and other general formulations in the *Restatement (Second)* as transitional statements of the law. He has said that Cavers' principles of preference can be useful as transitional principles pending the development of more precise rules.²⁰⁰ Overall, the progression should be guided by continuing reference to the considerations in section 6.

Reese views the debate over choice-of-law methodologies as involving two fundamental arguments. Perhaps the most basic contest, in his view, is between the advocates of rules and those who argue for an ad hoc analysis of each case.²⁰¹ The second issue, which is closely related to the first, is whether choice-of-law cases will be analyzed by focusing on governmental interests or by considering all of the objectives traditionally pursued in the choice-of-law area. Here, he sees himself and Professor Leflar aligned against the governmental interest school.²⁰² He believes that the governmental interest school is one-dimensional in its approach because its focus on the interests of contending states results in neglecting important

192. Reese, *supra* note 18, at 681.

193. *Id.*; Reese, in *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1251, 1254 (1963).

194. Reese, *supra* note 18, at 681-82.

195. Cheatham and Reese, *supra* note 18, at 960.

196. Reese, *supra* note 18, at 681.

197. Reese, *supra* note 94, at 322.

198. *Id.* at 325.

199. Reese, *supra* note 18, at 699.

200. Reese, *supra* note 94, at 324.

201. Reese, *supra* note 30, at 184-88.

202. *Id.* at 188-90.

considerations, such as facilitating the working of the federal system and furthering justified expectations.²⁰³ He also believes that governmental interest analysis pursues aims which sometimes are impossible to achieve, because the purpose underlying relevant local law rules cannot always be ascertained.²⁰⁴

What then is the methodology of the *Restatement (Second)*? Is it simply the product of compromise and consensus that one would expect from the political process that inevitably accompanies the production of a restatement?²⁰⁵ It may be the product of a political process, but it also seems to reflect accurately Professor Reese's philosophy of choice-of-law. Section 6 appears to provide the best key to understanding the *Restatement (Second)*. As Leflar points out, reliance on choice-influencing considerations, or choice-of-law principles to use the phraseology of section 6, inevitably results in contradictions. Thus it is not surprising that the *Restatement (Second)* is eclectic in its choice of rules, sometimes recommending general rules and sometimes recommending specific rules, sometimes espousing jurisdiction-selecting rules and sometimes espousing some other approach. Eclecticism is the most appropriate response to a field in which contradictions and change are inherent. The complexity and contradictions are dealt with by continuing reference to the fundamental policies that underlie the choice-of-law process. The jurisdiction-selecting rules are thus not merely the heritage of the first *Restatement* but the result of a deliberate choice based upon the application of the policies identified in section 6. This reference back and forth should, over a period of time, produce ever more specific rules. Although much of the *Restatement (Second)* is a transitional statement of the law, it provides a method by which the transition may be accomplished. As was pointed out in the discussion of Professor Leflar's approach, this methodology can be described as a dialectic between the general and the specific. Although Professor Reese probably would reject the term as sounding pretentious, it would be accurate to describe the approach of Professor Reese and the *Restatement (Second)* as dialectical eclecticism. It would also be fair to describe the *Restatement (Second)* as a model designed to encourage and accommodate change rather than as a static finished product.

203. *Id.* at 186.

204. *Id.*

205. *See* Cavers, *supra* note 25, at 350.

III. THE REASONS WHY A "FAIL-SAFE" CHOICE-OF-LAW METHODOLOGY WILL NEVER BE PERFECTED

Before proceeding to evaluate the competing choice-of-law methodologies, it will be helpful to make certain observations about the nature of the problems dealt with in the choice-of-law field. This will assist in an evaluation of the contending methodologies and put the debate in perspective by giving some indication of what one can realistically expect a methodology to contribute. It was stated earlier that some scholars assert that many of the difficulties in the conflicts field result from the relative youth of the subject.²⁰⁶ The position advanced in this section is that it is a mistake to assume that there will be a gradual progression toward a mature, permanent, and widely accepted body of conflicts law or conflicts thinking. There are several reasons why choice-of-law problems are and will continue to be among the most complex and difficult problems in law no matter which methodology is adopted. These reasons are closely related; indeed they overlap to a great extent. It should be useful, however, to separate them for purposes of exposition.

A. *Choice-of-Law Cases Require Courts to Reconcile the Irreconcilable*

The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law.

*Cardozo*²⁰⁷

Judge Cardozo was speaking of law in general when he made this statement in a lecture at Columbia University. But choice-of-law cases provide some of the more apt illustrations of the truth of his statement. It is a truism worth repeating that humans differ in their estimates of the relative importance of particular values. When important values are in conflict and one must be preferred over the other, intelligent, well-meaning persons will differ on what should be done. Moreover, the choices men make in such situations will be influenced by their institutional role. Choice-of-law problems reflect the same tensions between competing values that exist throughout law with the added complication of conflicts between the laws of different jurisdictions. The differences between the methodologies reviewed earlier derive from fundamental disagreements over the weight to be accorded values at stake in the choice-of-law process.

206. Text accompanying notes 18-19 *supra*.

207. B. CARDOZO, *Paradoxes of Legal Science*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 254 (M. Hall ed. 1947).

An examination of the choice-influencing considerations set forth in Leflar's work and in the *Restatement (Second)* will point up some of the conflicting values involved in choice-of-law. Factors (f) and (g) in section 6 of the *Restatement (Second)* emphasize certainty, predictability, uniformity of result, and ease in the determination of the law to be applied.²⁰⁸ Looking in the opposite direction are factors (b) and (c), which suggest that consideration should be given to the relevant policies and interests of the forum and other interested states.²⁰⁹ Also pointing away from such values as uniformity is Leflar's better rule of law consideration. The tension between these factors, each in itself an important value deserving consideration, corresponds to the classic tension in the law between legal certainty and equity.²¹⁰ On the one hand, the law should be clear, foreseeable, and applicable uniformly. As Brandeis once said, ". . . in most matters it is more important that the applicable rule of law be settled than that it be settled right."²¹¹ In stressing the importance of uniform application, Sir John Salmond argued that men's respect for law depends in large measure on their belief that "[j]ust or unjust, wise or foolish, it is the same for all. . . ."²¹² Yet there is also something in human nature that rebels at sacrificing concrete human or governmental interests to abstract goals of certainty and uniformity, especially when we recognize that these goals often are unattainable. Valuing good sense and decency, we want cases decided in a way that strikes us as just. This means that courts must give adequate weight to the special and unique circumstances of each case. It also means that societal changes must be accommodated by continual adjustment of the law.²¹³ The authors of the first *Restatement* sacrificed the values which cluster under the umbrella of equity to those which fit under that of certainty. The functional methodologies that dominate contemporary conflicts thinking move sharply in the other direction. The Rheinstein approach seeks to meet the objections to the methodology of the first *Restatement* without undue sacrifice of the uniformity and predictability promised by a classificatory approach.

208. RESTATEMENT (SECOND), *supra* note 51, at § 6(f)-(g).

209. *Id.* at § 6(b)-(c).

210. See Neuhaus, *Legal Certainty Versus Equity in the Conflict of Laws*, 28 LAW & CONTEMP. PROB. 795 (1963).

211. *Burnett v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (dissenting opinion).

