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Choice of Law in Ohio: Two Steps Routinely Missed

Richard S. Walinski

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**CHOICE OF LAW IN OHIO:
TWO STEPS ROUTINELY MISSED**

*Richard S. Walinski**

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I. INTRODUCTION

In civil cases, trial courts often must identify the jurisdiction whose law will control the issues in the case.¹ Most often, the choice is between

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the law of the state in which the court sits and the law of another state. To make that choice, the court applies the forum state's choice-of-law rules and principles.² Historically, the common law provided these rules and principles.³ From their earliest days, courts in the United States struggled through the inevitably slow process of discovering common law rules for choice-of-law questions in a federal system of independent sovereignties that were becoming ever more interdependent.⁴

Forests were consumed on theories about the common-law rules, how they are to be stated, how they could be improved, what considerations ought to form them, etc. Academics have offered diverse, novel approaches for courts to try. The American Law Institute (ALI) itself has taken two separate—and quite different—passes at divining a comprehensive set of choice-of-law rules. The ALI's first go was the Restatement of Conflict of Laws, which was published in 1934.⁵ The Restatement (Second) Conflict of Laws was published in 1971.⁶

Ohio courts actively participated in this process.⁷ The nature of Ohio's involvement in the process changed, however, in 1984. That year,

each major political party. He also served as Chairman of the Ohio Supreme Court's Rules Advisory Committee and of its Evidence Rules Subcommittee. The author was a member of the Ohio Constitution Modernization Commission. He is a fellow of Litigation Counsel of America and member of the Order of the Coif and the American Society of Writers on Legal Subjects.

1. Although this discussion will treat choice of law as arising only once in a case, reality is frequently more complex. The common law recognized that the law of different jurisdictions may apply to separate issues in a single case. It referred to this possibility as "dépeçage," which "means 'choice of law issue by issue; the practice of applying rules of different jurisdictions to different issues in a legal dispute.'" BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 266 (3d ed. 2011). The American Law Institute's Restatement (Second) Conflict of Laws recognizes that practice. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(c) (AM. LAW INST. 1971) note 34 *infra*.

2. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941) ("[Each state] is free to determine whether a given matter is to be governed by the law of the forum or some other law.").

3. *Kryger v. Wilson*, 242 U.S. 171, 176 (1916) ("[D]octrines of the conflict of laws . . . [are] purely a question of local common law."). See also *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516 (1953) ("The states are free to adopt such rules of conflict of laws as they choose . . ."); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 542–43 (1981) (Stevens, J., concurring) ("It is not this Court's function to establish and impose upon state courts a federal choice-of-law rule, nor is it our function to ensure that state courts correctly apply whatever choice-of-law rules they have themselves adopted."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 cmt. b (AM. LAW INST. 1971) ("A court applies the law of its own state, . . . including its own conception of Conflict of Laws. It derives this law from the same sources which are used for determining all its law: from constitutions, treaties and statutes, from precedent, from considerations of ethical and social need and of public policy in general, from analogy, and from other forms of legal reasoning. . . .").

4. A choice-of-law question was presented as early as 1788 in *Camp v. Lockwood*, 1 U.S. 393 (1788), 1 Dall. 393 (C.P. Phila. Cty. 1788). See also JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834).

5. RESTATEMENT OF CONFLICT OF LAWS, INTRODUCTION (AM. LAW. INST. LAW INST. 1934).

6. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. LAW. INST. 1971).

7. See generally Sonja M. Haller, Note: *Ohio Choice-of-Law Rules: A Guide to the Labyrinth*,

the Supreme Court of Ohio declared in *Morgan v. Biro Manufacturing Company* that “[w]e hereby adopt the theory stated in the Restatement of the Law of Conflicts [sic], as it . . . provides sufficient guidelines for future litigation.”⁸ Underscoring the sweep of this wholesale incorporation into Ohio law, the court in *American Interstate Insurance Company v. G & H Service Center, Inc.* made clear that in *Biro Manufacturing* it had “adopted the Restatement (Second) in its entirety.”⁹

The entire content of the Restatement (Second) constitutes, at best, merely secondary legal authority regarding choice-of-law rules and principles.¹⁰ So, the supreme court’s prospectively “adopting” the entire content of this secondary authority as law that will control future decisions is a most unusual exercise of a court’s adjudicative authority. It is even more remarkable¹¹—for a variety of reasons—that a court in one fell swoop would summarily dispense with the gradual, incremental process by which courts, through a series of cases, eventually develop common-law rules of decision. Had that process been followed in developing Ohio’s choice-of-law rules, the courts would have had the benefit of arguments that parties with personal but adverse interests would offer for how Ohio should choose the specific rule of decision to apply generally in cases like theirs.

This Article does not focus, however, on the odd way in which the Restatement (Second) has been elevated into a fixture of Ohio law. It will focus rather on the process that the Restatement (Second) prescribes for making a choice of law and, briefly, on how Ohio courts have used that process. Despite the Ohio Supreme Court’s emphatic reminder in *American Interstate* that Ohio follows the “entire” Restatement (Second),¹² the Ohio Supreme Court and lower courts do not apply the entire process that the Restatement (Second) prescribes for making

44 OHIO ST. L.J. 23 (1983).

8. *Morgan v. Biro Mfg. Co.*, 15 Ohio St. 3d 339, 341–42 (1984) (*per curiam*) (dictum adopting entire Restatement (Second) of Conflict of Laws).

9. *Am. Interstate Ins. Co. v. G&H Serv. Ctr., Inc.*, 112 Ohio St. 3d 521, 522 (2007).

10. *See, e.g.*, John Henry Merryman: *The Authority of Authority*, 6 STAN. L. REV. 613, 629 (1954).

11. A district court in Indiana was asked to predict that Ohio would adopt the entire Restatement (Second) for all choice-of-law case that might arise. Unaware that the Ohio Supreme Court had already done just that, the court refused to believe that a court would delegate lawmaking authority to the ALI. *See Ormond v. Anthem, Inc.*, No. 1:05-cv-1908-DFH-TAB, 2008 U.S. Dist. LEXIS 30230, at *57–58 (S.D. Ind. 2008) (“It is a much bigger leap to assume that the Ohio court’s decision to adopt some sections of the Restatement amounted to a delegation to the American Law Institute of the authority to craft Ohio’s conflicts of law jurisprudence through future revisions of the Restatement. The court is unwilling to make that leap.”).

12. *Am. Interstate Ins. Co.*, 112 Ohio St. 3d at 522.

choices of law. They have, instead, consistently applied only a portion of that process.

Even after *American Interstate*, Ohio courts have used the Restatement (Second) the same way as courts do in virtually every other jurisdiction that follows the Restatement (Second) to any extent. Their method is simply to pluck a seemingly pertinent rule or two out of the Restatement (Second)'s 400-plus subject-matter-specific rules for choosing the state with the most significant relationship with a particular issue in a lawsuit. They then use the extracted rule or rules to guide their choices of law. They do so, however, without taking account of the premises that the introductory sections of the Restatement (Second) built into subject-matter-specific rules. Those premises can alter—often materially—the apparent meaning of specific rules.

By using the Restatement (Second) in a selective and detached way, a court limits its consideration to only the forum state's choice-of-law rules and principles. But in doing so, courts ignore two steps that are elemental in the Restatement (Second)'s system for making a choice of law. Both of these steps require the court in the forum state to take into account choice-of-law rules of foreign states, not just the forum state's choice-of-law rules. The Supreme Court of Ohio missed both of the steps in *Biro Manufacturing Company*.¹³ And, it missed them again in *American Interstate*,¹⁴ even after reaffirming Ohio's adoption of "the Restatement in its entirety."¹⁵

This Article will discuss two steps that are commonly missed in the Restatement (Second)'s method for choosing law. Both steps call for the forum court to take account of foreign states' choice-of-law rules. One step occurs early in a choice-of-law analysis. The other occurs at the end. The purposes of the reviews differ, but the steps are both important in the Restatement (Second)'s system. The Article will try to explain why courts that are otherwise willing to follow the Restatement (Second) routinely miss them. Finally, it will demonstrate why failure to implement the steps can result in a choice-of-law analysis that encourages forum-shopping.

13. *Morgan*, 15 Ohio St. 3d at 342–43 (“When confronted with a choice-of-law issue . . . analysis must begin with Section 146 [Personal Injury].”) (Kentucky law applied).

14. *Am. Interstate Ins. Co.*, 112 Ohio St. 3d at 522–24, 526 (“[The court began choice-of-law analysis by] determin[ing] whether Sections 145 [the General Principle of choice of law for torts] and 146 [Personal Injury] or Section 185 of the Restatement [Action for Tort of Wrongful Death After Rendition of an Award] applies to determine which state law controls”) (Louisiana law applied).

15. *Id.* at 522 (referring to *Morgan*, 15 Ohio St. 3d.).

