

# Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger

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*ABSTRACT: This Article provides a novel account for the choice of law revolution of the 1960s and 1970s and, building on our new conceptualization of the choice of law revolution, this Article argues for a fundamental shift in modern choice of law—a shift toward a multifactor future.*

*Whereas previous scholars have uniformly conceived of the transition from the dominant first Restatement of Conflict of Laws to modern choice of law theory as a legal realist rejection of vested rights, this Article argues that judges were motivated to move away from the first Restatement because they found inequitable its single-factor results. The first Restatement relies on a single contact with a state to determine which state's law applies in a multistate dispute, and this Article concludes that when that contact "stands alone"—i.e., is the only contact with that state—judges find the result dictated by the first Restatement to be arbitrary and unjust. When faced with such "lopsided" factual scenarios, judges have moved away from the first Restatement.*

*However, because judges and scholars alike have consistently misdiagnosed the underlying problem, as this Article demonstrates, modern choice of law theories suffer from the same single-factor flaws that plague the first Restatement. Thus, this Article argues for a multifactor approach to choice of law. This Article argues that a multifactor approach will have three significant advantages: (1) avoidance of controversial jurisprudential premises; (2) reduction of extraterritoriality; and (3) greater flexibility for judges. Perhaps most importantly, by properly identifying the root cause of the first Restatement's ills, this Article paves the way for greater theoretical clarity and simplicity, leading to more equitable results in choice of law.*

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## I. INTRODUCTION

Choice of law is an essential concern in any case involving occurrences in more than one jurisdiction, and American courts are increasingly hearing cases involving choice of law concerns. Before a judge can decide how to apply the law to the facts of a case, the judge must decide which law to apply. Since the laws of different jurisdictions are often directly in conflict, choice of law often determines whether the plaintiff or the defendant wins the case. Choice of law is a critical component of American jurisprudence, intensely practical yet theoretically complex.

We identify one pervasive error in the way that courts ordinarily conceptualize choice of law. This error is the common assumption that judges can determine the correct choice of law by identifying one particular, theoretically exceptional contact that, even when standing alone, dominates the choice of law process and dictates the result.

Consider, as illustration, the following hypothetical problem. A North Carolina clothing manufacturer and a New York retailer negotiate a contract in the course of meetings at the seller's home office in North Carolina. The contract legally comes into being when the buyer accepts the offer at the seller's office in North Carolina and is expressly made subject to North Carolina law. North Carolina is the place where the plaintiff alleges the breach took place. Which law applies, and why?

The conventional wisdom is that this question requires a choice between different connecting factors ("contacts"). Courts have typically framed the choice of law question as follows: Should the applicable law be the law of the place of contracting, the law chosen by the parties, the law of the place of performance, or the law of the state where the buyer (or seller) resides? Traditional theory, embodied in the "vested rights" approach of the first Restatement of Conflict of Laws, framed the answer in terms of particular territorial occurrences (e.g., where the contract was formed); in contrast, modern theory, illustrated by governmental interest analysis, focuses on the parties' domiciles. Both approaches, however, implicitly assume that there is a single, inherently significant contact—what we call the "trigger"—that, standing alone, is sufficient to support applying the chosen state's law. In both theories, the reasoning revolves around the chosen factor's supposedly special jurisprudential character: Under traditional theory, the "last act" gives rise to a "vested right," while under modern theory, one party's domicile gives a state an "interest" in having its laws applied.

Entirely overlooked is the overall pattern of contacts between the dispute and the states involved. The "single factor" way of understanding the hypothetical posed above disregards the fact that five factors point toward North Carolina (the domicile of the seller, the location of the negotiations, the location of the acceptance, the choice of law reflected in the contract, and the location of the breach) while only one factor (the domicile of the

buyer) points toward New York. The dispute's "center of gravity" as a whole is assigned no importance at all; multifactor methods are hardly even considered.<sup>1</sup>

Despite the conventional wisdom, we doubt that there are many cases in which choice of law can be reduced to a single, intrinsically dispositive contact.<sup>2</sup> The answer to choice of law problems cannot be found by theorizing about which connecting factors are inherently the most important because the applicable law is a function of the overall fact pattern a particular case presents and not of any particular contact standing alone. The sterile character of much contemporary choice of law debate is a direct result of the fact that conventional choice of law approaches are searching for something that does not exist—a single, inherently determinative contact that, standing alone, is sufficient to justify the application of local law.

Our argument begins with a review of the traditional first Restatement territorial vested rights approach and surveys the reasons why it was eventually found unsatisfactory.<sup>3</sup> We argue that the standard account of how traditional thinking was discredited overlooks the theory's single most important defect: The first Restatement was unable to handle cases in which the designated trigger was the only contact supporting application of the chosen law.<sup>4</sup> This defect is a direct consequence of the first Restatement's single-factor structure, which treats choice of law as basically a question about the choice among connecting factors.<sup>5</sup> Modern interest-based theories, however, turn out to make similar single-factor assumptions and are therefore similarly vulnerable.<sup>6</sup>

A third system, the Restatement (Second) of Conflicts, mixes conceptual elements taken from both of these theories. It is possible to interpret the Restatement (Second) as a "multifactor" theory, thus avoiding the pitfalls of both vested rights and interest-based theories, but so far most academics have not done this.<sup>7</sup> We conclude by recommending further

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1. For a discussion of the abortive center-of-gravity approach that the New York courts applied around the midpoint of the twentieth century, see *infra* notes 210–14 and accompanying text.

2. See *infra* note 266 and accompanying text (providing possible exceptions).

3. See *infra* notes 9–25 and accompanying text (reviewing the early development of the first Restatement approach).

4. See *infra* Part II.B (discussing stand-alone trigger cases).

5. See *infra* notes 29–57 and accompanying text (discussing the conventional account of the choice of law revolution).

6. See *infra* notes 154–57, 191–208 and accompanying text (discussing modern approaches to choice of law).

7. See *infra* notes 250–51 and accompanying text (discussing these approaches to the Restatement (Second)).

examination of alternative multifactor approaches to choice of law, such as weighing or balancing.<sup>8</sup>

## II. TRADITIONAL APPROACHES TO CHOICE OF LAW: THE CONVENTIONAL ACCOUNT

The last one hundred years have seen tremendous change in the assumptions underlying choice of law. For about the first third of the twentieth century, the traditional vested rights theory was the dominant approach. Several decades of legal realist inspired critique followed this period, before the gradual adoption of modern approaches. Legal historians refer to the transition from traditional to modern theories as the “choice of law revolution.”<sup>9</sup>

The conventional explanation for the choice of law revolution attributes the transition exclusively to the defects in the traditional vested rights approach. This explanation overlooks, however, one striking feature of the transition that led to the abandonment of traditional choice of law theory: Most cases rejecting traditional methods involved scenarios where the supposedly applicable law was supported by a single, stand-alone contact. It is not so much that judges came to appreciate that the first Restatement’s designated connecting factors were the wrong ones; rather, judges simply became increasingly unwilling to apply the law of a state with only a single contact with the dispute.

### A. THE FIRST RESTATEMENT OF CONFLICT OF LAWS

The first Restatement is the earliest choice of law approach that American courts still apply.<sup>10</sup> The object of its vested rights approach was to designate when and where the cause of action came into being.<sup>11</sup> Vesting coincided with the occurrence of the “last act” necessary to create the cause of action—for example, the location of the car crash in a tort suit. The location of this final occurrence thus determined the applicable law.

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8. See *infra* notes 252–93 and accompanying text (describing the benefits of these approaches).

9. For general discussions of the first Restatement approach to choice of law, see generally Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277 (1989), and Perry Dane, *Vested Rights, “Vestedness,” and Choice of Law*, 96 YALE L.J. 1191 (1987).

10. The work of Joseph Story preceded the first Restatement, and the vested rights theory borrowed in certain ways from ideas in Story’s earlier work, JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (Boston, Hilliard, Gray & Co. 1834). Story’s approach, founded on the concept of “comity,” has had considerably less influence on American choice of law, and we do not address it below for this reason. See Terry Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity*, 62 N.Y.U. L. REV. 651, 658 n.32 (1987) (describing the “territorial approach” reflected in the first Restatement). Even the critics of the first Restatement acknowledge its importance. See, e.g., WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 182 (3d ed. 2002).

11. See *infra* note 17 and accompanying text (discussing vested rights).

Professor Joseph Beale of Harvard Law School, the chief author of the first Restatement, was motivated by a grand ambition typical of an earlier generation of scholars—the scientific systematization of an entire field of law.<sup>12</sup> He sought to bring all existing conflicts case law under a single theoretical umbrella. His vision of the meaning and importance of territoriality was central to the development of the traditional approach. For Beale, states did not enforce other states' laws directly, but rather recognized the rights created under other states' laws.<sup>13</sup> The substantive legal rights that courts are charged with enforcing, Beale argued, vested at a particular time and place.<sup>14</sup> Choice of law required the identification and application of the law under which the rights vested because without rights having vested under a particular law, no substantive legal rights existed, and there was nothing for other states to enforce.<sup>15</sup>

Beale explained the matter in his treatise, published one year after the first Restatement:

The law annexes to the event a certain consequence, namely, the creation of a legal right. . . . When a right has been created by law, this right itself becomes a fact . . . . [T]he existing right should everywhere be recognized; since to do so is merely to recognize the existence of a fact.<sup>16</sup>

From Beale's premise that rights vest at a particular time and in a particular place, it followed logically that a single, unique spatiotemporal occurrence marked the right's creation. We refer to this uniquely defined occurrence as the "trigger."

The first Restatement identified different triggers for different substantive areas of law (for example, tort, contract, or family law) and in some of these legal areas, different substantive sub-rules required different triggers as well.<sup>17</sup> Within a particular rule or sub-rule, however, only a single act in a single place might trigger the vesting of a legal right. In contract cases, for instance, the trigger was the final event necessary to cement the

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12. See generally LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960*, at 14 (2001) (discussing Beale's attempt to "systematize the entire field of conflict of laws").

13. See *infra* text accompanying note 16 (explaining Beale's vision).

14. See Dane, *supra* note 9, at 1194–95 (recounting Beale's argument).

15. *Id.*

16. 3 JOSEPH H. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* 1969 (1935).

17. See, e.g., *RESTATEMENT (FIRST) OF CONFLICT OF LAWS* §§ 377–378 (1934) ("The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place, [and t]he law of the place of wrong determines whether a person has sustained a legal injury."); *id.* § 332 ("The law of the place of contracting determines the validity and effect of a promise with respect to capacity . . . to make the contract . . ."); *id.* § 255 ("Capacity to make a valid conveyance of an interest in a chattel is determined by the law of the state where the chattel is at the time of the conveyance.").

parties' contractual entitlements and responsibilities—the acceptance.<sup>18</sup> Thus, the first Restatement directed the judge to apply the law of the “place of contracting,” typically “the place . . . where the delivery [of the acceptance] is made.”<sup>19</sup> In tort cases, the supposed last act—“the state where the last event necessary to make an actor liable for an alleged tort takes place”<sup>20</sup>—was assumed to be the place of the injury.<sup>21</sup> A well-known early case illustrates the basic idea. *Alabama Great Southern Railroad Co. v. Carroll* dealt with a choice between the laws of Mississippi, which had a fellow-servant rule, and Alabama, which did not.<sup>22</sup> An injured brakeman, who resided in Alabama, had been working for an Alabama-incorporated railroad company; the employment contract had been signed in Alabama as well.<sup>23</sup> The injury occurred in the course of a trip originating in Alabama and crossing into Mississippi, with the negligent failure to inspect the braking equipment occurring in the former state and the injury occurring in the latter.<sup>24</sup> Noting that there had been no cause of action while the train was still in Alabama, the court applied the law of Mississippi, where the injury occurred.<sup>25</sup> Generations of law students have studied this case as an example of the first Restatement's elevation of conceptual reasoning over common sense. Common sense directs that the court should have applied Alabama law, given that all factors—except for the trigger factor—pointed to Alabama.

#### B. THE CHOICE OF LAW REVOLUTION

Around the middle of the twentieth century, doubts about the first Restatement's solution reached a critical point; certain states stopped applying it and started to look for better answers.<sup>26</sup> The conventional explanation for this choice of law revolution focuses on the defects of the traditional approach. Scholars focused their criticism on the territorial connecting factors, arguing that reliance on territorial factors is arbitrary

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18. *Id.* § 312.

19. *Id.*

20. *Id.* § 377.

21. See *supra* note 17 and accompanying text (detailing triggers in the first Restatement). Other Restatement rules governed numerous other substantive areas of law. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 121 (requiring application of the law of the place where the marriage was celebrated); *id.* § 208 (requiring application of the law of the property's location).

22. *Ala. Great S. R.R. Co. v. Carroll*, 11 So. 803, 804 (Ala. 1892). This case did not apply the first Restatement—it was decided several decades earlier. However, its reasoning was symptomatic of the body of law that Joseph Beale sought to “restate.”

23. *Id.*

24. *Id.*

25. *Id.* at 809.

26. California and New York led the search for a superior choice of law approach. See *infra* notes 98–110.

and leads to fortuitous results.<sup>27</sup> They argued that the “last act” test, in particular, corresponded to nothing of genuine relevance to the choice of law process.<sup>28</sup> In practice, judges faced with applying the first Restatement’s rules lacked the flexibility to avoid irrational outcomes and were forced to rely on “escape devices” to avoid absurd results. When the system of loopholes and exceptions collapsed under its own weight, bellwether states like California and New York took their first steps toward modern “interest analysis.”

### 1. The Conventional Account

The first Restatement’s logic was difficult to credit. The theory designates the “last act” as its preferred single-factor trigger because the “last act” coincides with the vesting of a cause of action.<sup>29</sup> Of course, in doing so, the first Restatement ignores the numerous other factors that contribute equally to the cause of action. In a tort case, for example, the first Restatement ignores the parties’ domiciles and the location of all of their other interactions, even though these parties and their other interactions may be just as necessary for the creation of a legal right as the final event—the injury. In contract cases, the first Restatement generally rendered the location of negotiations and performance irrelevant; everything turned on where the acceptance was delivered.<sup>30</sup>

Two leading authorities, Richman and Reynolds, offer the following hypothetical example of the first Restatement’s application to a contract dispute:

Suppose a contract is negotiated in Connecticut for the delivery of goods in Connecticut by a Connecticut seller to a Connecticut buyer. Although Connecticut is the only state with a real interest in the transaction; if the parties had concluded their negotiation at a

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27. See, e.g., Ernest G. Lorenzen & Raymond J. Heilman, *The Restatement of the Conflict of Laws*, 83 U. PA. L. REV. 555, 587 (1935). The authors query:

Why should the legal relations between residents of the different states of this country arising out of interstate transactions be determined by such an accidental consideration as that of where the last act occurred which would be necessary to make a transaction contractually binding . . . or by the rules of some state arbitrarily selected? Should not interests arising out of interstate contractual transactions be controlled by economic and social objectives rather than technical and arbitrary rules relating to the place where, if at all, the alleged contract is deemed to have been made?

*Id.*

28. *Id.*

29. Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 891 (2002) (“Rights were considered to have vested in the jurisdiction where the last act necessary to complete the cause of action occurred.”).

30. See *supra* notes 18–19 and accompanying text (explaining the trigger for the creation of a contract right).

trade convention in Florida, the Restatement would apply the law of Florida to the contract. Surely that is a triumph of form over substance.<sup>31</sup>

They construct a similar hypothetical from the first Restatement's rules for torts:

Consider an automobile accident between two Californians, plaintiff and defendant, which occurs about two miles south of the border between California and Mexico. Suppose that plaintiff is seriously injured—about \$200,000 worth. Further suppose that Mexico, desiring not to impoverish tortfeasors, has established a negligence damage limitation of \$6,000 but that California does not limit damages because it favors full compensation for tort victims. According to the Restatement, the law of Mexico should apply because Mexico is the place of injury.<sup>32</sup>

Richman and Reynolds designed these hypotheticals to demonstrate the irrationality of the first Restatement's vested rights approach. Only the last act is given any weight, even when its location is entirely arbitrary; the choice of law analysis considers all other events irrelevant.

Faced with such arbitrary results, judges began to resist the first Restatement. The resistance took two forms—manipulation to avoid irrational results on a case-by-case basis (“escape devices”) and abandonment of the traditional approach entirely (the choice of law revolution).<sup>33</sup> Scholars have traditionally explained this resistance as both a response to the first Restatement's rigidity and a consequence of legal realism disavowing the underlying legal theory of vested rights.<sup>34</sup>

#### *a. Escape Devices*

A frequent critique launched against the first Restatement was that it forced judges to resort to subterfuge and manipulation to avoid irrational results.<sup>35</sup> As a general matter, the first Restatement denies judges the flexibility necessary to reconsider outcomes that seem illogical or counterproductive. The vested rights approach conceptualizes choice of law as an objective, predetermined rule of decision.<sup>36</sup> Judges are not tasked with

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31. RICHMAN & REYNOLDS, *supra* note 10, at 202.

32. *Id.* (footnote omitted).

33. See *infra* notes 35–57 and accompanying text (discussing the ways that judges avoided the first Restatement's arbitrary results).