212. Salmond, *Introduction to SCIENCE OF LEGAL METHOD* at lxxxii (1917).

213. See A.N. WHITEHEAD, *SYMBOLISM, ITS MEANING AND EFFECT* 88 (1927).

B. *Varying Conceptions of How Judges Should Discharge Their Responsibilities*

Different conceptions of the proper role of the judiciary are reflected in choice-of-law methodologies and in the preference of judges for particular methodologies. Not only are there differences of opinion at any one time, but the prevailing opinion changes from one period of history to another. When changes occur in the prevailing concept of the manner in which judges should discharge their responsibilities, some approaches to choice-of-law gain in popularity and others fade. Karl Llewellyn, one of the great legal realists, pointed out that there are period styles in legal writing. There are times when the climate in the legal profession and the judges' concept of their function result in opinions written in the "Formal Style," where decisions seemingly are based only on formal logic and consistency.²¹⁴ This style is appealing to judges who are reluctant to expose their underlying social judgements to public critique. It satisfies a need to have the law appear neutral, even static.²¹⁵ It is obvious that a classificatory approach to choice-of-law fits more comfortably into this style of opinion writing. There are times, however, when judicial opinions tend to be written in the "Grand Style," where there is an open checking of results against principle, common sense, and decency.²¹⁶ In an age when formalism and deference to symbols is viewed with suspicion, judges earn respect by frank discussion of the actual bases of their decisions. If men no longer believe that decisions are made through sole reliance on formal conceptualism, it can be argued that the symbolic ideal of the law's certainty is better preserved by open consideration of the policies in issue.²¹⁷

It seems clear that the period style at present is one in which there is little tolerance of artifice and fictions. We believe that law should be a workable social tool, and we insist that law should be talked about and explained in terms of functions and policies.²¹⁸ It is to be expected that the methodology of a Cavers, a Currie, or a Leflar, with their emphasis on the purposes which underlie laws or on choice-influencing considerations, would appeal to contemporary

214. K. LLEWELLYN, *THE BRAMBLE BUSH* 157-58 (1951).

215. See Hamilton, *Judicial Process*, in 8 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 450, 454 (1937).

216. K. LLEWELLYN, *supra* note 214, at 157-58.

217. See K. LLEWELLYN, *THE COMMON LAW TRADITION* 191-95 (1960).

218. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 591-92 (1973).

judges. It seems quite possible that the demise of the first *Restatement* resulted as much from the fact that its language and rationale were out of step with the current period style as from any deficiencies in the way it dealt with concrete cases. After all, judges were quite skillful in manipulating traditional concepts to achieve acceptable results. A good example of the sensitivity of an outstanding judge to such considerations is Judge Traynor's subsequent apology in the *Texas Law Review*²¹⁹ for his reliance on the substance-procedure distinction in his opinion in *Grant v. McAuliffe*.²²⁰

The writings of Brainerd Currie provide another example of how one's view of the judiciary's proper function influences one's methodological preference. His advocacy of forum preference in a true-conflict case derived from a strongly held belief that:

. . . assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy.²²¹

The rejection of Currie's resort to forum preference in true-conflict cases by sympathetic scholars is in large part a result of disagreement on this view of the courts' proper function in a democracy.²²² Most conflicts scholars believe that courts have long engaged in this weighing of competing interests and that they may be more competent than legislatures to do so. Legislatures cannot foresee all of the situations that may arise. Courts, on the other hand, can deal with problems on a case-by-case basis. If a solution fashioned in one case does not appear suitable in a slightly different case, it can be distinguished.²²³

C. *The Federal System*

The structure of our federal system inevitably produces large numbers of conflicts problems. We have two sets of substantive law, state and federal, and two judicial systems in each state. For the most part, private law is the domain of the states.²²⁴ Not only are

219. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 670 n.35 (1959).

220. 41 Cal. 2d 859, 264 P.2d 944 (1953).

221. B. CURRIE, *supra* note 55, at 182.

222. See D. CAVERS, *supra* note 1, at 113 and ch. IX.

223. Reese, *supra* note 193, at 1253.

224. More areas of private law are left to the states in this country than in the comparable federal systems of Canada and Australia. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 19-20 (1945).

fifty states generating private law, but choice-of-law rules vary from state to state. Absent the application of the law of a state which has no substantial connection with a case, decisions of the United States Supreme Court leave a state free to make its own choice of the governing law.²²⁵ It would be surprising if the appellate courts and legislatures of the fifty states did not disagree frequently over the policies they think will promote the welfare of their citizens, and each such disagreement carries the potential for a conflict of laws which must be resolved by the courts. Moreover, the growing volume and complexity of statutes and decisions have caused a concomitant growth in the number of conflicts between states' laws. It is no surprise that the typical reaction of foreign observers is that our system is far too complicated.²²⁶ Reflecting on our legal system, Justice Jackson said that, "We have so far as I can ascertain the most localized and conflicting system of any country which presents the external appearance of nationhood."²²⁷

In some respects the situation in the United States is analogous to that which existed in the thirteenth century when each of the Italian city-states began developing a separate body of law.²²⁸ Given the fact that the citizens of those cities did not spend all of their time at home, it was natural that controversies arose between citizens of different cities. In seeking an acceptable means of choosing the applicable law, the statutists tried for six or seven hundred years to eliminate differences of opinion within their ranks.²²⁹ Their lack of success is sometimes explained by what are thought to have been defects in their methodology. Professor Cavers has compared them to the alchemists who sought to make gold out of other metals.²³⁰ It is questionable, however, whether this is a wholly satisfactory explanation of the statutists' difficulties. It is at least possible that the presence of numerous sources of law presents intractable problems which cannot be completely solved through resort to choice-of-law techniques. And if six or seven centuries did not eliminate differences of opinion among the statutists, one may reasonably conclude that differences of opinion over the proper approach to choice-of-law

225. Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

226. Von Mehren, *Conflict of Laws in a Federal System: Some Perspectives*, 18 INT. & COMP. LAW Q. 681, 683 (1969).

227. Jackson, *supra* note 224, at 18.

228. For a summary of the work of the statutists in dealing with the situation presented in the Italian cities, see D. CAVERS, *supra* note 1, at 1-3.

229. *Id.* at 2.

230. *Id.* at 1.

may not disappear from our jurisprudence with the passage of time. In sum, continuing controversy over choice-of-law problems may be one of the inevitable consequences of living under a federal system such as ours.

D. *The Large Number of Variables Presented in Choice-of-Law Cases*

The almost infinite number of law-fact patterns that can arise in cases raising conflicts questions makes it extremely difficult to formulate rules of decision that will deal satisfactorily with each case that may arise. In discussing *Grant v. McAuliffe*,²³¹ Brainerd Currie pointed out that there were at least 174 different fact situations involving the California statute on survival of tort actions that would give rise to choice-of-law problems.²³² All lawyers use the technique of distinguishing cases when the facts of a case differ in some way from precedent that would otherwise govern. Because conflicts cases contain more variables than wholly domestic cases, existing precedent is more apt to be distinguishable. Since conflicts cases arise less frequently than wholly domestic cases,²³³ there are fewer reported decisions available for guidance of the court and the parties. Thus, in a field where a greater variety of questions can arise, there are fewer resources of precedent upon which one can rely.