II. THE RESTATEMENTS; CONFLICT OF LAWS

A. *Restatement (Second) Conflict of Laws*

Although the Restatement (Second) is the most widely accepted among a variety of methodologies for choosing law to be applied in litigation, it nevertheless is accepted by only a minority of states as an authoritative expression of their jurisdiction's choice-of-law rules.¹⁶ Ohio is among that minority of states. The Restatement (Second)'s spotty acceptance reflects its controversial origin and novel content.

The American Law Institute published the Restatement (Second) of Conflict in 1971 as part of its second set of Restatements.¹⁷ In publishing the first set, which covered various areas of the common law, the ALI's objective had been narrow. Its goal was "to present an orderly statement of the general common law of the United States."¹⁸ The "Restatements"

16. See Shirley A. Wiegand, *Fifty Conflict of Laws Restatements: Merging Judicial Discretion and Legislative Endorsement*, 65 LA. L. REV. 1, 3–4 (2004). See generally Symeon C. Symeonides, *Choice-of-Law in the American Courts in 2015: Twenty-Ninth Annual Survey*, 64 AM. J. COMP. L. 243, 291 (2016). Since 1986, the American Association of Law Schools Section on Conflict of Laws has annually counted how many states have gravitated to the Restatement (Second)'s revolutionary approach to choice of law since it was published in 1971. The count does not track all subject areas covered in the Restatement (Second), only the Restatement (Second)'s sections on choice of law for torts and contracts. "[T]he American Conflict 'revolution' has not had an appreciable impact outside these two areas." P. John Kozyris & Symeon C. Symeonides, *Choice of Law in the American Courts in 1989: An Overview*, 38 AM. J. COMP. L. 601, 602 (1990).

17. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *Introduction* (AM. LAW INST. 1971).

18. See RESTATEMENT OF CONFLICT OF LAWS, *Introduction* (AM. LAW INST. 1934):

The object of the [American Law] Institute in preparing the Restatement is to present an orderly statement of the general common law of the United States

.....

The Institute recognizes that the ever increasing volume of decisions . . . establishing new rules or precedent [omitted comma] . . . and the numerous instances in which the decisions are irreconcilable, taken in connection with the growing complications of economic and other conditions . . . are . . . increasing the law's uncertainty and lack of clarity and that this will force the abandonment of our common law system . . . unless a new factor promoting certainty and clarity can be found.

The careful restatement of our common law by the legal profession as represented in the Institute is an attempt to supply this needed factor. The object of the Institute is accomplished in so far as the legal profession accepts the Restatement as prima facie a correct statement of the general law of the United States.

Id.; see also *Kansas v. Nebraska*, 135 S. Ct. 1042, 1064 (2015) (Scalia, J., concurring in part and dissenting) ("The object of the original Restatements was to 'present an orderly statement of the general common law' Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be. . . . [I]t cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law."); Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 217 n. 62 (2007) (quoting LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960* 14 (UNC Press Enduring Editions 1986)). Regarding the inception of the

in the first set were, thus, aptly named. Courts frequently accepted them as reliable secondary authority that accurately described the common-law rules in this country.¹⁹

In publishing the second set, the ALI had a very different purpose.²⁰ It would no longer strive “to present an orderly statement of the general common law of the United States.”²¹ Rather, its purpose was to change the law as it had been stated in the first Restatement.²² It prescribed new forms of analysis that would produce results that sometimes differed from what accepted common-law rules produced. Although the ALI changed—consciously and purposefully—its fundamental method for choosing law, it nevertheless preserved for the second set the same title that it had used when the ALI named the first set—“Restatements.”²³

Restatement movement in 1923 and its early development, Adams quotes Kalman as writing:

The [I]nstitute directed its reporters to “make certain much that is now uncertain and to simplify unnecessary complexities” and “to promote those changes which will tend better to adapt the laws to the needs of life.” As work progressed, the [I]nstitute abandoned the second objective, telling its reporters to “state clearly and precisely in the light of the decisions the principles and rules” of existing law. Increasing legal certainty became the [I]nstitute’s only objective, a goal underlined by its decision to print the rules in especially bold letters.

Id.

19. For an entertaining description of the fidelity that academics who worked on the first set of Restatements held for the common law, see generally W. Barton Leach, *The Restatements as They Were in the Beginning, Are Now, and Perhaps Henceforth Shall Be*, 23 A.B.A. J. 517, 519 (1937) (“[T]he statements of the Institute were really statements by groups of school-teachers [i.e., law professors]; for by necessity the basic work of the Institute has to be done by the Reporters and the Advisory groups. . . . I as one of them do not deplore the fact that the American Bar seems not to be ready to substitute decisions by professors arrived at *in abstracto* in the retirement of the conference room for decisions by judges arrived at *ad hoc* in the presence of the contending vital forces of the court room. We have our appropriate and very useful functions; but they are in aid of the traditional processes of the common-law, not in substitution for them.”).

20. See *Kansas v. Nebraska*, 135 S. Ct. at 1064 (“Over time, the Restatements authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be. . . . And it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law.”).

21. *Id.*

22. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 17.

23. See Herbert Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS U. L. J. 185 (1968). Herbert Wechsler was executive director when the ALI published the Restatement (Second) Torts and started work on the Restatement (Second) of Conflict of Laws. He described the attack directed at the ALI for publishing rule 402A, “Special Liability of Seller of Product for Physical Harm to User or Consumer,” as black-letter law in a draft of its Restatement (Second) Torts. *Id.* at 187-92. Rule 402A was a proposition that was followed in only a minority—perhaps even a distinctly small minority—of jurisdictions. *Id.* at 189. Mr. Wechsler quotes verbatim the criticism leveled at the ALI. The critics accused the ALI of dangerously misrepresenting the current state of American law by publishing a minority rule as black-letter law in a “restatement.” *Id.* at 191 n.15.

The most dramatic instance of that decision was the Restatement (Second) of Conflict of Laws. In the Introduction, the ALI stated:

[The Restatement (Second)] is far more than a current version of the old. . . . [W]hat is presented here is a fresh treatment of the subject. . . . The essence of that change has been . . . jettisoning . . . of rigid rules in favor of standards of greater flexibility, [thereby] according sensitivity in judgment to important values that were formerly ignored. Such a transformation in the corpus of the law reduces certitude as well as certainty, posing a special problem in the process of restatement. . . . The result presents a striking contrast to the first Restatement in which dogma was so thoroughly enshrined. . . .

. . . .

The retreat from dogma . . . is [a] pervasive . . . feature of this work²⁴

Despite being a fundamentally “fresh treatment of the subject,” an innovative “retreat from dogma” and a bold “jettisoning . . . of rigid rules,”²⁵ the proselyting new treatise was palmed off as a “Restatement,” a bait-and-switch that implied to all but the most diligent researcher that the Restatement (Second) was—like the first—an objective but merely updated synthesis of existing law. It was anything but that.

The Restatement (Second) of Conflict of Laws was the ALI’s “attempt to furnish rules in an area of law . . . rather than a systematic record of the law as it actually is used by the courts.”²⁶ “As a descriptive ‘restatement,’ it was doomed to failure from the outset because it is impossible to ‘restate’ a revolution that is in progress and whose outcome is in doubt.”²⁷ Emerging from the midst of an upheaval, the Restatement

24. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 17, at Introduction.

25. *Id.*

26. Sonja M. Haller, Note: *Ohio Choice-of-Law Rules: A Guide to the Labyrinth*, 44 Ohio St. L.J. 239, 247–48 (1983) (citing E. SCOLES & P. HAY, CONFLICT OF LAWS § 2.15 (1982)).

27. William M. Richman & William L. Reynolds, *Prolegomenon to an Empirical Restatement of Conflicts*, 75 IND. L. J 417, 420 (2000). As recently as 2013, the ALI described its set of Restatement (Second)s as genuine descriptions of law as the courts have announced it. In describing the whole set of Restatements, the ALI assures the reader that “Restatement black-letter formulations assume the stance of describing the law as it is.” *Projects Overview*, AMERICAN LAW INSTITUTE, <http://www.ali.org/index.cfm?fuseaction=projects.main> [<http://perma.cc/78L6-MEJ6>] (last visited Aug. 21, 2013).

That representation about descriptiveness may well be true about the Restatements (Second) on some subjects. It may even be true today about Restatement (Second) of Conflict of Laws in the minority of jurisdictions that have wrapped themselves in it to some extent since 1971. But when the ALI first offered the Restatement (Second), much of the restatement had been constructed of whole cloth—“whole cloth” in this instance meaning little more supporting authority than the heatedly debated theories about conflict of law advanced by “warring factions of choice-of-law

(Second) inevitably became “a complex, negotiated settlement among several warring factions of choice-of-law revolutionaries.”²⁸

The ALI tried “to present the widely divergent views extant at the time and to jumble together incompatible schools of thought.”²⁹ “In fact, the Restatement (Second) of Conflict of Laws . . . stands as a warning against the efforts to enshrine disparate and vacillating conflicts doctrines in black-letter rules.”³⁰ Inevitably, the result was “a radically different approach to choice of law,”³¹ a jumbling “cacophony of discordant voices,”³² and “a system in which each case is decided as if it were unique and of first impression.”³³

Scholars recognized very early that the Restatement (Second)’s system for choosing law amounts to little more than “legal impressionism.”³⁴ They saw that it would become merely a disguise for a process that is no more substantial or predictable than “judicial intuition.”³⁵ By “mixing together all manner of doctrinal currents, it simply furnished courts with any number of plausible reasons to support whatever results they wished to reach.”³⁶ Some legal scholars pleaded with the ALI not to publish the Restatement (Second).³⁷ They failed.

