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## A Common Law of Choice of Law

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## ESSAY

### A COMMON LAW OF CHOICE OF LAW

*Lea Brilmayer\* & Daniel B. Listwa\*\**

*For more than a generation, choice of law has been the victim of a historical contingency. The “conflicts revolution” of the mid-twentieth century and its legal realist leaders bundled together three concepts that, although all typifying the traditional approach, are not inherently connected: the “scientific formalism” of Bealean territorialism, attention to “system values” like uniformity and predictability, and judicial activism. The revolutionaries tied an anchor to formalism, sinking the regard for system values and judge-led decision-making in the process. This Essay argues that the rejection of system values and judicial lawmaking in the choice-of-law context was a mistake—and it offers a means of reintegrating them into postrevolution choice-of-law thought.*

*Waving the flag of “legislative supremacy,” modern choice-of-law theory has asserted that standard techniques of statutory interpretation ought to be determinative of how courts resolve choice-of-law problems. However, the modernists have failed to grapple with what “interpretation” means in a context that is almost never contemplated by legislatures. In recent years, those studying statutory interpretation have become increasingly sophisticated in their understandings of the ways in which courts use expansive sets of resources to counter difficult cases, leading to recognition of the “common law” of interpretation. But, so far, choice-of-law theorists have been left behind—continuing to adhere to a primitive conception of statutory interpretation that shuns the role of the judge and the importance of broader goals, including the facilitation of system values. The Restatement (Third) of Conflict of Laws, currently being circulated in draft form, continues that error, wholeheartedly endorsing an outdated and unworkable mode of interest analysis.*

*This Essay offers a means of modernizing the modernists and rescuing the Restatement (Third) in the process. The key insight is to recognize that judicial creativity and attention to the facilitation of a workable system of choice of law is fully consistent with realism. Moreover, the principle of*

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\*\* Associate, Wachtell, Lipton, Rosen & Katz. The authors thank Professor Bill Eskridge, Charlie Seidell, and Brad Polivka for their conversations and insights; and the editors of the *Fordham Law Review*, especially Alex Langsam, for their thoughtful and careful edits.

*legislative supremacy is better protected by a methodology that does not mask metaphysical invention behind empty phrases like “interests” but instead recognizes explicitly the important yet limited role of the judiciary. In line with these recommendations, this Essay advocates for the embrace of a “common law of choice of law” methodology, an approach that recognizes judicial, common-law rulemaking and that does not rely on sharp, fictive lines drawn between “interpreting” the law and developing system-oriented rules.*

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#### INTRODUCTION

It was an academic bloodbath. Emboldened by the successes of like-minded reformists in other areas of the law, a generation of choice-of-law firebrands rose up against their elders in what is now known as “the choice-of-law revolution.” The old ways of thought were replaced by a new manifesto that, had it ever been written, would have read as follows:

Our predecessors thought that they could determine the applicable law through introspection into first principles of territorial sovereignty. Their view was that choice of law should serve the interstate system and that adherence to “system values” would promote predictability, prevent forum shopping, and protect parties’ vested rights. To the brainchild of Harvard Law School Professor Joseph Beale, this theory of “vested rights” reflected an archaic jurisprudence, which has now been shown by legal realism to have no basis in fact or logic.

This approach was a disaster. The theory that the courts were trying to apply was so unconvincing that it was soon riddled with exceptions and

became a virtual laughingstock. What is worse, their pursuit of the chimeras of “territorial sovereignty” and “vested rights” utterly neglected—in fact, undermined—a court’s proper function in a democracy: interpreting and applying the commands of its legislature. The goal of the choice-of-law process, properly understood, is to implement one’s own state’s interests, as defined by the policies underlying the substantive statutes vying for application.<sup>1</sup>

This theoretical manifesto was accompanied by more practical instructions about how choice-of-law decisions were supposed to be made. Interests were to be determined by the usual domestic processes of interpreting the statutes implicated in a particular case. In actuality, this reduced to the homily that states were interested in applying their laws where doing so would inure to the benefit of a local resident. The theory became known as “governmental interest analysis,” reflecting the foundational principle that the “true” goal of choice of law was implementation of a state’s governmental interests.

Fast forward five or six decades. Interest analysis has now achieved dominance among the law reviews and is one of the theories embraced in our nation’s courts. Its practical influence stems in part from the number of states that have adopted the theory in its entirety and in part from the influence that it has had on the development of other academic theories. It has even captured the favor of an American Law Institute drafting committee, presently charged with producing a Restatement (Third) of Conflict of Laws.<sup>2</sup> Indeed, the current draft of the Restatement (Third) wholeheartedly embraces interest analysis as the definitive account of what choice of law entails.

Calling what happened during the choice-of-law revolution a bloodbath may be a bit melodramatic. But it is not unfair; even some of the theory’s sympathizers were driven to violent metaphors.<sup>3</sup> The old learning has never regained its former respectability. And yet more recently, a counterrevolution has been emerging on the horizon; the modern theory faces attacks arguably comparable to those that brought it to power—the accusation that the modernists, like the territorialists before them, rely on a biased and metaphysical conception of states’ “interests” with little basis in reality.<sup>4</sup>

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1. See *infra* notes 36–42 and accompanying text (discussing interest analysis and citing appropriate authorities).

2. See RESTATEMENT (THIRD) OF CONFLICT OF L. ch. 7, introductory cmt. (AM. L. INST., Preliminary Draft No. 3, 2017).

3. In the words of one scholar, the realists, led by Walter Wheeler Cook, “brutally murdered” Beale’s theory. Nicholas deBelleville Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1087–88 (1956). The description perhaps reflects the viciously personal way that Beale’s contemporaries mocked him and his theories. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960*, at 25–28 (Edward White ed., 1986).

4. Although these debates are currently playing out in connection to the drafting of the Restatement (Third), criticisms of interest analysis have appeared in law reviews for decades. See, e.g., Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980).

Some of the criticisms of interest analysis and its modern “metaphysics” are now taken quite seriously.<sup>5</sup> But there is another problem, a more fundamental one, if anything, which has hardly been raised and never really addressed in this growing literature—focused as it is on deconstructing modern theorists’ ontological claims regarding the existence of state “interests.” It concerns the peculiar role assigned to courts by modern choice-of-law theory.

Modern choice-of-law theory claims to be grounded in the principle of legislative supremacy.<sup>6</sup> Judges, it is said, have a duty to implement statutes. A court applying the traditional learning—grounded in facilitating interjurisdictional coordination—supposedly flouts legislative wishes because it does not claim to base its decisions on statutory construction. From this axiom, two key principles follow: (1) choice of law should further states’ substantive policies; and (2) judges should have no leeway to decide the choice-of-law issue according to values germane to the interstate context, such as predictability, interstate harmony, or avoidance of forum shopping, because these objectives interfere with the pursuit of substantive policies that is a judge’s only legitimate goal.

These guiding principles of modern choice-of-law theory, obviously, are closely tied to a particular conception of the judicial role. The reason that courts should further state interests, the modernists assert, is that in a democracy, courts should be subservient to legislative wishes.<sup>7</sup> A court (the modernists claim) can always find an answer to the question of the interstate scope of a statute if it looks at the statute itself. And that is what it should do. Judges are not supposed to exercise decision-making discretion but instead to implement the objectives of the legislature. These axioms—the modernists urge us to believe—follow simply from the principle of legislative supremacy.

But look again at the assumptions underlying this last set of claims. First, these claims assume that all substantive law is statutory; this is obviously false. Courts are sometimes faced with disputes in which both the cause of

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5. See, e.g., Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1283 (1989); Friedrich K. Juenger, *Choice of Law: How It Ought Not to Be*, 48 MERCER L. REV. 757, 760–61 (1997); Harold G. Maier, *Finding the Trees in Spite of the Metaphorist: The Problem of State Interests in Choice of Law*, 56 ALB. L. REV. 753, 753 (1993); Bruce Posnak, *Choice of Law: Interest Analysis and Its “New Critics,”* 36 AM. J. COMPAR. L. 681, 684–89 (1988).

6. See Courtland H. Peterson, *Private International Law at the End of the Twentieth Century: Progress or Regress*, 46 AM. J. COMPAR. L. 197, 218 (1998).

7. Currie argued this point in terms manifesting his skepticism of courts and desire to minimize their role in the choice-of-law context, stating that the “choice between the competing interests of coordinate states is a political function of a high order, which ought not, in a democracy, to be committed to the judiciary.” Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 77 (1958); see also Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176 [hereinafter Currie, *Notes on Methods*] (“[A]ssessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function which should not be committed to courts in a democracy.”).

action and the defenses are all based on common law. Statutory construction cannot resolve questions of application in such cases.<sup>8</sup> Second, the claims assume that where a statute is involved, there will always be a right answer to the question of the law's scope; this is doubtful and no support is offered for it. Third, they assume that legislatures do not want courts to take account of systemic or procedural values because it is only substantive policies that count. There is no foundation for this assumption, and it is implausible as an empirical matter. Finally, these principles are said to be grounded in the ordinary domestic methodology that courts apply in cases with no multistate dimensions. The modern theorists argue that they are doing nothing more than extending to the interstate system the methodological principles that already govern domestic decision-making. This claim does not pass the straight-face test.

If one puts these modernist principles all together, one comes to the overall conclusion that judges should never play a creative role in the development of the rules of choice of law—just as they supposedly do not when enforcing domestic, substantive law. All that judges should ever do—either domestically or in interstate disputes—is interpret statutes. But how can this be the methodological foundation for a *modern* theory of choice of law? The firebrands responsible for starting the assault on traditional choice of law claimed to be adherents of legal realism—but does this sound like legal realism? Does it sound like any sophisticated theory of how domestic courts decide either statutory or common-law cases?

The modern choice-of-law theorists' misunderstanding of the common-law method is matched only by their misunderstanding of principles of statutory construction. There are substantial bodies of literature on both the common law and statutory interpretation, but neither has been brought to bear by modernist proponents of the statutory method. As a result, modern choice of law has failed to reckon with one of the most important and challenging issues in statutory interpretation: when are there gaps in a statute and how, when a gap exists, is a judge to go about filling it? Instead, the modern theorists ignore this issue and base their model on an account of the relative roles of the courts and legislatures in choice of law that defies reality—all the while deriding those who disagree with them as adherents of an outdated and undemocratic set of theories.

At stake in this debate are some of the most basic foundational principles of the American legal system. Today, we find ourselves at a potential inflection point; the future of choice of law is up for grabs. The new restatement that is currently on the drafting table would take positions on many of the questions outlined above. With multistate disputes an unavoidable feature of modern life, choice of law is more important than ever. There could not be a more auspicious point in time to sort out the merits of the competing approaches to choice of law. This Essay tells the story of how the issue of judicial role was treated when it first arose, the extent to

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8. See *infra* Part II.A.

which the criticisms of the traditional understandings of that role were justified, the defects in the modern theory that replaced it, and what should be done about the problem now.

A simple historical account of how we got to where we are would be fascinating enough. It would be a story of personal enmity, intellectual ambition, and real-world pathos involving tens of thousands of litigants whose financial futures depend on which state's law will govern their cases.<sup>9</sup> But the history of the subject barely scratches the surface of the issues' significance to legal theory and legal practice. For purposes of this Essay, history is largely of instrumental interest; the main focus here is to learn from past mistakes to avoid repeating them or making new ones.

To begin, we present our diagnosis of the problem. Part I explains how it was that judicial lawmaking regarding conflict of laws came to be irreversibly associated with system values and how both were simultaneously banished from polite company in contemporary choice-of-law circles. As we explain, the banishment of judicially enforced system values largely is due to a matter of historical contingency. Beale's territorial theory was rightfully criticized for its formalism and reliance on an outdated conception of state sovereignty. But in ferociously tearing down Beale's hegemony, the modernists also attacked all that was associated with it, including recognition of the importance of judges in facilitating an efficient system of choice of law. Bearing the standard of "legislative supremacy," the conflicts revolution forced judicial creativity and system values into the shadows, despite their necessary and important roles in choice of law.

Part II critiques the solution that has been adopted by the modern theories. The conflicts revolution replaced the territorial model with interest analysis—a theory that suggests that every choice-of-law dispute can be resolved by turning to the "usual processes" of domestic statutory construction and interpretation. Although the modernists never quite define what this means, the general suggestion is that the answers to all questions can be inferred from the intentions of the legislatures that enacted the implicated laws. As we explain, this appeal to the usual processes fails on two counts. First, it is simply not the case that statutory interpretation can never leave space for judicial creativity. In hard cases, the statute is open-textured; it falls on the courts to utilize their discretion to make choices about how the law should be applied. Second, it is simply not true that the usual processes of statutory interpretation in the domestic context eschew considerations beyond the substantive policies underlying the statutes themselves, which is what the modernists assume. Instead, courts engaged in statutory interpretation regularly look beyond the specific statutes in question to consider broader policy goals. The usual processes of statutory interpretation do indeed allow for judges to consider system values when constructing their interpretations.

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9. See *infra* notes 21–27 and accompanying text.