34. See *infra* notes 36–38 and accompanying text (categorizing the first Restatement approach as objective and inflexible).

35. See RICHMAN & REYNOLDS, *supra* note 10, at 164 (discussing judges manipulating the choice of law decision to avoid arbitrary results).

36. See Dane, *supra* note 9, at 1194–96 (noting that the law of the place where the specified events occurred governed choice of law decisions almost exclusively).

choosing the appropriate law for a particular dispute and are allowed no latitude for a holistic evaluation of the underlying facts.<sup>37</sup> Neither is there room to consider the legislature's policy objectives in adopting the particular substantive law in question.<sup>38</sup> The vested rights approach, one might say, removes *judgment* from a judge's determination of the appropriate law.

Lacking the authority to reconsider arbitrary outcomes, judges resorted to evasion. The subterfuges that they employed became known as "escape devices" because judges took advantage of competing rules within the Restatement system to "escape" results they did not wish to reach.<sup>39</sup> Judges employed several types of escape devices.<sup>40</sup>

Perhaps the handiest escape device was "characterization"—where a case that seemed to be one sort of dispute might on closer examination be "reconceptualized" as a different type of dispute.<sup>41</sup> For example, in *Carroll*, the injured brakeman attempted to recharacterize his cause of action as a contract rather than a tort case.<sup>42</sup> If successful, the plaintiff would have been entitled to application of the place-of-contract, rather than the place-of-injury, rule.<sup>43</sup> Unfortunately for the plaintiff, the judge retained the tort characterization and applied the law of the place where the accident occurred.<sup>44</sup>

Characterization provided other litigants better luck. *Levy v. Daniels' U-Drive Auto Renting Co.*, for example, involved an automobile accident that occurred in Massachusetts.<sup>45</sup> Under the first Restatement, Massachusetts law would have applied to cases sounding in tort.<sup>46</sup> The Connecticut court chose instead to characterize the case as a contract case.<sup>47</sup> This characterization resulted in application of Connecticut's vicarious-liability rule which allowed the passenger's suit to proceed against the rental agency and not only the driver.

Equally possible was the conversion of a tort case into a dispute regarding marital status. In *Haumschild v. Continental Casualty Co.*, the defendant, the plaintiff's former husband, injured the plaintiff by his

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37. *Id.*

38. RICHMAN & REYNOLDS, *supra* note 10, at 202.

39. See generally R. LEA BRILMAYER & JACK L. GOLDSMITH, CONFLICT OF LAWS: CASES AND MATERIALS 114–72 (5th ed. 2002) (discussing the escape devices of characterization, *renvoi*, the substantive–procedural distinction, and public policy).

40. *Id.*

41. *Id.* at 114.

42. Ala. Great S. R.R. Co. v. Carroll, 11 So. 803, 807 (Ala. 1892).

43. *Id.* at 807–08.

44. *Id.* at 809.

45. *Levy v. Daniels' U-Drive Auto Renting Co.*, 143 A. 163, 163 (Conn. 1928).

46. *Id.* at 164.

47. *Id.* at 164–65.

negligent driving in California.<sup>48</sup> California had an interspousal-immunity rule; Wisconsin did not.<sup>49</sup> The Wisconsin Supreme Court characterized the issue as a problem of marital status.<sup>50</sup> The court's characterization resulted in application of Wisconsin's law of marital domicile, rather than California's tort law.

Just as a tort case was turned into a contract dispute (or a contract dispute transformed into a tort case), a substantive rule was, likewise, characterized as procedural, and therefore governed by the law of the forum. *Grant v. McAuliffe*, for instance, arose out of a two-car collision in Arizona.<sup>51</sup> Under Arizona law, the claim did not survive the defendant's death, but there was no such bar to suit in California, the forum.<sup>52</sup> Justice Traynor reasoned that the relevant issue—survival of the action after the death of the tortfeasor—was properly considered procedural and not substantive and rejected the Arizona law defense.<sup>53</sup>

Where characterization did not preclude illogical results, judges turned to stronger medicine: the infamous public policy exception.<sup>54</sup> Under this escape device, a court might refuse to apply another state's law if that law's substantive content was profoundly objectionable.<sup>55</sup> Sometimes judges combined the public policy exception with characterization to avoid application of a disfavored law. In *Kilberg v. Northeast Airlines, Inc.*, Massachusetts was the location of the plane crash and, consequently, the place of injury.<sup>56</sup> Thus, under the first Restatement, Massachusetts law would have been applicable as the location where the cause of action vested. The New York Court of Appeals refused, however, to apply the Massachusetts Wrongful Death Act, which capped recovery at \$15,000 on two grounds: (1) the issue should be governed by forum law because it was procedural (characterization) and (2) the limitation was contrary to New York's public policy.<sup>57</sup>

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48. *Haumschild v. Cont'l Cas. Co.*, 95 N.W.2d 814, 814 (Wis. 1959).

49. *Id.* at 815.

50. *Id.* at 817–18.

51. *Grant v. McAuliffe*, 264 P.2d 944, 946 (Cal. 1953) (en banc).

52. *Id.*

53. *Id.* at 949.

54. *See, e.g.*, *Marchlik v. Coronet Ins. Co.*, 239 N.E.2d 799, 803 (Ill. 1968) (“Public policy of Illinois precludes the use of our courts as the forum for cases under the Wisconsin direct action statutes and application of the exclusionary rule does not violate the full-faith-and-credit provisions of the Federal constitution.”).

55. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 612 (1934) (“No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum.”).

56. *Kilberg v. Ne. Airlines, Inc.*, 172 N.E.2d 526, 526 (N.Y. 1961); *see also* Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 823–25 (1983) (discussing the facts and outcome of *Kilberg*).

57. *Kilberg*, 172 N.E.2d at 529.

b. *Transition Cases: The Choice of Law Revolution*

No theory requiring such a complex system of loopholes and exceptions was likely to last for long. The opportunities for evasion that these loopholes offered not only discredited the first Restatement's theoretical underpinnings, but also undercut its practical aspirations of predictability and uniformity. Rather than being applauded for providing flexibility, the myriad exceptions to the rigid rules may actually have hastened the first Restatement's downfall.

Once courts began to contemplate the possibility of abandoning the first Restatement, the choice of law revolution was underway. Many important transition cases rejecting the first Restatement justified their rejections on the grounds that the trigger factor was "fortuitous"<sup>58</sup> or some similar pejorative—"adventitious," "arbitrary," or "happenstance."<sup>59</sup> By

58. See *infra* notes 145–52 and accompanying text (discussing the connection between fortuity and stand-alone triggers).

59. *Armstrong v. Armstrong*, 441 P.2d 699, 703 (Alaska 1968) (referring to the parties' contact with Canada as "fortuitous, transitory, and insubstantial"); *First Nat'l Bank v. Rostek*, 514 P.2d 314, 317 (Colo. 1973) ("harsh, unjust results"); *O'Connor v. O'Connor*, 519 A.2d 13, 19 (Conn. 1986) ("The virtue of simplicity [, as embodied in the *lex loci delicti* rule,] must . . . be balanced against the vice of arbitrary and inflexible application of a rigid rule."); *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999, 1000 (Fla. 1980) ("happenstance"); *DeMeyer v. Maxwell*, 647 P.2d 783, 786 (Idaho Ct. App. 1982) ("Considering that they both lived in Idaho, where this trip originated, and that only through fortuitous circumstances were they passing through Oregon at the time of the accident, we cannot infer that either of them had any expectation that the Oregon guest statute would apply."); *Ingersoll v. Klein*, 262 N.E.2d 593, 596 (Ill. 1970) ("The arbitrary nature of the doctrine is quite evident in this case where determination of the applicable law is based upon what spot in the Mississippi River the decedent met his death."); *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071, 1074 (Ind. 1987) ("The place of the tort is insignificant to this suit."); *Fuerste v. Bemis*, 156 N.W.2d 831, 833 (Iowa 1968) ("The presence of the parties in Wisconsin at the time of the accident was entirely fortuitous."); *Wessling v. Paris*, 417 S.W.2d 259, 260 (Ky. 1967) ("By fortuitous circumstances the accident happened on the other side of the Ohio River instead of on this side."); *Beaulieu v. Beaulieu*, 265 A.2d 610, 613 (Me. 1970) (referring to *lex loci delicti* as the "arbitrary stereotyped course"); *Mitchell v. Craft*, 211 So. 2d 509, 513 (Miss. 1968) ("Louisiana's sole relationship with the occurrence is the purely adventitious circumstance that the collision happened there."); *Phillips v. Gen. Motors Corp.*, 2000 MT 55, ¶ 35, 298 Mont. 438, ¶ 35, 995 P.2d 1002, ¶ 35 ("The Restatement approach is preferable, in our view, to the traditional *lex loci* rule which applies the law of the place of the accident which may be fortuitous in tort actions."); *Babcock v. Jackson*, 191 N.E.2d 279, 284 (N.Y. 1963) ("adventitious"); *Auten v. Auten*, 124 N.E.2d 99, 102 (N.Y. 1954) ("fortuitous"); *Issendorf v. Olson*, 194 N.W.2d 750, 755 (N.D. 1972) ("The locus of the accident was fortuitous . . ."); *Woodward v. Stewart*, 243 A.2d 917, 923 (R.I. 1968) ("All the interest factors, other than the fortuitous locus of the accident, point to the application of Rhode Island law."); *Chambers v. Dakotah Charter, Inc.*, 488 N.W.2d 63, 68 (S.D. 1992) ("It was merely fortuitous that Charlotte slipped while the bus was passing through Missouri."); *Hataway v. McKinley*, 830 S.W.2d 53, 60 (Tenn. 1992) ("We think the fact that the injury occurred in Arkansas was merely a fortuitous circumstance, and that the State of Arkansas has no interest in applying its laws to this dispute between Tennessee residents."); *Gutierrez v. Collins*, 583 S.W.2d 312, 317 (Tex. 1979) (explaining that the place-of-injury rule is "often arbitrary and unjust"); *Wilcox v. Wilcox*, 133 N.W.2d 408, 416 (Wis. 1965) (describing the place of accident—Nebraska—as "fortuitous").

referring to “transition cases,” we mean only those cases on the cutting edge in which courts of some particular state first made the shift away from the first Restatement. The first state to entertain the possibility of rejecting the vested rights theory was New York<sup>60</sup>—its experience is instructive.

The earliest New York transition case was *Auten v. Auten*: a dispute regarding the enforcement of an alimony and child-support agreement.<sup>61</sup> An English woman brought the case against her husband who had deserted her and moved to New York.<sup>62</sup> She followed him there, and the two entered into a separation agreement.<sup>63</sup> The wife then immediately returned to England and sued for divorce the following year.<sup>64</sup> Thirteen years later, she brought suit in New York for the arrears.<sup>65</sup> Her former husband defended on the ground that her filing for divorce in England violated the separation agreement and forfeited any right to payments under it.<sup>66</sup> This defense was legally inadequate under English law but would have been recognized in New York.<sup>67</sup> However, the New York court dismissed the connection with New York—the place where the parties signed the agreement—as “entirely fortuitous” and allowed the case to proceed.<sup>68</sup> Thus, *Auten* demonstrates an early rejection of the first Restatement because the New York court relied on a “grouping of contacts” theory, rather than allowing a single-factor trigger to determine the applicable choice of law.<sup>69</sup>

In the 1963 case of *Babcock v. Jackson*, similarly, the New York Court of Appeals dismissed the defendant’s argument that, as the place of injury, Ontario’s law should apply.<sup>70</sup> The court of appeals based its decision on the grounds that the place of injury was merely “adventitious.”<sup>71</sup> A vehicle registered, garaged, and insured in New York, carrying only New York domiciliaries, had set off on a weekend trip to Ontario.<sup>72</sup> The accident occurred while the group was in Ontario, and when the group brought the suit in New York, the critical objection was the Ontario guest statute.<sup>73</sup> The

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60. See *infra* notes 61–76 and accompanying text (illustrating the New York cases *Auten*, 124 N.E.2d 99, and *Babcock*, 191 N.E.2d 279).

61. *Auten*, 124 N.E.2d at 100.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Auten*, 124 N.E.2d at 101.

67. See *id.* (noting that under New York law, “plaintiff’s commencement of the English action and the award of temporary alimony constituted a rescission and repudiation of the separation agreement, requiring dismissal of the complaint”).

68. *Id.* at 102.

69. *Id.* at 101–02.

70. *Babcock v. Jackson*, 191 N.E.2d 279, 284–85 (N.Y. 1963).

71. *Id.* at 284.

72. *Id.*

73. *Id.*

New York court refused to apply Ontario's guest statute, favoring the law of the parties' common domicile.<sup>74</sup> The judge reasoned:

The present action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile, garaged, licensed and undoubtedly insured in New York, in the course of a week-end journey which began and was to end there. In sharp contrast, Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there.<sup>75</sup>

*Babcock v. Jackson* has been called the "watershed decision that at last moved the modern choice of law revolution out of the academic journals and into the courts."<sup>76</sup> It is an excellent example of the methods and objectives of the choice of law revolution, as conventionally interpreted because the court focused on the grouping of contacts rather than traditional law's single-trigger factor.

## 2. What the Conventional Account Omits

The conventional account of the choice of law revolution attributes the first Restatement's demise to its theoretical deficiencies, specifically to its theoretical underpinnings in the vested rights theory. Importantly, the conventional account concludes that the arbitrary nature of these cases stems from the fact that, in accordance with vested rights theory, the selected trigger is a *territorial* factor.<sup>77</sup> Scholars assumed that identifying a different single-trigger factor—such as the parties' domicile—would lead to better results.<sup>78</sup> Scholars did not question the wisdom of selecting a single-trigger factor, only whether a territorial last act should fill that role.<sup>79</sup>

Closer examination, however, reveals that the nature of the trigger factor—the territorial last act—was not the problem. The results dictated by the first Restatement were arbitrary not because of the nature of the single trigger, but rather because they relied on a single, stand-alone trigger.<sup>80</sup> The most important common characteristic animating the academic hypotheticals, application of escape devices, and transition cases that discredited the first Restatement's approach is that in almost all of them the

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74. *Id.* at 285.

75. *Babcock*, 191 N.E.2d at 284.

76. Korn, *supra* note 56, at 827.

77. See *supra* notes 12–15 and accompanying text (describing Beale's theory that a right vested in a particular place); *supra* notes 26–28 and accompanying text (noting the criticism of the traditional approach).

78. See Lorenzen & Heilman, *supra* note 27, at 587 (questioning the arbitrary selection of the territorial-last-act standard).

79. See *id.* (suggesting economic or social triggers instead of a territorial one).

80. See *infra* Part II.B.2.a (describing the problem with the stand-alone trigger).

Restatement trigger factor—the place of contract or the place of the accident—was the *only* factor tying the dispute to the Restatement outcome.<sup>81</sup> Indeed, opinions disparaging the first Restatement’s results as arbitrary or fortuitous often explicitly mention that the designated trigger is the only factor pointing in the direction of applying a particular state’s law.<sup>82</sup> The correct lesson to be drawn from past experience is that any single factor, viewed in isolation, is likely to provide an arbitrary basis for a choice of law decision. The conventional accounts detailing the first Restatement’s demise omit the important role that the stand-alone trigger played in discrediting the first Restatement’s approach.

In order to demonstrate the critical importance of the stand-alone trigger in the first Restatement’s demise, we will first provide several examples of stand-alone trigger fact patterns. Subsequently, we will demonstrate the importance of stand-alone triggers in pretransition cases where judges employed escape devices to avoid arbitrary results. Next, we will demonstrate the central importance of the stand-alone trigger to the choice of law revolution by surveying the choice of law revolution transition cases—the vast majority of which evidence a stand-alone trigger fact pattern.

*a. Examples of the Stand-Alone Trigger*

The two hypothetical cases provided by Richman and Reynolds are perfect examples of stand-alone triggers. In the first hypothetical, a contract case, two Connecticut parties negotiate in Connecticut for delivery in Connecticut.<sup>83</sup> However, they sign their agreement in Florida while temporarily present at a trade convention.<sup>84</sup> In the second example, a tort case, two Californians are temporarily a few miles south of the California–

81. See *infra* Part II.B.2.c (describing the cases that cast doubt on the first Restatement standard).

82. The New York Court of Appeals in *Auten v. Auten*, for example, observed that New York’s “sole nexus with the matter in dispute—entirely *fortuitous*, at that—is that it is the place where the agreement was made and where the trustee, to whom the moneys were in the first instance to be paid, had his office.” *Auten v. Auten*, 124 N.E.2d 99, 102 (N.Y. 1954) (emphases added). England had “all the truly significant contacts.” *Id.* Likewise, in *Babcock v. Jackson*, the Court of Appeals dismissed as “adventitious” Ontario’s “sole relationship with the occurrence,” namely, the place of the injury:

The present action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile, garaged, licensed and undoubtedly insured in New York, in the course of a week-end journey which began and was to end there. In sharp contrast, Ontario’s *sole* relationship with the occurrence is the *purely adventitious circumstance* that the accident occurred there.

*Babcock v. Jackson*, 191 N.E.2d 279, 284 (N.Y. 1963) (emphases added).