Larry Kramer, former dean of Stanford Law School, described the state of affairs since ALI’s publication of the Restatement (Second) Conflict of Laws. He sees the Restatement (Second) as having degraded the role of law in conflicts analysis and, as a result, the persuasiveness of judicial selections of controlling law.

[I]t is hard to read a lot of choice of law opinions without being terribly disappointed in the quality of the analysis, which tends to be unsophisticated, unthoughtful, and often unreasoned. . . . Much of the blame can

revolutionaries.” Richman & Reynolds, *supra*, at 420.

28. Richman & Reynolds, *supra* note 27, at 420.

29. Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L. J. 403, 405 (2000). Arthur Taylor von Mehren, *Recent Trends in Choice-Of-Law Methodology*, 60 CORNELL L. REV. 927, 964 (1975).

30. *Id.*

31. R. CRAMPTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS: CASES B COMMENTS B QUESTIONS* 117 (5th ed. 1993).

32. Juenger, *supra* note 29, at 404.

33. P. John Kozyris, *Interest Analysis Facing Its Critics—And, Incidentally, What Should Be Done About Choice of Law for Products Liability?*, 46 OHIO ST. L.J. 569, 580 (1985).

34. *See, e.g.*, Kurt H. Nadelmann, *Impressionism and Unification of Law*, 24 AM. J. COM. L. 1, 11 (1976).

35. Patrick J. Borchers, *Courts and the Second Conflict Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1233 (1997).

36. Juenger, *supra* note 29, at 406.

37. Albert A. Ehrenzweig, *The Second Conflict Restatement, A Last Appeal for its Withdrawal*, 113 U. PA. L. REV. 1230 (1965).

perhaps be attributed to the dominance of the Second Restatement, since its undirected, multifactor analysis invites post-hoc rationalizing of intuitions about the applicable law. Or perhaps this states the relationship backwards, and it is the judges' poor understanding of choice of law that accounts for the dominance of the Second Restatement. Either way, the level of discourse in the courts is depressingly low.³⁸

He is not alone in his dark assessment. Another critic has characterized the situation that the Restatement (Second)'s method has produced: greater uncertainty for litigants and added complexity for judges. She observes that, due to the emergence of the Restatement (Second) Conflict of Laws,

it has become difficult to predict what a court will do when faced with choice of law issues, and each case seems to demand an ad hoc determination. For attorneys, this lack of predictability may discourage settlement; it certainly inhibits an accurate case valuation. For judges, choice of law issues take an inordinate amount of time and require a fairly complex analysis.

The current situation has been described in a variety of ways, generally unfavorably. It is "a total disaster," "chaos," "gibberish," "a veritable playpen for judicial policymakers, ". . . a maze constructed by professors drunk on theories."³⁹

Justice Antonin Scalia has concluded that "it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law."⁴⁰

The salient feature of Restatement (Second)'s method requires courts to balance disparate, qualitatively dissimilar factors and considerations in order to estimate which state with a possible interest in an issue in litigation has the most significant relationship to the dispute in which the issue has arisen. The thicket of factors that the Restatement (Second) prescribes range from readily provable objective facts⁴¹ to vague abstractions that are incapable of evidentiary proof.⁴²

38. Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 466 (1991).

39. Wiegand, *supra* note 16, at 4 (internal citations omitted).

40. *Kansas v. Nebraska*, 135 S. Ct. at 1064.

41. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2)(c) (AM. LAW INST. 1971) ("the domicile, residence, nationality, place of incorporation and place of business of the parties . . .").

42. *See, e.g., id.* § 6(2)(a) ("the needs of the interstate and international systems"); § 6(2)(c) ("the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue").

Section 6 is the lodestar of the Restatement (Second)'s approach to choice of law. It sets forth the principles that underlie the method for all choices of law, whether in torts, contracts, property law, trusts, etc.⁴³ In § 6 comment *c*, the ALI acknowledges that these foundational principles on which its entire choice-of-law system is based will “point in different directions in all but the simplest case.”⁴⁴ Many of the area-specific rules for choosing law, which make up the bulk of the Restatement (Second), are similarly unpredictable.⁴⁵

The Restatement (Second)'s kaleidoscopic balancing of hard fact against abstract policy considerations is, of necessity, fundamentally unpredictable. William L. Prosser, the renowned scholar of tort and property law, described the impossibility of balancing evidentiary facts against abstractions, like those that are featured in the Restatement (Second). He said that abstract policy considerations “can no more be balanced against evidence than ten pounds of sugar can be weighed against half-past two in the afternoon.”⁴⁶ It is fair to say that criticism of the ALI's Restatement (Second) Conflict of Laws has been deep, varied, and severe.

B. *Choice of Law in Ohio under the Restatement (Second)*

Although the Restatement (Second) is faulty, Ohio courts are obliged to apply it in deciding choice-of-law questions.⁴⁷ And it has been clear since *American Interstate* that all parts of the Restatement (Second)—not just the 400-plus area-specific, black-letter choice-of-law rules—are part of Ohio law.

43. Section § 6 contains a nonexhaustive list of considerations that a court is to take into account in the absence of statutory directive of its own state on choice of law:

- (2) . . . [T]he factors relevant to the choice of the applicable rule of law include
- (a) the needs of the interstate and international systems,
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - (d) the protection of justified expectations,
 - (e) the basic policies underlying the particular field of law,
 - (f) certainty, predictability and uniformity of result, and
 - (g) ease in the determination and application of the law to be applied.

Id. § 6(2).

44. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. *c* (AM. LAW INST.1971).

45. *See, e.g.*, Borchers, *supra* note 35, at 1238–39 (“[S]ection 145 [is] nearly as amorphous as section 6. . . . [It] is no more definite than section 6, and perhaps even less so.”).

46. William L. Prosser, *Res Ipsa Loquitur in California*, 37 CAL. L. REV. 183, 225 (1949).

47. *Am. Interstate Ins. Co. v. G&H Serv. Ctr., Inc.*, 112 Ohio St. 3d 521, 522 (2007). (“The *Morgan* court adopted the Restatement in its entirety.”) (citing *Morgan v. Biro Mfg. Co.*, 15 Ohio St. 3d 339, 341–42 (1984) (*per curiam*)).

According to the Restatement (Second), a court faced with a conflict of laws will approach it in three steps. Table 1 lays out the three-step analysis in a visual format. First, Restatement (Second) § 7 requires the court to characterize the legal issues.⁴⁸ Only by fitting issues into appropriate legal classifications can the party urging the court to apply foreign law demonstrate that the laws of the other state and the forum state conflict.⁴⁹ To determine whether a conflict exists, the court must first identify which group of subject-matter-specific rules within the Restatement (Second) to use in analyzing the states' respective relationships to the dispute.⁵⁰ Without proper classification of the issues, comparison is impossible. Because this classification is done, however, solely for the purpose of the choice-of-law analysis, the law of the forum state is generally used to determine the appropriate legal classification of the dispute.⁵¹

48. RESTATEMENT (SECOND) CONFLICT OF LAWS § 7 cmt. *b* (AM. LAW INST. 1971) (“Characterization is an integral part of legal thinking. In essence, it involves two things: (1) classification of a given factual situation under the appropriate legal categories and specific rules of law, and (2) definition or interpretation of the terms employed in the legal categories and rules of law. The factual situation must be classified to determine under what legal categories and rules of law it belongs. Likewise, the terms employed in the legal categories and rules of law must be interpreted in order that the factual situation may be placed under the appropriate categories and that the rules of law may properly be applied.”).

49. *See, e.g.*, *Cross v. Carnes*, 132 Ohio App. 3d 157, 168 (1998) (“[T]he party asserting the application of the foreign law has the initial burden to demonstrate such a conflict. . . . Here, appellants have failed to do the same. As a result, we will apply the law of the forum state, Ohio . . .”).

50. *Ohayon v. Safeco Ins. Co. of Ill.*, 91 Ohio St. 3d 474, 476 (2001) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7, cmt. *b* (“[C]lassification of a given factual situation under the appropriate legal categories and specific rules of law.’ . . . We must *classify* the Ohayons’ cause of action before we answer the choice-of-law question raised in their complaint because different choice-of-law rules apply . . .”).