Traditional conflicts theory dealt with this bewildering array of possible law-fact patterns by isolating only one of the relevant factors and establishing it as the key to the applicable law.²³⁴ It was pointed out earlier that this tendency toward oversimplification is considered to be one of the key shortcomings of the traditional system.²³⁵ Some contemporary conflicts scholars urge an approach that would strike a balance between the few broad rules of the first *Restatement* and an approach that would treat each case as unique. It was pointed out earlier that Professor Reese has urged the necessity of developing large numbers of relatively narrow rules.²³⁶ Other scholars react to the multiplicity of cases that can arise by eschewing any attempt to formulate conflicts rules and urging instead a method of analysis which can be used to decide cases on a more or

231. 41 Cal. 2d 859, 264 P.2d 944 (1953).

232. B. CURRIE, *supra* note 55, at 141.

233. D. CAVERS, *supra* note 1, at 14.

234. B. CURRIE, *supra* note 55, at 142.

235. Text accompanying notes 46-47 *supra*.

236. Text accompanying notes 192-200 *supra*.

less ad hoc basis.²³⁷ These scholars argue that such an approach is the only feasible way of dealing with the tremendous variety of cases which arise in a fashion which will give adequate weight to the varying policies brought into play by shifting law-fact patterns. The point that should be emphasized is that these differences in methodology arise because of differences of opinion as to how best to cope with the tremendous variety of problems generated by our legal system. Everyone recognizes that the creation of jurisprudential tools to deal with such complexity is very difficult. The large number of variables makes it impossible to reconcile the demands of certainty and equity in a manner that does not in itself create additional problems. The choice of a methodology is in part a decision as to which problems the legal system can best cope with and which problems are best left alone.

E. *Societal Changes*

Social and economic changes result in changes in the characteristic choice-of-law problems which confront the courts during any one period of time. Thus, even if a consensus has emerged on the most appropriate mode of analysis for dealing with a particular set of problems, the consensus may crumble if the accepted approach does not work well in dealing with the new problems generated by societal changes. Cavers has pointed out that the characteristic choice-of-law problems of nineteenth-century America were conflicts involving commercial law and the flow of funds from "the capital-rich East to the capital-poor West."²³⁸ He notes also that conflicts problems were generated in the latter half of the nineteenth century by "the uneven emergence among the states of statutes designed to remove anachronisms in the common law, such as restraints on married women as property owners and traders, the denial of actions for wrongful death, and the fellow-servant rule. . . ."²³⁹ Professor Ehrenzweig has asserted that the contemporary ferment in conflicts law is concentrated in the area of tort conflicts law.²⁴⁰ Professor Juenger agrees and suggests that the rejection of the rule of *lex loci delicti* in tort cases has often been motivated by a desire to avoid the application of noxious substantive law.²⁴¹ Seen

237. Currie, *supra* note 92, at 1241.

238. D. CAVERS, *supra* note 1, at 114-15.

239. *Id.* at 115.

240. Ehrenzweig, *supra* note 1, at 378, 383, 392.

241. Juenger, *supra* note 9, at 224.

in this light, *Babcock v. Jackson*²⁴² is a product of the notorious Ontario guest statute. The emergence of no-fault statutes is now producing new choice-of-law problems.²⁴³

It is true, of course, that this is a problem which exists throughout law. Social and economic changes occur continuously; the only variable from one age to another is the rate of change. Law must respond to change, and this fact of life produces one of the perennial problems of jurisprudence—the reconciliation of the claims of stability with those of progress.²⁴⁴ Yet this fundamental fact of legal life has special significance in the conflicts field. The uneven response of state courts and legislatures to societal changes provides a continuing source of conflicts problems. Although some may argue that their methodology provides a philosophy for all seasons, it seems more realistic to assert that the desirability of various choice-of-law methodologies will vary with the problems being considered. Consequently, a subject which would be difficult even if the characteristic problems remained relatively constant is periodically subjected to great stress as a result of changes in the nature of the problems which find their way into the courts.

IV. AN EVALUATION OF THE COMPETING CHOICE-OF-LAW METHODOLOGIES

A. *General Considerations*

One who approaches the writings of leading conflicts scholars without strong preconceptions about the choice-of-law process is apt to react in the way that the central character in Walker Percy's novel *The Moviegoer* reacted to reading liberal and conservative periodicals.²⁴⁵ He went to the library to read controversial periodicals whenever he felt bad. Although he took great pleasure in the attack and counterattack, he was either unable or felt no real necessity to decide which point of view was correct. He enjoyed the debates the way a sports fan enjoys a good football game. Moreover, the choice-of-law debate seems less important when one realizes that intelligent judges can achieve satisfactory results with any of the competing approaches because all of them leave maneuvering room where wisdom and common sense can have an impact. But scholars, practicing lawyers, and judges cannot afford to approach

242. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

243. See Kozyris, *No-Fault Automobile Insurance and the Conflict of Laws—Cutting the Gordian Knot Home-Style*, 1972 DUKE L.J. 331.

244. See B. CARDOZO, *SELECTED WRITINGS*, *supra* note 207, at 254.

245. W. PERCY, *THE MOVIEGOER* 95 (1961).

the problem this way. In advising clients, writing briefs and opinions, writing articles, or teaching law students, one cannot simply throw up his hands. Methodological choices are made whether or not one realizes it. It is best to make the choices consciously.

It has been said that the tendency in developed countries is for conflicts specialists to refine and complicate the field to a point where it cannot be understood by the average judge.²⁴⁶ Although it is difficult to see how the choice-of-law field could be made easy, it probably is true that scholars have a tendency to write for each other rather than for the non-specialists. This, in turn, tends to make the final product less comprehensible and useful for the non-specialist. It has been common in recent years to see law review symposia in which several scholars address themselves to a single case.²⁴⁷ After reading each writer's analysis of the case, many practitioners and judges probably find themselves thoroughly confused. There is little chance that the scholars will reach a consensus on methodology in the near future. Even if they did, changing circumstances and perceptions would soon dissolve such a consensus. There is no need, however, to await achieving a consensus before attempting to meet the needs of the bench and bar. More work needs to be directed toward those who do not have time to become thoroughly conversant with the intricacies of the field.²⁴⁸ Scholars should periodically ask themselves whether their proposals could be readily understood and applied by trial judges and whether their proposals would give any guidance to attorneys deciding whether to settle or litigate a case. Everything else being equal, it should be considered a plus for a particular methodology if it allows lawyers and judges to think and talk in a manner that is natural to them. It is also a point in favor of a particular approach if its rationale is capable of being explained to non-lawyers and its results fulfill their normal expectations when they are confronted with a legal problem. All of this is not to suggest that the methodological debate should not go on; such a suggestion would be fanciful anyway since conflicts scholars are as addicted to this type of argument as some people are to drugs or alcohol. It simply suggests that there should be greater sensitivity to the needs of the non-specialist, which might cause one to be skeptical of

246. Zweigert, *Some Reflections on the Sociological Dimensions of Private International Law or What is Justice in Conflict of Laws?*, 44 *COLO. L. REV.* 283, 299 (1973).