Part III offers an alternative to interest analysis and its dogmatic invocation of statutory interpretation: the solution that it presents is a common-law method of choice of law. As this part explains, common-law reasoning is, in many situations, a better way to conceive of the choice-of-law process than either the modern approach that dominates choice-of-law theory today or the traditional approach that it replaced. Focusing on the promise of the Restatement (Third) of Conflict of Laws, we show how the common-law conception of the judge's role in choice of law provides a better justification for the promulgation of a new restatement than the modernist theories do—despite the fact that the current draft explicitly endorses interest analysis. Interest analysis—which grounds the resolution of each choice-of-law dispute in an individual act of statutory interpretation—cannot explain the value of a single set of nationally distributed choice-of-law rules. On the other hand, within the common law of choice of law framework, the Restatement (Third) can be understood as an important coordination device, a focal point around which judges can harmonize their decisions, so as to facilitate a more uniform and predictable interjurisdictional system of choice of law. Such a result is only possible when the important role of courts in determining the applicable law is recognized. And such recognition is only possible if contemporary theorists recognize the importance of the common law of choice of law.

#### I. JUDICIAL FUNCTION AND THE CHOICE-OF-LAW REVOLUTION

Choice-of-law disputes are frustrating in the extreme; they involve juggling multiple, potentially contradictory bodies of law, while simultaneously balancing competing values, such as respect for cosovereigns, reduction of forum shopping, and promotion of substantive policies. Hardly anyone who deals with multistate legal problems on a regular basis welcomes close contact with a choice-of-law problem. But welcome or not, the task of selecting the applicable law is an integral part of analyzing, litigating, and adjudicating cases in a world where people interact across state and international boundaries.

This has never been a problem for our legislatures—with some minor exceptions, choice of law in the United States has never been a subject ruled by statutes.<sup>10</sup> Legislatures take up issues that they deem politically rewarding or practically compelling; choice of law has rarely looked so rewarding or compelling that our legislators choose to get involved. The subject, inevitably, is left to the courts to figure out. Courts cannot simply pass the

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10. While a couple of states have enacted general codifications of specific choice-of-law rules, the vast majority have merely said nothing at all about the general approach to be taken in resolving choice-of-law disputes—effectively leaving the issue to the courts. See James A. R. Nafziger, *The Louisiana and Oregon Codifications of Choice-of-Law Rules in Context*, 58 AM. J. COMPAR. L. 165, 169 (2010). That said, many states have adopted specific, rule-like choice-of-law provisions in at least a few specific areas of law. New York, for example, famously enacted legislation allowing parties around the world to elect for New York law to govern their contracts. N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2020).



questions that they find too hard or too politically disagreeable to the next in line, as legislatures do. For courts, there is no next in line.

The “dismal swamp” of multistate relations has therefore traditionally fallen to courts to drain.<sup>11</sup> Until the second half of the twentieth century, choice of law was part and parcel of the American common law;<sup>12</sup> hardly anyone complained about the fact that choice of law was the responsibility of our courts and not our legislatures. In carrying out this assignment, the courts relied on case law, academic treatises, and once it was published, the Restatement (First) of Conflict of Laws. This was effectively the same collection of sources that courts consulted on any other topic in the common law. There the matter rested, until around the middle of the twentieth century.

Then the academic winds abruptly shifted. The authority of courts over choice of law was newly recast as judges riding roughshod over democratic prerogatives, rather than as judges being stuck with jobs that no one else had wanted. The source of the complaint was legal realism; its academic adherents felt that choice of law should be radically rewritten.<sup>13</sup> Choice of law was henceforth to be a purely statutory subject. This line of criticism was somewhat ironic considering that legal realism, generally speaking, was quite accommodating to the fact that courts made law and did not find it. Besides, the country’s legislatures and executives seemed more grateful than offended by the supposed judicial usurpation.

The long debate between “traditional” theories and “contemporary” theories that followed pitted traditional virtues—the needs of the interstate system—against the substantive policy interests of individual states. Traditional theories focused only on system values and excluded substantive policies; contemporary theories, conversely, focus on substantive policies to the exclusion of system values.<sup>14</sup> Caught up in this debate is the subject of interest here: the division of authority between courts and legislatures. Restatement (First) learning expected judges to operate as the protectors of the interstate system and the guardians of system values, while contemporary learning expects judges to adopt a posture more reflective of legislative policy priorities. This competition for influence has dominated much of the

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11. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

12. See RANDALL BRIDWELL & RALPH U. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM* 61–97 (1977); Lea Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 555, 561–63 (1984); David F. Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROBS. 732, 737–43 (1963); Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 805 (1955); Mark D. Rosen, *Choice-of-Law as Non-constitutional Federal Law*, 99 MINN. L. REV. 1017, 1021 (2015).

13. See Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2458–60 (1999).

14. See Kermit Roosevelt III, *Certainty vs. Flexibility in the Conflict of Laws*, in *THE PRIVATE INTERNATIONAL LAW: CONTEMPORARY CHALLENGES AND CONTINUING RELEVANCE* 6, 7 (Franco Ferrari & Diego P. Fernández Arroyo eds., 2019) (“[T]he First Restatement is inflexible, territorial, traditional, and rule-based, while the Second Restatement is flexible, policy-based, modern, and standard-like.”).

literature on choice of law since the choice-of-law revolution first broke out. But as we shall see below, other issues that have seen relatively little attention are in fact more fundamental.

*A. System Values: The Traditionalist Position*

Choice of law in the American federal system was always, by tradition, a common-law subject, subject to very little statutory development. As the standard telling goes, the courts largely followed an approach typified by the Restatement (First) of Conflict of Laws, whose rules were informed by the goal of supporting the well-being of the multistate system.<sup>15</sup> Modern choice-of-law theory arose out of a reform movement in the mid-twentieth century, during which the conceptual framework of the Restatement (First) was largely unseated and replaced. The phenomenon at issue here—the contemporary choice-of-law theorist’s dismissive stance toward the common-law functions of judges—was a product of this reform movement. Evaluation of this so-called “choice-of-law revolution” must therefore start with the Restatement (First).

The drafting of the Restatement (First) began nearly a century ago. At that time, American aspirations for the choice-of-law process were fairly unassuming. Choice-of-law rules, it was thought, were designed to promote what we refer to here as “system values”—so named because they concerned the protection of the international/interstate system. These values included uniformity, predictability, discouragement of forum shopping, interstate harmony, and the protection of party expectations.<sup>16</sup>

These values are closely related to one another. Consider how uniform treatment of choice of law provides predictability and, as a result, helps the parties to a litigation: people rarely plan on getting entangled in litigation, and when they do, they frequently do not know where that litigation will take place until it begins. As a result, if states take different approaches to choice of law, parties cannot be sure what law governs their conduct. This creates costly uncertainty, potentially undermining interstate activity. In contrast, clear, predictable, and uniform choice-of-law rules benefit both people and states, lessening the concern that expectations will be frustrated by manipulation or error. Appreciation for the importance of such system-oriented rules goes back hundreds of years and is even reflected in the U.S. Constitution, whose Full Faith and Credit Clause<sup>17</sup> explicitly delegates to

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15. Although it is generally assumed that the Restatement (First) largely reflected historical approaches to choice of law, the truth is—as is often the case—more complicated. See generally Daniel B. Listwa & Lea Brilmayer, *Jurisdictional Problems, Comity Solution*, in *PHILOSOPHICAL FOUNDATIONS OF CHOICE OF LAW* (forthcoming 2021). But for present purposes, we can assume that the Restatement (First) represents the “traditional” approach.

16. See Ernest G. Lorenzen & Raymond J. Heilman, *The Restatement of the Conflict of Laws*, 83 U. PA. L. REV. 555, 556 (1935).

17. U.S. CONST. art. IV, § 1.

Congress the authority to craft a federal system of choice of law, an authority that—perhaps disappointingly—has never been invoked.<sup>18</sup>

In his seminal treatise, published towards the beginning of the twentieth century, Harvard's Professor Joseph Beale (the Restatement (First)'s reporter and a committed formalist) built an entire theory around values such as these, referred to as the “vested rights” theory. Beale offered a detailed set of rules built on the territorial premise that a state's law was supreme within its own jurisdiction but powerless beyond those borders.<sup>19</sup> But critically, Beale did not justify his set of rules on the grounds of the mutual convenience that would be wrought were all states to adopt them. Rather, he argued that such a territorial conception of choice of law—and specifically, *his* articulation of that conception—was mandated by the very nature of state sovereignty.<sup>20</sup> For this reason, in Beale's mind, his commitment to system values to the exclusion of substantive policy was justified by the deepest of legal arguments. And thus, nearly a hundred years ago, system values and formalistic legal ontology became fatefully associated: both were the province of the judiciary.

Throughout the first half of the twentieth century, Beale's rule-bound theory dominated conflicts of law in both the courts and classrooms.<sup>21</sup> But the near monopoly that his theories once enjoyed at the start of that period became more tenuous as the decades wore on. In the latter half of the last century, a reform movement grounded in legal realism mounted an attack on this distribution of responsibility. It accused the courts of violating the principle of legislative supremacy by shirking their responsibility to further the legislature's substantive policy choices.<sup>22</sup> Thus was born the perennial debate between system and substance, with its implications for the division of authority between courts and legislatures.

The critique got underway before Beale's magnum opus, the Restatement (First), was even finished. With unabashed ferocity, the rising school of legal realism—which Beale mistakenly dismissed as an “ephemeral school of legal philosophy”<sup>23</sup>—discredited the vested rights theory and the man behind it. In violent and colorful language, the realists thrust Beale's theories out of polite company.<sup>24</sup> The result was to bury Beale and all that is associated with him deep into the ground, a grave from which his legacy has yet to emerge.<sup>25</sup>

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18. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 297 (1992).

19. See 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 4.12, at 46 (1935).

20. *Id.* § 5.4, at 53.

21. Erwin N. Griswold, *Mr. Beale and the Conflict of Laws*, 56 HARV. L. REV. 690, 690 (1943).

22. BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 182, 610, 617 (1963).

23. 1 BEALE, *supra* note 19, at xiii.

24. See, e.g., Katzenbach, *supra* note 3, at 1087.

25. That is not to say, however, that territorial conceptions of state sovereignty have disappeared from contemporary legal thinking. In a recent opinion of the Delaware Court of Chancery, Vice Chancellor J. Travis Laster cited as a “first principle[]” that each state's sovereignty is territorially bound. *Sciabacucchi v. Salzberg*, No. CV 2017-0931, 2018 WL

B. *Substantive Policies and the Basic Modernist Claim*

The realist attacks on Beale were multipronged but importantly intertwined. First and foremost, the realists criticized the jurisprudential framework that Beale relied on—a formalism that sought to derive from first principles a body of law, “without special reference to the actual law in any particular state.”<sup>26</sup> Such a model of the law, Walter Wheeler Cook and the realists argued, relied on a mistaken notion that “rights” and other legal conceptions “exist” in some way that is abstracted from the actual behavior of the actors in the legal system.<sup>27</sup> Beale was wrong—they said—to direct judges to apply choice-of-law rules derived from abstract metaphysics while ignoring the substantive applicability of the contending laws.<sup>28</sup> Such a method of decision-making was not only jurisprudentially bankrupt, the realists argued, but also impractical. Despite the false sheen of Beale’s logic, the rules were ultimately indeterminate in application and open to manipulation, undermining the very system values they supposedly upheld.<sup>29</sup>

Although the realist contributions were largely critical in nature, their complaints led to a new way of thinking and talking about the choice-of-law problem, one that claimed the imprimatur of legal realist principles. The main exponent of the positive theory that largely replaced Beale was Brainerd Currie. Having in effect declared judicial involvement under the traditional common-law method *persona non grata*, Currie developed a new methodology based on statutes.<sup>30</sup> In the place of judge-made choice of law, the common-law method, and multistate system values, Currie endorsed legislative supremacy, statutory interpretation, and substantive policies.<sup>31</sup> Most important of these for present purposes was the replacement of the common-law method with Currie’s theory of statutory construction, including his views on deference to the elected branches.

Currie seized on the realist notion that choice of law was not some abstract set of concepts but rather a tool to be used to further state policy.<sup>32</sup> He developed a new discourse around this conception of choice of law: a state was said to have an “interest” in applying its statute if extending the

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6719718, at \*2 (Del. Ch. Dec. 19, 2018), *appeal dismissed*, 204 A.3d 841 (Del. 2019), *rev’d*, 227 A.3d 102 (Del. 2020). For a discussion of this case and its mischaracterization of territorialism as a “first principle” of legislative sovereignty, see Daniel B. Listwa & Bradley J. Polivka, *First Principles for Forum Provisions*, 2019 CARDOZO L. REV. DE•NOVO 106.

26. 1 BEALE, *supra* note 19, § 1.12, at 9.

27. See WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASE OF THE CONFLICT OF LAWS* 33 (1942).

28. In reality, as a devoted positivist, Beale was not committed to any such *a priori* metaphysic, but that was how the realists characterized him and the association has had a long legacy. See Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2092–94 (1995).

29. See Joseph M. Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws*, 14 S. CAL. L. REV. 221, 223 (1941).

30. See Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 478 (1985).

31. *Id.*

32. See Brilmayer, *supra* note 5, at 1284.

geographic reach of the state's statute to the dispute in question would further the substantive policies underlying the statute.<sup>33</sup> System values such as protection of party expectations and respect for sister states were out; substantive policies and pursuit of state interests were in.