51. RESTATEMENT (SECOND) CONFLICT OF LAWS § 7(2) (AM. LAW INST. 1971) (“The classification and interpretation of Conflict of Laws concepts and terms are determined in accordance with the law of the forum, except as stated in § 8.”). Section 7 comment *c* states:

When the same legal term or concept appears both in the local law of a state and in its choice-of-law rules, the meaning which has been given the term or concept in local law does not determine the meaning to be given the term or concept in choice of law.

Id. § 7 cmt. *c*.

Table 1 – Restatement (Second) Conflict of Laws Analysis	
<p>Step 1: (A) Court determines whether foreign state law would characterize the nature of claim as contractual or restitutionary. (B) Court determines what choice of law the foreign state court would apply to the claim.</p>	Restatement (Second) § 7
<p>Step 2: Forum court identifies the state that has the most significant relationship to the disputed issues.</p>	Restatement (Second) § 6, and §§ 11-423
<p>Step 3: If the court finds (a) that a conflict exists between the forum state's local law and that of the foreign state and (b) that the foreign state has the most significant relationship to the issue in dispute, the court must then decide how much of that foreign state's law to apply.</p>	Restatement (Second) § 8

The following hypothetical will illustrate the operation of this first step in the Restatement (Second)'s method. Assume that two insurance companies, A and B, provide coverage to the same insured for successive policy periods. The insured X, a resident of Ohio, was sued in Maryland on a claim that triggered coverage under both company A's policy and company B's policy. Insurance company A defended X in Maryland and paid a judgment rendered against it. Having fully performed its contractual obligation to provide coverage to the insured, company A sues company B in Ohio claiming equitable contribution, seeking to recover company B's proportionate share of the obligation they owed to X. Company A contends that their liability arises out of the insurance policies and that Maryland's contract law applies to the dispute over contribution. Company B contends that A's claim against B is for restitution, that there is no privity between them, and that Ohio's law regarding restitution applies to the dispute. To decide whether the issues raised in A's claim for

relief is an action governed by contract law or by the law of restitution, Ohio generally applies its own law to characterize the dispute. The court would—probably⁵²—apply Ohio law and hold that the character of company A’s claim against B is restitution, not contract.⁵³

The second step calls for the forum court to identify the state that has the most significant relationship to the disputed issues. In the Restatement (Second), this second step is addressed in § 6 and in §§ 11–423. A court needs to conduct a choice of law analysis, however, only when there is an actual conflict between Ohio’s local law (i.e., its substantive law excluding its conflicts-of-law rules) and the local law of the other state.⁵⁴ In the hypothetical described above, the court would compare Ohio’s law of restitution with Maryland’s, applying the considerations listed in Restatement (Second) § 221 Restitution to determine which state has the more significant relationship with the claim for restitution.⁵⁵

52. At one point, the Restatement (Second) seems to waffle on this point. Under the hypothetical, the Ohio court may—or may not—first have to determine whether Maryland law would characterize the nature of company A’s claim as contractual or restitutionary and, then, what choice of law a Maryland court would make regarding whether to apply Maryland or Ohio’s law to company A’s claim. Cf. RESTATEMENT (SECOND) CONFLICT OF LAWS § 7(2) (AM. LAW INST. 1971) *supra* note 51, and Sections IV and V *infra*.

53. Ohio regards claims between parties who share a common obligation to third parties as claims for restitution. See *Robinson v. Boyd*, 60 Ohio St. 57, 65–66 (1899) (“[An action to recover a shared obligation] is not founded on contract, but arises from the equitable consideration that persons subject to a common duty or debt should contribute equally to the discharge of the duty or debt; and so, where one performs the whole duty or pays the debt, or more than his aliquot part, each of the others should contribute to him, so as to equalize the discharge of what was a common burden.”).

54. See *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St. 3d 470, 474–75 (2006) (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 1 cmt. b (AM. LAW INST. 1971) (“[S]everal of the appellate courts in Ohio . . . have held that an actual conflict between Ohio law and the law of another jurisdiction must exist for a choice-of-law analysis to be undertaken.”)). See also *Andersons, Inc. v. Consol, Inc.*, 185 F. Supp. 2d 833, 836 (N.D. Ohio 2006); *Mécanique C.N.C., Inc. v. Durr Envtl., Inc.*, 304 F. Supp. 2d 971, 975 (S.D. Ohio 2004) (“If the two states would use the same rule of law or would otherwise reach the same result, it is unnecessary to make a choice of law determination because there is no conflict of law.”).

55. § 221 Restitution

(1) In actions for restitution, the rights and liabilities of the parties with respect to the particular issue 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 a relationship between the parties was centered, provided that the receipt of enrichment was substantially related to the relationship,
- (b) the place where the benefit or enrichment was received,
- (c) the place where the act conferring the benefit or enrichment was done,
- (d) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (e) the place where a physical thing, such as land or a chattel, which was substantially

But before beginning the comparison of the states' respective relationships with the dispute over restitution, the Restatement (Second) instructs the forum court to narrow the field of states that are candidates for having the most significant relationship and, therefore, having its law applied to the disputed issues.⁵⁶ It is in this step, which is discussed more fully in Section III below, that the Restatement (Second) urges the first consideration of the choice-of-law rules that the foreign states' courts might use.

Third, if the court finds (a) that a conflict exists between the forum state's local law and that of the foreign state and (b) that the foreign state has the most significant relationship to the issue in dispute, the court must then decide how much of that foreign state's law to apply. This third step is addressed in Restatement (Second) § 8 and it is at this point that the Restatement (Second)'s method of choosing law requires a second consideration of the foreign states' choice-of-law rules. This step is addressed in Section III below.

III. THE IMPORTANCE OF A FOREIGN STATE'S CHOICE-OF-LAW RULES TO THE FORUM COURT'S CHOICE-OF-LAW ANALYSIS

A. *Foreign State's Choice-of-Law Rules as Relevant in the Identification of the State Having the Most Significant Relationship*

Most of the Restatement's 400-plus black-letter rules are devoted to suggestions, broken down by areas of law, for how to identify the state having the most significant relationship in the disputed issues of law. In the hypothetical described above, the Ohio court would assess Maryland's and Ohio's respective relationships with the company's disputed claim for equitable contribution. Because Ohio characterizes the claim as one for restitution, the court would analyze the interests under the considerations listed in Restatement (Second) § 221⁵⁷ and § 6.⁵⁸

But before the forum court applies the black-letter rules, the Restatement (Second) § 8 comment *k* directs the court to review the

related to the enrichment, was situated at the time of the enrichment.

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

RESTATEMENT (SECOND) CONFLICT OF LAWS § 221 (AM. LAW INST. 1971).

56. *Id.* § 6 cmt. *c.*

57. *Id.* § 221, *supra* note 55.

58. *Id.* § 6.

foreign state's choice-of-law rules to determine whether courts sitting there would apply that state's local law if the pending dispute had been filed there.⁵⁹ This step is not the subject of a black-letter rule, but it is mentioned repeatedly in the Restatement (Second).⁶⁰ It is important as a first step because, if taken, it may be able to short-cut an otherwise lengthy choice-of-law analysis. The reason for this step is obvious, at least according to the ALI's way of thinking: if a court sitting in the other state would not apply that state's own local law to resolve the dispute, that fact alone is enough—according to the Restatement (Second)—to demonstrate that the other state does not have a significant relationship to the dispute.⁶¹ Thus, the forum court may remove a state from further consideration even if the black-letter rules elsewhere in the Restatement might eventually have identified that state as having the most significant relationship to the dispute.

59. *Id.* § 8 cmt. *k* (“An indication of the existence of a state interest in a given matter, and of the intensity of that interest, can sometimes be obtained from an examination of that state’s choice-of-law decisions. For example, the fact that a state’s choice-of-law decisions provide for application of the local law of another state to determine a certain issue may afford some indication that the state has little or no interest in the application of its relevant local law rule in the resolution of that issue.”).