247. See, e.g., the symposia cited note 5 *supra*.

248. See Pelaez, *Interest Analysis - The Sands of Confusion*, 9 *DUQUESNE L. REV.* 446, 458 (1971).

suggestions that we must discourage short cuts and synthesis²⁴⁹ or that we should have refrained from attempting the *Restatement (Second)*.²⁵⁰

It is fashionable now to deprecate the factor of predictability in law. The insights of the legal realists have combined with accelerating changes and the outpouring of legislative, administrative, and court-made law in recent decades to cause sophisticated lawyers to suggest that the notion of law as something which has a discoverable structure is an illusion.²⁵¹ Law is thought of as a vast ocean, a bottomless pit,²⁵² which is better understood as a process than as an end product. This is true of legal scholarship in general, and it is even more true of the conflicts field. In the conflicts field predictability is said to be either unattainable or, in the case of unplanned events, of questionable importance.²⁵³ Although it is impossible to deny the value of such insights, it is questionable whether law can fulfill society's expectations if the value of predictability is not given an honored place. In conflicts, as in other fields, the ideal of predictability must be pursued even if it can never be completely attained. The virtues of predictability are obvious in situations where careful planning is based on assumptions as to what the law is. Even in the case of unplanned events, the argument that predictability is not important is subject to serious question.²⁵⁴ In a case involving an accidental injury, a predictable choice-of-law rule helps a lawyer decide whether his client should sue or settle and where to sue.²⁵⁵ It reduces the time that must be devoted to legal research and writing briefs. Decisions must be made before suit is brought, during trial, and in deciding whether to appeal a trial court's decision. Uncertainty as to the applicable law can often cause problems which are as serious for those involved in tort litigation as the problems associated with planning commercial transactions. When one seeks to teach a sophisticated understanding of the manner in which a legal system operates, it is necessary to dwell on the difficulty inherent in predicting what "law" will be applied in particular cases. But when one attempts to devise a choice-of-law approach which will

249. Currie, *supra* note 92, at 1241.

250. Ehrenzweig, *supra* note 181, *passim*.

251. See, e.g., Bork, *We Suddenly Feel that Law is Vulnerable*, Dec. 1971 FORTUNE 115.

252. L. FRIEDMAN, *supra* note 218, at 595.

253. E.g., Felix, *The Choice-of-Law Process at a Crossroads*, 9 DUQUESNE L. REV. 413, 418 (1971).

254. See Maier, *supra* note 126, at 254-56.

255. *Id.*

serve the interests of living, breathing human beings, it is important to place some emphasis on the factor of predictability. There are other important values at stake in the choice-of-law process, but we are entitled to be skeptical of any methodology which denigrates the importance of predictability.²⁵⁶

One final point is worthy of note before discussing the individual views of scholars. Although scholars are apt to stress their differences, much of their work can coexist peacefully with that of their colleagues in the field. Similarities in some of the approaches were pointed out earlier.²⁵⁷ Combinations of the approaches of different scholars can be productive. Synthesis and compromise do not necessarily result in imprecision and uncertainty. It was suggested earlier that the tendency of the courts has been to lump all of the modern approaches together.²⁵⁸ It is submitted that a focus on solving the concrete problems of real people will indicate that such eclecticism is preferable to attempts to achieve doctrinal coherence.

B. *The First Restatement*

The criticisms of the first *Restatement* were given when its methodology was described *supra*. This was done because it assisted in explaining the current situation in the conflicts field and in describing the modern approaches. After reviewing the latter, however, the shortcomings of the first *Restatement* seem less overwhelming. When one views the conflicts field in perspective, it is difficult to avoid the conclusion that inherent contradictions and complexity will make it impossible to develop a "fail-safe" methodology. It follows that there will be shortcomings in any restatement, any approach, any comprehensive set of proposals. This does not mean that the first *Restatement* presents a viable alternative today. As a comprehensive methodology, it is dead and cannot be revived. It should not be revived. Its simplicity was appealing, but experience has shown that such simplicity will not work in a federal system such as ours. Perhaps its most important flaw was the fact that abstract conceptualism provided its intellectual underpinnings.

Any modern choice-of-law methodology must be designed to

256. *Id.* Professor Maier makes a useful distinction between the need for predictability and certainty for lawyers and the need for protection of the justified expectations of the parties.

257. Text accompanying notes 77-78, 95, 111-12, 140-41 *supra*.

258. Text accompanying notes 7-10 *supra*.

serve functional goals and explained in functional terms in order to be acceptable. But this does not mean that a modern system should never make use of jurisdiction-selecting rules and a classificatory approach. There may be times when a jurisdiction-selecting rule is the best way to serve functional goals, if functional is defined more broadly than the governmental interests revealed by the competing rules sought to be applied. For example, the drafters of the *Restatement (Second)* may have made a wise choice when they retained the situs rule in some situations involving real property. The situs rule is probably the jurisdiction-selecting rule that is most firmly entrenched in case law. Although it has been roundly criticized in several excellent articles by scholars who advocate a functional or interest analysis approach to choice-of-law problems,²⁵⁹ a careful reading of the articles leaves one with a feeling that the critics have exaggerated the problems associated with retaining the situs rule and have unduly minimized the problems that would result from its demise. A classic choice-of-law problem involving intestate distribution of land, drawn from an article by Professor Weintraub, will illustrate the point:

The real estate is situated in state X. It is owned in fee simple by Mr. Smith. Mr. Smith has a settled residence in state Y, as do his wife and three minor children. Mr. Smith dies intestate. Under the intestacy statute of state X, the widow would take a one-third interest in the real estate and the other two-thirds would be divided equally among the children. Under Y intestacy law, however, the widow would take a one-half interest in the realty and the other one-half would go to the children. Should X or Y law be applied to the intestate distribution of the X realty?²⁶⁰

Professor Weintraub argues for application of the law of the state of residency by asserting that:

If a Y resident does not receive a share that Y thinks sufficient and as a consequence becomes a public charge, it is Y and Y's citizens who will pay the bill. If the distribution does not comport with Y's

259. The following articles were written by Moffatt Hancock: *Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: The Disadvantages of Disingenuousness*, 20 STAN. L. REV. 1 (1967); *Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation: The Supreme Court and the Land Taboo*, 18 STAN. L. REV. 1299 (1966); *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 STAN. L. REV. 1095 (1965); *In the Parish of St. Mary leBow, in the Ward of Cheap*, 16 STAN. L. REV. 561 (1964). See also Weintraub, *An Inquiry Into the Utility of "Situs" as a Concept in Conflicts Analysis*, 52 CORNELL L. REV. 1 (1966).

260. Weintraub, *supra* note 259, at 17.

ideas of fairness and the *Y* claimants quarrel, it is *Y*'s peace that is disturbed.²⁶¹

It is highly unlikely that the decision as to whether to apply *X* or *Y* law will have any effect upon whether someone becomes a public charge or the peace is disturbed. Those who litigate the intestate distribution of realty are not likely candidates for welfare. Many things may influence the parties to disturb the peace, but having *X* rather than *Y* law applied is not one of them. In the fact situation in question, it is unrealistic to speak of governmental interests. Both *X* and *Y* have more of an interest in having the case decided quickly and finally than in who wins or what law is applied. Although there are cases in which states have a real rather than fictional interest in the application of their law in litigation involving foreign land, the really substantial interest of the states in most cases is in preserving the security of their land transactions.²⁶²

In the final analysis, the normal concern should be with the interests of people rather than of governments. And the concern should not be solely with those people who are parties in the case before the court. In cases involving real property, for example, there should be concern for those persons who will engage in transactions which are similar to the one before the court. Recognition should be given to the interests of attorneys and their clients in the efficient and accurate examination of titles to land and in the planning of real estate transactions so as to avoid litigation. For every person who litigates a conflicts case involving land there will be hundreds who need guidance in planning real estate transactions so as to avoid litigation.