83. RICHMAN & REYNOLDS, *supra* note 10, at 202.

84. *Id.*

Mexico border when they are injured in an accident involving only themselves.<sup>85</sup>

Both are stand-alone trigger cases in which the trigger is the only contact pointing to the chosen state's law. The authors treat the results in both of the above hypotheticals as a paradigm of "form over substance," on the grounds that the place of contracting and place of injury are intrinsically irrelevant.<sup>86</sup> They fail to note, however, the overall pattern and the lopsided distribution of contacts between the trigger locations (Florida and Mexico) versus the nontrigger locations (Connecticut and California). These two examples tap into a common intuition that a single factor—whether it is the territorial last act, the place of domicile, or a different single factor—standing by itself may not outweigh the remaining factors when the remaining factors all point toward a different state.

*Alabama Great Southern Railroad Co. v. Carroll* supports this intuition.<sup>87</sup> The domicile of both parties, the negligent conduct, and the employment contract all pointed toward Alabama; only the place of injury pointed toward Mississippi.<sup>88</sup> The place of injury, as the stand-alone trigger, resulted in application of Mississippi law in a dispute in which every other connecting factor was clustered in Alabama.<sup>89</sup> Choice of law "first principles" mandated that the Alabama judge ignore what can only be described as an overwhelming set of contacts with Alabama and apply the law of a state with a single tenuous connection to the dispute.<sup>90</sup> The case does not demonstrate the general inadequacies of the first Restatement's chosen trigger factor (e.g., the irrationality of reliance on *territorial* connecting factors) so much as the first Restatement's specific inability to logically resolve cases in which the trigger stands alone. When judges began to recognize the arbitrariness inherent in the first Restatement's illogical resolution of stand-alone trigger cases, judges turned to escape devices.

#### *b. Escape Devices*

Many of the familiar escape-device cases in which courts reached sensible results by recharacterizing the dispute also featured stand-alone triggers. In *Levy v. Daniels' U-Drive Auto Renting Co.*, for example, the driver had obtained a car from a rental agency located in Connecticut, the driver and passenger were from Connecticut, Connecticut was the forum, and the accident occurred in Massachusetts; thus, only the first Restatement's trigger

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85. *Id.*

86. *Id.*

87. Ala. Great S. R.R. Co. v. Carroll, 11 So. 803 (Ala. 1892).

88. *Id.* at 803–04.

89. *Id.*

90. *Id.* at 809.

factor pointed toward Massachusetts.<sup>91</sup> In *Grant v. McAuliffe*<sup>92</sup> and *Haumschild v. Continental Casualty Co.*,<sup>93</sup> likewise, the only factor tying the case to the supposedly applicable law was the first Restatement's trigger factor.<sup>94</sup> The remaining contacts in both cases all clustered around a different jurisdiction.

Numerous cases employing the public policy exception also involve a stand-alone trigger.<sup>95</sup> In *Kilberg v. Northeast Airlines*, the Restatement trigger (the place of injury) was the only contact pointing toward Massachusetts.<sup>96</sup> The other contacts pointed toward the forum, which was New York.<sup>97</sup> Citing both the public policy exception and the substance–procedure distinction, the New York Court of Appeals disregarded the location of the injury and applied its own law.

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91. *Levy v. Daniels' U-Drive Auto Renting Co.*, 143 A. 163, 163 (Conn. 1928). One leading treatise actually noted this fact about *Levy*, although nothing much was made of the point: "Probably," wrote the two authors, "the court also felt justified in applying Connecticut law to a case where all relevant contacts except the place of injury were in Connecticut." RICHMAN & REYNOLDS, *supra* note 10, at 163.

92. *Grant v. McAuliffe*, 264 P.2d 944 (Cal. 1953) (en banc). *Grant* involved one car owned and driven by a Californian, which collided in Arizona with another car driven by a Californian. *Id.* at 946. The claim was heard as part of the administration of an estate in California. *Id.*

93. *Haumschild v. Cont'l Cas. Co.*, 95 N.W.2d 814 (Wis. 1959). In *Haumschild*, the plaintiff and her ex-husband were both Wisconsin domiciliaries and Wisconsin was the forum. *Id.* at 815.

94. In *Levy*, the Restatement trigger factor would have been the place of the injury. *Levy*, 143 A. at 163. In *Grant*, the trigger factor was the place of the injury. *Grant*, 264 P.2d at 946. In *Haumschild*, the trigger factor was the place of the injury. *Haumschild*, 95 N.W.2d at 818. In *Kilberg v. Northeast Airlines, Inc.*, the trigger factor was the place of the injury. *Kilberg v. Ne. Airlines, Inc.*, 172 N.E.2d 526, 526 (N.Y. 1961).

95. See, e.g., *Sweeney v. Sweeney*, 262 N.W.2d 625, 628 (Mich. 1978) (stating that Michigan "public policy should apply to Michigan residents suing in Michigan courts even though the alleged negligence occurred in Ohio"); *Mertz v. Mertz*, 3 N.E.2d 597, 599 (N.Y. 1936) (providing a lopsided scenario in which the New York court relied on "public policy" and refused to apply Connecticut's interspousal immunity rule); *Owen v. Owen*, 444 N.W.2d 710, 710, 712 (S.D. 1989) (creating "a limited public policy exception to *lex loci delicti*" to allow a wife to recover under South Dakota law when her recovery would have been barred by Indiana's guest statute; all other factors pointed to the application of South Dakota law—the parties' residences, the location of their property, the state where they voted, the state where they licensed their cars, and the state to which the parties returned when the husband completed his degree); *Paul v. Nat'l Life*, 352 S.E.2d 550, 551 (W. Va. 1986) (involving a single car collision in Indiana causing the death of two West Virginia residents briefly present in the state; the only factor pointing to the application of Indiana law was the place of the accident).

96. *Kilberg*, 172 N.E.2d at 526. In *Kilberg*, the plaintiff and his decedent were both New York domiciliaries. *Id.* The latter had purchased his ticket in New York for a flight that left from a New York airport. *Id.* New York was also the forum. *Id.*

97. *Id.* at 526–27.

c. *Transition Cases*

Some cases applying escape devices cast doubt upon the first Restatement generally and, therefore, count as transition cases.<sup>98</sup> *Grant v. McAuliffe* provides an example from the California experience.<sup>99</sup> The California Supreme Court avoided applying Arizona law, the law of the state where the injury occurred, by employing characterization as an escape device.<sup>100</sup> The court reasoned that the relevant issue, survival of actions, was “procedural.”<sup>101</sup> In addition to employing an escape device, *Grant* also functions as a transition case.<sup>102</sup> Its criticism of the first Restatement resulted in California’s first break from the traditional approach and a step on the road to a modern approach.<sup>103</sup> Undoubtedly influencing the result was the fact that the first Restatement’s designated trigger—the place of the accident—was the only contact pointing toward Arizona. With this stand-alone trigger case, California began its escape from the first Restatement.

Other cases unabashedly rejected the first Restatement, and they too showed a pattern of stand-alone triggers. The cases that motivated abandoning the first Restatement generally involved disputes where the only contact pointing toward the chosen law was the contact designated by the vested rights theory.<sup>104</sup> New York transition cases are especially clear. In *Auten*, Judge Fuld pointed out that England had all the truly significant contacts, including the marital and family domicile and the continuing domicile of the wife and children; the husband, additionally, was a British subject.<sup>105</sup> Further, England had a great concern in the financial well-being of its domiciliaries, while New York’s nexus with the case was “entirely fortuitous.”<sup>106</sup> Almost nothing pointed toward applying New York law other than the Restatement’s trigger factor, the place of contracting.<sup>107</sup> *Babcock v.*

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98. The court in *Kilberg*, for example, coupled its reliance on characterization and the public policy exception with the observation that modern air travel provides the possibility of swift passage across multiple state lines to conclude that, “the place of injury becomes entirely fortuitous.” *Id.* at 527–28.

99. See *Grant*, 264 P.2d at 949 (stating that if the survival of a cause of action is purely procedural, the law of the forum will control).

100. *Id.*

101. *Id.* at 947–48.

102. See Roger J. Traynor, *War and Peace in the Conflict of Laws*, 25 INT’L & COMP. L.Q. 121, 144 (1976) (“After *Grant v. McAuliffe*, the stones began to roll.”).

103. *Id.*

104. See *supra* notes 61–76 and accompanying text (discussing *Auten* and *Babcock*, two cases that rejected the first Restatement approach).

105. *Auten v. Auten*, 124 N.E.2d 99, 102–03 (N.Y. 1954).

106. *Id.* at 102.

107. *Id.* The court stated:

Turning to the case before us, examination of the respective contacts with New York and England compels the conclusion that it is English law which must be applied to determine the impact and effect to be given the wife’s institution of the

*Jackson* reveals the same pattern.<sup>108</sup> The trigger factor—the place of the injury—was the only factor pointing toward Ontario law, while all the other contacts were clustered in New York, which was the forum.<sup>109</sup> As the sole connection to Ontario was the location of the accident, it is no surprise that the New York Court of Appeals dismissed the connection to Ontario as too fortuitous to justify applying Ontario law.<sup>110</sup>

Transition cases from other states exhibit the same pattern as the California and New York decisions—a stand-alone trigger factor as the only factor supporting the Restatement's choice of law and the other factors all pointing toward the forum.<sup>111</sup> In *Ingersoll v. Klein*, for example, a car carrying an Illinois domiciliary crashed through the ice on an Iowa section of the Mississippi River.<sup>112</sup> In addition to the decedent, the estate's administratrix and all of the defendants were Illinois residents.<sup>113</sup> As the court pointed out, "The only basis for applying the Iowa statutes is that the State of Iowa is the alleged situs of the decedent's death. Under the doctrine of *lex loci delicti* the situs of death would be the only consideration in the selection of the applicable law."<sup>114</sup> The Supreme Court of Illinois applied Illinois, rather than Iowa, law.<sup>115</sup>

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separation suit. It hardly needs stating that it is England which has all the truly significant contacts, while this state's sole nexus with the matter in dispute [is] entirely fortuitous . . . .

*Id.*

108. *Babcock v. Jackson*, 191 N.E.2d 279, 279 (N.Y. 1963).

109. *Id.* at 284.

110. *Id.* at 284–85. The court stated:

As to that issue, it is New York, the place where the parties resided, where their guest-host relationship arose and where the trip began and was to end, rather than Ontario, the place of the fortuitous occurrence of the accident, which has the dominant contacts and the superior claim for application of its law.

*Id.*

111. We argue that transition cases tended to have a particularly lopsided distribution of contacts. Once courts switched to a modern theory, however, the new theory might be applied to cases with very different distributions of contacts. A small number of single-factor transition cases do not follow this exact pattern. There are some in which the trigger is isolated, but some of the other factors point to a third state, rather than to the forum state. For examples of cases supporting this proposition, see generally *Wallis v. Mrs. Smith's Pie Co.*, 550 S.W.2d 453 (Ark. 1977) (en banc), *Phillips v. Gen. Motors Corp.*, 2000 MT 55, 298 Mont. 438, 995 P.2d 1002, and *Griffith v. United Air Lines, Inc.*, 203 A.2d 796 (Pa. 1964). Additionally, in some cases, like *Fox v. Morrison Motor Freight, Inc.*, 267 N.E.2d 405 (Ohio 1977), it is unclear from the opinion whether there were factors pointing to a third state.

112. *Ingersoll v. Klein*, 262 N.E.2d 593, 594 (Ill. 1970).

113. *Id.*

114. *Id.* at 596.

115. *Id.* at 597.

At least thirty other state courts refused to apply the first Restatement when no other factors supported the Restatement trigger.<sup>116</sup> A chart reproduced as an appendix to this Article summarizes the data.<sup>117</sup> Examples include the transitions in Maine,<sup>118</sup> Texas,<sup>119</sup> Florida,<sup>120</sup> Delaware,<sup>121</sup> Pennsylvania,<sup>122</sup> Tennessee,<sup>123</sup> New Hampshire,<sup>124</sup> and Connecticut.<sup>125</sup> Of the forty-one states and the District of Columbia that have repudiated the first Restatement, thirty-four did so when faced with a lopsided, stand-alone trigger fact pattern.<sup>126</sup> Only seven states repudiated the first Restatement in cases where at least one additional contact supported the Restatement

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116. See *infra* Appendix.

117. See *infra* Appendix (categorizing states on the basis of whether they continue to use the first Restatement, transitioned away from the first Restatement in a multifactor case, or transitioned away from the first Restatement in a stand-alone trigger case).

118. *Beaulieu v. Beaulieu*, 265 A.2d 610, 611, 615 (Me. 1970). The Supreme Judicial Court of Maine concluded that Maine law should apply when all of the factors pointed to Maine except the place of the injury. *Id.* The father and son, both Maine residents, had set out for a brief trip to Massachusetts with the intent to return directly to Maine. *Id.* at 611.

119. In *Gutierrez v. Collins*, the state's highest court applied Texas law when all factors pointed to Texas except for the place of the injury, which occurred in Zaragosa, Mexico. *Gutierrez v. Collins*, 583 S.W.2d 312, 313 (Tex. 1979).

120. *Bishop v. Florida Specialty Paint Co.* arose out of the crash of a small plane in route from Florida to North Carolina. *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980). All of the relevant parties were Florida residents. *Id.* at 1000. Although the plane crashed in South Carolina, the Supreme Court of Florida declined to apply South Carolina law, stating that “[t]he relationship of South Carolina to the personal injury action is limited to the happenstance of the plane coming into contact with South Carolina soil after developing engine trouble in unidentified airspace.” *Id.*

121. *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 43 (Del. 1991).

122. *Griffith v. United Air Lines, Inc.*, 203 A.2d 796, 805–06 (Pa. 1964). The decedent had purchased his ticket in Pennsylvania; the plane took off from Philadelphia; and United Air Lines, the defendant, regularly conducted business in Pennsylvania. *Id.* Excepting United's technical place of incorporation, Delaware, and principal place of business, Illinois, all other factors pointed to Pennsylvania except the arbitrary location of the plane crash and the situs of the decedent's death, Colorado. *Id.*

123. *Hataway v. McKinley*, 830 S.W.2d 53, 59 (Tenn. 1992). In *Hataway*, the parents of a deceased Tennessee university student brought a wrongful-death action against a university scuba diving instructor whose alleged negligence led to the death of their son. *Id.* at 54. All of the factors except the place of the injury, which was Arkansas, pointed toward Tennessee. *Id.* at 60.

124. *Clark v. Clark*, 222 A.2d 205, 210 (N.H. 1966). In *Clark*, a wife sued her husband, alleging his negligence in an automobile accident that occurred in Vermont. *Id.* at 206. All of the factors—domicile, relationship of the parties, forum—except for the place of the injury, pointed to New Hampshire. *Id.* at 209.

125. *O'Connor v. O'Connor*, 519 A.2d 13, 25 (Conn. 1986). Although the automobile accident giving rise to the tort claims at issue took place in Quebec, Canada, all of the other factors pointed to the application of Connecticut law—both parties' domiciles, the forum, the place of the relationship between the parties, and the place where the alleged medical expenses and lost wages were suffered. *Id.* at 15.

126. See *infra* Appendix (listing all of the states that have transitioned with a single-factor trigger).

trigger factor.<sup>127</sup> Thus, approximately eighty-three percent of Restatement repudiations occurred in the context that we identify as the first Restatement's Achilles' heel—one stand-alone contact, such as the place of injury in tort cases, arrayed against every other factor, including the parties' common domicile, pointing toward a different state (typically, the forum).<sup>128</sup>

Conventional wisdom is that states repudiated the first Restatement because territorial connections are arbitrary and the first Restatement's logic made no provision for "substantive policies" underlying the contending legal rules.<sup>129</sup> A better explanation, and one omitted from the conventional account, focuses on the fact that in almost every one of the important transition cases the court faced a stand-alone trigger.<sup>130</sup> As we will now examine, this can hardly be a coincidence.

### III. SINGLE-FACTOR THEORIES AND THE SIGNIFICANCE OF THE STAND-ALONE TRIGGER

What explains the predominance of stand-alone trigger cases wherever judges sought to escape or reject the first Restatement? The reason that the trigger stood alone in an overwhelmingly large number of the escape devices and transition cases is that these were the cases where the Restatement result was least satisfactory. The motivation to reject the first Restatement would have been highest in cases where its consequences were least acceptable, and for the Restatement this would have been the case where the choice of a particular state's law turned on only one isolated factor.

Many state courts continued using the first Restatement, it seems, until the time that their appellate courts finally had to deal with this one very specific and particularly problematic fact pattern.<sup>131</sup> Even after the revolution was well underway in the academic journals and in other states, courts generally seemed to hold off following suit until the facts of a particular case made the reform argument compelling.<sup>132</sup> The result was

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127. See *infra* Appendix (listing the states that have transitioned with a multifactor transition). The remaining states still use the first Restatement. See *infra* Appendix (listing nine states that continue to follow the first Restatement).

128. See *infra* Appendix (listing the forty-one states that had a single-factor transition).

129. See, e.g., RICHMAN & REYNOLDS, *supra* note 10, at 202 (introducing the contract-formation example, the authors state that "[a] far more serious problem with the First Restatement is that it often chooses the law of a state with no interest in the resolution of the dispute").