60. *See, e.g., Id.* § 145 cmt. *h* (“[I]n judging a state’s interest in the application of one of its local law rules, the forum should concern itself with the question whether the courts of that state would have applied this rule in the decision of the case.”); § 149 cmt. *c*, illus. 1 (“If it were to be found that an X court would not have applied its rule to the facts of the present case, the arguments for applying the Y rule would be even stronger”); § 188 cmt. *e*, illus. 1; § 189 cmt. *d*, illus. 2 (“If, on the other hand, it were to appear that the X courts would not apply their rule of incapacity to the facts of the present case, there would be ground for the conclusion that no important interest of X would be affected if the Z court were to uphold the contract by application of Y local law”); § 191 cmt. *f*, illus. 6 (“If, on the other hand, it were to appear that the X courts would not apply their rule of illegality to the facts of the present case, there would be ground for the conclusion that no important interest of X would be affected if the Z court were to uphold the contract by application of Y local law”); § 222 cmt. *e* (“[I]n judging a given state’s interest in the application of one of its local law rules, the forum should concern itself with the question whether the courts of that state would have applied this rule in the decision of the case.”); § 244 cmt. *m* (“[I]n judging a given state’s interest in the application of one of its local law rules, the forum should concern itself with the question whether the courts of that state would have applied this rule in the decision of the case.”); § 283 cmt. *m* (“The fact that these courts would not have applied their rule to invalidate the marriage provides conclusive evidence that no sufficiently strong policy of this state is involved.”); § 287 cmt. *h* (“[I]n judging a state’s interest in the application of one of its local law rules, the forum should concern itself with the question whether the courts of that state would have applied this rule in the decision of the case.”); § 291 cmt. *g* (“[I]n judging a state’s interest in the application of one of its local law rules, the forum should concern itself with the question whether the courts of that state would have applied this rule in the decision of the case.”); § 302 cmt. *j* (“[I]n judging a given state’s interest in the application of one of its local law rules, the forum should concern itself with the question whether the courts of that state would have applied this rule in the decision of the case.”); § 303 cmt. *h* (“The fact . . . that the courts of the state of incorporation would not have applied their local law rule in the decision of the particular issue may indicate that no important interest of that state would be infringed if the rule were not applied by the forum”).

61. *Id.* § 8 cmt. *k*, *supra* note 59.

In the hypothetical, the Ohio court would review Maryland's choice-of-law principles to determine whether a Maryland court would, if presented with the same case, apply Maryland law or the law of some other state. The forum court would make this determination before attempting to identify which state has the most significant relationship with the dispute. According to the Restatement (Second),⁶² if the Ohio court found that a Maryland court would not apply Maryland's law of restitution to company A's claim against company B, an Ohio court could eliminate Maryland from further consideration. And that might well be what would happen in the hypothetical. The Ohio court might well find that a court in Maryland would apply the law of Ohio to this dispute because, in the case of claims between insurers who allegedly insure the same insured under separate contracts, Maryland will apply the law of the state where the two contracts were made.⁶³ So, under the Restatement (Second)'s elimination-step, Maryland would be eliminated from consideration.

The inference that the ALI urges from a foreign state's failure to apply its own law to the dispute is hardly compelling. Whether a state has the most significant relationship is an important—indeed, central—feature of the Restatement (Second)'s method. But it is not the central consideration in other theories for choice of law to which some other states still cling. That, of course, is precisely the case with Maryland in the hypothetical.

And Maryland is not an isolated example. A number of states still follow the Restatement (First) of Conflict of Laws.⁶⁴ The Restatement (First) most often employed mechanistic determinations in making a choice of law, focused on more tangible determinants than the often intangible factors and abstract considerations that are used in the Restatement (Second)'s system of analysis. The Restatement (First)'s rule for choosing law in a dispute over the validity of a contract directs the forum court to apply the law of the state where the agreement was formed.⁶⁵ When the issues involve performance of a contract, the

62. *Id.*

63. *See* *Interstate Fire & Cas. Co. v. Dimensions Assurance Ltd.*, 843 F.3d 133, 136–37 (4th Cir. 2016) (quoting *Perini/Tompkins Joint Venture v. Ace Am. Ins. Co.*, 738 F.3d 95, 100 (4th Cir. 2013)) (“In insurance contract disputes, Maryland follows the principle of *lex loci contractus*, which applies the law of the jurisdiction where the contract was made. For choice of law purposes, a contract is made where the last act is performed which makes the agreement a binding contract. Typically, this is where the policy is delivered and the premiums paid.”) (internal quotation marks and citation omitted).

64. *See* *Symeonides*, *supra* note 16.

65. RESTATEMENT OF CONFLICT OF LAWS § 332 (AM. LAW INST. 1934).

Restatement (First) directs the forum court to apply the law of the place where performance under the contract was due.⁶⁶ The Restatement (Second), by comparison, directs the forum to make the choice by weighing a variety of factors⁶⁷ that vary depending on the subject matter of the contract.⁶⁸ So, if a foreign state still follows the Restatement (First), it would make a choice of law in a contract case without ever balancing how significant the competing states' interests are with respect to the contract in dispute.

The elimination-step, while elemental, is antithetical to the Restatement (Second)'s quest to identify the state with the most significant relationship to the dispute. Because the Restatement (Second) urges a forum court to ignore a state for reasons that have nothing to do with the criteria it would otherwise use to assess the significance of that state's relationship to a dispute, this elimination-step induces the court to drop a state from consideration for no better reason than that state uses a choice-of-law system different from the Restatement (Second)'s. After eliminating a state that may in fact have the more significant relationship—as measured by the Restatement (Second)—the court may be forced then to apply the law of a state that Restatement (Second)'s method would otherwise have eliminated. Again, consider Maryland in the hypothetical. It seems that to the ALI, proselytizing adherence to its method is more pressing than identifying consistently the state with the most significant relationship.

66. *Id.* § 358.

67. RESTATEMENT (SECOND) CONFLICT OF LAWS, § 188 (1) and (2) state:

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the 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.

Id. § 188(1)–(2).

68. *Id.* § 188(3) states, “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.”

B. *The Foreign State's Choice-of-Law Rules as Relevant in Determining How Much of the Foreign State's Law Should be Applied*

The Restatement's recommendation for deciding how much of the other state's law to apply is set out in § 8. The section is entitled "Applicability of Choice-Of-Law Rules of Another State (Renvoi)."⁶⁹ Subparts (1) and (2) of § 8 identify the choice that the forum court faces—whether to apply the other state's "local law" (i.e., its substantive law excluding its conflict-of-law rules) or "whole law" (i.e., its substantive law plus its conflict-of-law rules). These two subparts of § 8 set up a default rule and an exception.

Subpart (1) states what the ALI proposes as the default rule: when the forum court state decides to apply the law of another state, the court should apply only the local law of that state, i.e., only its substantive law, ignoring the state's conflict-of-law rules and principles.⁷⁰ The ALI acknowledges, however, that this default rule creates a fundamental problem. If the forum court applies only the local law of the other state, the forum court may end up deciding the case differently from how a court sitting in the other state would decide the very same case.⁷¹ This potential for inconsistency exists because, under the Restatement (Second)'s default rule, the forum court will consciously ignore a segment of the other state's law—that state's choice-of-law rules—even though a court sitting in that state and faced with the identical case would necessarily apply those rules. The ALI recognizes that this inconsistency of results is an inescapable possibility under its default rule.⁷² Subpart (2) states an exception to the default rule of Subpart (1). It states that: "When the objective of the particular choice-of-law rule is that the forum reach the same result on the very facts involved as would the courts of another state, the forum will apply the choice-of-law rules of the other state, subject to considerations of practicability and feasibility."⁷³

69. *Id.* § 8.

70. *Id.* § 8(1).

71. *Id.* § 8 cmt. 1.

72. *Id.* § 8 cmt. d ("When reference is to 'law' of another state. . . Here the word 'law', as it appears in the choice-of-law rule in question, . . . can be characterized as referring to the local law of the other state. **If so, the matter at hand will not necessarily be decided as a court of the other state would have decided in the actual case.** . . . In the alternative, the word 'law' in the particular choice-of-law rule can be characterized as referring to the entire law of the other state, including its choice-of-law rules. If so, the effort will be made to decide the case in the same way as a court of the other state would have decided on the very facts involved.") (emphasis added).

73. *Id.* § 8(2).

This black-letter rule in the Restatement (Second) instructs the forum court to ignore the default rule and to apply the whole law of the foreign state if to do so would serve a public policy **of the forum state**.⁷⁴ According to § 8, whether to apply the local law or the whole law of the foreign state—i.e., the state with the most significant relationship as measured by § 6 and §§ 11–423—is a question that is directly controlled by the forum state’s public policy regarding its courts’ decisions being uniform with judicial decisions of that other state. The Restatement emphasizes the significance of this policy-choice by mentioning it twice in the comments to § 8, once in comment *g*⁷⁵ and again in comment *e*.⁷⁶

These two comments are densely written, like most of the comments in the Restatement (Second). But the point is eventually clear: subpart (2) of § 8 recognizes that a forum state may well have a public policy that encourages its courts to reach the same results as the courts of the other state would reach. If the forum state has that policy, courts in the forum state should apply the whole law of the foreign state. As the Restatement (Second) puts it, if “the objective of the particular choice-of-law rule [in the forum state] is that the forum reach the same result on the very facts

74. The Restatement (Second) makes clear—well, as clear as the Restatement (Second)’s style of composition allows—that this consideration of the foreign state’s whole law is a different process than what occurred in the elimination stage. RESTATEMENT (SECOND) OF CONFLICT OF LAW § 8 cmt. *k* (AM. LAW INST. 1971) (“It should be made clear that in this instance [i.e., the state-elimination step] a state’s choice-of-law decisions are consulted for a reason entirely different from that which gives rise to the rules of [§ 8,] Subsections (1) and (2). In this instance, the forum consults the choice-of-law decisions of one or more other states for whatever aid these decisions may give it in determining **which states have interests involved and which one of those states should be the state of the applicable law. The rules of Subsections (1) and (2) do not come into play until a later stage in the proceeding, namely, after the forum has already determined which is the state of the applicable law.** These rules then provide guidance to the forum in determining whether it should apply the local law or the choice-of-law rules of the selected state.”) (emphasis added).