Currie's advice to judges faced with choice-of-law disputes was to address choice-of-law problems by interpreting statutes; supposedly statutes provided all of the necessary information for choosing the applicable law. Whether a particular substantive statute applied to a particular multistate fact pattern was to be determined by using the familiar domestic law processes of "construction or interpretation" of the substantive rules vying for application.<sup>34</sup> If the familiar processes of statutory construction resulted in a decision to which the statute applied, then the state was said to have an "interest."<sup>35</sup>

Currie expected his theory<sup>36</sup> to work essentially as follows: the single most important step is to determine which states, if any, have "interests" in the application of their laws to the dispute as the rule of decision. A state has an interest if and only if the purpose of its law would be furthered by applying it to the case at hand. This is to be determined by ascertaining the multistate scope of each of the contending statutes. A state's law applied by its own terms if, when properly interpreted, it encompassed the fact pattern of the case before the court. By interpreting the statute, in other words, and applying that interpretation to the fact pattern at hand, one might determine whether a state has an "interest" in having its law applied. Without an "interest," a state lacks the prima facie claim to have its law applied.

This analytical framework gives rise to three distinct categories of "conflicts," which Currie labeled false conflicts, true conflicts, and "unprovided-for cases."<sup>37</sup> If only one state has an interest, then the case is a "false conflict."<sup>38</sup> In these cases, the law of the only interested state ought to be applied—this will effectuate the policy of the interested state, while leaving the policies of the other implicated state uninjured. If both states are interested, then it is a true conflict—the choice of one state's law over the other will necessarily leave the other state's interests unvindicated.<sup>39</sup> Taking true conflicts as unsolvable, Currie argued that the forum ought to apply its own law, regardless of the system-warping incentives such a policy would create.<sup>40</sup> Finally, where no state is found to be interested (the "unprovided-for case"), Currie again suggested applying the law of the forum, arguing that such a firm and uncompromising rule was better than giving the judge any

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33. See Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 9, 50 (1989).

34. Currie, *Notes on Methods*, *supra* note 7, at 171, 178.

35. *Id.*

36. For a more detailed summary of Currie's theory, see Roosevelt, *supra* note 13, at 2461.

37. *Id.* at 2462–63.

38. *Id.*

39. *Id.* at 2464.

40. Currie, *Notes on Methods*, *supra* note 7, at 177, 184.

discretion to choose.<sup>41</sup> The result is a system exactly opposite the uniformity of the traditional method: except in the instance of a false conflict, the law that governs a particular dispute depends on the state in which the suit was ultimately brought—with each forum state applying its own law.

The reformers, with Currie at the helm, justified their rejection of system values on the grounds that taking them into account interfered with the promotion of substantive policy. If application of local law was called for in order to further some substantive policy, then allowing system values to override that substantive policy was illegitimate. The reason was the principle of legislative supremacy—that is to say, judicial deference to the elected branches.<sup>42</sup> Privileging system values over local statutory concerns was unacceptable judicial activism. The pursuit of traditional choice-of-law values, such as decisional uniformity, multistate harmony, and the like, had to be abandoned because that was not a proper role for courts in a democratic society.

As this short account of the subject's intellectual history reflects, the conflicts revolution, as it is known, facilitated a bundling of three concepts: the “scientific formalism” of Bealean territorialism, a system-values approach to choice of law, and judicial activism. All three of these conceptual positions were rejected simultaneously. In their stead, interest analysts' self-declared pragmatic, policy-oriented, and legislatively centered approach gained prominence. Its appeal to the late twentieth-century legal mind should not be too surprising. Framing its chief objective as the efficient promotion of legislatively declared policy, the overall effect was scientific, democratic, and no-nonsense. Today, it is reported that interest analysis “is the leading scholarly position, and the only doctrine that could plausibly claim to have generated a school of adherents.”<sup>43</sup> The extent to which it has come to dominate modern thinking on choice of law is suggested by the fact that interest analysis has finally—fifty years after its first introduction—been largely adopted by the new draft Restatement (Third) of Conflict of Laws.<sup>44</sup>

### C. *The Basic Modernist Claims Today*

An impressive intellectual edifice, interest analysis has provoked not only criticism but also the creation of a number of variations upon the theme. In this section, we discuss the variants that have emerged—noting the ways in which they have evolved to meet certain criticisms of Currie's original theory. But for our purposes, it is what they share that is of greatest significance: the notion that judicial attention to system values cannot be given pride of place without infringing on legislative supremacy. This basic

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41. BRAINERD CURRIE, *Survival of Actions: Adjudication Versus Automation in the Conflicts of Laws*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS, *supra* note 22, at 128, 156.

42. *Id.* at 171–72.

43. Roosevelt, *supra* note 13, at 2466.

44. See Lea Brilmayer & Daniel B. Listwa, *Continuity and Change in the Draft Restatement (Third) of Conflict of Laws: One Step Forward and Two Steps Back*, 128 YALE L.J.F. 266, 269 (2018).

commitment, inherited from Currie, remains a critical component of the modern theories.

### 1. Divergent Applications Within Interest Analysis

The major cause of difference between the modernist subgroups probably results from divergent approaches to one particular thorny issue of application: what to do if either a true conflict or unprovided-for case arises. Some authors balk at Currie's instructions simply to apply forum law, acknowledging the mayhem that would be introduced by such an approach.<sup>45</sup> In place of this crude solution, various alternatives have been proposed. These include, for example, William Baxter's "comparative impairment" approach, which directs courts to resolve choice-of-law questions so as to do the least violence to the interests of the states involved.<sup>46</sup> Another is Robert Lefflar's five nonhierarchical "choice influencing considerations," which include—most influentially—the determination of which of the conflicting states' laws is the "better" one.<sup>47</sup> The influence of these alternatives, which have been embraced by some states, have helped facilitate a greater appreciation of system values in the mainstream—but they have not brought about any deeper examination of the theoretical constructs underpinning interest analysis.

The Restatement (Second) of Conflict of Laws is another modern theory—at least in the sense that it emerged as a rejection of the Bealean framework. It has proven popular with courts, but conflicts scholars have condemned it as a "mush"<sup>48</sup> with "no explanatory power"<sup>49</sup> that offers little guidance to its users.<sup>50</sup> The Restatement (Second) essentially provides judges with a list of considerations to be weighed in determining which state has the "most significant relationship" to the dispute in question.<sup>51</sup> Notably, these considerations include the substantive policies of the forum and other interested states, as well as system values, such as certainty, predictability, and uniformity.<sup>52</sup> In that sense, it has a foot in both the Restatement (First) and Currie's interest analysis.

The still tentative drafts of the Restatement (Third) endorse yet another version of interest analysis, though using a different terminology. For instance, instead of saying that a state has an "interest" in the dispute at hand,

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45. See, e.g., Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301, 1303 (1989).

46. William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 19 (1963).

47. See Robert A. Lefflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1586–87 (1966).

48. Laycock, *supra* note 18, at 253.

49. Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 321–22, 321 n.149 (1990).

50. *Id.*

51. RESTATEMENT (SECOND) OF CONFLICT OF L. § 145 (AM. L. INST. 1971).

52. *Id.*

it is said that the dispute falls within the “scope” of the state’s law.<sup>53</sup> Also notable is the way that the draft Restatement (Third) seeks to integrate the theoretical model associated with interest analysis with a decision framework governed by a set of rules combined with an escape clause.<sup>54</sup> The focus placed on these rules represents a significant break with Currie, who argued that choice-of-law rules “cannot be made to work”<sup>55</sup> and are, by their nature, “empty and bloodless thing[s].”<sup>56</sup> As we have previously argued, the focus on rules—which are derived by looking at prevailing practices in the courts—cannot be reconciled with Currie’s theoretical framework, as it substitutes deference to prevailing norms for individualized acts of statutory interpretation.<sup>57</sup> This is a theme to which we return in the latter half of this Essay.

More changes are probably in store for the future. Leading adherents to interest analysis have shown that they are thinking deeply about the jurisprudential foundations of choice of law and are open to reconsidering long-held assumptions.<sup>58</sup> In addition, certain spots of tension have developed among adherents on key issues for interest analysis, including what it means to say that a state has an “interest.” Specifically, as the reporter of the Restatement (Third) has acknowledged, “there has been debate” among adherents of interest analysis as to whether “courts should be free to disregard the words of sister-state statutes and the interpretations of the courts of those states” in declaring whether a given state has an interest or not.<sup>59</sup> Those who defend courts’ right to do so are said to understand interest to be objective, while those who oppose this view take interests to be subjective.<sup>60</sup> While we can put aside these divisions for present purposes, it is worthwhile to note that they exist and thus to acknowledge that today “interest analysis” is not a monolith.

## 2. Premises Shared by Interest Analysis

Despite the depth of disagreement between these theories, the common principles that they share still justify treating them as variations on a single theme. We shall, accordingly, refer to all of these divergent strands as “modernist,” given that on the issues of importance here, the differences are not substantial. The most important points do seem to be settled. For present

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53. RESTATEMENT (THIRD) OF CONFLICT OF L. § 7.18 cmt. d (AM. L. INST., Preliminary Draft No. 2, 2016); *id.* § 7.19 cmt. a.

54. See Kermit Roosevelt III & Bethan R. Jones, *The Draft Restatement (Third) of Conflict of Laws: A Response to Brilmayer & Listwa*, 128 YALE L.J.F. 293, 298 (2018).

55. CURRIE, *supra* note 22, at 182.

56. *Id.* at 52.

57. See Brilmayer & Listwa, *supra* note 44, at 274.

58. See Roosevelt, *supra* note 14, at 18 (noting “[t]he conventional understanding” that there is a “necessary tradeoff between systemic and [substantive policy] values” and suggesting, as we argue here, that this understanding is incorrect).

59. See Roosevelt & Jones, *supra* note 54, at 304.

60. See generally Lea Brilmayer & Charles Seidell, *Jurisdictional Realism: Where Modern Theories of Choice of Law Went Wrong, and What Can Be Done to Fix Them*, 86 U. CHI. L. REV. 2031 (2019).



purposes, two are particularly significant: the sharp distinction between system values and substantive policies and the perception of incompatibility between an active judiciary and the principle of legislative supremacy.

Deeply ingrained in the theoretical apparatus of modern choice of law is the notion that an embrace of system values necessarily involves a compromise of substantive values.<sup>61</sup> For Currie, the rejection of system values was nearly total. He argued that courts should resolve conflicts purely by looking at whether the states in question have an interest in the dispute as a matter of domestic, substantive policy and, if both do, simply choosing the law of the forum—wholly undermining any hope for uniformity or predictability in the process.<sup>62</sup>

In all the modernist variants, therefore, consideration of system factors is minimized and their function is sharply distinguished from that of substantive values. Even in the writings of the academics that have diverged from Currie's version of the modern theory, they are relevant, if at all, only as tiebreakers. The scope of a particular state's law is still to be resolved wholly by reference to domestic, substantive policies and by use of the methodology of statutory interpretation.<sup>63</sup> To do anything else, it is presumed, would be to sacrifice fidelity to legislative supremacy in the name of Bealean system values. The modernist theory's exclusive focus on substantive values, and its concomitant rejection of system values, has been the hallmark of the postrevolution approach to choice of law—what could be called the “modern choice-of-law orthodoxy.”

The second theme that has remained constant throughout the development of modern choice of law is the modern theorists' mistrust of common-law lawmaking. The villain of the traditional territorialist account of choice of law was a judicial system—dominated by unprincipled “local” judges—that had disregarded the purpose for which domestic courts were constituted<sup>64</sup>: the provision of individual justice in keeping with the furtherance of authoritatively developed substantive policies. The error that had been made (in the eyes of the modern theorists) was the substitution of system values for substantive policies.<sup>65</sup> But what made the error possible was the fact that the

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61. Though, as noted above, the consensus on this point is beginning to crumble. *See supra* note 58 and accompanying text.

62. Toward the end of his career, he appears to have relented slightly, hinting that states might choose to make a “moderate and restrained” reassessment of their interests—presumably including consideration of system values—if their preliminary analyses indicated that there was more than one interested state. Brainerd Currie, *The Disinterested Third State*, 28 *LAW & CONTEMP. PROBS.* 754, 757 (1963). This suggestion has drawn some support from other authors. In particular, this is the approach endorsed by the draft Restatement (Third) of Conflict of L. § 5.01 cmt. d (AM. L. INST., Council Draft No. 2, 2017).

63. RESTATEMENT (THIRD) OF CONFLICT OF L. add. to reporters' memorandum at xvii–xx (AM. L. INST., Council Draft No. 2, 2017).

64. Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 *WASH. & LEE L. REV.* 357, 382 (1992) (describing courts' invocation of choice-of-law methodologies as “little more than long-winded excuses to do what courts wanted to do in the first place”).

65. *See supra* note 7 and accompanying text.

democratically unresponsive judges had stepped in and taken over a function that was not properly theirs.

Neither the reformers who sought an approach based on interests nor the old-fashioned choice-of-law theorists who fought for retention of the Restatement (First)'s methodology devoted much of their time to debating the merits of the principle of legislative supremacy in the conflict of laws. Each side of the debate apparently took its position as self-evident.<sup>66</sup> The choice-of-law revolution was recognized as implicating ideas about the proper role of judges; but neither the formalists nor the modernists ever developed a sustained and coherent theory of judicial function.