130. See *supra* notes 98–129 and accompanying text (highlighting various state transition cases).

131. See *infra* note 132 (discussing how the courts have been slow to transition from the first Restatement).

132. The majority of the courts that have transitioned did so in the late 1960s and early 1970s. Courts transitioned at a trickle: one in 1957, one in 1963, one in 1964, one in 1965, one in 1966, four in 1967, four in 1968, one in 1969, two in 1970, one in 1971, one in 1972, two in

that a very high percentage of transition decisions are stand-alone trigger cases.

The key issues, then, are why stand-alone trigger cases arise under the first Restatement and why they are the most difficult to resolve. The answer to the first is simple: It traces to the first Restatement's single-factor logical structure.<sup>133</sup> The answer to the second is that any single connecting factor, taken out of context and viewed in isolation, is likely to appear arbitrary and "fortuitous."<sup>134</sup>

#### A. SINGLE-FACTOR VERSUS MULTIFACTOR THEORIES

The anomalies that sparked the choice of law revolution were possible only because the first Restatement designates a single trigger as dispositive of the entire choice of law issue.<sup>135</sup> The first Restatement generates stand-alone trigger cases because it is logically structured so that choice of law turns on the location of a single event—the injury in tort cases or the formation of a contract in contractual disputes, for example. The first Restatement is a single-factor theory, meaning that it designates a single factor as the trigger and the locations of any other persons or events are dismissed as irrelevant.<sup>136</sup>

Traditional choice of law theory's preoccupation with single-factor approaches reveals underlying assumptions about the nature and objectives of the choice of law process. Academic analysis of the choice of law process generally presumes that the essential elements of the choice of law determination are individual connecting factors and not the case as a whole. One might describe the issue as being analyzed on an atomic rather than a molecular level. Equally implicit is the assumption that not all individual contacts are relevant. The object of choice of law theory, scholars assume, is

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1973, one in 1974, two in 1976, one in 1977, one in 1979, one in 1980, one in 1981, two in 1982, one in 1986, one in 1987, one in 1989, one in 1991, two in 1992, one in 1996, one in 1997, one in 2000, and one in 2008. *See infra* Appendix (listing states that have transitioned). We think this slow pace demonstrates that the courts were not motivated to transition solely because they preferred the modern theories to the first Restatement; rather, the courts were motivated to transition when they were faced with a difficult, lopsided case. We also think it is noteworthy that, of the seven transition cases that did not involve lopsided fact patterns, four of those cases were quite late—1980, 1989, 1997, and 2008. Courts making those late transitions could easily have examined the myriad of single-factor cases motivating the transition in other states and been convinced, such that they no longer needed to wait on a single-factor scenario in their own states.

133. *See supra* notes 77–82 and accompanying text (discussing the first Restatement's approach and its shortcomings).

134. *See infra* notes 145–52 and accompanying text (discussing *Dym v. Gordon*, 209 N.E.2d 792 (N.Y. 1965), and arbitrariness and fortuitousness as they relate to stand-alone triggers).

135. *See supra* notes 77–82 and accompanying text (discussing the first Restatement's approach).

136. *See supra* notes 77–82 and accompanying text (discussing the first Restatement's approach).

to differentiate between the single inherently relevant connecting factor—the trigger—and the intrinsically irrelevant connections that form the factual background of the remainder of the case.

Single-factor theories take for granted that there is a single contact that is sufficient, by virtue of its special jurisprudential characteristics, to justify application of a particular state's law. Once that factor is identified, other connections to other states are irrelevant. Single-factor analysis is “either/or”—it is either factor X or factor Y, but not both—and the enterprise is “winner take all.” The consequence is that once the territorial orientation of the trigger factor is known, it is not necessary to determine whether or how many other factors point to the same state. Having a larger or a smaller number of connections to a particular state does not make the case for applying local law any stronger or any weaker under such single-factor analysis.<sup>137</sup>

Return for a moment to the hypothetical choice of law problem provided at the outset.<sup>138</sup> It involved a North Carolina clothing manufacturer and a New York retailer that negotiated and accepted a contract in North Carolina.<sup>139</sup> The parties made the agreement expressly subject to North Carolina law and North Carolina was the location of the breach.<sup>140</sup> The first Restatement would subject this agreement to North Carolina law because the acceptance occurred in North Carolina.<sup>141</sup> The result itself is certainly not unfair, given the predominance of North Carolina contacts, but it relies on problematic reasoning.

The reasoning commits a court to applying North Carolina law to a case in which the *only* contact was the mailing of the acceptance.<sup>142</sup> For instance, in a case where both parties, the negotiations, the breach, and the choice of law clause all point toward New York and the mailing of the acceptance stands alone in pointing to North Carolina, the Restatement would require application of North Carolina law. Any single-factor approach is vulnerable to counterexamples of this sort because the reasoning underlying a single-factor theory focuses exclusively on the importance of that single factor. A multifactor theory that attributes the application of North Carolina law in

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137. A center-of-gravity approach would not simply create a new single-factor trigger in the form of the location of the most contacts because such an approach allows judges the flexibility to assign varying weights to different contacts, depending on the factual scenario. More importantly, a center-of-gravity approach does not create a hard-line, precedential rule elevating any particular factor to preeminence.

138. See *supra* note 1 and accompanying text (setting forth the problem and the various factors that could inform the choice of law analysis).

139. See *supra* note 1 and accompanying text.

140. See *supra* note 1 and accompanying text.

141. See *supra* note 18 and accompanying text (naming the location of acceptance as the single-factor trigger in contract cases).

142. See *supra* note 18 and accompanying text.

the first hypothetical to the overall orientation toward North Carolina, in contrast, does not have this consequence.

The assumption that only a single factor matters might have constituted harmless error in an earlier historical period. The first Restatement was drafted at a time when it was safe to assume that in most cases the “last act” was in the same state as at least some of the other events making up the dispute. During the first quarter of the twentieth century, transportation and communication were slower and more difficult than they are today; face-to-face disputes were the norm, with few widely dispersed legal problems. By applying the law of the state where the “last act” took place, a court would be applying home-state law for most of the other contacts as well because most of these contacts would be located in the same state as the last act.

Such an assumption is less plausible today. The intervening seven decades since the first Restatement’s drafting have seen the advent of commercial air travel, mass product distribution, television, telephones, fax machines, e-mail and text messaging, large-scale mail-order and internet businesses, long-distance car trips, and many other technological innovations and social changes that break open or loosen bonds of geographical proximity that at one time kept the behavior’s consequences close to the behavior itself.<sup>143</sup> It is suggestive in this regard how many of the transition cases involved long distance communications and travel—airplane crashes, family road trips, and the like.<sup>144</sup>

Under present conditions, the location of the trigger contact tells little or nothing about where the other factors are, and vice versa. It is not possible to justify applying the law of the trigger state on the basis of presumed geographical identity with other occurrences in the case. Single-

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143. See, e.g., *Kilberg v. Ne. Airlines, Inc.*, 172 N.E.2d 526, 527–28 (N.Y. 1961). The court stated:

Modern conditions make it unjust and anomalous to subject the traveling citizen of this State to the varying laws of other States through and over which they move. . . . An air traveler from New York may in a flight of a few hours’ duration pass through several of those commonwealths. . . . The place of injury becomes entirely fortuitous.

*Id.* at 527; see also *First Nat’l Bank v. Rostek*, 514 P.2d 314, 317 (Colo. 1973) (explaining the merits of applying the law of a state other than that in which the harm occurred); *Beaulieu v. Beaulieu*, 265 A.2d 610, 613 (Me. 1970) (applying Maine law where both parties lived in Maine but the automobile accident occurred in Massachusetts); *Griffith v. United Air Lines, Inc.*, 203 A.2d 796, 801 (Pa. 1964) (applying Pennsylvania law where the decedent was a Pennsylvania resident but the airplane crashed in Colorado).

144. See, e.g., *Halstead v. United States*, 535 F. Supp. 782, 784 (D. Conn. 1982) (plane crash); *Grant v. McAuliffe*, 264 P.2d 944, 946 (Cal. 1953) (en banc) (automobile trip); *First Nat’l Bank*, 514 P.2d at 317 (plane crash); *O’Connor v. O’Connor*, 519 A.2d 13, 17 (Conn. 1986) (automobile trip); *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999, 1000 (Fla. 1980) (plane crash); *Clark v. Clark*, 222 A.2d 205, 206 (N.H. 1966) (automobile trip); *Babcock v. Jackson*, 191 N.E.2d 279, 280 (N.Y. 1963) (automobile trip); *Issendorf v. Olson*, 194 N.W.2d 750, 755 (N.D. 1972) (automobile trip); *Griffith*, 203 A.2d at 805–06 (plane crash).

factor theories, including the first Restatement, have not adjusted to meet these changed conditions and are incapable of providing fair and just results under modern conditions. Stand-alone trigger cases are, therefore, the Achilles' heel of single-factor theories.

B. THE ACHILLES' HEEL OF SINGLE-FACTOR THEORIES

The reasons that the first Restatement cannot easily deal with stand-alone trigger cases are readily apparent. A stand-alone contact appears arbitrary and fortuitous because its isolation leaves its location detached from the dispute between the plaintiff and the defendant. Where the contacts are dispersed, as they often are today—or even worse, where all but one are oriented in one direction while the trigger points somewhere else—basing the decision on the stand-alone contact appears arbitrary and fortuitous.

The connection between arbitrariness or fortuity and stand-alone triggers is illustrated by *Dym v. Gordon*.<sup>145</sup> *Dym* was an early guest-statute case heard by the New York Court of Appeals, one of *Babcock's* progeny. Unlike *Babcock*, which applied New York law to a case in which the only connection to the guest-statute state was that the accident occurred there, *Dym* applied the law of the place of injury, Colorado, because the place of injury was not a stand-alone trigger. *Dym's* result was not accomplished, however, by reverting to the first Restatement. Rather, the location of the injury counted toward applying Colorado law because, unlike the place of injury in *Babcock*, the location of the injury in *Dym* was not fortuitous.

The *Dym* court distinguished *Babcock* on the grounds that in *Babcock* the parties resided full-time in New York while in *Dym* the host and the guest had been “temporarily residing” in Colorado at a six-week-long summer session.<sup>146</sup> Both parties in *Dym* were legally New York domiciliaries, but they had not traveled together to the summer session, and apparently had not even known each other in New York.<sup>147</sup> The parties, therefore, formed the “host-guest relationship” in Colorado.<sup>148</sup> The short drive, additionally, was to begin and end in Colorado and the parties expected to travel entirely within the state of Colorado.<sup>149</sup> The New York Court of Appeals wrote that the accident's occurrence in Colorado “could in no sense be termed fortuitous” because the parties were “dwelling in Colorado when the relationship was formed and the accident arose out of Colorado based activity.”<sup>150</sup> In *Dym*,

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145. *Dym v. Gordon*, 209 N.E.2d 792 (N.Y. 1965).

146. *Id.* at 793.

147. *Id.*

148. *Id.* at 794.

149. *Id.* at 793.

150. *Dym*, 209 N.E.2d at 794.

the trigger—Colorado, as the place of the accident—did not stand alone and application of Colorado law was therefore not arbitrary.

This conclusion—that a court will most likely perceive a contact as arbitrary or fortuitous if it is the only connection to the particular state in question—makes sense. The classic example of an arbitrary or fortuitous place of injury is an airplane crash. When a plane engine malfunctions and the plane falls to earth, there is typically no discernible reason why it hits ground in one place rather than another.<sup>151</sup> This example suggests that whether the location of some occurrence is fortuitous depends somehow on whether there is a plausible reason why it happened where it did. The *Dym* opinion linked this question—the existence of a reason—to the question of whether there were other background contacts between the dispute and the State of Colorado.<sup>152</sup> The background of a dispute is relevant to establishing whether the location of an injury is fortuitous because it is such background connections between the state and the dispute that make it logical for the injury to have happened where it did. Rebutting the fortuity argument requires tying the state and the dispute together with background facts.

In *Dym*, any explanation for the injury occurring in Colorado would obviously have to be grounded in the dispute's multiple Colorado connections—the parties' temporary Colorado residences, the Colorado formation of the parties' relationship, and so forth. An explanation that made no reference to Colorado could hardly have rationalized how it was that the accident happened to take place there. With no background connection of any kind to single out Colorado, it would be no more logical for the accident to happen in Colorado than in any of the other states that had no connection to the dispute. But given the number of connections between the dispute and Colorado, it was much more likely that the injury would happen there, and thus the location of the accident was not fortuitous.

The first Restatement is structured in such a way that a court need not corroborate the place of contracting or injury with additional contacts for that state's law to apply.<sup>153</sup> A single contact is a sufficient basis for choosing the applicable law. Such results are hard to defend when they occur, however. The appearance of such “hard cases”—cases with which the first

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151. Plane crashes present a particularly compelling case for the arbitrary nature of a single-factor test. *See, e.g.*, *Halstead v. United States*, 535 F. Supp. 782, 784–85 (D. Conn. 1982) (holding that Connecticut's guest-passenger statute applied in a wrongful-death action due to plane crash where the single connection to Connecticut was the at-death residence of the decedents); *First Nat'l Bank v. Rostek*, 514 P.2d 314, 317 (Colo. 1973) (discussing the general undesirability of a single-factor approach); *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999, 1000 (Fla. 1980) (stating that Florida's conflicts rules applied to determine that the South Carolina guest-passenger statute governed based solely on location of the plane crash).

152. *Dym*, 209 N.E.2d at 794.

153. *See supra* note 17 (stating that the first Restatement required a single factor—location of injury—to determine choice of law).

Restatement understandably found it difficult to deal—occasioned the transition away from the traditional theory. Once isolated from any other contacts, the place of injury or place of contracting appears an irrational basis for the application of a particular law.

It is not unfair to test the first Restatement against *all* cases that it purports to resolve, including the ones where the trigger had no support from any other connecting factors. What may be unfair, however, is to test both the first Restatement and the modern theories against the cases that are difficult for the first Restatement, while disregarding cases that would be difficult for modern theories but that the first Restatement could easily solve. On examination, it appears that modern approaches to choice of law have as many hard cases as traditional approaches and for much the same reason. Governmental interest analysis, for example, also treats a single factor as sufficient to justify applying a particular state's law.

#### IV. MODERN APPROACHES TO CHOICE OF LAW

Not only does the first Restatement struggle with stand-alone trigger cases, but the modern approaches to choice of law struggle with stand-alone trigger cases as well. The key consideration is whether a method generates results that are supported by a single, stand-alone factor—governmental interest analysis is as likely as the first Restatement to do so.<sup>154</sup> Without awareness of what they were doing, modern critics replicated one of the most problematic aspects of the theory they criticized. The very characteristic that drove academic commentators and judges away from the first Restatement—that it was single factor in structure—infects the modern interest-based theories that replaced it.<sup>155</sup>

There are, however, few alternatives to single-factor theories available in the literature.<sup>156</sup> The Restatement (Second) of Conflict of Laws can be interpreted in a way that avoids these problems, but typically courts have not done so.<sup>157</sup> We can avoid the problems by adopting a weighing or balancing approach, but weighing and balancing have their own problems.<sup>158</sup> We recommend investigating such alternatives, however, as an antidote to the sterile metaphysics of vested rights and governmental interests. The entire

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154. See *infra* notes 191–206 and accompanying text (discussing the prevalence of stand-alone trigger cases in interest-based analysis).

155. See *infra* notes 189–208, 249–50 and accompanying text (discussing the adequacy of a single contact in determining choice of law).

156. See *infra* notes 189–208, 249–50 and accompanying text (discussing the adequacy of a single contact in determining choice of law).

157. See *infra* notes 249–51 (discussing the “most significant relationship” standard imposed by the Restatement (Second)).

158. See *infra* notes 252–92 and accompanying text (discussing the pros and cons of the balancing approach as well as its use in courts and other legal contexts).

context of a case should be taken into account rather than a single, arbitrary trigger when deciding the proper choice of law.

#### A. THE MODERN METHODS: STATE POLICIES AND GOVERNMENTAL INTERESTS

Throughout the years following the first Restatement's publication, well-respected scholars such as Walter Wheeler Cook, David Cavers, Albert Ehrenzweig, and Ernst Lorenzen attacked the vested rights theory.<sup>159</sup> Most of these critiques were strongly influenced by the then-novel insights accompanying the legal-realist school.<sup>160</sup> Brainerd Currie's theory of governmental interest analysis was the first to fill the void left by the gradual discrediting of the first Restatement.<sup>161</sup> Currie sought to avoid metaphysical constructs such as vested rights and grounded his theory, instead, on the policies underlying the substantive laws in question.<sup>162</sup>

##### 1. Governmental Interests Defined

Currie's most distinctive contribution was the concept of a "governmental interest" or "state interest." Although earlier cases used the word "interest" sporadically, it was Currie who made the concept what it is today.<sup>163</sup> In dethroning the traditional core concept of a vested right and replacing it with that of a state or governmental interest, Currie revolutionized the choice of law field.<sup>164</sup>

159. For scholarly writings attacking the vested rights theory, see generally WALTER W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942), BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963), David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933), Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924), and Hessel E. Yntema, *The Restatement of the Law of Conflict of Laws*, 36 COLUM. L. REV. 183 (1936).