75. *Id.* § 8 cmt. *g* (AM. LAW INST. 1971) (“The forum should not interpret the word ‘law’ in its choice-of-law rule as referring to the entire law, including the choice-of-law rules of another state, **unless the purpose sought to be achieved by the particular choice-of-law rule is that the forum should reach the same result on the very facts involved as would the courts of the other state.** Achievement of this purpose can only be assured if the forum determines the rights and liabilities of the parties in accordance with the same local law as would have been applied by the courts of the selected state. The identity of this local law can only be ascertained by application of the latter state’s choice-of-law rules.”) (emphasis added).

76. *Id.* § 8 cmt. *e* (“Usually, . . . a choice-of-law rule, whether contained in a statute or in the common law, will do no more than direct application of the ‘law’ of a given state without further explanation. In such a case, the forum should interpret the word ‘law’ in its choice-of-law rule in the light of that rule’s underlying purpose. In other words, **the forum should make the answer to the question whether the word ‘law’ in its choice-of-law rule refers to the local or to the entire law, including the choice-of-law rules, of the given state depend upon which interpretation would be most likely to result in the attainment of the objective which the rule was designed to achieve.**”) (emphasis added).

involved as would the courts of another state,”⁷⁷ the forum state should apply the whole law of the foreign jurisdiction, not just the local law of the foreign state as the Restatement (Second)’s default rule prescribes.

C. *The Missed Steps*

The labyrinthine process described above requires a forum court to consider the foreign state’s choice-of-law rules twice: once, in determining whether a state’s choice-of-law rules may disqualify that state from the comparison of states’ respective interests and, later, in determining how much of the dominant state’s law should be applied. Although these steps are integral parts of the Restatement (Second)’s overall system for choosing law, Ohio courts have routinely ignored both of them and so have courts everywhere else. But the oversight has a consequence. It increases the opportunity and incentive for parties to engage in forum shopping.

It is difficult to understand why the first review of foreign choice-of-law rules—to determine whether a particular foreign state would apply its own local law to the conflict—is so often missed. That step is mentioned repeatedly in the Restatement (Second).⁷⁸ Perhaps it is missed because the repeated references appear, not in any of the Restatement’s black-letter rules themselves, only in the comments with their often muddy, turgid prose.

It is easier, however, to understand why the other step—the local-law-versus-whole-law question—is missed. Even though the step is set out in the bold-face text of § 8, the remaining 400-plus sections of the Restatement (Second) consistently divert a casual reader’s attention away from § 8.

The Restatement (Second) consistently, in section after section, seduces the casual reader to believe that, when a court decides that a foreign state has the most significant relationship to the dispute, the court *ipso facto* also decides that the local law of the other state must apply. Look at any of the numerous sections in the Restatement that list factors for identifying the state whose law should apply—e.g., § 145 (torts), § 188 (contracts), § 216 (negotiable instruments), § 221 (restitution), § 246 (chattels), § 293 (agency), § 294 (partnerships), § 302 (corporations), § 371 (administration of estates), etc. The black-letter rule in each one of these sections instructs flatly and categorically that, after assessing the

77. *Id.* § 8(2).

78. *See supra* note 60.

listed factors, the court should apply the “local law” of the state that the factors identify.

None of these black-letter rules prompts the reader to return to § 8. None cautions the reader that the local-law-versus-whole-law choice has merely been raised—not decided—by the court’s identification of a foreign state’s predominant relationship to the dispute. None reminds the reader that the forum state’s public policy becomes the central source of law at this point in the Restatement’s choice-of-law system. Nor do any of the sections explain how the application of only the local law, rather than the whole law of a foreign state, advances the “certainty, predictability and uniformity of result,” as urged in § 6(2)(f).⁷⁹ With the issue of local-law-versus-whole-law so effectively hidden from view, it is no surprise that courts, including those in Ohio,⁸⁰ so easily and so routinely overlook the need to consider the forum state’s public policy.

D. When Should the Whole Law of the Foreign State be Applied?

Most surprising about the Restatement (Second)’s treatment of the local-law-versus-whole-law question is just how frequently—as measured by the Restatement (Second) itself—the whole law of a foreign state might be applied. Section 8(2) says that if the public policy of the forum state favors deciding cases the same way they would be decided in the courts of the state with the most significant relationship, the forum should apply the whole law of the other state. A comment to Restatement (Second) § 8 recommends, however, that public policy should favor application of the whole law in only two narrow circumstances. Those circumstances are discussed in § 8 comment *h*.⁸¹ The descriptions of the

79. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(f) (AM. LAW INST. 1971).

80. *See, e.g.*, *Thomas v. Cook Drilling Corp.*, 79 Ohio St. 3d 547 (1997); *Am. Interstate Ins. Co. v. G & H Serv. Ctr., Inc.*, 165 Ohio App. 3d 104, 109 (2005); *Knight v. Grange Mut. Cas. Co.*, 2004 Ohio 6677 (App. 2004); *Craft v. W. Reserve Mut. Cas. Co.*, 2004 Ohio 4105 (App. 2004).

81. Restatement (Second) of Conflict of Laws § 8 cmt. *h* (Am. Law Inst. 1971) states: When purpose *of forum rule is attainment of same result*. In at least two situations, the purpose underlying the forum’s choice-of-law rule will be that the forum should reach the same result on the very facts involved as would the courts of the other state. This will **usually be so when the other state clearly has the dominant interest in the issue to be decided and its interest would be furthered by having the issue decided in the way that its courts would have done**. At least in part for this reason, questions relating to the validity and effect of a transfer of interests in land are determined as the courts of the situs would have done (see § 223). **The second situation where the purpose underlying the choice-of-law rule of the forum will usually be attainment of the same result as would have been reached by the courts of the other state is where there is an urgent need that all states should apply a single law in resolving a certain question**. Here the forum’s choice-of-law rule may seek attainment of the same result as would have been

two circumstances are, of course, obscure. What's more, the Restatement offers none of its customary hypothetical illustrations to clarify obscurity. And the Reporter's Notes likewise provide no explanation.

But the two narrow circumstances mentioned in § 8 comment *h* are not the only public-policy considerations that should, according to the Restatement (Second), influence a state's formation of choice-of-law rules. The bold-face text of § 6, the lodestar of the Restatement (Second)'s choice-of-law scheme, states that in every instance where a court is required to make a choice of law, "the factors relevant to the choice . . . include . . . (f) certainty, predictability and uniformity of result."⁸² Comment *i* to § 6 goes so far as to recognize that uniformity and predictability are matters of public policy with overarching importance to all areas of law, including choice of law.⁸³ It acknowledges that, without uniformity and predictability in choice-of-law rules, courts are more likely to decide the same dispute differently, directly creating an incentive for litigants to forum shop. Stating the point conversely, the Restatement (Second) says "[t]o the extent that they [i.e., uniformity and predictability] are attained in choice of law, forum shopping will be discouraged."⁸⁴ But the point is clear.

E. The Effect of Choosing the Whole Law Rather than Local Law

Even though the Restatement (Second) recognizes the overarching importance of uniformity and predictability in the area of conflict of law, it nevertheless recommends in § 8(1) that choice of the foreign state's local law be the default rule.⁸⁵ And in rule after rule thereafter, the Restatement (Second) directs courts to apply only "local law."⁸⁶ The Restatement (Second) makes this recommendation repeatedly even though that recommendation ignores § 8's insistence on the local nature of this policy question and even though § 6 openly acknowledges that the

reached by the courts of another state, not so much because the other state is the state of dominant interest as because that state will usually have as great an interest in the matter as any other and is also the state whose law is applied by the great majority of courts. . . . (emphasis added).

82. *Id.* § 6(2)(f).

83. *Id.* § 6 cmt. *i* ("*Predictability and uniformity of result.* These are important values in all areas of the law. To the extent that they are attained in choice of law, forum shopping will be discouraged").

84. *Id.*

85. *Id.* § 8(1).