A functional analysis should also include consideration of the costs to courts, litigants, and society of adopting one rule or approach instead of another. If such costs are considered, some attention would have to be paid to John Frank's point that the multiplication of decision points will increase the burden on courts,²⁶³ which will in turn increase costs for everyone concerned because of the added time and uncertainty resulting from such an increased burden. After striking a balance between the various competing considerations, a court might decide that the situs rule is the most practical solution to the majority of cases involving land. It might, on the other hand, narrow the range of cases in which the situs rule

261. *Id.*

262. See Rheinstein, Book Review, 8 J. PUB. LAW 551, 556 (1959).

263. See text accompanying note 15 *supra*.

is relied upon. Experience may show that principles of preference or other techniques provide more feasible solutions in some situations. The point is that labeling a rule as jurisdiction-selecting does not conclude the argument. Although it would be a mistake to rely wholly on jurisdiction-selecting rules, it also would be a mistake to reject them out of hand.

There is another factor which should be considered in evaluating the territorial emphasis of the first *Restatement*. In an interesting article in the *Duquesne Law Review*, Professor Aaron Twerski suggested that expectations play a role beyond affecting conduct.²⁶⁴ It can be very disconcerting unless we can rely upon a regularity and rhythm in life. He pointed out that although the population has learned to live with the change that is an inevitable part of the common law, it would be difficult to persuade people to accept the notion that time and space elements play no role in choice of the applicable law. Human experience indicates that these time and space elements are part of normal expectancies. To demean these elements in the law of conflicts is to take away some of the sense of regularity and rhythm. He concluded by saying that those who advocate a fragmented choice-of-law theory should "reconsider normal expectancies as an appropriate function of the law."²⁶⁵

C. *Rheinstein*

Professor Rheinstein was certainly right when he argued against the intellectual undergirding of the first *Restatement* by asserting that choice-of-law rules must be based upon considerations of policy rather than seemingly compelling logic.²⁶⁶ And he made an enduring contribution when he pointed out that the primary purpose of choice-of-law rules is to protect the justified expectations of the parties.²⁶⁷ In some ways "justified expectations" was an unfortunate choice of words to indicate the point he was making. Taken literally these words could be said to refer only to those situations where advance planning is undertaken before one acts. Many have used the words in this sense and, as a consequence, have asserted that the concept of justified expectations has no relevance in cases involving unplanned events such as automobile accidents. But Rhein-

264. Twerski, *Enlightened Territorialism and Professor Covers—The Pennsylvania Method*, 9 DUQUESNE L. REV. 373, 381-83 (1972).

265. *Id.* at 382.

266. Rheinstein, *supra* note 70, at 17.

267. See text accompanying notes 67-72 *supra*.

stein used the term in a broader sense than this; the idea underlying justified expectations is the desirability of mitigating for individuals the hardships created by legal diversity. This needs to be done in all kinds of cases. By insisting that the purpose of conflicts law is to mitigate the hardships for individuals resulting from differences in the laws of various states, he put the emphasis where it should be—on people rather than governments. In making such an assertion, one does not have to reject Professor Cavers' point that rules of private law usually represent norms for the ordering of behavior.²⁶⁸ Cavers went on to say:

Even in the case of laws with the most limited public objectives, I think it reasonable to ascribe to the state a desire to have the purposes of its laws effectuated in situations where this would appear to advance those purposes, absent countervailing considerations.²⁶⁹

Although Professor Cavers has indicated a willingness to dispense with the term "interest,"²⁷⁰ he still believes that a consideration of the purposes underlying laws will prove more useful in conflicts cases than consideration of justified expectations.²⁷¹ It is at this point that a persuasive case can be made for Professor Rheinstein's emphasis on justified expectations. It is clear that an interested forum would have the power to decide a case so as to effectuate the purposes of its state's laws. It is not so clear that this should be the approach taken in a case involving a conflicts problem. In a wholly domestic case it would be improper not to construe a statute so as to carry out its purpose. When a case involves facts which bring the laws of other states into the picture and there is no statutorily mandated choice-of-law, an entirely different problem is presented. In the usual case the state legislature never thought of the situation presented to the court and to speak of "purposes" in the interstate context is to indulge in fictions. If the legislature had considered the conflicts implications of the substantive rule in question, it would have weighed an entirely different set of factors. It is sensible in such a situation for a court to use the freedom given to it by accepted notions of the role of the judiciary and current constitutional doctrines to fashion a result designed to mitigate the hardships for

268. D. CAVERS, *supra* note 1, at 100.

269. *Id.*

270. *Id.*

271. *Id.* at 69.

individuals which result from legal diversity. If the domestic rule in question was developed by the judiciary, the case for consideration of justified expectations is even stronger. Courts should realize that conflicts cases present problems and raise expectations for those involved which are often wholly different than the domestic case. There is every justification, therefore, for the development of a body of law which responds to the needs of those confronted by the special problems created by legal diversity. This emphasis on mitigating hardships for individuals will not always provide an obvious answer to specific questions, but every choice-of-law rule and every decision should be examined to see if they are consistent with the values that inhere in the concept of justified expectations. Professor Rheinstein correctly pointed out that this emphasis on mitigating hardship is the underlying basis of the search for uniformity regardless of forum.²⁷² The quest for uniformity, in turn, has been the chief motivating force in the development of a separate body of law known as conflict of laws.²⁷³

Although the emphasis on justified expectations should play a major role in any comprehensive conflicts methodology, it is not enough in itself. A comprehensive methodology should seek to encompass the full range of factors covered in section 6 of the *Restatement (Second)* and Professor Leflar's choice-influencing considerations, perhaps giving justified expectations a more prominent role than is given by the *Restatement (Second)* or Leflar. Although the suggestion that we classify problems and develop narrow rules provides a useful key to resolving troublesome issues, this is not, in itself, enough to provide the bench and bar with a workable model for decision making in conflicts cases. The range and complexity of choice-of-law problems in the United States requires a model that is both more comprehensive and more eclectic.

D. Currie

No conflicts scholar in recent years has written more brilliantly than Brainerd Currie. His articles provide a rare sort of pleasure for the conflicts enthusiast. In the final analysis, however, his approach does not provide a methodology that will work in a satisfactory manner across the full range of conflicts problems. His advocacy of forum preference has not and will not achieve broad acceptance because more is involved in the choice-of-law process than choosing

272. Rheinstein, *supra* note 70, at 29.

273. *See id.*

between conflicting governmental interests as Currie defines them, and because most scholars and judges do not share Professor Currie's belief that it is inappropriate for judges to decide between conflicting state interests.²⁷⁴ Currie argued that this task should be performed by legislatures because courts are not qualified, and for courts to do so would be undemocratic. It was suggested previously that courts are better qualified than legislatures to deal with choice-of-law problems.²⁷⁵ Currie himself has indicated grave misgivings about legislative efforts in the conflicts field.²⁷⁶ Legislative abstention from the conflicts field seems to amount to a concession that the courts should handle these problems. Currie's advocacy of a moderate and restrained interpretation and rational altruism²⁷⁷ by courts implies that courts are capable of discharging responsibilities which are fully as difficult as those involved in choosing between governmental interests.²⁷⁸ His argument that this function should not be committed to courts in a democracy denies large parts of the legal tradition of this country, for this and similar functions have been performed by courts throughout our history. It cannot be denied that courts frequently are motivated by a parochial preference for forum law. This instinctive preference has value as long as it is not elevated to the status of an automatic preference. In the final analysis, however, the widespread shared acceptance of the ideal of disinterested justice will prevent most courts from frankly embracing an approach which calls for an automatic forum preference whenever the forum has an interest.