## II. JUDICIAL FUNCTION AND THE MODERN APPROACH TO CHOICE OF LAW

Part I of this Essay identified three jurisprudential assumptions that underlie the modern choice-of-law approach: the rejection of formalism, the rejection of system values, and the rejection of a creative role for the judiciary. These were linked together largely as a matter of historical contingency; although it happened in the choice-of-law context in the first half of the twentieth century that the judiciary supported system values, and adopted a heavily formalistic approach, the courts could very well have taken the opposite position.<sup>67</sup> Although the modernists tie their rejection of system values and formalism to their complaints about the judiciary, they give no reason to assume that the judiciary was either necessarily more formalistic or a stronger supporter of the interstate system than other branches of government. The revolutionaries' main complaint was against formalism and system values, yet they included the judiciary within their general sense of grievance toward all things traditional.

The courts did make a tempting target. In the late 1950s and early 1960s, complaining about undemocratic decision-making by courts was a growth industry. In 1961, Alexander Bickel had just published his oft celebrated—and almost as frequently vilified—article on passive virtues and was about to publish *The Least Dangerous Branch*.<sup>68</sup> The book was published in 1963, the year that also saw the publication of Currie's *Selected Essays on the Conflict of Laws*, the foundational text for adherents of interest analysis.<sup>69</sup> Skepticism of judicial activists was in the air—and the field of conflict of laws would not be excepted in feeling its effects.<sup>70</sup>

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66. Indeed, some have argued that choice-of-law theories generally give too little thought to the process of judicial decision-making. See William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1371–72 (1997).

67. Cf. Brilmayer & Seidell, *supra* note 60, at 2067–72 (arguing that the position of the modernists bears little relationship to the realist sensibilities from which it was borne).

68. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1963).

69. See generally CURRIE, *supra* note 22.

70. Not coincidentally, the early 1960s also saw the beginnings of the “law and economics” movement. See Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 994 (1990). A key motivation (or, perhaps, aspiration) behind the movement was—and is—the substitution of freewheeling judicial lawmaking with a principled and externally imposed methodology. See Ryan R. Stones, *The Chicago School*

Although at most contingently linked to the rejection of formalism and system values, legislative supremacy supplied those modernist premises with normative cover. A highly theoretical challenge to the foundational basis of the obscure legal specialty of choice of law could not be expected to excite much moral outrage even on law faculties, let alone in the general population. But reframing the complaint in terms of the role of the courts in a democracy—at the end of the ten-year period in which the Warren Court gave us *Brown v. Board of Education*,<sup>71</sup> *Baker v. Carr*,<sup>72</sup> and *Mapp v. Ohio*<sup>73</sup>—tied the choice-of-law problem to pressing current events. The temptation to hitch one's wagon to the ideas that Bickel popularized and to capitalize on the general sense of malaise inflicting many observers of the American judicial system was undeniably present. Bealean theory was therefore declared illegitimate because it was countermajoritarian. Maybe it was not quite as powerful as a complaint about the Warren Court's constitutional rights activism, but it was probably better than nothing.

Few—if any—traditionalists saw fit to engage on the legislative supremacy argument; either they did not see a response or they did not think one necessary. Whatever the strategic value of the slogan to the choice-of-law revolutionaries, however, legislative supremacy is in point of fact completely inadequate as a weapon to use against Bealean choice-of-law theory. Legislative supremacy is irrelevant where the legislature has no position on the matter under examination. Why would legislative power be threatened by judges resolving issues that no legislature has even bothered to decide? It was not as though judges were eagerly overreaching into areas where they had no business. Judges were charged with deciding cases, and this included selecting the applicable law, whether they liked it or not.<sup>74</sup>

Moreover, there is no reason to assume that any other theory of choice of law would produce results more in line with democratic legitimacy. If one assumes modern theory honors legislative preferences but traditional theory does not, then perhaps we should indeed be worried about Bealean judges rampaging around like bulls in a china shop. But there is no reason to make such an assumption. The modernists apparently thought it was obvious that

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and the *Formal Rule of Law*, 14 J. COMPETITION L. & ECON. 527, 529 (2019). That same motivation is said to underlie support for textualism—the close intellectual cousin of interest analysis. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–79 (1989). In a sense, the radicalism of this Essay is to reject this decades-long embrace of judicial constraint, at least in the conflict-of-laws context, recognizing the importance of judicial creativity to the construction of a functioning system of choice of law.

71. 347 U.S. 483 (1954).

72. 369 U.S. 186 (1962).

73. 368 U.S. 871 (1961).

74. And the reality is that judges—like most lawyers—probably prefer *not* to be drawn into a dispute over choice of law. Judge Jack B. Weinstein's statement on choice of law in the class action context, though perhaps apocryphal, probably reflects how many feel about conflicts issues more generally: "Whenever I want class action attorneys to settle the case, I call them into chambers and ask them to brief me the choice-of-law issues." Linda S. Mullenix, *Gridlaw: The Enduring Legacy of Phillips Petroleum Co. v. Shutts*, 74 UMKC L. REV. 651, 651 (2006).

their approach was superior from the point of view of democratic theory.<sup>75</sup> The closest that modern theorists ever came to justifying their attempt to claim the democratic moral high ground, however, was their premise that interests are determined by construing statutes.<sup>76</sup> The legislative supremacy argument ultimately reduces, therefore, to the claim that the determination of governmental interests is a product of “the typical method of interpretation used to determine the scope of a law in purely domestic cases.”<sup>77</sup> As the next section will demonstrate, the evidence on this claim all points in the opposite direction—a serious look at how courts approach interpretive questions unanticipated by the legislature reveals the creativity demanded of judges in such circumstances.

We are not by any means antagonistic to the principle of legislative supremacy. Where courts and legislatures disagree, the legislative will should govern unless some constitutional provision or governing federal law provides otherwise. We simply disagree about what this means. This Essay argues that the principle of legislative supremacy does not rule out the exercise of judicial decision-making power. To the contrary, our legislatures count on courts as something of a junior partner in the exercise of making policy. It is expected that they will play a substantial, although subsidiary, role by fleshing out statutory language and resolving issues the legislature has not answered.

#### A. *The Limited Relevance of Legislative Supremacy*

Modern choice-of-law theory’s basic argument depends on being able to show that the exercise of judicial creativity to reach choice-of-law decisions violates the principle of legislative supremacy. But if these decisions are left to the judiciary by a legislature that simply declines to deal with issues of this sort, then legislative supremacy is not violated. If the legislature is genuinely silent, then there is no countermajoritarian objection to the judge arriving at a choice-of-law decision. And unless there is some reason to think that the legislature objects to system values, there is no basis for prohibiting judges from taking them into account. Traditionalists agree that there is no dispute over the superiority of legislative wishes in nonconstitutional questions that the legislature has actually decided. They would claim, however, that if the legislature has not decided the problem, this leaves a gap that the courts must fill.<sup>78</sup>

Treating legislative silence as an invitation to the courts to decide the choice-of-law issue themselves poses a real threat to governmental interest analysis. To the traditionalist-minded judge, it amounts to an invitation to take system values into account, to promote the vindication of vested rights—in short, to do everything that the modern theorists believed courts should

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75. See *supra* note 7 and accompanying text.

76. See Roosevelt & Jones, *supra* note 54, at 305 & n.61.

77. *Id.* at 303.

78. See Justin Zaremby, *Restating the Restatement of Conflicts: Approaching the Legitimacy Question in Choice-of-Law Theory*, 45 SUFFOLK U. L. REV. 67, 84 (2011).

avoid. The possibility that statutory construction might not produce an answer is therefore a serious challenge to the modernists. Everything depends, in other words, on whether there is a legislative position on the issue that the judge is facing—a hook on which legislative supremacy can hang its hat.

It is generally agreed that legislatures rarely state the interstate reach of legislation in so many words.<sup>79</sup> But the modern theory takes the position that the absence of any explicit indication of legislative consideration of the issue is not fatal, because a legislative position can be inferred from the text of the statute and the statute's underlying policy—essentially positing that for each substantive policy there is an interstate scope that would best forward that policy. Thus, by consulting the policy underlying that statute, an answer can always be found. The methodology that it claims to apply in accomplishing this derivation is said to be the usual processes of statutory construction and interpretation.<sup>80</sup> The results of applying this methodology to determine the interstate reach of statutes, it is argued, are as authoritative as the results of applying this methodology to determine the reach of statutes in domestic cases.

The “new critics” of the modern methodology disagree. They find implausible the claim that choice-of-law consequences can be drawn from apparently silent statutes “like rabbits from a hat.”<sup>81</sup> The rabbits, the new critics claim, are not the result of any genuine statutory construction methodology but simply the imputation of the modernists' own value judgments to the legislature in situations where no evidence of actual intent can be found.<sup>82</sup> In support of this claim, the new critics point out that the modernists refuse to accept indications of actual legislative intent when they point toward a territorialist result.<sup>83</sup> The modernists, the new critics point out, are more interested in getting results consistent with interest analysis than in showing respect to the democratically elected legislature.

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79. Elliott E. Cheatham, *Sources of Rules for Conflict of Laws*, 89 U. PA. L. REV. 430, 448 (1941) (“The statutes of a state, like the common-law rules of a state, are for the most part formulated without regard to Conflict of Laws. The ordinary statutes and the ordinary common-law rules of a state are normally referred to and applied, however, in a Conflict of Laws case.”); *id.* at 449–50 (“Most statutes are formulated with regard to only the ordinary or internal situations and on the problems of Conflict of Laws they are silent.”).

80. See *supra* note 63 and accompanying text.

81. Brilmayer, *supra* note 4, at 402.

82. *Id.*; see also Maurice Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946, 957 (1981) (arguing that interest analysis “requires imposing externally derived value judgments on” the laws of the implicated states).

83. One manner in which this is manifested is through the “objective” view of choice-of-law policies endorsed by many interest analysts. An interest analyst who takes an objective approach makes a determination regarding the relevant interests at stake “de novo, without crediting any prior determination by the state.” Brilmayer & Seidell, *supra* note 60, at 2075. In making this determination, they tend to set aside territoriality and other system values in an effort to narrow the set of relevant considerations. By narrowing the view of what each state may consider at stake, one has a greater chance of finding that the dispute in question presents a false conflict. *Id.* at 2075–76.

The only basis that modern theory has provided for assuming that a right answer can always be found in the interstate context is to point to the fact that when faced with the need to decide issues on which the legislature has not spoken in the domestic context, it somehow finds a way to do so. This has been the stock response since the early days of interest analysis, and it continues to be the stock response today.<sup>84</sup> It surely cannot be impossible for courts to find sufficient guidance in the statute, the argument runs, because that is what they do every day in ordinary domestic cases.

But a fallacy lies beneath this argument. The claim is that the ability of courts to decide cases on a silent statutory record demonstrates the feasibility of the method that Brainerd Currie recommended. This is only the case if the method that courts use to decide cases on a silent statutory record in the domestic context is the same method that Currie recommended to resolve choice-of-law disputes. If the two methods are different, then the fact that courts are successful at resolving domestic cases proves exactly nothing about the feasibility of interest analysis. The entire argument thus stands or falls on the claim that the modern theorists make about “the usual processes of statutory construction and interpretation.”<sup>85</sup> To put it another way—the most pressing question facing the future of choice of law in the United States is whether or not interest analysis is consistent with a conception of statutory interpretation that accurately reflects the methodologies utilized by judges to resolve noninterstate disputes.

And, in our view, that answer is clear. The differences between the two methods—statutory construction in domestic cases and interest analysis “construction” in choice-of-law cases—are obvious and undeniable. All it takes is a comparison between the sources consulted in the domestic context and the sources listed in the literature of interest analysis. When interest analysis is explained by its proponents, the methodology is described as consulting “the policies underlying the statute.”<sup>86</sup> It seems to be assumed that this description will match the way that decisions are made about the applicability of statutes in the domestic context. But quite the contrary—this description only highlights the differences.

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84. See, e.g., Kramer, *supra* note 49, at 300–01 (“This is a common problem of unforeseen or unanticipated circumstances, and it is black letter law that such problems can be resolved by ascertaining the statute’s purpose and extrapolating from that purpose to the particular question . . . . The objection thus really amounts to a claim that courts are unable to do something that they do all the time.”); Roosevelt & Jones, *supra* note 54, at 305 (“[W]e simply do not see how it follows that determining scope is not interpretation. Statutes do not explicitly specify lots of things: that is exactly why interpretation matters. Courts or other decisionmakers often have to decide whether a law grants rights to, or imposes obligations on, a particular person in particular circumstances. If a statute grants rights to pedestrians, does it do so to a person on rollerblades? When this question is answered in the domestic context, we call it interpreting the law, and there is no reason to suppose it magically becomes something else simply because another state is involved.” (footnote omitted)).

85. Brilmayer & Seidell, *supra* note 60, at 2067.

86. Rosenberg, *supra* note 82, at 952 (“Stated differently, the Currie scholars assert that by investigating the substantive policies underlying a statute the court will be able to determine its intended territorial reach without resorting to the a priori rules that often led the territorialist system to unjust results.”).