86. *Id.*

application of foreign local law encourages forum-shopping by introducing the prospect of inconsistency and unpredictability.⁸⁷

Here's how the Restatement (Second) rationalizes this odd recommendation. It says that predictability and uniformity of results in litigation:

[are] values [that] can . . . be purchased at too great a price. In a rapidly developing area, such as choice of law, it is often more important that good rules be developed than that predictability and uniformity of result should be assured through continued adherence to existing rules.⁸⁸

Apart from the rationale itself, the reader cannot help but be surprised by the reference here to “good rules.” The ALI must surely have meant “good rulings.” “Rules” after all—whether good or bad—cannot emerge from a case-by-case, subjective balancing of largely abstract, *ad hoc* considerations; that is the essential method that permeates the Restatement (Second). Indeed, the central objective of the Restatement's ubiquitous balancing processes is to produce not rules, but case-specific, outcome-driven rulings.⁸⁹

And the rationale? The passage above is the full extent of the justification that the ALI gives for abandoning consistency in the law that a forum court and a foreign court will apply to the same case. It reflects a view that gained prominence in a mid-twentieth-century campaign to modernize how courts approached choice of law. Robert A. Leflar was a prominent protagonist in the campaign. To him, the idea that law—at least the law that directs courts in making a choice of law—could be based on settled, predictive rules was a “mirage” and was “not so important” as its proponents believed.⁹⁰ The ALI's Restatement (Second) embodies Leflar's view of the legal process, holding it is better that unpredictability, uncertainty, and forum-shopping be universally encouraged than that a less-than-“good” ruling occasionally emerge when courts adhere to knowable, predictive choice-of-law rules. In the ALI's view, judges should be set free to make “good” rulings and, to do this, they must be released from the common-law obligation to articulate transcendent rules for application to particular cases.

87. *Id.* § 6 cmt. *i.*

88. *Id.*

89. *See id.* cmt. *j* (“[I]t is obviously of greater importance that choice-of-law rules lead to desirable results [than that the choice-of-law rules be easily determinable in advance or that they be easily applied to existing disputes].”).

90. Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 267–68 (1966).

The result? As one observer put it, American conflicts law “has become a tale of a thousand-and-one-cases” in which “each case is decided as if it were unique and of first impression.”⁹¹ The method of the Restatement (Second) fulfills precisely the prediction that Samuel Williston, the great contracts scholar and Chief Reporter for the first Restatement of Contracts, sadly uttered about the future of American law: it will be “a wilderness of single instances.”⁹²

It is impossible to overstate the consequence of a system that formulates decision-making as merely a subjective balancing of numerous, vague considerations that are not ranked in any particular order of importance and that often defy comparison. That system washes away the rule of law, which is the very ground on which the legitimacy of the judicial process rests, as the common law conceived it.

The common-law idea of the rule of law is not an amorphous abstraction. It espouses that whenever a particular set of provable circumstances or conditions are shown to exist, a particular legal result will obtain. Consistency, in other words, is a premise of the common-law tradition. Lord Mansfield admonished that “[w]e must act alike in all cases of like nature.”⁹³ Putting that admonition more concretely, Justice Benjamin Cardozo warned that it is anathema to “decide the same question one way between one set of litigants and the opposite way between another. . . . Adherence to precedent must . . . be the rule rather than the exception if litigants are to have faith in the evenhanded administration of justice in the courts.”⁹⁴ The Restatement (Second)’s system guarantees only one thing: that the faith about which Justice Cardozo wrote has been, at last, displaced. In its stead, the ALI espouses as a tenant of faith that transcendent wisdom—or in the words of the Restatement (Second), “good rules”⁹⁵—will more assuredly emerge when individual judges are freed to gather their surmises and idiosyncratic impressions and then to mix them, case-by-case, into a mystic balancing of qualitatively dissimilar factors and considerations.

91. PETER HAY, PATRICK J. BORCHERS, & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 123 (5th ed. 2010) (quoting P. John Kozyris, *Interest Analysis Facing Its Critics*, 46 OHIO ST. L.J. 569, 578, 580 (1985)).

92. Samuel Williston, *Change in the Law*, 69 U. S. L. REV. 237, 240 (1935) (internal quotations omitted).

93. William Murray, 1st Earl of Mansfield, Lord Chief Justice of the King’s Bench, quoted in *Ward v. James*, 1 Q.B. 273, 294 (1965).

94. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 33–34 (1921).

95. RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 cmt. *i* (AM. LAW INST. 1971).

F. Local-Law-Versus-Whole-Law in Ohio

Nothing in the Restatement (Second), of course, binds a forum state to follow the Restatement (Second)'s path to chaos. Nothing in the Restatement forecloses a state from endorsing a public policy that—contrary to the urging of the ALI—discourages forum-shopping. And nothing prohibits a state from enforcing that policy through its choice-of-law rules. To the contrary, it is unequivocally the ALI's position—at least in § 8, if not in the remainder of the Restatement (Second)—that the choice between applying a foreign state's local law and its whole law is a question to be decided according to locally-defined public policy of the forum state.⁹⁶ In fact, leading contemporary scholars support this uncommon application of § 8's references to public policy and the whole law of the state with the most significant relationship with the dispute.⁹⁷ And the door is open in Ohio to pursue that course.

The Ohio Supreme Court has never yet considered the policy question presented in § 8 that is the foundation for the choice between the whole law of a foreign state and its local law. In fact, the court has never been required to reach that question of public policy. There are several reasons why not.

For one, the local-law-versus-whole-law issue—at least as it is presented in § 8—has rarely arisen. Most often, the supreme court has concluded that Ohio law, not a foreign state's law, applies in the cases before it.⁹⁸ The court, of course, can reach the local-law-versus-whole-law question only if it has ruled that the law of a foreign state applies. Second, when the court has concluded that foreign law should apply, it frequently has done so because the parties themselves agreed that foreign local law should control. In these cases, it only makes sense that the parties would choose local law of the chosen jurisdiction,⁹⁹ and the court usually

96. *Id.* § 8 cmt. *e.*

97. *See, e.g.*, E. SCOLES et al., CONFLICT OF LAWS *supra* note 91, § 3.14 (“[F]ew American courts have adopted the more extensive use of [the whole law of the state with the most significant relationship] as suggested by § 8 of the Second Restatement. . . . [E]ven greater openness on the part of the courts to the content of the foreign jurisdiction's choice-of-law rules would be desirable Uniformity should remain a principal goal of conflicts law; it is not always served by an interest analysis in which local interests tend to dominate. . . .”).

98. *See, e.g.*, *Ohayon v. Safeco Ins. Co. of Ill.*, 91 Ohio St. 3d 474, 478 (2001) (applying Ohio's choice-of-law rules, the court determined that the local law of Ohio should apply).

99. RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 cmt. *h* (AM. LAW INST. 1971) (“When they choose the state which is to furnish the law governing the validity of their contract, the parties almost certainly have the ‘local law,’ rather than the ‘[whole] law,’ of that state in mind To apply the ‘[whole] law’ of the chosen state would introduce the uncertainties of choice of law into the proceedings and would serve to defeat the basic objectives, namely those of certainty and predictability, which the choice-of-law provision was designed to achieve.”).

honors that choice.¹⁰⁰ Finally, in those rare cases where the supreme court has held that foreign law should apply and thus, where the court might have reached the policy issue that underlies the local-law-versus-whole-law question, the court merely assumed—but did not decide—that the local law rather than the whole law of the foreign state would apply. The court routinely proceeds on this assumption because the parties have not raised the local-law-versus-whole-law question as a distinct step in the choice-of-law analysis.¹⁰¹

Only one court in Ohio has ever considered the policy implications of the local-law-versus-whole-law choice. It was a case decided long before the ALI announced its position in the Restatement (Second)'s § 8. In *Nolan v. Borger*,¹⁰² the court chose to apply a foreign state's whole law rather than merely local law. It reasoned that to choose only the local law could result in the forum court deciding the central, substantive question in the case in a way that differs from how a court sitting in the state with the most significant relationship would decide it.¹⁰³

A number of lower court cases in Ohio, of course, have stated unqualifiedly—although again without explanation—that the local law of the foreign state applies. These decisions are of two kinds. One group simply cites dictum from *Ohayon v. Safeco Insurance Co. of Illinois*, where the supreme court mentioned the possible applicability in that case of the foreign state's local law.¹⁰⁴ These lower courts fail to recognize that the supreme court did not—and could not—decide the local-law-versus-whole-law question in *Ohayon*. Having found that Ohio law, not foreign law, applied in that case, the question about whether to apply the local law or whole law of the foreign state did not arise.¹⁰⁵

100. See, e.g., *Schulke Radio Prod., Ltd. v. Midwestern Broad. Co.*, 6 Ohio St. 3d 436, 438 (1983) (quoting RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 (AM. LAW INST. 1971)) (“The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue . . .”).

101. See, e.g., *Morgan v. Biro Mfg. Co.*, 15 Ohio St. 3d 339 (1984) (*per curiam*) (noting that the parties did not contest whether, if Kentucky law were to apply, it would be the whole law of Kentucky or merely the local law).

102. *Nolan v. Borger*, 203 N.E.2d 274, 278 (1942).

103. *Id.*

104. *Ohayon v. Safeco Ins. Co. of Ill.*, 91 Ohio St. 3d 474, 479 (2001) (emphasizing the importance of the several factors in choice of law analysis).