The best argument for a forum preference approach is that it achieves greater certainty than an approach which requires the court to choose between conflicting state interests. If it is argued that one will not know the applicable law until after the case is filed, a proponent of forum preference could reply that at least it will be possible to ascertain the applicable law without having to take the case all the way to the state's highest court. Predictability after the case is filed is preferable to no predictability at all. The simpler task of ascertaining whether the forum has an interest would reduce the

274. See, e.g., D. CAVERS, *supra* note 1, at 93-96, 113; Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 474-81 (1960); Traynor, *supra* note 219, at 675.

275. Text accompanying notes 221-23 *supra*.

276. Currie, *supra* note 225, at 84 n.334.

277. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 180.

278. Peterson, *Weighing Contacts in Conflicts Cases: The Handmaiden Axiom*, 9 DUQUESNE L. REV. 436, 443-44 (1971).

burden on trial courts and attorneys and might encourage settlements. This argument is most persuasive in the area of tort choice-of-law. A proponent of the Currie approach could maintain with some justification that a period of confusion appears to be an inevitable consequence of a rejection of *lex loci delicti* and that a rule of forum preference is the quickest and simplest way to bring some order out of the confusion. This argument would be more acceptable if forum preference were viewed as a transitional device and were strictly limited to the area of tort choice-of-law.

Professor Currie's rejection of all choice-of-law rules in favor of ad hoc analysis is more objectionable than his advocacy of forum preference. He referred to rules as short cuts and syntheses and spoke of them in a deprecatory manner.²⁷⁹ The formulation of rules, however, is an inevitable part of the judicial process. Lawyers are a rule-making breed.²⁸⁰ It is true that excessive reliance on generalities can encourage imprecise analysis. A total rejection of rules, on the other hand, would place an intolerable burden on the bench and the bar, both intellectually and in terms of the time needed to deal with conflicts problems. In commenting on Professor Currie's concession that the traditional system works tolerably well at the hands of "sensitive and ingenious" judges, Professor Hill pointed out that Currie would replace it with a different system without consideration of how the new system would operate under judges who are less than sensitive and ingenious.²⁸¹ A crucial question is whether Currie's insistence on ad hoc analysis would be acceptable in the law offices and judicial chambers of the country. The Currie methodology is not likely to become widely adopted if large numbers of lawyers and judges would find it more difficult to work with than the alternative methodologies, or would tend to fall into error more often when engaged in ad hoc analysis. Perhaps the answer to this question lies with the new generation of law students, because those who have had a good course in conflicts in recent years will have been exposed to Currie's views before obtaining too many preconceptions.²⁸² It is significant that only a few of the scholars who share with Professor Currie an emphasis on the ordinary process of con-

279. Text accompanying note 92 *supra*.

280. Compare Leflar, *supra* note 190, at 273, with Rosenberg, in *Symposium on the Value of Principled Preferences*, 49 *TEX. L. REV.* 229 (1971).

281. Hill, *supra* note 274, at 473.

282. R. CRAMTON & D. CURRIE, *supra* note 7, one of the leading conflicts casebooks, is dedicated to Brainerd Currie and presents his views in a sympathetic manner, while adding new insights of the editors.

struction and interpretation are ready to join him in rejecting all choice-of-law rules.²⁸³

Although Professor Currie's advocacy of automatic preference for the interested forum and insistence on total abstinence from reliance on rules have not been widely accepted, his assertion that choice-of-law problems should be dealt with by a search for governmental interests through the process of construction and interpretation has been favorably received.²⁸⁴ The idea that such an analysis often will reveal a false conflict has been especially appealing.²⁸⁵ The efficacy of the technique of governmental interest analysis is one of the crucial issues in the contemporary choice-of-law debate. It is submitted that Professor Currie's version of governmental interest analysis suffers from several flaws. It was suggested previously that this approach will be difficult to use because laws often have multiple purposes which may point in opposite directions.²⁸⁶ This multiplicity of purpose, the lack of reliable sources of information on state legislative purpose, and the protean nature of the concept of interest combine to make interest analysis fully as subject to manipulation as traditional choice-of-law rules. Moreover, many of the interests relied upon in interest analysis are every bit as fictitious as the more abstract fictions that were popular in the past. What may be going on is simply an exchange of one set of fictions for another, dressed up in language that is more acceptable to the contemporary audience. Even if one assumes that interests can be discovered with some precision, a serious flaw still exists. When the legislature has expressed a clear domestic policy determination, we are told that this interest cannot be sacrificed even where there is no clue as to whether the policy was intended to be applied to multi-state cases.²⁸⁷ This assertion results from an unduly narrow concept of state interests. Professor Hill has pointed out that Currie in effect argues that courts should give effect to specific, limited interests but should not try to give effect to long-term interests.²⁸⁸ Among the

283. D. CAVERS, *supra* note 1 at 94.

284. See authorities cited note 88 *supra*; Hill, *supra* note 278, at n. 8; Kramer, *Interests and Policy Clashes in Conflict of Laws*, 13 RUTGERS L. REV. 523 (1959); Traynor, *supra* note 219, at 667-75; Kelso, *The Process of Analyzing Choice of Law Problems*, 1959 WASH. U. L. Q. 37; Leflar, *Conflict of Laws* (Annual Survey of American Law), 35 N.Y.U. L. REV. 62, 63-66 (1960).

285. Authorities cited note 88 *supra*.

286. Text accompanying note 96 *supra*. The difficulty of ascertaining governmental interests can be illustrated by comparing Baade, *supra* note 188, with Seidelson, *Interest Analysis and Divorce Actions*, 21 BUFFALO L. REV. 315 (1972).

287. Peterson, *supra* note 278, at 441.

288. Hill, *supra* note 274, at 485.

long-term interests most vigorously rejected by Currie are those which accrue because of uniformity of outcome.²⁸⁹ Professor Hill's long-term interests parallel the factors identified by Leflar and section 6 of the *Restatement (Second)*. Professor Hill argued persuasively that these long-term interests are fully as important to the states as the more limited interests which Currie says should be advanced.²⁹⁰ By stressing the narrowness of Currie's concept of state interests, Professor Hill also illustrated the illusory quality of the false-conflict concept.²⁹¹ He suggested that uniformity of result in particular classes of cases is a valid interest. However, consideration of this interest is omitted from the false-conflict analysis. Thus a case can be said to involve a false conflict only because an artificially restricted concept of governmental interest is used.

Viewed as a whole, Professor Currie's conflicts philosophy is basically a philosophy of surrender. He was willing to give up the effort to achieve the values traditionally associated with conflicts law because he believed that a rational system designed to further these values was "impossible of accomplishment with the resources which are available."²⁹² He wanted to lead us out of the wilderness by persuading us to pursue more modest goals. Given the ease with which interest analysis can be manipulated, there is reason to believe that even these more modest goals would not be realized in a way that would satisfy Professor Currie. There is room in an eclectic approach to choice-of-law for use of the techniques of interest analysis, but interest analysis does not provide a complete answer to the problems presented by legal diversity.