Now, the task of compiling a complete list of evidentiary sources consulted in the context of domestic statutory construction is not a trivial task. But for our purposes, we can look to William Eskridge and Philip Frickey's "funnel of abstraction" as an instructive foundation.<sup>87</sup> The "funnel" is a hierarchical model identifying "the primary evidentiary inquiries in which [courts] will engage" when seeking to resolve a question of statutory interpretation—that is, the categories of evidence to which courts will look when seeking to determine the meaning of the statute.<sup>88</sup> The funnel sets out the evidentiary sources, here listed in descending order of priority: (1) the ordinary commonsense meaning of the text; (2) the whole act and purpose (meaning the purpose as inferred from the act when examined in a holistic manner); (3) judicial precedent; (4) legislative materials; (5) agency practice (which we might generalize to mean the practice of the body empowered to enforce the law, where applicable); and (6) norms and values.<sup>89</sup>

There is room for disagreement about what exactly should be included on this list, as well as the proper hierarchy; but such disagreements would not affect the argument here. What matters for present purposes is that only the second of these categories is considered in the context of governmental interest analysis, "whole act & purpose" or, as it is referred to in the interests analysis literature, the underlying policy. The other five are either not mentioned or are dismissed as not authoritative. We can start at the top.

One would certainly think that the ordinary meaning of the text of the statute ought to be authoritative when it comes to statutory interpretation. Of course, there may be differences of opinion as to whether it should exclude all other considerations. Strict textualists would insist on limiting interpretation to only the text, while others might be more flexible.<sup>90</sup> But no serious theory of statutory interpretation would declare the text irrelevant.

Yet, astonishingly, many interest analysts do essentially that. Proponents of interest analysis regularly assert state interests without offering justifications based on textual analysis and that often could not be so justified. Indeed, in Currie's foundational work on interest analysis, which focuses on married women's property statutes, his only engagement with the text of the statutes in question is to say "that the lawgivers do not mean all that they say."<sup>91</sup> Instead, he "stipulate[s]" to a set of interests based on the assumption that each state is concerned exclusively with assisting its local citizens.<sup>92</sup> It is, of course, quite plausible that each state legislature acts to the benefit of its citizenry—but it is far from obvious that this end is never joined with

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87. See William N. Eskridge Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353 (1990).

88. *Id.*

89. WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 30 (2016).

90. See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91–95 (2006).

91. Brainerd Currie, *Married Women's Contracts: A Study in Conflicts-of-Law Methods*, 25 U. CHI. L. REV. 227, 231 (1958).

92. *Id.* at 231–32.

others that might be in tension with it, such as a desire to recognize the equal dignity of all persons regardless of their origin.<sup>93</sup>

Consider, for example, a recent decision of a California appellate court where it held that California had no more than a “hypothetical” interest in applying its pro-plaintiff strict products liability law to a case in which a bus of Chinese tourists crashed in Arizona, killing some of the passengers and injuring others.<sup>94</sup> Although one of the original defendants in the suit was a California-based tour bus operator that owned the bus, the court ultimately held that Indiana’s “more business-friendly” rule should be applied, given that none of the injured passengers were from California.<sup>95</sup> Taking seriously the claims of the modernists, this analysis suggests that the court is imputing to the California legislature an utter indifference as to how its own residents treat foreign nationals outside of state lines, allowing business interests to trump basic safety so long as no Californians are harmed. Perhaps this is correct, but such a distasteful conclusion seems hard to swallow when the court has offered no support in text or even precedent.

In fact, the only California policy cited by the court—incentivizing manufacturers to put only safe products on the market—would seem to point against the decision ultimately reached, further enforcing the invented nature of the interests modernists posit.<sup>96</sup> Moreover, it may even be the case that the interests of the local citizenry are best advanced through laws that level the playing field, thus encouraging individuals from other jurisdictions to enter the state and engage in commerce there. Thus, one can see the implausibility of the foundational modernist notion that a pro-plaintiff law only gives rise to a state interest when the plaintiff is from that state; while a pro-defendant law only gives rise to a state interest when there is an in-state defendant.<sup>97</sup> In other words, it is not clear that the modernists are even taking seriously the second category of evidence—whole act and purpose—and are instead substituting broad assumptions.<sup>98</sup>

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93. Additionally, such an interest in always favoring the in-state litigant may be in tension with the interest in adhering to the U.S. Constitution. *See* Douglas Laycock, *Equality and the Citizens of Sister States*, 15 FLA. ST. U. L. REV. 431, 446–47 (1987) (suggesting that Currie’s in-state preference rule violates equal protection).

94. *Chen v. L.A. Truck Ctrs., LLC (Chen III)*, 255 Cal. Rptr. 3d 559, 562 (Ct. App. 2019), *review denied*, No. B265304 (Cal. Feb. 26, 2020).

95. *Id.* at 565.

96. *See id.* at 566 (“The policy behind imposing strict products liability ‘is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.’” (quoting *Barrett v. Superior Ct.*, 272 Cal. Rptr. 304 (Ct. App. 1990))).

97. *See* Russell J. Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases*, 46 OHIO ST. L.J. 493, 495 (1985) (stating that it would be irrational for a state to apply the law of an unintentional tort to an accident that occurred within its state that involved no in-state citizens, because doing so “never will advance the purpose of its rule”).

98. Regarding the fourth category, legislative material, it is apparent that such material is taken more seriously in the domestic context than in the choice-of-law context. It is close to impossible to find modernists mentioning legislative history as a source for statutory interpretation. Admittedly, we should not place too much emphasis on this criterion for the simple reason that legislative materials are frequently unavailable in the state context,



Jumping to the end of the list, another important resource in statutory interpretation is normative canons—that is, norms and values. Normative canons are presumptions drawn from broader policy considerations, normative backgrounds, and often, constitutional values.<sup>99</sup> Far from being a secondary aspect of statutory interpretation, normative canons are routinely cited by courts.<sup>100</sup> While much of the research in the area has focused on the federal courts, the same observation regarding the importance of substantive canons can be made in the context of state courts.<sup>101</sup> Some commentators have likened the normative canons, particularly when weighed against the other sets of canons, as forming a “common law of statutory interpretation,” akin to the common law of contract, which has its own rules of interpretation.<sup>102</sup>

One way of understanding the normative canons is that they provide the means by which judges can coordinate a statute with another body of law—avoiding conflicts that would arise were the statute interpreted in isolation. Consider, for example, the constitutional avoidance canon, which—in its modern form—counsels that “a statute should be interpreted in a way that avoids placing its constitutionality in doubt.”<sup>103</sup> As reflected in Chief Justice Roberts’s use of the canon in *National Federation of Independent Businesses v. Sebelius*,<sup>104</sup> the constitutional avoidance canon may sometimes involve contorting a statute’s meaning into shapes that might seem foreign to its text or stated purpose in order to avoid the law’s constitutional invalidation. In that sense, many of the normative canons serve as canons of coordination or, what we might call, “conflicts avoidance” canons. Another canon with a long historical pedigree helps establish this point further: “statutes in derogation

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particularly older state statutory materials. Perhaps that is why it is not mentioned in modern choice-of-law theory. More likely, however, legislative history is ignored for the same reason as is text: the modernists construct state interests from basic assumptions that are drawn from whole cloth—not ones that are actually derived from statements made by the legislature, whether in legislative history or in the statute itself. Thus, as this differing treatment of legislative history helps to accentuate, the interpretive process employed by the modernist is of little resemblance to the usual processes of statutory interpretation to which they appeal. We have similarly seen no cases addressing how the relevant regulatory agency enforces the law, the fifth category, likely for similar reasons.

99. ESKRIDGE JR., *supra* note 89, at 11–13.

100. One study of the Supreme Court found that substantive canons were cited in 14.4 percent of opinions authored between 2005 and 2011, while purpose was cited in 26.0 percent. Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 850 (2017).

101. See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1806 (2010).

102. Daniel B. Listwa, Comment, *Uncovering the Codifier’s Canon: How Codification Informs Interpretation*, 127 YALE L.J. 464, 471 (2017) (quoting ESKRIDGE JR., *supra* note 89, at 21). The notion of statutory interpretation as being integrated with common-law-making is one to which we turn below.

103. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 247 (2012).

104. 567 U.S. 519 (2012).

of the common law shall be narrowly construed.”<sup>105</sup> Like the constitutional avoidance canon, the derogation-of-common-law canon allows judges to interpret statutes in a dynamic fashion so as to reconcile conflicts with the common law. The canon, which has its roots in the “traditional hostility of English judges to legislation,”<sup>106</sup> essentially allows judges to retain significant “law-making power for themselves,” even in areas of the law thoroughly canvassed by statutory authority.<sup>107</sup> These and other canons speak to the way in which judges do not interpret statutes in isolation but rather in a manner that places the particular statutes in conversation with other sets of norms.<sup>108</sup>

As the notion of normative canons providing the basis for a “common law of statutory interpretation” suggests, their presence in the interpretation context reflects the great deal of creative discretion exercised by judges when engaged in resolving the open texture of the law. More pointedly, they reflect the fact that judges regularly look beyond the substantive policies of the particular statute in question to consider other values that ought to be considered. For example, when a court invokes constitutional avoidance in order to prevent a statute from violating a constitutional precept, it is looking outside of the specific statute in order to forward another set of values. This is essentially the invocation of system values—here the constitutional system—in the context of constructing an individual statute. This closely parallels the invocation of choice-of-law system values when a judge construes the interstate scope of a law such that its application is consistent with some broadly held choice-of-law rules—a way of integrating modernist and more traditionalist goals that we discuss further in the final part of this Essay. There is, thus, straightforward continuity between the actual usual processes of statutory interpretation, which involve normative canons, and the invocation of system values in choice of law. This is despite the fact that interest analysis asserts—without support—that carrying over the interpretive methodologies used in the purely domestic sphere to the choice-of-law context would eschew the judicial invocation of such broader concerns. In other words, a sophisticated model of statutory interpretation makes space for the integration of norms and presumptions intended to forward values such as predictability and uniformity, belying the modernists’ assertion that an approach to resolving choice-of-law problems that seeks to follow the “ordinary” process of legal interpretation must focus single-mindedly on the law’s substantive policies, rather than a given state’s interest in producing a workable interstate system of conflicts resolution.

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105. See, e.g., *Rehberg v. Paulk*, 566 U.S. 356, 362–63 (2012); *United States v. Texas*, 507 U.S. 529, 534 (1993).

106. *Liu v. Mund*, 686 F.3d 418, 421 (7th Cir. 2012).

107. Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 769 (2013).

108. See, e.g., Daniel B. Listwa & Charles Seidell, Note, *Penalties in Equity: Disgorgement After Kokesh v. SEC*, 35 YALE J. ON REGUL. 667, 687–89 (2018) (discussing the courts’ use of presumptions based on background norms derived from equity).

A final point underscores the extent of the difference between modern choice-of-law theory and the *actual* usual methods of statutory construction and interpretation. The ordering of these different kinds of statutory construction materials is important—but more important for our purposes is that there *is* an order. The ordinary commonsense meaning of the text is listed first for a reason. Text is considered the most authoritative, such that if an answer is found in the text—either explicitly or by very clear inference—it makes recourse to any of the other considerations unnecessary or at least less important. The priority ordering of the remaining factors is not always straightforward—the force of a constitutional norm may be enough to bend the ordinary meaning of the text in some circumstances, for example. But still, the general ranking is roughly lexicographic, meaning that consistency with a higher ranked evidentiary source will not be sacrificed to achieve consistency with a lower ranked source.

The reasoning underlying this order is that the higher categories are more significant than the lower categories, but it is understood that evidence of meaning in the higher ranked categories may not be conclusive. The reason that we have five categories following the first one—namely, ordinary meaning, is precisely because the ordinary meaning of the text may not supply an answer. And the reason that we have additional categories after the whole act and purpose is that text together with the whole act still may not supply an answer. In this manner, the very structure of the standard methodology of domestic statutory interpretation reveals awareness and acceptance of the fact that there may not always be an answer if one limits oneself to legislative text and purpose. Additional categories are included precisely because it is understood that they will sometimes be needed. Therefore, there is no basis for the claim that the impoverished methodology employed by governmental interest analysis has any similarity at all to domestic interpretation.

### *B. Common Law in the Statutory System*

As the previous section describes, while the presence of a relevant statute certainly constrains and shapes the judge's discretion in deciding on questions of multistate scope, the statute itself does not exhaust the evidentiary sources to which the judge will look when confronted with an interpretive question. In particular, the judge may look at background norms—including presumptions derived from more systemic concerns. But when it comes to understanding the role of judicial lawmaking in a statutory system, this is only part of the story. There are many cases in which a particular statute has come to be understood as an invitation to a court to take jurisdiction over an issue and develop common law on the subject. This provides another model for understanding how a sophisticated view of the judge's role in statutory gap filling makes space for the sort of common-law decision-making that the modernists reject.