105. See, e.g., *Akins v. Harco Ins. Co.*, 158 Ohio App. 3d 292, 2004-Ohio-4267, 815 N.E.2d 686, at ¶¶ 13-14, at 296-97; *Garcia v. Green*, 2003-Ohio-3841, at ¶¶ 15-22, at *2-*3; *Nationwide Ins. v. Phelps*, 2003-Ohio-497 at ¶¶ 15-17, at *3; *Hofle v. General Motors Corp.*, 2002-Ohio-7152, at ¶¶ 8-10, at *2.

The other group simply follows the misleading black-letter references to “local law” in the Restatement (Second), without making the policy-choice that the black-letter rule stated in Restatement (Second) § 8 recognizes the forum court must make.¹⁰⁶ Because none of the decisions in either group has considered the public-policy question necessarily raised by the choice of a foreign state’s law, the courts’ eventual application of a foreign state’s local law has no precedential value on how Ohio would resolve the policy question if a court were ever to address it. A decision has no precedential weight on a question the court did not consider.

G. *A Public Policy Exists in Ohio*

Although courts in Ohio have not yet explored how Ohio’s public policy affects the local-law-versus-whole-law question, a public policy is clear. The Supreme Court of Ohio and lower courts have been consistent in resisting the interpretation of any statute, court rule, or common-law principle that would have the effect of creating the possibility of inconsistent rulings between jurisdictions and, therefore, have the effect of encouraging forum-shopping.

A policy against forum-shopping was cited—often as a *ratio decidendi*—in cases that involve, for example, the effect of voluntary dismissals of claims,¹⁰⁷ out-of-state visitation decrees,¹⁰⁸ concurrent

106. See, e.g., *Seaford v. Norfolk S. Ry. Co.*, 159 Ohio App. 3d 374, 2004-Ohio-6849, 399, 824 N.E.2d 94, 113, at ¶ 75, at 399, *rev’d on other grounds*, 106 Ohio St. 3d 430 (2005); *Carrington Farms Dev. Co. v. Pulte Home Corp.*, No. L-97-1300, 1998 WL 336927 (Ohio App. 6th Dist. May 22, 1998); *Cincinnati Ins. Co. v. Leeper*, No. L-97-1265, 1998 WL 123108, at *2 (Ohio App. 6th Dist. Mar. 13, 1998); *Jernigan v. Columbia Elec. Mfg. Co.*, Nos. 63441, 63442, 1992 WL 388872 (Ohio App. 8th Dist. Dec. 17, 1992); *U. S. Fire Ins. Co. v. Carter-Jones Lumber Co.*, No. 92-P-0032, 1992 WL 267417 (Ohio App. 11th Dist. Sept. 30, 1992); *Makepeace v. Chrysler Motors Corp.*, C.A. No. L-80-187, 1981 WL 5572, at *6 (Ohio App. 6th Dist. May 8, 1981).

107. *Carter-Jones Lumber Co. v. B & A Bldg. Servs.*, No. 07CA000003, 2008 WL 62288, at ¶ 41, (Ohio App. 5th Dist. Jan. 4, 2008) (“To accept appellee’s argument [that voluntary dismissal makes a judicial decision null] would give an imprimatur to forum shopping as clearly evidenced in this case.”).

108. *In re Gibson*, 61 Ohio St. 3d 168, 172 (1991) (“Ohio has reasonably determined that . . . [out-of-state visitation decrees] should be enforced to discourage . . . forum shopping”).

jurisdiction,¹⁰⁹ dual rights of appeal,¹¹⁰ cross-jurisdictional tolling,¹¹¹ custody orders,¹¹² statutory interpretation,¹¹³ property interests,¹¹⁴ personal jurisdiction,¹¹⁵ judicial disqualification,¹¹⁶ and availability of declaratory judgments.¹¹⁷ In short, a policy against forum-shopping is broadly recognized in Ohio.

109. *Friedman v. Johnson*, 18 Ohio St. 3d 85, 87–88 (1985) (holding that subject matter jurisdiction was exclusive in one court rather than concurrent in two courts in order to avoid creating an opportunity for “forum-shopping”); *Kraus v. Hanna*, No. 2002-P-0093, 2004 WL 1662248, at ¶ 34, at *5 (Ohio App. 11th Dist. July 23, 2004) (explaining that jurisdiction in common pleas court general division was exclusive and not concurrent with probate court because to “hold otherwise . . . would allow the estate to ‘forum shop’”) (internal citations omitted).

110. *Harris v. Lewis*, 69 Ohio St. 2d 577, 581 (1982) (explaining that the dual right to appeal was found not to exist because it would “promote forum shopping”); *Davis v. State Personnel Bd. of Review*, 64 Ohio St. 2d 102, 106 (1980) (“If a dual right of appeal were allowed . . . [it would promote] forum-shopping, and would inevitably result in a needless increase in the cases brought before this court.”); *Althof v. State, State Bd. of Psychology*, No. 04CA16, 2006 WL 279229, ¶ 12, at *3 (Ohio App. 4th Dist. Jan 31, 2006) (“[D]ual appeals advance the unfavorable practice of forum shopping.”).

111. *Vaccariello v. Smith & Nephew Richards, Inc.*, 94 Ohio St. 3d 380, 394 (2002) (Lundberg Stratton, J., dissenting) (“[C]ross-jurisdictional tolling rule . . . invit[es] plaintiffs to forum-shop, a practice that this court does not promote and does not wish to encourage.”).

112. *In re I.B.*, Nos. 102373, 102853, 2015-Ohio-4181, slip op., at ¶ 30, at *6 (Ohio App. 8th Dist. Oct. 8, 2015) (“Appellant’s complaint seeking legal custody in the juvenile court is the kind of forum shopping barred by virtue of R.C. 2151.23(A)(2).”); *Parker v. Jamison*, No. 02CA002857, 2003 WL 24135688, at ¶ 24, at *5 (Ohio App. 4th Dist. Nov. 26, 2003) (“[The] limitation of the court’s authority . . . [necessitated] to prevent forum shopping when another court has already issued a custody order.”).

113. *Schottenstein v. Schottenstein*, No. 00AP-1088, 2003 WL 22176786, at ¶ 11, at *3 (Ohio App. 10th Dist. Nov. 29, 2003) (“[T]he purpose of the restriction in R.C. 3113.31(E)(1)(d) is to prevent a party from forum-shopping.”).

114. *Am. Home Products Corp. v. Tracy*, 152 Ohio App. 3d 267, 274 (2003) (“Uniform treatment of property interests by both state and federal courts within a State serves to . . . discourage forum shopping”) (quoting *Butner v. United States*, 440 U.S. 48, 55 (1979)).

115. *Estate of Poole v. Grosser*, 134 Ohio App. 3d 386, 394 (1999) (finding that extension of personal jurisdiction over a Kentucky resident is not permitted because “[c]ourts discourage this type of forum shopping”).

116. *Grimes v. Oviatt (In re Disqualification of Eighth Dist. Court of Appeals)*, No. 104491, slip op., 2017-Ohio-2840, ¶ 6 (Mar. 31, 2017) (“To hold otherwise would invite parties to file disciplinary grievances solely to obtain a judge’s disqualification, which could lead to forum-shopping and hamper the orderly administration of judicial proceedings.”).

117. *State of Ohio ex rel. Fattler v. Boyle*, No. 70522, 1997 WL 428664, at *583 (Ohio App. 8th Dist. July 31, 1997), *aff’d* Ohio St. 3d 123 (1998) (finding that mandamus is not available in the court of appeals while a declaratory judgment action is pending in the trial court because to recognize the possibility for a second court to contemporaneously consider the dispute would encourage judicial forum shopping).

IV. CONCLUSION

Ohio is stuck with the Restatement (Second)—at least for now. As a method for choosing law, it is unnecessarily complicated, abstract, and confusing. Worst of all, it is highly subjective and unpredictable. Its faults are only exacerbated when courts ignore facets of the Restatement (Second)'s method. Ignoring portions of the method produces an analysis that is also random or selective. As discussed above, two steps built into the Restatement (Second)'s system are routinely missed.

One of the missed steps, however, offers the prospect of resurrecting some degree of consistency and predictability in the Restatement (Second)'s method, albeit in only a limited number of cases. Those instances are limited to cases where the forum court identifies a foreign state as having the most significant relationship with a dispute. At that moment in the choice-of-law process, Restatement (Second) § 8 makes it the forum court's duty to determine how much of the foreign state's law to apply. It must decide whether to apply all of the law that a court sitting in that foreign state would apply if the case were pending there or just some of it. In the latter alternative, the forum court will apply all of that state's local law except its choice-of-law rules and principles. This alternative, however, guarantees that the forum court will decide the case after applying different law than what a court sitting in the state with the most significant relationship with it would apply. Deciding the same case by applying different law creates the prospect that the forum court will reach a different result than would a court sitting in the foreign state.

This prospect of the forum state possibly reaching a different result than the foreign state is very dynamic that spawns forum-shopping. For a jurisdiction that, like Ohio, has recognized a policy discouraging forum-shopping, Ohio Restatement (Second) § 8(2) provides the rubric that—if used—can give palpable effect to that policy.