E. *Cavers*

Professor Cavers has not developed principles of preference for every category of case that can arise. Even those principles which have been developed presumably will be modified as they are examined and used by courts and scholars. Professor Rosenberg is right when he suggests that the principles of preference tend to neglect values such as coordination of the multi-state system and easing the burdens on courts and litigants caught up in a case with multi-state elements.²⁹³ He is also persuasive when he suggests that in devising choice-of-law rules we need not confine ourselves to principles of

289. *Id.* at 488.

290. *Id.* at 488-90.

291. *Id.* at 490-91.

292. Currie, *supra* note 56, at 263.

293. Rosenberg, *supra* note 280, at 234.

preference but should choose the type of rule which best promotes the various values at stake in the particular problem area in question.²⁹⁴ Emphasizing flexibility, Rosenberg believes that an eclectic approach is preferable to a system built solely around principles of preference.²⁹⁵ But any modern conflicts methodology should certainly make full use of Professor Cavers' insights and his principles of preference. The greatest strength of the Cavers approach lies in the fact that he seeks to further the purposes and policies underlying state law without exposing lawyers and litigants to the expense and uncertainty which accompany a case-by-case analysis of governmental interests. He does continue to rely in some cases on a false-conflict analysis, and the same criticism can be made of his approach in this respect that was made of Professor Currie's approach.²⁹⁶ This criticism is less important in Professor Cavers' case, however, because the logic of his principles of preference is leading him away from too great a reliance on the false-conflict analysis.²⁹⁷

F. *Leflar*

A satisfactory choice-of-law methodology should identify or provide a means of identifying the values which it is designed to advance. Professor Leflar's discussion of the choice-influencing considerations does this well. The continuous testing and reexamination of choice-of-law rules in light of these considerations would provide a workable means of correcting errors and keeping the rules up to date. Section 6 of the *Restatement (Second)* would serve the same purposes equally well. Although Professor Leflar believes that the choice-influencing considerations are more usable because they are fewer in number,²⁹⁸ it is at least arguable that the greater detail of section 6 would make it a preferable tool for the testing and reexamination of rules.

Professor Leflar has demonstrated that the considerations can be used to decide specific cases,²⁹⁹ a proposition that is bolstered by use of the considerations in several decided cases.³⁰⁰ It is questionable, however, whether the choice-influencing considerations provide a satisfactory method of deciding cases in other than excep-

294. *Id.* at 234-35.

295. *Id.*

296. See text accompanying notes 284-91 *supra*.

297. See text accompanying note 108 *supra*.

298. R. LEFLAR, *supra* note 44, at 243-44.

299. Leflar, *supra* note 116, at 304-09.

300. *Supra* note 134.

tional situations. The values of predictability, uniformity, and ease in determining the applicable law would be furthered more effectively by principles of preference or some other type of rule. The very flexibility and comprehensiveness which enable the considerations to deal effectively with the full range of values which arise in conflicts cases make it unlikely that they will prove consistently workable in deciding cases.

The most questionable of the choice-influencing considerations is the one which encourages application of the better rule of law. Professor Leflar is correct in saying that this factor does influence courts. Professor Cavers is right, however, when he argues that although the tendency should be recognized, it should not be encouraged.³⁰¹ Use of the better rule in deciding which law should apply misconceives the nature of the task confronting the court. When a court is asked to apply some law other than forum law, its responsibility is to decide whether the facts relate the parties or the controversy to another state's law.³⁰² If a court decides such a question on the basis of its preference for one of the competing laws, it is either assuming the role of a super appellate court, evading its responsibilities to correct obsolete or erroneous forum judge-made law, or assuming powers which should be left to its own state legislature. It is assuming the role of a super appellate court when it applies forum law because it concludes that it is superior to the law of another state.³⁰³ The determination whether the law of the sister state should be overruled or modified is properly the function of that state's highest court, and it is both presumptuous and inappropriate for the forum court to negate that law because of a belief that it is inferior. The forum court is evading its responsibility when it applies another state's law because of a belief that it is superior to forum judge-made law. The forum court, if it is the highest appellate court in the state, has the responsibility to overrule or modify outdated or clearly erroneous judicial rules. Reliance on the looseness in the joints of the conflict-of-laws system in such a situation obscures the basic issue before the court. The court is assuming powers which should be left to its state legislature if it applies another state's law because of a belief that it is superior to a forum statute. Although the court must concern itself with questions of interpretation and constitutionality, it is the responsibility of the legislature to deter-

301. Cavers, *supra* note 108, at 215.

302. *Id.*

303. Seidelson, *Comment on Cipolla v. Shaposka*, 9 DUQUESNE L. REV. 423, 432 (1971).

mine whether statutes should be modified or repealed. It is true, of course, that the discretion inherent in any conflicts system would permit a court to avoid the application of noxious law in each of these situations and explain its decision on choice-of-law grounds. Professor Leflar would argue that in such a situation it would be preferable for a court to state honestly the basis for its decision. But when one realizes that encouraging such candor promotes confusion as to the proper responsibility of a court in a case raising choice-of-law issues, the argument for candor loses some of its force. As Professor Maier has said, “. . . encouraging a court to be honest in making poor choice-of-law policy judgements does not improve the quality of the judgement made.”³⁰⁴ A final problem with the better rule of law consideration is the danger that it might serve as a substitute for analysis, because it often is easier to decide whether one of the competing rules is superior than to engage in the difficult analysis necessary to decide a case on choice-of-law grounds.³⁰⁵

Rejection of the better rule of law consideration does not imply rejection of all forms of result selection or advocacy of a wholly classificatory approach to choice-of-law. The *Restatement (Second)*'s treatment of usury³⁰⁶ is an example of result selection based upon the preference of one policy over another when the preferred policy is considered more important and the degree of encroachment upon the other policy is slight. One does not have to approve of this particular rule to accept it as an example of how result selection can be channeled so as to avoid encouragement of purely ad hoc decision making.

Viewed in perspective, Professor Leflar's choice-influencing considerations are an interesting reflection of his scholarly career in the conflicts field. It is difficult to think of another scholar who has been so open to the ideas of others and who has done as good a job in clearly describing the thinking of others. This is one of the great strengths of his treatise. It is one of the salient characteristics of the many annual surveys on developments in the conflicts field which he has written for the Annual Survey of American Law published by the New York University School of Law. Reading his work, one has the impression that this is the way that a wise man who has kept up with the cases and scholarly developments might react to what he has learned. His comprehensive approach shows an awareness of

304. Maier, *supra* note 126, at 259.

305. *Id.* at 256.

306. RESTATEMENT (SECOND), *supra* note 51, at § 203.

the many factors that have been influential. Its flexibility reflects the lesson of experience that it would be a mistake to try to force the field into a rigid mold and that a "fail-safe" system will never be perfected. Its chief value is that it forces one to focus on the fundamental values at stake in the choice-of-law process.