Even a cursory examination of modern American legal practice establishes that, while sometimes controversial, judicial exercise of the substantive

power to elaborate on minimal statutory content is tolerated even when that elaboration is far more extensive than ever contemplated in the choice-of-law context. Take, for example, Delaware's broad general corporation statute, which its courts have routinely characterized as an "enabling statute," not intended to provide detailed guidance but rather to empower the courts to respond creatively to new problems.<sup>109</sup> If it is illegitimate for courts to flex their policy muscles in the determination of multistate scope, then several important areas of American legal practice would have to be substantially reconfigured.

The legal landscape of the modern era differs markedly from that which characterized the nineteenth century. In the early years of the American republic, most state legislatures passed few statutes of general application. Instead, they largely enacted private bills, granting a debtor more time to pay creditors or permitting a town to build a road.<sup>110</sup> More broadly applicable acts, such as one setting the procedures under which a person could obtain a divorce, were enacted, but those were the exceptions.<sup>111</sup> The paucity of legislation left the judge with a prominent role, making the Blackstonian method of common-law-making, which was wholly within the purview of the courts, the dominant method by which the law developed.

In contrast, in the modern era, legislatures have largely displaced the courts as the primary source of laws. Today, when a litigant asserts a cause of action—whether it be in tort, contract, or something else—there is a good chance it is one that is grounded in statutory law. But it is a mistake to conclude that the proliferation of statutes has rendered common-law-making irrelevant. In fact, the process of common-law rulemaking frequently finds a place in the context of statutory construction.

The most obvious place in which the common law remains nestled within the confines of statutory law is in the context of "common-law statutes." A common-law statute, as the term is used, refers to a statute that embodies a "broad delegation to the judiciary," one in which "the legislature expects judges to develop the law over time by utilizing a free-form common law method."<sup>112</sup> The typical example—acknowledged by the U.S. Supreme Court as a common-law statute—is the Sherman Act,<sup>113</sup> the foundational federal antitrust statute.<sup>114</sup> Section 1 of the Act merely prohibits "restraint[s] of trade or commerce among the several States," a broad standard that provides little guidance for how it ought to be applied.<sup>115</sup> Rather than attempting to parse the original, specific intentions of the Congress that

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109. See Leo E. Strine Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 675 (2005).

110. Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 720 (2018).

111. *Id.*

112. Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J.F. 47, 53 (2010).

113. 15 U.S.C. §§ 1–7.

114. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899–900 (2007) ("From the beginning the Court has treated the Sherman Act as a common-law statute.").

115. 15 U.S.C. § 1.

enacted the law, the Supreme Court has viewed the Sherman Act as an invitation to the federal courts to “act more as common-law courts” and continue the process of developing the common law of antitrust that had first developed in England, “adapt[ing] to modern understanding and greater experience” as appropriate.<sup>116</sup> In the case of common-law statutes, the legislative intervention serves as little more than an endorsement of the judicial project, leaving the Blackstonian process of common-law rulemaking largely undisturbed.

Although the Sherman Act represents an extreme, both scholars and judges have noted a large swath of statutes that maintain for the courts a common-law-making role. For example, the Supreme Court has noted that in the context of private securities fraud actions under Rule 10b-5, a “judicial oak [] has grown from little more than a legislative acorn.”<sup>117</sup> Similarly, intellectual property scholars have pointed to many of the major enactments, such as the Copyright Act of 1976<sup>118</sup> and the Patent Act,<sup>119</sup> as serving as broad delegations to the courts, which have subsequently developed robust sets of legal rules with only the most cursory connections to the statutory text.<sup>120</sup> More controversially, scholars have described the Administrative Procedure Act<sup>121</sup> as codifying past common-law doctrine while still leaving room for the courts to continue evolving the law.<sup>122</sup> With all of these statutes, the general view is that the legislative text serves largely to “enable” further lawmaking by the courts—even when the text of the statute includes no explicit enabling language.<sup>123</sup> This does not mean that the statute itself provides no guidance but rather that the courts have a great deal of freedom to import external concerns—including those derived from social, economic, and political theories—in order to formulate a workable set of rules. For example, in the context of the Sherman Act, over the last few decades the Court has crafted a robust set of doctrines built around an economic school

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116. *Leegin*, 551 U.S. at 899 (quoting *Nw. Airlines, Inc. v. Transp. Workers*, 451 U.S. 77, 98 n.42 (1981)).

117. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975).

118. Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of the U.S.C.).

119. 35 U.S.C. §§ 1–293.

120. See, e.g., Shyamkrishna Balganesh, *Debunking Blackstonian Copyright*, 118 *YALE L.J.* 1126, 1167 (2009); Pierre N. Leval, *Trademark: Champion of Free Speech*, 27 *COLUM. J.L. & ARTS* 187, 198–99 (2004); Craig Allen Nard, *Legal Forms and the Common Law of Patents*, 90 *B.U.L. REV.* 51, 53 (2010).

121. Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

122. See Gillian E. Metzger, *Embracing Administrative Common Law*, 80 *GEO. WASH. L. REV.* 1293, 1321 (2012); see also John C. Brinkerhoff Jr., *FOIA's Common Law*, 36 *YALE J. ON REGUL.* 575 (2019) (arguing that the Freedom of Information Act can be fruitfully thought of as a common-law statute).

123. In this manner, these broad statutes can be contrasted with such laws as the Rules Enabling Act, which explicitly delegates to the U.S. Supreme Court the authority “to prescribe general rules of practice and procedure and rules of evidence.” 28 U.S.C. § 2072(a).

of thought that did not even arise until some sixty years after the statute itself was enacted.<sup>124</sup>

Generally, discussions of “common-law statutes” focus on federal law, but the most natural examples are actually on the state level. Various state legislatures have passed statutes codifying features of specific areas of common law, such as torts and contracts, with the expectation that courts will be able to continue developing the doctrine.<sup>125</sup> For example, the Supreme Court of California has explained that when the legislature enacted the California Civil Code it intended to codify the common law, while leaving to courts the freedom to develop the law by interpreting the code in a “flexible and adaptable” manner in “response to changing circumstances and conditions.”<sup>126</sup> The court specifically referenced areas in which the code left gaps or used vague language as “provid[ing] ample room for judicial development of important new systems of rules.”<sup>127</sup> Similarly, as already noted above, Delaware courts understand the general corporations law of the state as largely an invitation for judicial lawmaking.<sup>128</sup> By understanding the legislation as implicit delegations to the courts, the state courts have retained much of their common-law-making authority, rendering the Blackstonian method of continuing importance even in today’s statutory era.

The notion that statutory interpretation is inconsistent with a broad and substantial role for courts’ common-law-making authority is thus wholly without support. Where the legislature has left the law in an open-textured manner, it falls on the courts to fill in the gaps creatively, often looking outside the individual policies of the statutes in question and toward broader values. This is a lesson with particular application in the choice-of-law context. Because legislatures have given courts little substantive guidance with regard to how the law should be applied in the interstate context, courts must utilize their discretion to fill in the gaps. In doing so, they can appropriately look beyond the individual statutes, toward broader values—including interstate harmony. Neither interest analysis nor any of the modern choice-of-law theories provide any space for such a role. Only by recognizing the important role of the common law of choice of law can one have a sufficiently robust theory for resolving conflicts. In the next part, we illustrate what such a theory would look like, focusing in particular on how such a theory would impact the forthcoming Restatement (Third).

### III. JUDICIAL FUNCTION AND THE FUTURE OF CHOICE OF LAW

The Restatement (Third) of Conflict of Laws is bound to play an important role in the development of choice-of-law theory in the future. Considerable thought has gone into making it not only theoretically sound but user-

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124. See Alan J. Meese, *Justice Scalia and Sherman Act Textualism*, 92 NOTRE DAME L. REV. 2013, 2018–20 (2017).

125. See Leib & Serota, *supra* note 112, at 52–53.

126. *Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226, 1238 (Cal. 1975).

127. *Id.*

128. See *supra* note 109 and accompanying text.

friendly, with “users” including judges, litigants, and lawyers. As we have previously argued, the Restatement (Third)’s approach incorporates certain incompatible elements: on the one hand, it offers a set of simple rules to resolve choice-of-law disputes, thus introducing predictability and uniformity; on the other hand, it directs courts to resolve disputes through bespoke acts of statutory interpretation, seemingly rendering the rules provided by the Restatement (Third) itself without force or relevance.<sup>129</sup> But in this part, we revisit these issues—offering a way to resolve this incompatibility by looking below the surface of the Restatement (Third) and keeping in mind its drafters’ ambitions. We believe that the key to this reinterpretation is the common law of choice of law. In the sections that follow, we offer a vision of the role we believe the Restatement (Third) of Conflict of Laws should have in the future—elaborating on what precisely a common-law model of choice of law would look like in the process.

#### A. *The Paradox of the Restatement (Third)*

As we have previously articulated, the current draft of the Restatement (Third) suffers from a deep contradiction.<sup>130</sup> The drafters have two ambitions. On the one hand, they seek to make conflicts feel less archaic and more understandable by providing within the Restatement itself a robust theoretical explanation of what choice of law entails.<sup>131</sup> On the other hand, they have endeavored to provide a definitive set of leading rules, dictating how particular choice-of-law disputes ought to be decided.<sup>132</sup> Stated at this high level of abstraction, there is no contradiction. The problem, however, arises because of the specific theory that has been endorsed by the Restatement (Third).

The drafters have embraced a novel theoretical framework—the “two-step” theory—that integrates the basic tenets of interest analysis with some updated terminology.<sup>133</sup> The “two-step” theory is described in the draft Restatement as follows:

Resolving a choice-of-law question requires two analytically distinct steps. First, it must be decided which states’ laws might be used as a rule of decision. This is typically a matter of discerning the scope of the relevant state internal laws: deciding to which people, in which places, under which

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129. See generally Brilmayer & Listwa, *supra* note 44.

130. *Id.*

131. The reporters’ memorandum prefacing the draft Restatement (Third) explains that one of the goals of the drafters was to render choice of law “intelligible to nonspecialists and to align with the ordinary process of legal analysis.” RESTATEMENT (THIRD) OF CONFLICT OF L. add. to reporters’ memorandum at xv (AM. L. INST., Council Draft No. 2, 2017).

132. *Id.* (stating that the drafters “do not expect courts, except in rare cases where no Restatement rule provides guidance, to perform a two-step analysis themselves,” instead of relying on the set of rules provided by the Restatement).

133. *Id.* reporters’ memorandum at xv–xvi.

circumstances, they extend rights or obligations. Second, if state internal laws conflict, it must be decided which law shall be given priority.<sup>134</sup>

In other words, the two steps consist “first of determining the ‘scope’ of the contending statutes through the ordinary processes of statutory construction used for deciding purely domestic cases; and second, of reconciling overlapping state scope claims through the application of ‘priority’ principles.”<sup>135</sup> It is a decision-making process that sharply separates the unilateral examination of each state’s respective statute’s scope (at step one) with the multilateral, systems-oriented determination of priority (at step two).

The virtue of the two-step theory is that it “domesticates” choice of law by setting aside strange terms like the state’s interests and more fully embracing the notion that choice-of-law problems can be answered by simply interpreting each statute that is implicated by a choice-of-law dispute.<sup>136</sup> Choice-of-law questions, in other words, should be answered like any other statutory issue, by engaging in a particularized interpretation of the implicated statutes.

The problem, however, is that such a conception of choice of law leaves little relevance for the rules set out in the draft Restatement. By surveying a large number of cases, the drafters have synthesized a body of black-letter rules that reflect the ways in which courts have resolved particular types of choice-of-law disputes in the past.<sup>137</sup> The idea is that a court can look to the restatement in order to see how courts in other states have resolved similar disputes and then invoke the persuasive value of those other states’ decisions to come to a resolution of its own. This is a familiar role for a restatement in most common-law subjects, but it does not quite fit with the conception of choice of law set out by the two-step theory. Under the two-step approach, and modern choice-of-law theory more generally, one ought to be able to resolve a dispute wholly by looking to the substantive law in question. To look beyond the state-specific law and to consider what other states have done would be a judicial imposition in violation of the principle of legislative supremacy. This is a serious problem for the Restatement (Third) in its current form and one that needs to be addressed.

We believe that the means of resolving this dispute are simple: an embrace of the role of common-law-making in the choice-of-law context. The Restatement (Third), following the modernists, assumes that the scope of the law in question can be determined conclusively by looking at the law and its underlying policy in isolation. One only considers other policies—including

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134. RESTATEMENT (THIRD) OF CONFLICT OF L. § 5.01 cmt. b at 115 (AM. L. INST., Preliminary Draft No. 2, 2016).

135. Brilmayer & Listwa, *supra* note 44, at 270.

136. *Id.* at 291.

137. *Id.* at 268; *see also* Roosevelt & Jones, *supra* note 54, at 298 (“The methodology of [the Restatement (Third)’s] Reporters is to look at current choice-of-law decisions under the *Restatement (Second)*, other modern approaches, foreign-country systems, and even the practice of territorial states, and identify categories of cases where the results are consistent enough to be stated in the form of rules.”).



system values—in the second step, when determining which of the two overlapping laws should be given priority. But as discussed in Part II, interpretation of the relevant law in isolation is neither likely to yield a conclusive answer (as it is rarely the case that the underlying policy will suggest a clear interstate scope) nor consistent with the pluralistic approach to interpretation that describes judicial decision-making in the domestic sphere (as indicated by the funnel of abstraction and the multiple categories of evidentiary sources it lists). The two-step model is thus in tension with the realities of the typical choice-of-law dispute.