160. See generally KALMAN, *supra* note 12 (discussing legal realism).

161. Joseph William Singer, *Facing Real Conflicts*, 24 CORNELL INT'L L.J. 197, 197 (1991) ("Modern choice-of-law analysis is heavily indebted to Brainerd Currie's interest analysis."). For other scholarly articles discussing Currie's contribution to the field of choice of law, see generally Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980), John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981), Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics'*, 34 MERCER L. REV. 593 (1983), and Robert A. Sedler, *Interstate Accidents and the Unprovided for Case: Reflections on Neumeir v. Kuehner*, 1 HOFSTRA L. REV. 125 (1973).

162. See *infra* notes 189–208 and accompanying text (discussing stand-alone triggers and modern analogs to the first Restatement's "escape devices").

163. The Supreme Court has used the word "interest" in a couple of cases. See *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 496 (1939) (referring to the "governmental interests of each jurisdiction"); see also *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 543 (1935) (referring to the state's "interest in affording adequate protection to this class of its population").

164. See, e.g., Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301, 1302 (1989) (arguing that governmental interest analysis "remains the starting point for modern choice of law scholarship"); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 278 (1990) ("Brainerd Currie's 'governmental interest analysis' probably remains the

Currie's basic argument about state or governmental interests started with the unexceptional claim that substantive laws were the creatures of state domestic policies and had to be interpreted in light of those policies.<sup>165</sup> Currie argued, as a consequence, that substantive rules could be given geographical scope by examining the rule's underlying policy objectives. Determining this geographical scope, he claimed, required nothing more exotic than "the familiar [processes] of construction or interpretation."<sup>166</sup>

This final claim is quite controversial.<sup>167</sup> Currie sometimes spoke in terms of courts' duties in a democracy, implying that courts refusing to follow his proposal acted contrary to the legislature's intentions.<sup>168</sup> At the same time, however, Currie was well aware that legislatures typically had no views regarding the proper interstate scope of the substantive laws they crafted.<sup>169</sup> Subsequent followers of Currie's approach clarified his position: Despite the casual references to judges' duties in a democracy, Currie did not believe that any actual legislative preference was involved in the determination of the territorial reach of a particular state's statute.<sup>170</sup>

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dominant choice of law theory among academics, but its hold is slipping." (footnote omitted)); Bruce Posnak, *Choice of Law: Interest Analysis and Its "New Critics,"* 36 AM. J. COMP. L. 681, 683 (1988) (stating that Currie argued that it is "inherently unsound to choose between competing laws without reference to the content of those laws"); Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation,* 25 UCLA L. REV. 181, 181 (1977) ("The governmental interest approach formulated by the late Brainerd Currie has been the catalyst of the modern 'revolution' in choice of law in this country." (footnotes omitted)).

165. See Herma Hill Kay, *Currie's Interest Analysis in the 21st Century: Losing the Battle, but Winning the War,* 37 WILLAMETTE L. REV. 123, 123 (2001).

166. Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis,* 215 RECUEIL DES COURS 19, 53–54 (1989).

167. See Brillmayer, *supra* note 161, at 393 (commenting on the implausibility of interest analysis as a theory of constructive intent); Kay, *supra* note 166, at 57.

168. CURRIE, *supra* note 159, at 182 ("[A]ssessment of the respective values of the competing legitimate interests of two sovereign states . . . is a function that should not be committed to courts in a democracy . . .").

169. *Id.* at 84 ("[T]he legislature has not thought about the matter, and does not want to think about it."); see also Kay, *supra* note 166, at 53–54 (explaining Currie's position).

170. See, e.g., Kay, *supra* note 166, at 53–54 (citing Currie and concluding that "[i]t follows from this way of defining the term that, although the state can create its governmental policy through its legislature, its executive, or its courts, it cannot create a governmental interest through its own actions"); *id.* at 126 (referring to "the mistaken assumption that a state can create a governmental interest in Currie's sense by a simple legislative or judicial declaration that it has an interest . . . it should be clear that such a declaration was not what Currie meant by a governmental interest"). But see CURRIE, *supra* note 159, at 171–72 (arguing that legislatures should specify the territorial reach of the statutes they enact); Kay, *supra* note 166, at 50–52 (citing CURRIE, *supra* note 159, at 171–72). Currie stated:

[L]egislatures . . . can cultivate the practice of adding to specific enactments a section specifying the extent to which the law is intended to apply to cases involving foreign factors . . . the value of such directions would be tremendous . . . [because] they would make explicit the policy expressed in the statute, and the mode of application that will promote that policy.

Indeed, Currie is characterized as believing that the precise circumstances in which an interest exists is “external” to the legislative process, such that even if the legislature *did* have a preference it would not be authoritative.<sup>171</sup> Determinations of when state interests exist, it thus appears, are based on *a priori* premises on a par with the Bealean definition of vested rights—interests are theoretical constructs that no degree of legislative preference can alter.

Currie’s proposed analysis spawned an entire new vocabulary. If one state had an interest and the other did not, the case was called a “false conflict”; if both states had interests the case was a “true conflict”; and when neither state had an interest, the case was “unprovided for.”<sup>172</sup> Currie’s position held that false conflicts should be governed by the law of the only interested state—the state of the parties’ common domicile—while true conflicts and unprovided-for cases should be governed by the law of whichever of the two states was in a position to impose its will—the forum.<sup>173</sup> He insisted that state courts should not hesitate about furthering their own state’s interests, even in the face of another state’s legitimate competing interest, because they are state institutions charged with the duty of enforcing their legislature’s intentions for the populace they represent.<sup>174</sup>

## 2. Governmental Interests and Domiciliary Connecting Factors

In assessing whether a state had an interest in applying its law to a dispute, governmental interest analysis typically followed Currie’s discussion of the early case of *Milliken v. Pratt*.<sup>175</sup> *Milliken* involved a Massachusetts

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CURRIE, *supra* note 159, at 171–72. Kay stated that a court must make a determination “[i]f the legislature has not been so obliging as to specify how its domestic policy should be applied to conflicts cases.” Kay, *supra* note 166, at 51.

171. See Kay, *supra* note 166, at 127. Kay criticizes Brilmayer, stating:

Brilmayer[] . . . confuses “the determination of domestic policy”—which a state does create by legislative enactment, judicial determination of a common-law rule, by administrative rule-making, or by executive order—“with the affiliating circumstances that trigger the application of that policy to the controversy”—which are external to the state’s declarations and cannot be created by it independently.

*Id.*

172. See generally CURRIE, *supra* note 159 (explaining conflict of laws).

173. Various authors made suggestions about other ways to resolve the true conflicts and unprovided-for cases—these included theories asking about “comparative impairment” of the various interests, and which state had the “better law.” See William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 23, 33 (1963) (advocating for the principle of comparative impairment); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1586–88 (1966) (providing five factors for determining choice of law, including the “better rule of law” approach).

174. See CURRIE, *supra* note 159, at 183–84.

175. *Milliken v. Pratt*, 125 Mass. 374 (1878); see CURRIE, *supra* note 159, at 77–127 (discussing *Milliken*).

married woman who had guaranteed the debts of her husband.<sup>176</sup> In Maine her guarantee would have been enforceable but Massachusetts would have treated it as invalid.<sup>177</sup> Currie argued that the Massachusetts law invalidating contracts signed by married women was for the benefit of Massachusetts married women while the Maine pro-creditor rule that upheld such contracts was for the benefit of Maine creditors. Thus, Massachusetts had an interest in applying its law only if the defendant-married woman resided in Massachusetts, and Maine had an interest only if the creditor was from Maine.<sup>178</sup>

The emphasis on domiciliary factors in this discussion of *Milliken* was typical of Currie's analysis.<sup>179</sup> *Haag v. Barnes*<sup>180</sup> provides another example of governmental interest analysis' domiciliary focus. Currie analyzed the fact pattern in this child-support dispute as follows:

The father is a resident of Illinois, and Illinois has an interest in applying its policy for his protection. The mother is a resident of New York, and is custodian of the child, and New York has an interest in applying its law for the welfare of the child and the community.<sup>181</sup>

Aside from the parties' domiciles, the other contacts in the case were all irrelevant in Currie's opinion. The rejected contacts included: the intentions of the parties that Illinois law should apply to their contract ("quite irrelevant"<sup>182</sup>); the place where the contract was drawn and signed by the complainant ("also . . . irrelevant"<sup>183</sup>); the location of the father's place of business in Illinois ("seems irrelevant"<sup>184</sup>); the fact that the child was born in Illinois ("fortuitous and obviously irrelevant"<sup>185</sup>); the fact that the persons named in the contract to act as agents for the parties were residents of Illinois ("seems irrelevant"<sup>186</sup>); the fact that the lawyers who drew up the contract were residents of Illinois ("irrelevant"); and the fact that all contributions for support were made from Chicago ("utterly irrelevant"<sup>187</sup>). Currie added, finally, that "no one . . . would consider for a moment that anything should turn on whether Mr. Barnes mailed his weekly and monthly

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176. *Milliken*, 125 Mass. at 374

177. *Id.* at 374-77.

178. CURRIE, *supra* note 159, at 86.

179. *See, e.g., id.* at 152 (discussing hypothetical variations on *Grant v. McAuliffe*, 264 P.2d 944 (Cal. 1953) (en banc)); *id.* at 84 (discussing hypothetical variations on *Milliken*).

180. *Haag v. Barnes*, 175 N.E.2d 441 (N.Y. 1961).

181. CURRIE, *supra* note 159, at 735.

182. *Id.* at 732.

183. *Id.* at 733.

184. *Id.*

185. *Id.*

186. CURRIE, *supra* note 159, at 734.

187. *Id.*

checks from Chicago or had his attorney deliver cash in person in New York.”<sup>188</sup>

Interests, for Currie, were driven by domiciliary connecting factors.<sup>189</sup> As his most articulate defender, Professor Herma Hill Kay explained, “Currie insisted that people were the focal point of governmental policy. . . . Currie viewed the state, then, as legitimately concerned with the welfare of its people.”<sup>190</sup> It was adequate justification for application of local law that a local party would reap the benefit, either as a plaintiff receiving compensation or as a defendant seeking protection.

### 3. Interest Analysis as a Single-Factor Theory

Currie’s discussion of cases such as *Milliken* makes clear that under his theory a single contact—the domicile of the benefiting party—is an adequate basis on which to determine choice of law and that it does not matter that all other connections in the case point to a different state.<sup>191</sup> In this respect, governmental interest analysis tracked assumptions made by the first Restatement. On the surface, the first Restatement and governmental interest analysis look very dissimilar because different contacts are important—domiciliary versus territorial—and different theoretical underpinnings are discussed—state interests versus vested rights. But the deeper structural similarity is that neither theory attempts to take into account the connections between a dispute as a whole and the various contending states.

The potential for stand-alone trigger cases is built into the fundamental premises on which the modern interest-based theories are constructed. Upon examination, it appears not only that stand-alone trigger cases are commonplace in interest-based analyses, but also that they form a subset of the notoriously intractable true conflicts.<sup>192</sup> Even proponents of interest analysis concede the problems that true conflicts create.<sup>193</sup> The fact that one single type of case—the stand-alone trigger case—underlies the difficulties faced by both modern interest-based and traditional vested rights approaches is of considerable interest. It suggests that the choice of law revolution replaced one defective theory with another.

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188. *Id.*

189. *See supra* note 181 and accompanying text (explaining Currie’s view that states’ interests in protecting domiciliaries could be used to justify choice of law).

190. Kay, *supra* note 166, at 55.

191. *See, e.g.*, CURRIE, *supra* note 159, at 84–85 (discussing variations on *Milliken v. Pratt* in terms of interests in protecting domiciliaries and stating that “the legislature decides in favor of protecting married women. *What* married women? Why, those with whose welfare Massachusetts is concerned, of course—*i.e.*, Massachusetts married women”).

192. *See infra* notes 194–208 and accompanying text (explaining the problem of true conflicts and failed attempts to avoid them).

193. *See infra* note 195 and accompanying text.

a. *Stand-Alone Triggers and True Conflicts*

A stand-alone trigger case is by definition one in which only a single factor points toward forum law, the factor designated as the trigger. Under interest-based analysis, this means that the party who would benefit from application of forum law is a forum domiciliary—which provides the necessary interest justifying application of forum law. All the other contacts, however, point toward other states. The stand-alone trigger case will always be a true conflict.

Consider first the case where the forum (call it state *A*) has a law favoring plaintiffs. Where this is true, state *A* will have an interest in applying its law in cases where the *plaintiff* is from state *A*. As a result, the stand-alone trigger case will have a plaintiff from state *A* but all other factors point to state *B*. In the alternative, state *A* might have the law the defendants prefer. If state *A*'s law is the one favoring defendants, then it will have an interest in applying its law in cases where the *defendant* is from state *A*. In such situations, the stand-alone trigger case will have a defendant from *A* but all other factors point to state *B*.

In either of these situations, the case in which the trigger stands alone will be, under Currie's terminology, a true conflict.<sup>194</sup> In the former situation (where state *A* is the state favoring the plaintiff), state *A* has an interest because the plaintiff is a state *A* domiciliary; however, because there is a state *B* defendant and a pro-defendant law in that state, state *B* will have an interest too. Similar reasoning shows that the latter situation (with state *A* having the pro-defendant law) is also a true conflict: state *A* has a pro-defendant law and a local defendant, whereas state *B* has a pro-plaintiff law and a local plaintiff. Because both states have interests, the case is a true conflict.

This is not a coincidence: Stand-alone trigger cases will always be true conflicts. Stand-alone trigger cases cannot be false conflicts. To be a false conflict the parties would have to share a common domicile, and we have assumed that all the other contacts point at state *B*. Nor can they be unprovided-for cases, for we are assuming that there is one state—the state at which the trigger points—that has an interest. True conflicts are split-domicile cases where the two parties each prefer the law of their own state. Stand-alone trigger cases fall into this category because a single factor stands alone in pointing toward application of forum law, and it is a factor that triggers a state interest.

b. *True Conflicts and "Escape Devices"*

That stand-alone trigger cases, as true conflicts, will present special problems should be generally conceded. Interest-based analysis has

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194. Note that the converse is not true—not all true conflicts are stand-alone trigger cases.

generally been recognized, even by its own proponents, as failing to provide a good solution to true conflict cases.<sup>195</sup> Some scholars have argued that interest-based analysis' chief accomplishment is the identification and solution of false-conflict situations.<sup>196</sup> Characterized by its proponents as a win-win solution to a clear nonproblem, the concept of a false conflict has been hailed as Currie's great contribution to choice of law.<sup>197</sup>

Currie himself suggested that where both states had interests, the judge might consider making "a more moderate and restrained" reinterpretation of the involved statutes.<sup>198</sup> William Baxter provided a theory called "comparative impairment" that argued that the best way to resolve true conflicts was to ask which state's interest would be more impaired by non-application.<sup>199</sup> Robert Leflar contributed his theory of "choice-influencing considerations," which was quickly nicknamed the "better law" theory in recognition of his recommendation that the respective merits of the contending laws be taken into account.<sup>200</sup> These maneuvers were designed to resolve the anomalies that Currie's original version of governmental interest analysis created, according to which true conflicts were resolved by brute force: The forum did what it wanted. Currie's original recommendation met considerable resistance in the courts.

The California<sup>201</sup> and New York<sup>202</sup> courts—among the first to apply modern choice of law theory—have set aside interests based on a single

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195. See Baxter, *supra* note 173, at 8–9 (explaining that borderline cases present a problem for interest-based analysis).

196. See William H. Allen & Erin A. O'Hara, *Second Generation Law and Economics of Conflict Laws: Baxter's Comparative Impairment and Beyond*, 51 STAN. L. REV. 1011, 1013–14 (1999).

197. See *id.*

198. Brainerd Currie, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1233, 1242 (1963).

199. See Baxter, *supra* note 173, at 33 (arguing that states should use "comparative impairment" in determining which state's law should control).

200. Leflar, *supra* note 173, at 1586–88.

201. For example, in *Offshore Rental Co. v. Continental Oil Co.*, the Supreme Court of California faced a true conflict between the laws of California and Louisiana and ultimately decided to apply Louisiana law. *Offshore Rental Co. v. Cont'l Oil Co.*, 583 P.2d 721, 723 (Cal. 1978). In that case, a California corporation sued a Delaware corporation for the loss of a key employee who was injured while on the "defendant's premises in Louisiana." *Id.* California had an interest in applying its law to the case as the plaintiff corporation was domiciled in California, and California law would have benefited its domiciliary. *Id.* However, the California court held Louisiana law applicable because the vast majority of the factors—the place of injury, the primary place of business and source of revenue of the California corporation, and the primary place of business of the defendant Delaware corporation—pointed to the application of Louisiana law. *Id.* at 728–29.