G. *Professor Reese and the Restatement (Second)*

It is possible to criticize many aspects of the *Restatement (Second)*. As the product of consensus and compromise, it lacks the brilliance and style of the writings of Currie and Cavers. Many of its black letter rules could be criticized.³⁰⁷ Professor Reese can be faulted for his unduly optimistic view that many of the problems in the conflicts field are a result of the youth of the subject.³⁰⁸ It is unlikely that we ever will or should develop narrow rules to cover all the problems in the field. With respect to some problems, Professor Cavers seems correct in arguing for rules of greater generality.³⁰⁹ We do need to experiment with rules of varying degrees of generality, as Professor Reese suggests,³¹⁰ but such experimentation probably will indicate that, although the progression in some areas will be toward ever narrower rules, in other areas it will be preferable to rely on more general rules.

Everything considered, however, the *Restatement (Second)* is the most workable and useful single tool which is currently available to the bench and the bar. It is comprehensive, flexible, and eclectic. These traits are necessary in dealing with the complexity and intransigence of the problems in the choice-of-law field. Models that are too logically tight cannot adequately cope with the variety of questions generated by our federal system. Although the *Restatement (Second)* has been criticized as discouraging the creative development of the law on a case-by-case basis,³¹¹ this criticism fails to take into account the fact that the continuing dialectic mandated by section 6³¹² is the best intellectual tool available to correct and update the law. The emphasis on developing rules and continually distinguishing and reexamining such rules comes closer than

307. See, e.g., Leflar, *supra* note 190, at 269, 274; Lowenfeld, *supra* note 172, at 384-86.

308. Compare text accompanying notes 18-19, *supra*, with Section III of this article, *supra*.

309. D. CAVERS, *supra* note 1, at 132-33.

310. Reese, *supra* note 94, at 322.

311. Sedler, *The Contracts Provisions of the Restatement (Second): An Analysis and a Critique*, 72 COLUM. L. REV. 279, 285 (1972).

312. Text accompanying notes 140, 205 *supra*.

the other approaches to speaking a language that is familiar and natural for the non-specialist members of the legal profession. It comes closer than the other approaches to serving the needs of the non-lawyer in a situation with multi-state elements because its comprehensiveness, flexibility, and eclecticism come closer than the others to serving the full range of values which touch upon the interests of non-lawyers. The methodology of the *Restatement (Second)* is fully capable of being used to accomplish the crucial task urged by Professor Rheinstein—the mitigation of hardships for individuals caused by the diversity of state laws. No lawyer or judge should have to rely solely on one book or treatise in the conflicts field, but if such a choice had to be made, the *Restatement (Second)* should be chosen.

V. CONCLUSION

The preceding review of the contemporary choice-of-law debate has led to an endorsement of the *Restatement (Second)*'s methodology and a questioning of some of the implicit and explicit assumptions on which certain positions are based. Some of the participants in the current debate assume that the situation in the conflicts field will improve with the passage of time. There is reason to believe, however, that the task facing those who work in the choice-of-law field is analogous to the myth of Sisyphus. Just as Sisyphus' stone rolled down the hill whenever he neared the top, even if a consensus should develop in the conflicts field, something eventually will happen to destroy the consensus or make many accepted solutions unacceptable. There is a continuing need to develop and modify solutions to particular types of problems. Permanent solutions to problems are more likely to come through the elimination of diversity than through improvements in choice-of-law methodology. It has been suggested, for example, that Congress should abolish guest statute defenses and death-damage ceilings in cases arising out of interstate transportation accidents.³¹³ Yet if a "fail-safe" system or a permanent solution is unattainable, conflict-of-laws as a field of study is no less important. Each generation of judges and conflicts scholars has the responsibility of fashioning workable solutions in the context of their time that will mitigate the hardships for individuals resulting from a multiplicity of potentially applicable law. An undue concentration on governmental interests tends to obscure this fundamental responsibility.

313. Rosenberg, *supra* note 280, at 234.

It is widely assumed that most of the problems in the conflicts field result from fundamental flaws in traditional thinking and in the reasoning and methodology of the first *Restatement*. There is a widespread belief that things will be better once we rid ourselves of these pernicious influences. A related assumption is that any reliance on a rule or technique found in the first *Restatement* is automatically suspect. The tendency in scholarly debate is to assume that one has scored a telling point simply by showing that a particular rule or idea has roots in the first *Restatement* or traditional conflicts thinking. Things are not that simple. The problems in the choice-of-law field arise from more fundamental causes than any defects in traditional thinking. Moreover, when weight is accorded the values of uniformity, predictability, and ease in determining the applicable law, some traditional ideas may hold up better under a policy-oriented evaluation than modern ideas. Rather than being a plea for the resurrection of the first *Restatement*, this is an argument that the debate on solutions to particular choice-of-law problems should not be conducted by attaching labels. Although the battle against the first *Restatement* as a whole is over, this fact alone does not prove that particular rules espoused in that document are unworkable today.

Some evaluations of competing methodologies are based upon an assumption that internal doctrinal consistency is a mark of superiority. To the contrary, it is more realistic to assert that the complexity, variety, and change that characterize the choice-of-law field call for an eclectic approach. An insistence upon methodological consistency may result in an intellectual straightjacket comparable to the one created by the vested rights notions in the first *Restatement*. Methodological consistency is not any more likely to achieve uniformity and predictability than an eclectic approach. Uniformity and predictability will come closer to being realized when the courts are persuaded that they are values worth promoting in the choice-of-law field. If concrete problems are isolated and subjected to a policy-oriented analysis, it seems probable that this will show that different types of problems call for different kinds of choice-of-law rules. Acceptance of an eclectic approach means that a court need not adopt a classificatory, functional, or result-selective methodology as the approach to take in all choice-of-law cases. Instead, the court's responsibility is to break the choice-of-law field down into a number of problem areas and, guided by the considerations identified in section 6 of the *Restatement (Second)* and Professor Leflar, make a deliberate choice among the types of

rules available. Consideration should be given to principles of preference, alternative-reference rules, jurisdiction-selecting rules, displaceable presumptions, and others. Consideration should also be given to Professor von Mehren's suggestion that special substantive rules, different from the domestic rules of any of the concerned states, should be developed for certain multi-state situations.³¹⁴

The kind of methodology needed today is one which relies upon rules rather than ad hoc analysis, is eclectic in its approach, and provides a mechanism by which the rules that have been developed can be continually tested and updated. The *Restatement (Second)* satisfies these criteria better than the other methodologies which have been considered. The adoption of the *Restatement (Second)* approach does not imply commitment to a particular set of black letter rules. Professor Reese's endorsement of Chief Judge Fuld's concurring opinion in *Tooker v. Lopez*³¹⁵ is a good indication that the *Restatement (Second)* methodology is open to the development of rules which are not contained in the *Restatement* itself. Professor Reese referred to Chief Judge Fuld's formulation of principles for guest statute cases as "a model which it is hoped other courts will emulate."³¹⁶ Adoption of the *Restatement (Second)* approach means that there is a commitment to the development of choice-of-law rules through the dialectic mandated by section 6. It also means there is a commitment to experimentation with rules of varying types and varying degrees of generality. Whatever approach is taken to the solution of particular problem areas, there should be a continuing effort to think in terms of the people affected by choice-of-law concepts. Both courts and scholars should continually ask how a particular decision or rule will affect the businessmen, consumers, litigants, practicing attorneys, trial judges, and others who will be affected by or who will have to apply the decision or rule. Scholars sometimes seem to neglect such considerations as a result of their absorption in the debate over methodology.

314. Von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974).

315. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

316. Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 562 (1971).