These tensions, however, can be resolved by softening the boundaries between step one and step two (or, better yet, collapsing them entirely). That is, by recognizing that when interpreting whether a statute or other law extends its scope to a particular interjurisdictional dispute, it is not inappropriate for a court to weigh considerations beyond the underlying policy, including system values, much as courts in the domestic context will consider not just the policy of the law in question but also constitutional values. This is what it means to adopt a common-law approach to choice of law, as it integrates the judge's creative decisional authority into the interpretive process. More specifically, it suggests that the choice-of-law rules provided by the Restatement (Third) ought to be construed as presumptions that are integrated into the judge's interpretative process, much as normative canons are integral to purely domestic statutory interpretation.<sup>138</sup>

This is our vision of the future of choice of law: an approach to resolving choice-of-law disputes that begins by looking at any applicable statutes, their texts and their purposes, but does not end there. Rather, after noting the extent to which gaps exist in the relevant laws, courts should look to the Restatement's rules as background presumptions that should be deferred to as a means of promoting uniformity and predictability. Such an approach, integrating presumptions into the interpretive process and thus achieving values that go beyond the substantive policy ends of the particular statutes in question, is—as we demonstrated in the previous part—a familiar aspect of standard interpretive models. In this sense, we agree wholeheartedly with the modernists' claims that choice-of-law disputes should be approached through the same "ordinary legal analysis"<sup>139</sup> used in domestic disputes—but it is with regard to what is "ordinary" that we disagree. As we have explained, to us, "ordinary legal analysis" in the choice-of-law context must recognize the role for judicial common-law-making.

In Part III.D, we further elaborate on what the common-law approach would look like in practice and how it would relate to the Restatement (Third). But before we provide this account, it is helpful to take one step back and reflect on the distinguishing characteristics of the common-law method, namely the nature and degree of decisional discretion left to judges.

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138. See Brilmayer & Listwa, *supra* note 44, at 290.

139. Roosevelt & Jones, *supra* note 54, at 303.

*B. The Distinguishing Characteristics of the Common Law of Choice of Law*

The most important distinguishing characteristics of a common law of choice of law (CLCL), understood in its most general sense, are its openness to judicial lawmaking and the relative freedom that judges have to consider a variety of factors as relevant to the rule being declared. These two characteristics are related to one another. It is because judges have the prerogative of making law that they are free to take a variety of social, economic, moral, and other factors into account. Judges are not bound by strict formulaic instructions; they have decisional discretion. An additional important feature that makes CLCL distinctive is its compatibility with a wide variety of outcomes. Telling a judge to apply a “common-law model” of choice of law does not tell her how to decide a case but rather, what her attitude toward the process of resolving choice-of-law problems ought to be and what sorts of considerations may legitimately be taken into account.

It might be tempting to define the common-law method in terms of the traditional commitment to system values, with the alternative modernist theories characterized by commitment to furthering the underlying substantive policies. But this is too simplistic a dichotomy. The modernists thought that the Restatement (First) wrongly disregarded statutes; and they thought that it was mistaken in treating domiciliary-connecting factors as less influential than territorial ones.<sup>140</sup> It then merged the two criticisms, so that it was the inattention to legislatures that irremediably led to territorialism. From their treatment of contingency as a necessity and their conflation of methodology and result, they came to the conclusion that giving statutes their due would result in diminishing the significance of territorial factors. This was, quite simply, a major logical mistake. Greater emphasis on what the legislature wants leads to the abandonment of territorial factors only if the legislature does not want to employ territorial factors. A modern CLCL can be either metaphysical or pragmatic. It can be territorially oriented or grounded on domiciliary concerns. It can focus on system concerns or on purely substantive concerns. It can do all of those things and still reflect the functioning of a common-law court.

A final distinctive characteristic of CLCL is its attitude toward statutes. It is considerably more deferential to statutes than the modernist interest-based theories are. This claim may surprise some readers. Modernist theories proclaim loudly their respect for the statutes they enforce. Traditional theories rarely mention statutes. But in fact, common-law judges should, and ordinarily do, recognize in their decided cases that statutes reign supreme. Conversely, as we have discussed,<sup>141</sup> the modernists’ regard for statutes is only surface deep—often imposing on the statute prior determinations of the law’s policy.

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140. *See supra* notes 40–43.

141. *Supra* note 83 and accompanying text.

The most important characteristic, instead, is the different roles that a theory might assign to judges. Modern theory allocates most of the decisional authority to the choice-of-law theory itself. The content of the decision can be found in the premises that modernist authors brought to bear on multistate disputes. Particularly in the earlier forms of modern choice-of-law theory, there is little if anything left for judges to do, except apply the interest analysis dogma: states are interested when applying their own law that would benefit a local party. Our proposal refocuses attention on the judicial process and on recalibrating the distribution of decision-making power. Adoption of a CLCL requires some level of deference to decision-making in the time and place of application. But where does this leave the Restatement (Third)? Which side of the line is it on?

This section has described the CLCL in its most general sense of giving deference to the judicial role in creating law to fill statutory gaps. But it is in the *manner* in which that judicial role is used to facilitate system values that the CLCL approach really takes shape. As stated in the previous section, we believe that courts should utilize their common-law authority to move their respective states toward the uniform set of rules embodied by the draft Restatement. In the remainder of this part, we elaborate on how the Restatement (Third) can help actualize a CLCL approach in the United States.

### C. *The Role of Restatements in American Law*

Restatements themselves do not purport to be authoritative; they are not taken as binding descriptions of what the law actually is. Of course, the conventional wisdom is that restatements are designed to restate what the law is, not what the law ought to be. And this is indeed the goal—at least most of the time.<sup>142</sup> But when we say that the restatements are designed to state what the law is, we do not mean in so many words that a restatement is the law of Alabama, Arkansas, Arizona, Alaska, and so on. Although we say that a restatement reports what the law is, there is no “what the law is” for the United States as a whole. Or at least, not literally; the project of writing a restatement must be understood correctly and in accordance with the unspoken assumptions of the restatement’s writers and readers.

The restatements are synthetic constructs, and they are understood to be as much. We no longer believe—if in fact we ever did—that there is some “brooding omnipresence in the sky”<sup>143</sup> that a restatement can report on. Rather, we understand that each restatement is looking at precedents from

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142. The American Law Institute (ALI) describes the role of a restatement as providing “clear formulations of common law and its statutory elements or variations and reflect[ing] the law as it presently stands.” AM. L. INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE 6 (rev. ed. 2015), [https://www.ali.org/media/filer\\_public/08/f2/08f2f7c7-29c7-4de1-8c02-d66f5b05a6bb/ali-style-manual.pdf](https://www.ali.org/media/filer_public/08/f2/08f2f7c7-29c7-4de1-8c02-d66f5b05a6bb/ali-style-manual.pdf) [<https://perma.cc/6DWH-KSW2>]. However, the ALI also notes that in certain cases a restatement should instead strive to “determine the best rule,” which might involve diverging from the approach that represents the majority view. *Id.*

143. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

throughout the fifty states and seeking to draw out from them prevailing trends. There is no “American law of contracts,” but the Restatement (Second) of Contracts does provide a way of discussing the contractual principles that have emerged through the common-law process throughout the country; the rules set out in the Restatement (Second) of Contracts reflect a synthesis of the common-law rulemaking on contracts. The draft Restatement (Third) of Conflict of Laws is no different in this sense. By synthesizing different courts’ choice-of-law decisions into a coherent body of rules, the Restatement (Third) offers a cogent view of choice of law as a common-law endeavor, building out guiding principles from generalizations regarding particular cases.

We do not claim that the drafters of the Restatement (Third) had the common-law model in mind when they wrote the text; so far as we know, the drafters may very well violently disagree with our characterization.<sup>144</sup> We expect our claim that the Restatement (Third) can actually be treated as an application of the common-law method to be controversial. But the Restatement (Third) of Conflict of Laws makes more sense when common-law insights are brought to bear. We therefore conclude this Essay with a reinterpretation of the Restatement (Third) of Conflict of Laws—one that maximizes its jurisprudential power and increases the likelihood of academic support and judicial adoption.

#### *D. The Restatement (Third) as a Focal Point*

Given the limitations associated with the Restatement (Third)’s embrace of interest analysis as its conceptual framework, a more promising route would be for the drafters to cast the new restatement as explicitly endorsing the CLCL framework. As discussed above, the CLCL framework recognizes the pragmatic value of the individual states adopting choice-of-law rules that cohere to form a uniform and predictable whole. In order to achieve such a goal, the state courts must recognize the value of their common-law-making authority in order to take advantage of gaps in the law as opportunities to engage in gap filling that forwards system values. However, it is not enough that the courts merely seek to forward system values in the abstract sense. Interstate harmony requires consensus and coordination.

In an ideal world, such coordination would be carried out through direct coordination between the states, culminating with something akin to an interstate covenant or at least an explicitly formulated set of model acts that would be enacted by each state. However, unlike state legislatures, state courts do not have those options—rather they are limited to acting in a unilateral fashion through individual judicial decisions. And as already discussed, the lack of political interest in choice of law means that courts are largely left to confront these problems alone. But the unilateral nature of these decisions does not mean that cooperation is impossible. To understand

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144. And in fact, in certain respects, the draft Restatement is not entirely consistent with the model we have been describing. Some aspects of the Restatement (Third) would need to be reconsidered before it could be characterized as falling securely into the category of CLCL.

why, consider first the now familiar one-shot prisoners' dilemma<sup>145</sup>: the equilibrium result is that each player makes the selfish choice of "defecting"—that is, ratting out the coconspirator. This results in a worse outcome for both players than if each had chosen to protect the coconspirator by remaining silent. Analogizing to choice of law, this parallels a situation in which each state takes an action to prefer its own myopic interests, when the end result is a level of uncertainty and dysfunction that is worse than if the states had cooperated and adopted a single choice-of-law solution.

But the dysfunction of the one-shot prisoners' dilemma is not the end of the story. As game theorists have observed, when players are given the opportunity to play the prisoners' dilemma in an iterated fashion, cooperation can emerge as the superior strategy, as compared to simply defecting on every turn.<sup>146</sup> It is this iterated game that offers a closer analogy to state courts making choice-of-law decisions. The states are not locked into one-shot interactions with their sister states but rather repeated interactions in which they are able to observe each other's decisions and react accordingly. This suggests that cooperation is possible. But an additional complication arises when one attempts to map an iterated prisoners' dilemma onto the situation of states confronting choice-of-law problems: when it comes to uniform choice-of-law solutions, there are plausibly multiple solutions that balance states' substantive interests with system values. This gives rise to what game theorists refer to as a coordination game—a situation in which there are multiple equilibria but they can only be reached if the players make a coordinated choice.<sup>147</sup>

But this seems merely to bring us back to where we began: how are the states to reach a coordinated choice when they cannot communicate directly?<sup>148</sup> One option is for a court to use dicta to signal to other courts

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145. Simply put, the prisoners' dilemma imagines two accomplices to a crime being separated and each interrogated by a prosecutor who makes the following offer:

You can confess or remain silent. If you confess and your friend is silent, you go home free and I will use your testimony to lock up your friend for a long time. But if you don't talk and your friend does, then it is you who will be locked away. If you both confess, I'll make sure you get an early parole. And if you are both silent, well, I'll have to settle for minor jail sentences.

Faced with these conditions, each is better off confessing ("defecting") than remaining silent, regardless of what the other does. See Steven Kuhn, *Prisoner's Dilemma*, STANFORD ENCYCLOPEDIA OF PHIL. (Apr. 2, 2019), <https://plato.stanford.edu/entries/prisoner-dilemma/> [<https://perma.cc/CR9M-FF6R>].

146. Identifying the "winning" strategy in an iterated prisoners' dilemma depends, among other things, on how one constructs the conditions of the game. But as various theorists have shown through models intended to model natural selection, strategies that incorporate cooperation are frequently superior to purely selfish strategies. See generally Robert Axelrod, *The Emergence of Cooperation Among Egoists*, 75 AM. POL. SCI. REV. 306 (1981).

147. See Don Ross, *Game Theory*, STANFORD ENCYCLOPEDIA OF PHIL. (Mar. 8, 2019), <https://plato.stanford.edu/entries/game-theory/> [<https://perma.cc/KRTQ-BHMK>].