202. In *Feldman v. Acapulco Princess Hotel*, a New York domiciliary brought suit in New York against a Mexican hotel for injuries sustained on the hotel's premises. *Feldman v. Acapulco Princess Hotel*, 520 N.Y.S.2d 477, 478 (N.Y. Sup. Ct. 1987). Applying interest analysis, the Supreme Court of New York determined that it had an interest "in applying its law of unlimited damages . . . to maximize recovery for its domiciliaries." *Id.* at 486. Mexico likewise had an interest in protecting its local business—the hotel—and standard practice would have

stand-alone contact and have taken the overall weight of various factors into account. They, and other courts, have contributed additional ad hoc maneuvers, such as complicated special rules,<sup>203</sup> *renvoi*,<sup>204</sup> the substance-procedure distinction,<sup>205</sup> and consideration of territorial connecting factors that had just a few years earlier been dismissed as arbitrary and fortuitous.<sup>206</sup> Such manipulation is the direct analog to the first Restatement's "escape devices."

Interest analysis, clearly, has not resolved the problem of the stand-alone trigger. It generates such cases because application of a state's law requires only a single contact and then the other connecting factors are dismissed as irrelevant. What, then, is to be done? There is only one mainstream theory that has the potential to avoid the problems that such assumptions create, and that is the Restatement (Second).<sup>207</sup> If courts and scholars decide that the Restatement (Second) is not suitable, then a final alternative is the weighing or balancing commonly employed in other areas of law.<sup>208</sup>

B. IDENTIFYING ALTERNATIVE APPROACHES: CENTER OF GRAVITY AND THE RESTATEMENT (SECOND)

The Restatement (Second) is the closest to an existing solution to this problem in American choice of law theory.<sup>209</sup> One interpretation of the Restatement (Second) is that it incorporates many factors into the choice of law calculation. Another possible interpretation is that it weighs or balances

characterized this dispute as a true conflict, leading to the application of New York law. *Id.* at 485–87. However, the court was unwilling to rely solely on the plaintiff's domicile—the only contact with New York—when all of the other factors pointed to the application of Mexican law. *Id.* Mexico was the place of the injury, and the plaintiff voluntarily went to Mexico on vacation. *Id.* at 486. The New York court stated that "Mexico's interests are more direct and unambiguous," including the need to protect its tourist industry from unforeseen suits. *Id.* The New York court reasoned that "fairness and equality of treatment" weighed in favor of the application of Mexican law. *Id.* at 486–87.

203. See *Neumeier v. Kuehner*, 286 N.E.2d 454, 457–58 (N.Y. 1972) (discussing guest-passenger rules).

204. See *BRILMAYER & GOLDSMITH*, *supra* note 39, at 312 (listing cases where the court used the *renvoi* approach).

205. *Id.* at 315–18.

206. See, e.g., *Bernhard v. Harrah's Club*, 546 P.2d 719, 720–21 (Cal. 1976) (relying on territorial factors to resolve a true conflict); *Hurtado v. Superior Court of Sacramento County*, 522 P.2d 666, 670–72 (Cal. 1974) (relying on territorial factors to resolve an unprovided-for case); *Bernkrant v. Fowler*, 360 P.2d 906, 909–10 (Cal. 1961) (relying on territorial factors to resolve a true conflict).

207. See *infra* notes 210–38 and accompanying text (describing the background and provisions of the Restatement (Second)).

208. See *infra* notes 252–92 and accompanying text (discussing the possibility of courts using a balancing method).

209. See *infra* notes 210–38 and accompanying text (describing the background and provisions of the Restatement (Second)).

the competing connections with different states. Such multifactor approaches would be less dependent on controversial jurisprudential assumptions than single-factor approaches, which seem to be looking for a metaphysical construct, such as vested rights or governmental interests, to separate the single relevant trigger from all the others.

### 1. “Center of Gravity”: The Road Not Taken

In the middle of the twentieth century, as the New York Court of Appeals was starting to turn away from the first Restatement, it experimented briefly with a formulation that became known as “center of gravity” or “grouping of contacts.”<sup>210</sup> Judge Fuld’s majority opinion in *Auten* explained the center-of-gravity or grouping-of-contacts approach as a continuation of earlier New York precedents that called for application of the law of the state that “has the most significant contacts with the matter in dispute.”<sup>211</sup> Despite its application in New York courts, the center-of-gravity test was never popular with scholars.<sup>212</sup> Brainerd Currie wrote scornfully:

The “grouping of contacts” theory provides no standard for determining what “contacts” are significant, or for appraising the relative significance of the respective groups of “contacts” . . . . The process of “grouping contacts” . . . deals in broad generalities about the “interest” of a state in applying its law without inquiry into how the “contacts” in question relate to the policies expressed in specific laws. One “contact” seems to be about as good as another for almost any purpose.<sup>213</sup>

Although the New York Court of Appeals did not pursue the grouping-of-contacts or center-of-gravity theory for long—later opinions such as *Babcock v. Jackson* were more in line with governmental interest analysis—

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210. See, e.g., RICHMAN & REYNOLDS, *supra* note 10, at 205–07 (“Beginning with *Auten v. Auten*, however, a frontal attack began in the courts as they started to experiment with new approaches to choice-of-law problems.” (footnote omitted)).

211. *Auten v. Auten*, 124 N.E.2d 99, 102 (N.Y. 1954) (quoting *Rubin v. Irving Trust Co.*, 113 N.E.2d 424, 431 (N.Y. 1953)).

212. For criticism of the center-of-gravity approach, see RICHMAN & REYNOLDS, *supra* note 10, at 213 n.44 (citing Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 BUFF. L. REV. 329, 359 (1997)).

213. CURRIE, *supra* note 159, at 727–28; see also RICHMAN & REYNOLDS, *supra* note 10, at 213 n.44 (“[The grouping-of-contacts approach] offers no way of measuring the significance of contacts, and, without a measure of significance, the center of gravity system amounts to little more than contract [sic] counting.” (citing Shaman, *supra* note 212, at 359)). Currie objected to the air of confident objectivity that the enterprise projected, comparing the grouping-of-contacts approach to the place-of-injury rule. CURRIE, *supra* note 159, at 727–28.

*Auten's* influence continued to be felt when the drafters of the Restatement (Second) formulated their most-significant-relationship test.<sup>214</sup>

## 2. The Most-Significant-Relationship Test—Restatement (Second)

The American Law Institute's drafting of the Restatement (Second) spanned almost twenty years, from 1952<sup>215</sup> to 1969,<sup>216</sup> with the completed two-volume set published in 1971.<sup>217</sup> The drafting committee faced somewhat of a moving target. In addition to the burgeoning academic literature, the cutting-edge conflicts decisions issued during this time period included *Grant v. McAuliffe*,<sup>218</sup> *Auten v. Auten*,<sup>219</sup> and *Babcock v. Jackson*.<sup>220</sup> Academic feedback on the early drafts of the Restatement (Second) was strongly negative.<sup>221</sup> Consequently, the drafting committee attempted to compromise, combining premises from several different modern theories.<sup>222</sup>

The Restatement (Second) has three levels of analysis, ranging from the very general to the very specific.<sup>223</sup> At the most general end of the spectrum is section 6, which has been called "the heart of the Restatement (Second)."<sup>224</sup> Section 6 sets out the basic principles for choice of law decision-making. The principles that it cites are commonly referred to as the "most-significant-relationship" test.<sup>225</sup> The considerations listed in section 6 include factors such as promoting uniformity and predictability,

214. RICHMAN & REYNOLDS, *supra* note 10, at 213 ("The early drafts of these sections are the lineal descendants of the 'center of gravity' opinions that appeared early in the choice-of-law revolution, especially in New York.")

215. Patrick J. Borchers, *Courts & the Second Conflicts Restatement: Some Observations & an Empirical Note*, 56 MD. L. REV. 1232, 1232 (1997).

216. Michael S. Finch, *Choice-of-Law Problems in Florida Courts: A Retrospective on the Restatement (Second)*, 24 STETSON L. REV. 653, 655 (1995).

217. William M. Richman & William L. Reynolds II, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417, 417–18, 420 (2000).

218. *Grant v. McAuliffe*, 264 P.2d 944 (Cal. 1953) (en banc).

219. *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954).

220. *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963).

221. See, e.g., Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 755 (1963).

222. See Korn, *supra* note 56, at 817 ("The final product is a transitional document, reflecting the period's mood of flexibility and openness to new ideas, while refusing to abandon past learning entirely and remaining committed to the principle of decision according to rule to the extent that satisfactory rules exist or can be developed.")

223. RICHMAN & REYNOLDS, *supra* note 10, at 208 ("Three basic elements define the choice-of-law approach of the Second Restatement: (1) § 6 and the most significant relationship, (2) a few grouping-of-contacts sections and (3) numerous sections that provide choice-of-law rules for specific legal claims and issues.")

224. *Id.* at 209; see also *id.* at 214 ("Thus, with either the specific sections or the general grouping-of-contacts sections, eventually the court will need to apply the factors of § 6(2).")

225. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971).

simplification of the judicial task, and respect for substantive policies.<sup>226</sup> No guidance is provided on how to combine them.

At a slightly less elevated level of generality are those Restatement (Second) sections listing the basic principles for particular areas of law such as section 145 for torts<sup>227</sup> and section 188 for contracts.<sup>228</sup> These sections are sometimes called the grouping-of-contacts provisions, and show the direct influence of the early New York cases such as *Auten*.<sup>229</sup> The contacts for contract cases include: the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of

226. *Id.* § 6.

227. *Id.* § 145. The General Principle for torts provides:

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

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

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

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

*Id.*

228. Section 187 deals with the effect of party selection of the applicable law. *Id.* § 187 (discussing contractual choice of law clauses). Section 188, titled “Law Governing in Absence of Effective Choice by the Parties,” provides as follows:

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

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and,
- (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

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

(3) If the place of negotiation of the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189–199 and 203.

*Id.* § 188.

229. RICHMAN & REYNOLDS, *supra* note 10, at 213.

the contract, and the domicile, residence, nationality, place of incorporation, and place of business of the parties.<sup>230</sup> For torts, analogously, the judge is instructed to take into account the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile, residence, nationality, place of incorporation, place of business of the parties, and the place where the relationship, if any, between the parties is centered.<sup>231</sup> In both contexts, the text instructs that “[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue” and with due regard to the principles of section 6.<sup>232</sup>

At the most specific end of the spectrum, the Restatement (Second) provides rules specifying which state’s law presumptively applies when a case involves certain substantive issues.<sup>233</sup> Section 148, for example, addresses the torts of fraud and misrepresentation:

§ 148. Fraud and Misrepresentation

(1) When the plaintiff has suffered pecuniary harm on account of his reliance on the defendant’s false representations and when the plaintiff’s action in reliance took place in the state where the false representations were made and received, the local law of this state determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.<sup>234</sup>

In the material on choice of law for contracts, similarly, section 192 deals with contracts for the sale of life insurance.<sup>235</sup> Remarks one authority:

For most contracts, the Restatement (Second) presumes that a specific law will be applied unless the presumption is rebutted by “the principles of § 6”. Nine sections deal with particular contracts . . .

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230. See *supra* note 228.

231. See *supra* note 227.

232. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 188.

233. See, e.g., *id.* § 154 (addressing “Interference with Marriage Relationships”). This section provides:

The local law of the state where the conduct complained of principally occurred determines the liability of one who interferes with a marriage relationship, unless, *with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties*, in which event the local law of the other state will be applied.

*Id.* (emphasis added).

234. *Id.* § 148.

235. *Id.* § 192 (Life Insurance Contracts).

The Restatement details nine rules for specific types of contracts . . . .

Where the Restatement sets forth a presumption concerning a specific problem, it usually maintains the most significant relationship test in reserve.<sup>236</sup>

Most of these rules reflect a territorial orientation, for example by choosing the law of the place where certain conduct occurred. Some refer the reader instead to the general instructions on torts or contracts.<sup>237</sup> All of them incorporate references to the principles of section 6.<sup>238</sup>

### 3. The Restatement (Second): Single or Multifactor Theory?

A multifactor interpretation can easily fit within the confines of the middle-tier grouping-of-contacts sections, such as sections 145 and 188. This is not surprising, considering the historical link between these two sections and the early New York grouping-of-contacts cases such as *Auten v. Auten*.<sup>239</sup> These middle-tier sections contain suggestions about combining factors that might result in applying a particular state's law, although these are phrased quite flexibly in terms of what will "usually" happen.<sup>240</sup>

For sections 145 (torts) and 188 (contracts), the listed contacts are put forward under the guise of interpreting and applying section 6.<sup>241</sup> Section 6,

236. RICHMAN & REYNOLDS, *supra* note 10, at 229.

237. *Id.* at 211.

238. *E.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 154. Section 154, "Interference with Marriage Relationship," provides:

The local law of the state where the conduct complained of principally occurred determines the liability of one who interferes with a marriage relationship, unless, with respect to the particular issue, *some other state has a more significant relationship under the principles stated in § 6* to the occurrence and the parties, in which event the local law of the other state will be applied.

*Id.* (emphasis added).

239. *See Auten v. Auten*, 124 N.E.2d 99, 102–03 (N.Y. 1954) (applying the "grouping of contacts theory"); *see also supra* notes 61–69 and accompanying text (illustrating a case that based the choice of law on a single factor).

240. For example, paragraph 3 of section 188 names two contacts that, if satisfied, will usually determine the outcome—place of negotiation and place of performance. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188. Section 188 provides: "(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189–199 and 203." *Id.*

241. Section 145 prefaces this list of contacts with the following language: "(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of that state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6." *Id.* § 145. Section 188 similarly prefaces its list of contacts for contracts cases as follows: "(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of that state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6." *Id.* § 188.

on its face, seems to be almost as geared toward multifactor analysis as sections 145 and 188—it does not purport to restrict what may be considered but leaves the judge free to take into account all of the important factors that are likely to arise in a tort or contract case.<sup>242</sup>

The Restatement (Second)'s detailed rules regarding particular substantive issues are almost as accommodating to multifactor approaches as the other two tiers. The more specific rules are typically rebuttable presumptions that can be overridden by section 6 or by the middle-level sections (sections 145 and 188). Take for example section 192:

§ 192. Life Insurance Contracts

The validity of a life insurance contract issued to the insured upon his application and the rights created thereby are determined, in the absence of an effective choice of law by the insured in his application, by the local law of the state where the insured was domiciled at the time the policy was applied for, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.<sup>243</sup>

This section appears to impose a single-factor test—“the local law of the state where the insured was domiciled at the time the policy was applied for.”<sup>244</sup> However, this rule is a rebuttable presumption which does not apply if “some other state has a more significant relationship under the principles stated in Section 6.”<sup>245</sup> The qualifying clause represents a door deliberately left open for consideration of additional factors.

Despite this apparent open door, some modern interest-oriented academics downplay the importance of the lists of contacts and presumptive rules, seeing everything through the lens of interests as their theory defines them. Faced with the language of sections 145 and 188, they point out that these contacts are supposed to be evaluated with respect to the requirements of section 6.<sup>246</sup>

Section 6, in their view, restricts the contacts that can be taken into account, through its references to policies and interests.<sup>247</sup> Sections 6(2)(b),

242. *Id.* § 6.

243. *Id.* § 192.

244. *Id.*

245. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 192.

246. *See id.* § 145(2) (“Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include . . . .”); *id.* § 188(2) (“In the absence of an effective choice of law by the parties (see § 187), the contacts [are] to be taken into account in applying the principles of § 6 to determine the law applicable to an issue . . . .”).

247. RICHMAN & REYNOLDS, *supra* note 10, at 214. The authors state:

[T]he final version of § 145 calls for application of the law of “the state which . . . has the most significant relationship to the occurrence and the parties under the

(c), and (e) refer to effectuation of the policies of the forum and “other interested states.”<sup>248</sup> In particular, some claim that the application of section 6 reflects the usual interest-based analyst’s categorization—false conflicts, true conflicts, and unprovided-for cases—and this analytical scheme bars the possibility of considering contact counting or grouping of contacts.<sup>249</sup>

Professor Louise Weinberg argues strongly for this position, referring to the Restatement (Second) as imposing a “most significant contact” test.<sup>250</sup> Her use of the singular noun “contact” suggests that the Restatement (Second) requires designation of a single contact for a particular issue. Despite her use of quotation marks to set off the formula, the singular form does not appear in the Restatement (Second)’s text. Rather, the verbal shorthand actually employed in the Restatement (Second) is “most significant relationship.”<sup>251</sup> That formula—most significant relationship—might refer either to the relationship between the case as a whole and the dispute (a multifactor interpretation) or the existence of a single contact that relates the dispute to the state in question (a single-factor interpretation).

Professor Weinberg’s interpretation cannot be taken as definitively established—the Restatement (Second) does not directly address the question of interest here—but neither can it be definitively rejected. The Restatement (Second) would appear to be available for a flexible, multifactor analysis if judges decide that they wanted to use it that way. We believe that they should.

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principles stated in § 6.” Correspondingly, the role of the enumerated contacts is diminished; they are simply “to be *taken into account* in applying the principles of § 6.”

*Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145).

248. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (b), (c), (e).

249. RICHMAN & REYNOLDS, *supra* note 10, at 214. The authors state:

Section 6(2)(b) and (c) clearly contemplate performing some sort of interest analysis. Presumably if that analysis indicates a false conflict, the court should apply the law of the only interested state. If the case is a non-false conflict, the court should use the factors of § 6(2)(d)–(g) to resolve the true conflict or unprovided-for case. *In no event, however, should the court use the grouping-of-contacts sections to justify a center-of-gravity or contact-counting approach. The contacts enumerated in the grouping-of-contacts sections have no independent significance and are relevant only insofar as they implicate the factors of § 6(2).*

*Id.* (emphasis added).

250. Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L.J. 475, 479 (2000) (referring to the Restatement (Second)’s master rule as “the law of the place of ‘most significant contact’”); *see also id.* at 479–80 (“Courts are told to go to the ‘place of most significant contact,’ but where is that place?”).

251. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6.

## C. THE PROS AND CONS OF BALANCING

Assuming that the Restatement (Second) is considered an inappropriate vehicle for adopting a multifactor approach, we believe the best way to structure a new multifactor method is by weighing or balancing the competing contacts.<sup>252</sup> The grouping-of-contacts or center-of-gravity formulations from the early New York Court of Appeals cases could be pressed into service here, for they are strongly reminiscent of the weighing or balancing employed in other areas of law. But not every judge or academic is fond of weighing and balancing. We close our argument, therefore, with some consideration of the merits and demerits of weighing and balancing, as a general matter.

## 1. Judges' Preferences

On the pro side, there is reason to believe that judges generally prefer multifactor approaches. Judge Frank Coffin asserts that, when faced with multiple interests, judges are naturally drawn to balancing.<sup>253</sup> In choice of law specifically, the long history of judicially created escape devices, while highly suggestive, is not the only indication that judges are not entirely satisfied with single-factor approaches. The Restatement (Second) has been well received by courts, which suggests a judicial responsiveness to the choice of law approach that is most inclusive of a variety of factors.

The way that judges have written choice of law opinions confirms that judges concern themselves with many more factors than academics have recognized. No matter how widely endorsed by academics a particular triggering factor seems to be, judges typically cite not only that contact but also every other contact that points toward the same state.<sup>254</sup> Judges do not just recite such supporting facts at an opinion's outset where they might dismiss those facts as merely extraneous background, but typically cite them in the part of the opinion that explains and justifies the result as well.<sup>255</sup>

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252. Even if choice of law is undertaken by reference to a multifactor interpretation of the Restatement (Second), some form of weighing or balancing would be necessary to collect and combine the different considerations and contacts into a single answer to the question, "What law applies?"

253. Frank M. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 21 (1988).

254. See, e.g., *Babcock v. Jackson*, 191 N.E.2d 279, 284 (N.Y. 1963). Additionally, consider *Haag v. Barnes*, a child-support case in which the opinion lists the following as contacts: where the parties are from; the location of the child's birth; the fact that the people acting as agents were from Illinois; and the place from which the parent sent the contributions. *Haag v. Barnes*, 175 N.E.2d 441, 444 (N.Y. 1961); see also *Grant v. McAuliffe*, 264 P.2d 944, 949 (Cal. 1953) (en banc) (applying California law, regarding survival of tort actions, on the ground that "all of the parties were residents of this state, and the estate of the deceased tortfeasor is being administered in this state").

255. See, e.g., *Jones v. R.S. Jones & Assocs., Inc.*, 431 S.E.2d 33, 33 (Va. 1993) (deciding a conflict of law issue by listing not only the place of the accident, but also that the trip originated

That judges write their opinions as though all these facts are relevant indicates that judges think these other factors do contribute to the result.<sup>256</sup>

Multifactor (e.g., balancing or weighing) approaches have several positive characteristics. For a court that is hesitant, uncertain, or internally divided about what reasoning to use, including as many factors as possible increases confidence and builds consensus. Extra factors pointing toward the chosen law—even ones that choice of law theorists dismiss as irrelevant—make the choice to apply that law more convincing. The fact that judges cannot reach a consensus without including all of these factors underscores that, on these facts at least, courts are not comfortable with a single-factor approach.<sup>257</sup> By including as many factors as possible, judges build consensus for the chosen state's law, implicitly acknowledging that the additional factors make the chosen law seem fairer and more reasonable.

Judges undoubtedly prefer multifactor approaches because of the flexibility these approaches give them to reach results they find acceptable. When there are a large number of connecting factors to consider, it is often not possible to specify an objectively determinate formula. The solution may be rebuttable presumptions such as the ones in the Restatement (Second)<sup>258</sup> or simply a loose verbal formulation such as center of gravity.<sup>259</sup> Flexibility is important because it is flexibility, precisely, that is lacking with single-factor theories. A rule that works well for a large percentage of cases will not necessarily provide acceptable results for unique or idiosyncratic ones. A single-factor method effectively ties a judge's hands by specifying the particular contact that determines the choice of law issue—every case with the same trigger factor must be treated the same.

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in the state where the accident occurred, and that the decedent was flying the airplane in that state).

256. Judges discuss supporting facts even in opinions that approvingly cite a single-factor approach as being authoritative in their state, making the recitation of additional factors in theory gratuitous. *See, e.g.*, *Risdon Enters., Inc. v. Colemill Enters., Inc.*, 324 S.E.2d 738, 739 (Ga. Ct. App. 1984) (listing the parties' domiciles, the location of the accident, the primary place of business of the defendant corporation, and the states over which the airplane frequently flew); *Hauch v. Connor*, 453 A.2d 1207, 1208 (Md. 1983) (listing the parties' domiciles, location of their employment, location of the accident, and location of the treatment facilities); *Poole v. Perkins*, 101 S.E. 240, 241 (Va. 1919) (listing the parties' present and past domiciles and the location where the note was signed and delivered, as well as the location where the note was to be made payable).

257. *See supra* note 256 (giving examples of courts who cite a single-factor approach while, at the same time, using multiple factors to reach a consensus).

258. *See supra* notes 242–43 and accompanying text (discussing the imposition of a single-factor test in the Restatement (Second) that is framed as a rebuttable presumption in case a competing factor has a more significant relationship).

259. *See supra* notes 212–16 and accompanying text (explaining the center-of-gravity formulation which applies the law of the state with the most significant contacts).

## 2. Critiques of Balancing

There are counterarguments, however. Balancing has its critics who claim that balancing provides a judge with neither “objective criteria for valuing or comparing the interests at stake” nor boundaries or restrictions for the types of interests to be considered.<sup>260</sup>

Such arguments have not deterred judges from employing balancing as a general matter, as a brief constitutional survey of balancing tests (below) clearly shows.<sup>261</sup> Moreover, the case for balancing is stronger in choice of law than in other legal contexts. A multifactor balancing approach to choice of law will not implicate the central academic concern with constitutional balancing—that balancing “diminishes fundamental constitutional principles.”<sup>262</sup> In choice of law there are no comparable hierarchically superior rights to be diluted.<sup>263</sup>

There are two related concerns, however, about multifactor approaches. The first is that balancing, unlike a bright-line rule, does not allow the parties to predict the applicable law—“balancing is inherently uncertain.”<sup>264</sup> The second is the danger of subjectivity in decision-making—imposition of judges’ personal preferences.<sup>265</sup> These concerns should be taken seriously. Notably, there are specific areas of law where the importance of predictability and uniformity have continued to dominate the choice of law process even to this day. These include, most importantly, real property and the internal affairs of corporations.<sup>266</sup> In substantive areas such as these, commitment to a single factor is far from arbitrary. For practical reasons, a

260. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972 (1987).

261. RICHMAN & REYNOLDS, *supra* note 10, at 249 (citing Michael Traynor, *Conflict of Laws: Professor Currie’s Restrained and Enlightened Forum*, 49 CAL. L. REV. 845 (1961)) (pointing out that courts routinely balance competing interests when they make law in domestic cases).

262. Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 296 (1990); *see also* Paul W. Kahn, *The Court, the Community, and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 4 (1987) (arguing that constitutional balancing is an unacceptable basis for judicial review because it is “based ultimately on an intuition of justice, rather than an articulate argument”); Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 792 (2001). *But see* Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789, 794 (2007) (arguing that constitutional balancing is an appropriate methodology in the United States because “rights should be overridable, at least in part, for democratic reasons”).

263. *But c.f.* CURRIE, *supra* note 159, at 182 (“[A]ssessment of the respective values of the competing legitimate interests of two sovereign states is a political function of a very high order.”); Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176 (arguing the same).

264. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 72 (1987).

265. *See* Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191, 1194 (2003) (“The potential pitfall of any pragmatic balancing approach is that it may devolve simply into an imposition of the judge’s personal policy preferences.”).

266. On the importance of the “situs” rule for real property, *see generally* Robert Ellickson, *A Private Idaho in Greenwich Village?* 115 YALE L.J. POCKET PART 5 (2005), <http://www.the-pocketpart.org/ylj-online/property-law/19-a-private-idaho-in-greenwich-village>.

single-factor test may be required. However, we do not believe that the potential problems with balancing should be automatically and invariably dispositive—in most areas of law, there are important countervailing concerns.

First, by repudiating the first Restatement, state courts have already decided that some uncertainty is preferable to an arbitrary, although foreseeable, result. The first Restatement is generally recognized as the most predictable of existing choice of law methods.<sup>267</sup> This fact has not prevented courts from using escape devices when necessary.<sup>268</sup> Courts that chose to use escape devices made the decision aware of the likely loss of certainty and predictability.<sup>269</sup> Thus, since judges have already demonstrated a preference for the likely loss of certainty and predictability over the arbitrary results created by stand-alone triggers, such loss of certainty and predictability cannot be blamed on multifactor approaches.

The problem of subjectivity, likewise, should be kept in perspective—a single-factor test may fare no better at reaching a desirable outcome. Escape devices undermine not only the first Restatement’s claim to predictability but also its claim to objectivity. Professor Symeon C. Symeonides observes that “these rules remain in place only because the court is able to find a way to evade them by using one of the traditional escapes, such as characterization, substance versus procedure, *renvoi*, or, more often, the [public policy] exception.”<sup>270</sup> The need for predictability and objectivity is undeniable, but choice of law may already have sacrificed those virtues. If, as seems possible, a judge’s personal preference is to apply the law of the state with the most contacts to the case, then personal preference (if that is what it is) is not necessarily a bad thing.

### 3. Balancing in Other Legal Contexts

Adopting a multifactor approach to choice of law would be consistent with other substantive areas, such as constitutional law. Courts began exploring the possibility of balancing the multiple interests at stake in civil-

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267. For example, in the Montana transition case *Phillips v. General Motors Corp.*, the court noted that “certainty [and] predictability” are among the “practical advantages” of the first Restatement’s bright-line rules. *Phillips v. Gen. Motors Corp.*, 2000 MT 55, ¶ 19, 298 Mont. 438, ¶ 19, 995 P.2d 1002, ¶ 19. However, those advantages are outweighed by the utility of “a more flexible approach which permits analysis of the policies and interests underlying the particular issue before the court.” *Id.* ¶ 22, 298 Mont. ¶ 22, 995 P.2d ¶ 22 (quoting *In re Air Crash Disaster at Boston, Mass.* on July 31, 1971, 399 F. Supp. 1106, 1110 (D. Mass. 1975)).

268. *Id.* ¶ 19, 298 Mont. ¶ 19, 995 P.2d ¶ 19.

269. William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1228 (1997) (“It is impossible to predict which issues will prompt a court to use the public policy escape.”).

270. Symeon C. Symeonides, *Choice of Law in the American Courts in 1998: Twelfth Annual Survey*, 47 AM. J. COMP. L. 327, 345 (1999).

rights cases in the 1960s.<sup>271</sup> By the 1980s, a tendency toward multifactor balancing approaches to constitutional analysis had taken root.<sup>272</sup> Over the next three decades, courts used balancing to address competing interests in numerous areas of constitutional law, ranging from First Amendment free-speech concerns to Dormant Commerce Clause analyses and regulatory takings.<sup>273</sup>

In First Amendment free-speech cases, courts routinely balance factors when determining whether a regulation of speech is content-neutral or content-based; whether it is valid as a time, place, and manner regulation; and whether the regulation serves a significant and legitimate state interest.<sup>274</sup> Courts balance private parties' interests against states' asserted interests in regulating commercial speech, as in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>275</sup> In *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, the Supreme Court balanced a religious organization's right to participate in door-to-door canvassing with a community's interests in preventing fraud and crime and protecting privacy.<sup>276</sup>

Courts also frequently engage in multifactor balancing in criminal-procedure cases.<sup>277</sup> The Supreme Court has broadly acknowledged that "the key principle of the Fourth Amendment is . . . the balancing of competing interests."<sup>278</sup> The basic requirement that a policeman have probable cause prior to effecting a stop or seizure balances "safeguard[ing] citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime" against "enforcing the law in the community's

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271. Coffin, *supra* note 253, at 18.

272. *Id.*

273. See, e.g., *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670–71 (1980) (balancing "a sensitive consideration of the weight and nature of the state regulatory concern [with] the extent of the burden imposed on the course of interstate commerce" (quoting *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441 (1978))); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (balancing the economic impact with the character of the governmental action to determine whether a constitutional "taking" has occurred).

274. See, e.g., *Hill v. Colorado*, 530 U.S. 703, 714–15 (2000) (balancing the state's interest in "protect[ing] the health and safety of . . . citizens" with the petitioners' First Amendment interests (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996))).

275. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566–71 (1980) (balancing the corporation's advertising rights against the commission's interest in banning certain types of advertisements).

276. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 160–64 (2002).

277. For an interesting overlap between First Amendment balancing and balancing in constitutional criminal procedure, see *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), in which the Supreme Court balances an attorney's right to free speech with the State of Nevada's interest in fair trials.

278. *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981) (quoting *Dunaway v. New York*, 442 U.S. 200, 219 (1979) (White, J., concurring)).

protection.”<sup>279</sup> In the Fifth Amendment context, the Supreme Court has balanced government’s interest in interrogation against the Court’s conviction that interrogation is inherently coercive.<sup>280</sup> In *Baldwin v. New York*, the Supreme Court balanced protection afforded by a jury against the need for speedy and efficient adjudication to determine the extent of the Sixth Amendment constitutional right to a jury trial.<sup>281</sup>

*Wilkinson v. Austin* underscores the continued relevance of balancing for constitutional criminal-procedure cases.<sup>282</sup> In *Wilkinson*, a Fourteenth Amendment case, the Court recognized an inmate’s liberty interest in not being assigned to a “Supermax,” or highest security, prison.<sup>283</sup> It balanced an inmate’s liberty interest against the “State’s . . . obligation . . . to ensure the safety of guards and prison personnel, the public, and the prisoners themselves.”<sup>284</sup> In concluding that the state’s interest is “dominant,” the Court showed no reluctance to engage in multifactor balancing.<sup>285</sup>

Balancing is also the dominant methodology in procedural-due-process cases. For example, in *Mathews v. Eldridge*, the Supreme Court ruled that “an evidentiary hearing is not required prior to the termination of disability benefits.”<sup>286</sup> In reaching this result, the Court balanced the following factors:

The private interest that will be affected by the official action [with] the risk of an erroneous deprivation of such interest through the procedures used [and] the probable value, if any, of additional or substitute procedural safeguards [against] the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>287</sup>

The factors considered in *Mathews v. Eldridge*—private interests, procedural concerns, and the state’s interest—are similar to ones potentially relevant to choice of law analysis.

#### 4. Balancing: The Positive Case

Many prominent academics and judges speak highly of balancing as a method for deciding complex issues. Frank Michelman, for example, wrote that “[t]he balancing test, with its contextual focus, solicits future conversation, by allowing for resolution of this case without predetermining

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279. *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

280. *Moran v. Burbine*, 475 U.S. 412, 426 (1986).

281. *Baldwin v. New York*, 399 U.S. 66, 73–74 (1970).

282. *Wilkinson v. Austin*, 545 U.S. 209 (2005).

283. *Id.* at 224.

284. *Id.* at 227.

285. *Id.*

286. *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976).

287. *Id.* at 335.

so many others that one ‘side’ experiences large-scale victory or defeat.”<sup>288</sup> Balancing has particular attractions, however, in the choice of law context.

At its most basic level, the argument in favor of multifactor approaches is that scholars and judges cannot satisfactorily reduce choice of law disputes to a single trigger factor, no matter how carefully the trigger is selected.<sup>289</sup> We posit two advantages potentially accompanying a multifactor approach such as balancing: (1) minimization of extraterritoriality and (2) avoidance of controversial jurisprudential assumptions.

As to the first, taking into account the number of contacts supporting a particular state’s law—as opposed to deciding on the basis of a single factor—reflects the view that extraterritoriality is something to avoid. A judge faced with a dispute having ten occurrences, persons, or items of property in state *A* and one in state *B* will minimize extraterritoriality by applying state *A*’s law—multifactor theories provide the necessary flexibility to do this. Every event that is located in the state whose law the court ultimately applies is one more event that the law of the place where the event occurred governs.

Single-factor approaches are not sensitive to the distribution of connecting factors between the competing states. A state’s law will apply if the trigger factor points to the designated state, even if the trigger factor is the only factor that does so. While it is thus guaranteed that the trigger factor will only be subjected to the law of the place where it occurred, there are no such assurances for any other events, persons, and property. Single-factor approaches make no effort to select the applicable law to keep the number of such events, persons, and property to a minimum. This would require “contact counting,” which both traditional and modern choice of law theorists have uniformly rejected.<sup>290</sup>

It is not possible to eliminate entirely the extraterritorial application of state law. In cases raising choice of law issues, there will always be contacts pointing in different directions—if all contacts pointed toward the same state the dispute would be purely domestic, and no choice of law issue would arise. In mixed cases, the best that choice of law theorists can hope for is reduction of extraterritoriality, not elimination. The question is not *whether* there will be extraterritoriality, but *how much*.

Second, by counting, grouping, weighing, or balancing contacts, one can reduce reliance on the contentious theorizing that plagues most choice of law methods. In keeping with the intuition that the simplest theoretical

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288. Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 34 (1986).

289. See *supra* notes 77–82, 153–56, 190–208 and accompanying text (discussing different theories for how to choose a potential single factor and highlighting the problems with the theories).

290. See *supra* notes 9–28, 190–208 and accompanying text (analyzing the ways in which choice of law theorists have come to realize the problems with single-factor approaches).

explanation is typically the best, avoidance of metaphysical constructs like vested rights or governmental interests has real attraction. Contact counting may be intellectually low-tech, but in the present context, that is a compliment.

Single-factor theories must have substantial theoretical bite to explain why one connecting factor matters while all others are irrelevant. By assuming the need to identify one connecting factor as uniquely relevant, a single-factor theory takes upon itself the responsibility to differentiate theoretically between the relevant contact and the others. Yet the source of the premises underlying the choice is unclear. Do scholars and judges derive the single factor from the law of one of the two states whose domestic laws vie for application? If so, which one, and why—and doesn't such an approach beg the important questions by presuming an answer to the choice of law question as a threshold matter? If not, does some choice of law "brooding omnipresence in the sky" compel the premises in question?<sup>291</sup> This would seem, after the decision of *Erie Railroad Co. v. Tompkins*, a rather tenuous source to consult.<sup>292</sup> Faced with both the need for theoretical "bite" and the absence of any readily available positive law source, academics can be forgiven for taking solace in higher-order constructs such as vested rights or governmental interests. They have been charged with finding something that simply has no tangible existence.

Multifactor approaches, in comparison, are theoretically minimalist. By treating contacts as more or less fungible, they escape having to provide a theoretical explanation for why one particular factor should matter so much more than any of the others. Single-factor theories require an intellectual commitment to a restrictive jurisprudential theory that can justify the choice of one factor over another; multifactor theories do not.

## V. CONCLUSION

Choice of law theory has long engaged in a fruitless search for a single contact—the trigger—that is intrinsically indicative of whether a state has a good claim to apply its own law. For the first Restatement, the trigger is the last act—the place of injury in a tort case, for example—and for interest-based analysis, the trigger is the domicile of the party who stands to benefit. We are doubtful that this is a meaningful quest. Instead, applying a state's law becomes appropriate because of the overall pattern of connections between the dispute and the particular state.

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291. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . . It always is the law of some State . . . .").

292. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 80 (1938) ("We merely declare that in applying the doctrine [that permitted the Court to disregard state common law] this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.").

Both traditional and modern choice of law theories have been considerably weakened by their reliance on a single talismanic factor. Single-factor theories are hard to maintain over extended periods of time because they lend themselves to the easy creation of counterexamples. All one need do is hypothesize a case in which the single dispositive contact—the trigger—points to one state and all other contacts point toward another state, particularly the forum. In such stand-alone trigger cases, courts have a long history of ignoring the supposedly dispositive trigger and applying the other state's law. The choice of law revolution of the mid-twentieth century was a consequence of counterexamples such as these.

Perhaps most importantly, this impossible quest has led choice of law theory into a dead end of meaningless conceptualism. Writers on the subject have created metaphysical entities at a very high level of abstraction like vested rights and governmental interests because there simply are not any real differences between the designated trigger and the other factors in a case. Weighing and balancing, in contrast, are conceptually more modest because they do not require theorizing about the unique characteristics of particular connecting factors.

Widespread adoption of the Restatement (Second) of Conflict of Laws is the simplest way to solve the problem. Another alternative is developing a weighing or balancing approach, perhaps under the center-of-gravity rubric, a label with an established pedigree. Already, the Restatement (Second)'s vague and amorphous most-significant-relationship test has found considerable acceptance—even if that acceptance has largely been in recognition of the minimal restrictions it imposes and maximal flexibility it allows. In the meantime, at least, it is useful to consider that the mistakes the first Restatement's drafters made are not so different from the ones its critics made. Perhaps we can avoid making the same mistakes a third time.

## APPENDIX

The following chart illustrates the breakdown of the transition cases, identifying which states transitioned on a single-factor, lopsided fact pattern, as opposed to a multifactor fact pattern. The chart also identifies states that continue to use the first Restatement.

Single-Factor Transition <sup>1</sup>		Multifactor Transition <sup>2</sup>	First Restatement <sup>3</sup>
Alaska	Minnesota	District of Columbia	Alabama
Arizona	Mississippi	Hawaii	Georgia
Arkansas	Missouri	New Mexico	Kansas
California	Montana	Oregon	Maryland
Colorado	Nevada	Utah	North Carolina
Connecticut	New Hampshire	Vermont	South Carolina
Delaware	New Jersey	Washington	Virginia
Florida	New York		West Virginia
Idaho	North Dakota		Wyoming
Illinois	Ohio		
Indiana	Oklahoma		
Iowa	Pennsylvania		
Kentucky	Rhode Island		
Louisiana	South Dakota		
Maine	Tennessee		
Massachusetts	Texas		
Michigan	Wisconsin		
<b>Total = 34</b>		<b>Total = 7</b>	<b>Total = 9</b>

\* Nebraska is not included; although Nebraska has adopted the Restatement (Second), Nebraska jurisprudence does not include a clear transition case.<sup>4</sup>

1. *Armstrong v. Armstrong*, 441 P.2d 699, 703 (Alaska 1968) (rejecting *lex loci delicti* when all other factors pointed to Alaska); *Schwartz v. Schwartz*, 447 P.2d 254, 257 (Ariz. 1968) (en banc) (rejecting the first Restatement and adopting the contacts theory when only the place of the injury pointed to Arizona and all other factors pointed to New York); *Wallis v. Mrs. Smith's Pie Co.*, 550 S.W.2d 453, 456–58 (Ark. 1977) (en banc) (rejecting the first Restatement and adopting the interest-analysis approach when only the place of the injury pointed to Missouri); *Grant v. McAuliffe*, 264 P.2d 944, 949 (Cal. 1953) (en banc) (applying the law of the forum after determining that survival of a cause of action is procedural); *First Nat'l Bank v. Rostek*, 514 P.2d 314, 320 (Colo. 1973) (rejecting the first Restatement and adopting the most-significant-relationship test when only the place of the injury (a plane crash) pointed to South Dakota and all other factors pointed to Colorado); *O'Connor v. O'Connor*, 519 A.2d 13, 21–23 (Conn. 1986) (adopting the Restatement Second approach); *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 47–48 (Del. 1991) (using the most-significant-relationship test); *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980) (confining *lex loci delicti* to only those cases where there is no state with a more significant relationship); *DeMeyer v. Maxwell*, 647 P.2d 783, 785–86 (Idaho Ct. App. 1982) (rejecting the first Restatement and adopting the Restatement (Second) when only the place of the injury pointed to Oregon and all other factors pointed to

Idaho); *Ingersoll v. Klein*, 262 N.E.2d 593, 596 (Ill. 1970) (rejecting *lex loci delicti* and adopting a “most significant contacts” rule where only the place of the accident pointed to Iowa and all other factors pointed to Illinois); *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071, 1074 (Ind. 1987) (applying Indiana law when only the place of the accident pointed to Illinois and all other factors pointed to Indiana; continuing to preference the law of the place of the injury, but if that state has an insignificant relationship to the action, applying the Restatement (Second)); *Fuerste v. Bemis*, 156 N.W.2d 831, 833–34 (Iowa 1968) (rejecting the first Restatement and adopting the most-significant-relationship test in the context of a guest statute when only the place of the injury pointed to Wisconsin and all other factors pointed to Iowa); *Wessling v. Paris*, 417 S.W.2d 259, 260–61 (Ky. 1967) (rejecting *lex loci delicti* and adopting the Restatement (Second) when only the place of the injury pointed to Indiana and all other factors pointed to Kentucky); *Jagers v. Royal Indem. Co.*, 276 So. 2d 309, 312–13 (La. 1973) (rejecting the first Restatement and adopting the Restatement (Second) when only the place of the injury pointed to Mississippi and all other factors pointed to Louisiana); *Beaulieu v. Beaulieu*, 265 A.2d 610, 616–17 (Me. 1970) (rejecting *lex loci delicti* and adopting the Restatement (Second) approach of applying the law of the common domicile in a guest-statute action where both parties left from and planned to return to Maine); *Pevoski v. Pevoski*, 358 N.E.2d 416, 417–18 (Mass. 1976) (rejecting *lex loci delicti* and adopting interest analysis when only the place of the injury pointed to New York and all other factors pointed to Massachusetts); *Sexton v. Ryder Truck Rental, Inc.*, 320 N.W.2d 843, 857 (Mich. 1982) (considering two companion cases—*Sexton v. Ryder Truck Rental, Inc.* and *Storie v. Southfield Leasing, Inc.*—that involved accidents where only the accident pointed to the application of another state’s law, but all other factors pointed to the application of Michigan law, and deciding that *lex fori* should apply); *Schmidt v. Driscoll Hotel, Inc.*, 82 N.W.2d 365, 368 (Minn. 1957) (applying Minnesota law “in conformity with principles of equity and justice” when all factors except the place of the accident pointed to Minnesota); *Mitchell v. Craft*, 211 So. 2d 509, 510 (Miss. 1968) (rejecting the law of the place of the injury in favor of “the most substantial relationships of the parties and the dominant interest of the forum” when only the place of the injury pointed to Louisiana and all other factors pointed to Mississippi); *Kennedy v. Dixon*, 439 S.W.2d 173, 184 (Mo. 1969) (en banc) (rejecting “the inflexible *lex loci delicti* rule in favor” of the Restatement (Second) when only the place of the injury pointed to Indiana and all other factors pointed to Missouri); *Phillips v. Gen. Motors Corp.*, 2000 MT 55, ¶ 35, 298 Mont. 438, ¶ 35, 995 P.2d 1002, ¶ 35 (adopting the most-significant-relationship test when only the place of injury pointed to Kansas and all other factors pointed to Montana); *Gen. Motors Corp. v. Eighth Judicial Dist. Court of the State of Nev.*, 134 P.3d 111, 116 (Nev. 2006) (en banc) (adopting the most-significant-relationship test of the Restatement (Second)); *Clark v. Clark*, 222 A.2d 205, 207 (N.H. 1966) (rejecting *lex loci delicti* when only the place of the injury pointed to Vermont and all other factors pointed to New Hampshire); *Mellk v. Sarahson*, 229 A.2d 625, 626–27 (N.J. 1967) (rejecting the *lex loci delicti* rule in favor of a state’s-interest test when only the place of the injury pointed to Ohio and all other factors pointed to New Jersey); *Auten v. Auten*, 124 N.E.2d 99, 102–03 (N.Y. 1954) (applying the “grouping contacts” theory); *Issendorf v. Olson*, 194 N.W.2d 750, 755 (N.D. 1972) (rejecting the *lex loci delicti* rule in favor of the significant-contacts test when only the place of the injury pointed to Minnesota and all other factors pointed to North Dakota because “[t]he locus of the accident was fortuitous, having resulted from a brief journey into Minnesota for food, beverage, and entertainment”); *Fox v. Morrison Motor Freight, Inc.*, 267 N.E.2d 405, 407–08 (Ohio 1971) (adopting interest analysis when only the place of the injury pointed to Illinois and all other factors pointed to Ohio); *Brickner v. Gooden*, 525 P.2d 632, 637–38 (Okla. 1974) (rejecting the *lex loci delicti* rule in favor of the most-significant-relationship test when only the place of the injury pointed to Mexico and all other factors pointed to Oklahoma); *Griffith v. United Air Lines, Inc.*, 203 A.2d 796, 805–07 (Pa. 1964) (rejecting *lex loci delicti* and applying interest analysis when only the place of the injury pointed to Colorado and all other factors pointed to Pennsylvania); *Woodward v. Stewart*, 243 A.2d 917, 923 (R.I. 1968) (rejecting the *lex loci delicti* rule in favor of the interest-weighting approach when only the place of injury pointed to Massachusetts and all other factors pointed

to Rhode Island); *Chambers v. Dakota Charter, Inc.*, 488 N.W.2d 63, 67–68 (S.D. 1992) (adopting the Restatement (Second) when only the place of the accident pointed to Missouri and all other factors pointed to South Dakota); *Hataway v. McKinley*, 830 S.W.2d 53, 59–60 (Tenn. 1992) (rejecting *lex loci delicti* and adopting the most-significant-relationship test when only the place of the injury pointed to Arkansas and all other factors pointed to Tennessee); *Gutierrez v. Collins*, 583 S.W.2d 312, 318–19 (Tex. 1979) (applying the most-significant-relationship test when only the place of the injury pointed to Mexico and all other factors pointed to Texas); *Wilcox v. Wilcox*, 133 N.W.2d 408, 416–17 (Wis. 1965) (adopting the most-significant-relationship test when only the place of the injury pointed to Nebraska and all other factors pointed to Wisconsin).

2. *Myers v. Gaither*, 232 A.2d 577, 584 (D.C. 1967) (determining that the contacts in Maryland were “fortuitous” and that those in the District of Columbia were “indeed superior to those of any other jurisdiction” (internal quotation marks omitted)); *Peters v. Peters*, 634 P.2d 586, 664 (Haw. 1981) (rejecting *lex loci delicti* in favor of “an assessment of the interests and policy factors involved”); *Ferrell v. Allstate Ins. Co.*, 2008-NMSC-042, ¶ 56, 144 N.M. 405, 188 P.3d 1156 (“We conclude that the Restatement (Second) is a more appropriate approach for multi-state contract class actions.”); *Casey v. Manson Constr. & Eng’g Co.*, 428 P.2d 898, 905 (Or. 1967) (en banc) (applying the most-significant-relationship test); *Forsman v. Forsman*, 779 P.2d 218, 219–20 (Utah 1989) (following the Restatement (Second) approach and applying the law of the domicile to an interspousal immunity claim); *Amiot v. Ames*, 693 A.2d 675, 677 (Vt. 1997) (deciding that choice-of-law decisions in tort actions “will be determined by which state or country has the most significant relationship to the occurrence and the parties”); *Johnson v. Spider Staging Corp.*, 555 P.2d 997, 1000–01 (Wash. 1976) (en banc) (abandoning *lex loci delicti* and applying the most-significant-relationship test).

3. *Fitts v. Minn. Mining & Mfg. Co.*, 581 So. 2d 819, 823 (Ala. 1991) (“Until it becomes clear that a better rule exists, we will adhere to our traditional approach.” (quoting *Gen. Tel. Co. v. Trimm*, 311 S.E.2d 460, 462 (Ga. 1984))); *Risdon Enters., Inc. v. Colemill Enters., Inc.*, 324 S.E.2d 738, 740 (Ga. Ct. App. 1984) (applying South Carolina law since the airplane crash occurred there, and “[u]nder Georgia law, the *lex loci delicti* determines the substantive rights of the parties”); *Ling v. Jan’s Liquors*, 703 P.2d 731, 735 (Kan. 1985) (applying *lex loci delicti* even when the injuries “were the result of a negligent act in another state”); *Hauch v. Connor*, 453 A.2d 1207, 1209 (Md. 1983) (“With regard to tort conflicts principles, we reject the position of the Restatement [(Second)] and adhere to the rule that the substantive tort law of the state where the wrong occurs governs.”); *Braxton v. Anco Elec., Inc.*, 409 S.E.2d 914, 915 (N.C. 1991) (maintaining *lex loci delicti* for “tort law controlling the rights of the litigants,” but ultimately finding that North Carolina’s workers’ compensation law applied even though Virginia was the place of the injury); *Lister v. NationsBank of Delaware, N.A.*, 494 S.E.2d 449, 458 (S.C. Ct. App. 1997) (“We find traditional common law choice of law rules are still controlling in South Carolina.”); *Jones v. R.S. Jones & Assocs., Inc.*, 431 S.E.2d 33, 34 (Va. 1993) (“[I]n this case, we apply the substantive law of Florida, the place of the wrong, and the procedural law of Virginia.”); *Paul v. Nat’l Life*, 352 S.E.2d 550, 556 (W. Va. 1986) (reaffirming the “adherence to the doctrine of *lex loci delicti*,” but holding that for public-policy reasons “we will no longer enforce the automobile guest passenger statutes of foreign jurisdictions in our courts”); *Jack v. Enter. Rent-A-Car Co.*, 899 P.2d 891, 895 (Wyo. 1995) (applying Wyoming law since the accident occurred in Wyoming).

4. See *Crossley v. Pac. Employers Ins. Co.*, 251 N.W.2d 383, 386 (Neb. 1977) (noting that the state “consistently held . . . the law of the place where the accident occurred will be applied,” but then stating that “[u]nder virtually any rationale of the current principles of conflict of laws . . . the same result still follows”).