148. Of course, it is not impossible for the courts to communicate directly. There exists, for example, the Conference of Chief Justices (CCJ), which was founded in 1949 to provide the highest judicial officers of each state the opportunity to discuss matters impacting the administration of justice. Indeed, in the early 1990s, the Mass Torts Litigation Committee of the CCJ was formed to encourage cooperation through the formulation of uniform civil

potential compromises that could be reached. The Supreme Court famously uses dicta to signal how the Justices want other authorities—such as Congress, federal agencies, or state courts—to behave, essentially engaging in a form of coordination.<sup>149</sup> In a similar way, state courts can and sometimes do use dicta as a way of suggesting uniform solutions and prompting other states to move toward them. Consider, for example, the indirect negotiations that occurred in connection to the enforcement of forum-selection provisions in corporate bylaws and charters. After one federal court refused to enforce such a bylaw, citing concerns about the circumstances under which it was adopted,<sup>150</sup> the Delaware Court of Chancery upheld a similar provision in an opinion that strongly endorsed the value of forum-selection provisions while also recognizing as valid as-applied challenges similar to those raised in the federal court.<sup>151</sup> The Delaware court thus drew attention to a potential equilibrium point—generally enforcing these provisions but allowing as-applied challenges—that balanced the concerns of each forum.<sup>152</sup>

In essence, the Delaware court was, through dicta, proposing an equilibrium point around which the other states could coordinate. Because of the outsized role that Delaware has in the context of corporate law, this was a highly salient form of communication—other courts pay attention to what the Delaware courts say. But in that sense, the case of corporate forum-selection provisions represents an outlier. It is rare for any one court to hold particular sway in connection to any issue, including choice of law. As a result, signals transmitted through judicial opinions are likely to get lost in the ether, rather than to orient the rest of the fifty states around some coordination point.

Because of the difficulties associated with intercourt communication, what is needed is a coordination that is salient without relying on subtle language buried in judicial opinions. In game theory, there is a technical term for these: “Schelling points” or, more colloquially, “focal points.”<sup>153</sup> Imagine two people traveling in New York City are unexpectedly separated—they want to reunite but failed to settle in advance where they would do so under such a contingency. This is a coordination problem in which there are innumerable equilibria; if left up to chance, their likelihood of reuniting would be unfathomably small—there are simply too many possible places to meet in the City. But, as Thomas Schelling famously observed, in situations

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procedure rules, so as to help overcome the growing burden created by asbestos litigation at that time—but the effort had limited success. See Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1193–94 (2005). In large part, this can be traced to the fact that while state judges may be able to communicate directly, they cannot enter into multistate pacts and are ultimately limited to acting in unilateral fashion.

149. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 865 (1999) (Rehnquist, C.J., concurring) (stating that “the ‘elephantine mass of asbestos cases’ cries out for a legislative solution” (citation omitted) (quoting *id.* at 821 (majority opinion))).

150. *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1174 (N.D. Cal. 2011).

151. *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 957 (Del. Ch. 2013).

152. See Listwa & Polivka, *supra* note 25, at 119 (discussing this dynamic).

153. See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 54–55 (1963).

like these, people manage to reunite at a rate much higher than chance. He illustrated this through a famous experiment. He asked a group of students where they would go if presented with a situation like that of the two lost travelers; a surprising number agreed on a single strategy: the information booth at Grand Central Terminal at noon.<sup>154</sup>

As Schelling explained, Grand Central at noon was a focal point—that is, an equilibrium that is particularly salient for reasons external to the “game”—whether they be cultural, social, psychological, etc.—and thus useful as a means of focusing the players around a single, coordinated equilibrium. The conventional focal point is, in some sense, naturally occurring—its salience is prior to the coordination game at issue. But in the real world, it is possible to create focal points by raising the salience of particular strategies.

The Restatement (Third) can be described as such a manufactured focal point. The Restatement provides a highly salient set of strategies around which the courts can coordinate.<sup>155</sup> Indeed, it is perfectly suited for such a job. Coordination is most likely to be successful if the marginal benefits of moving toward uniformity are outweighed by the marginal costs to each state’s substantive goals—that is, where the coordination centers around an equilibrium. Such an end is facilitated when coordination is carried out in relation to a focal point that is itself consistent with each state’s substantive policy. In other words, the ideal focal point is one that requires the least amount of change from what the states are already doing individually. This is exactly what a restatement does. The drafters of the Restatement (Third) have carefully surveyed each state’s precedents to determine what solution to a particular problem has prevailed among the states. Assuming that courts have, by and large, adopted the approach that is consistent with their substantive policy, then the result of the Restatement drafters’ survey is the point that is maximally consistent with state policy from a nationwide, aggregated perspective. This provides an ideal focal point around which the states can coordinate to achieve the benefit associated with interstate harmony.

To utilize the Restatement (Third) as such a tool for coordination, the courts need not do anything unusual. As has already been described, choice-of-law problems regularly demand that courts engage in gap filling, construing statutes that contain no explicit or even implied directions as to how they are to be extended into the interstate context. In such cases, the common-law-making authority of the court is plainly invoked. In exercising this discretionary authority, the courts should look toward the Restatement (Third)’s rules as providing presumptive answers. The court ought then to judge whether that presumption is consistent with the other sources of legal authority that are appropriately invoked; such a fluid interpretive process simply mirrors what courts regularly do in the purely domestic sphere. In that sense, integrating the CLCL framework into the utilization of the

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154. *See id.* at 54–55, 58.

155. *Cf.* LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 162 (1991) (using game theory to describe the benefits of reciprocity in choice of law).

Restatement (Third) is not a wholesale rejection of the modern choice-of-law theory and its embrace of the ordinary processes of statutory interpretation but rather, a development of it—the generation of a more sophisticated model of what the principle of legislative supremacy truly demands in the interstate context.

To conclude, consider once again *Chen v. Los Angeles Truck Centers, LLC*<sup>156</sup> (*Chen III*), the case involving the tour bus accident. As discussed above, in that case, a California appellate court held that California had no interest in applying its own products liability law to a case in which no California citizens were harmed and thus only Indiana, the state in which the bus was made, had an interest in applying its law. But what was not mentioned in our previous discussion was that the opinion by the appellate court was actually issued on a remand from the Supreme Court of California on a procedural issue.<sup>157</sup> In fact, in its initial opinion, the very same appellate court had come to the exact opposite conclusion—that is, it held that it was California that had an interest in applying its products liability law and that Indiana had no interest in the case at all.<sup>158</sup> Placing the two opinions next to each other, it is as though one is looking at the other through a fun house mirror; while the first opinion discusses how California’s interests extend beyond “simple plaintiff compensation” and include policing its citizens’ actions beyond its borders,<sup>159</sup> the second opinion describes California’s interests in the case as purely “hypothetical”;<sup>160</sup> and while the first discusses how Indiana has no interest in protecting a foreign buyer of its products,<sup>161</sup> the second discusses Indiana’s interest in having its law applied to those who do business with its residents.<sup>162</sup> The California Supreme Court’s remand was procedural in nature—it did not touch on the substantive question of which law should apply—and yet, on remand, the appellate court came out the opposite way.

How are we supposed to reconcile these two very different opinions coming from the exact same court? Can it really be that the appellate court simply erred initially in divining what substantive policies underlay each state’s laws, only to correct that error on remand? No person who takes seriously the lessons of legal realism is likely to accept such an answer. Rather, the most logical reading of the situation is that the court was presented with a difficult question in which there was no ready answer within existing precedents or statutes; forced to make a choice, the court utilized its discretion and reached a decision, only to be prompted, albeit indirectly, to reconsider by the California Supreme Court. But none of that reality can be

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156. 255 Cal. Rptr. 3d 559 (Ct. App. 2019), *review denied*, No. B265304 (Cal. Feb. 26, 2020); *see also supra* notes 94–96 and accompanying text.

157. *See* *Chen v. L.A. Truck Ctrs., LLC (Chen II)*, 444 P.3d 727, 728 (Cal. 2019).

158. *Chen v. L.A. Truck Ctrs., LLC (Chen I)*, 213 Cal. Rptr. 3d 142, 156 (Ct. App. 2017), *rev’d*, 444 P.3d 727 (Cal. 2019), *remanded to* 255 Cal. Rptr. 3d 455 (Ct. App. 2019).

159. *Id.* at 155.

160. *Chen III*, 255 Cal. Rptr. 3d at 562.

161. *Chen I*, 213 Cal. Rptr. 3d at 156.

162. *Chen III*, 255 Cal. Rptr. 3d at 566.



seen in the opinions. Required to accept the theoretical framework of government interest analysis, the court has no means by which to explain the role of judicial discretion and judgment in its decision.

Now consider how adoption of the CLCL, along with reference to the Restatement (Third), would have changed the reasoning—if not the result. Within the CLCL framework, the court would discuss the open-textured nature of the substantive law at issue and the role for judicial lawmaking that results. Further, it would discuss factors beyond the myopic interests of the states, including, most crucially, the goal of generating a uniform and predictably nationwide system. Finally, the court would look to the guidance of the Restatement, explaining how doing so enables the court to utilize its discretion in a manner that forwards system values. With such an approach, the court would not have been shoehorned into making outrageous remarks, such as that California has no interest in the safety of Chinese tourists; nor would it have been forced to expound inexplicably a view seemingly irreconcilable with what it had stated previously.

As this example illustrates, government interest analysis—with its one-note focus on the substantive policies of the states—is simply too crude a system to reflect the realities of judicial decision-making in the face of difficult choice-of-law problems. An approach embracing the realities of common-law-making makes space for a broader vocabulary, placing system values alongside substantive policies, and thus allows judges to articulate their reasoning in a way that reflects reality. Moreover, the CLCL framework, in building out this broader conceptual space, clarifies the role to be played by the Restatement (Third), justifying the important place in American choice of law that it deserves to hold.

#### CONCLUSION

For more than a generation, choice of law has been the victim of a historical contingency. By calling attention to the way in which Beale's vested rights theory relied on metaphysical principles, the legal realists undeniably did a service to the field of choice of law, opening up the archaic field to more pragmatically oriented approaches. However, the attack on traditional choice of law was far from a targeted strike. In the realists' wake, the conflicts revolution and its thought leaders bundled together three concepts which, although all typifying the traditional approach, are not inherently connected: the scientific formalism of Bealean territorialism, a system-values approach to choice of law, and judicial activism.

The revolutionaries tied an anchor to Beale's formalism, sinking the regard for system values and judge-led decision-making in the process. In their stead, interest analysis, a supposedly pragmatic, policy-oriented, and legislatively centered approach, gained prominence. But as this Essay has argued, the reorientation around the legislature has been nothing but a façade. Interest analysis and its modern variants all claim that the standard techniques of statutory interpretation ought to be determinative of how courts resolve choice-of-law problems. Further, they assert that such an approach

invariably leads to a conflicts methodology that places each state's interest in forwarding its individual substantive policy goals above any broader interest in facilitating interstate harmony. But the fact is, in this context, "statutory interpretation" is merely an empty phrase. With a few notable exceptions, legislatures never address choice-of-law issues when drafting statutes. Thus, any time a conflict between two relevant states' laws occurs, courts are certain to find themselves in the center of a statutory gap.

Gaps are, of course, familiar territory for courts. And indeed, the standard methods of statutory interpretation have generated numerous modalities by which gaps are overcome. Since at least the time of Blackstone, judges have engaged creatively with hard cases to arrive at solutions that not only "fill" gaps in the statute but also harmonize statutory law with other values and principles held by the relevant jurisdiction, including those that are common law and constitutional in origin. In recent years, those studying statutory interpretation have become increasingly sophisticated in their understanding of the ways in which courts use expansive sets of resources to counter difficult cases, leading to wide recognition of the "common law" of interpretation. But, so far, choice-of-law theorists have been left behind—continuing to adhere to a primitive conception of statutory interpretation that shuns the role of the judge and the importance of broader goals, including the facilitation of system values. The Restatement (Third), in its current draft, continues that error, wholeheartedly endorsing an outdated and unworkable mode of interest analysis.

In this Essay, we have offered a means of modernizing the modernists and rescuing the Restatement (Third) in the process. The key insight, we have argued, is to recognize that judicial creativity and attention to the facilitation of a workable system of choice of law is fully consistent with realism. Moreover, the principle of legislative supremacy is better protected by a methodology that does not mask metaphysical invention behind empty phrases like "interests" but instead, recognizes explicitly the important yet limited role of the judiciary. In line with these recommendations, we advocate for the embrace of a CLCL methodology, an approach that recognizes judicial, common-law rulemaking and that does not rely on sharp, fictive lines drawn between "interpreting" the law and developing system-oriented rules.

Embracing CLCL in the Restatement (Third) would overcome the theoretical paradox at the current draft's center. The Restatement seeks to bring uniformity and simplicity to choice of law by offering a number of easy-to-apply rules; yet at the same time, it provides a full-throated endorsement of the notion that each choice-of-law problem should be solved by a particularized exercise in statutory interpretation. The common-law approach advocated here breaks through this apparent contradiction by recognizing that the rules offered in the Restatement are not derived from statutory interpretation. Rather, they have emerged from common-law rulemaking as a solution to the problems created by the gaps in legislated law. And, like other such common-law rules, courts can integrate them into their interpretive processes by using them as substantive presumptions.

Conceptualized in this manner, the Restatement (Third)'s rules can serve as uniform focal points around which courts throughout the United States can coordinate.

CLCL weds the modern with the traditional. Embracing the lessons of the revolutionaries and the modernists, it does away with pseudoscientific adherence to metaphysical principles. But at the same time, it returns to the traditional roots of choice of law by giving top billing to system values and the judges that facilitate them—this time through the lens of game theory. Finally, it looks outside of the field of conflicts toward modern, sophisticated theories of statutory interpretation to explain how judicial creativity and broader, substantive values can sit coherently with the principle of legislative supremacy. By bridging these different theories and placing them within a single conceptual framework, CLCL offers a means of rising beyond the disputes that have defined the last century of choice-of-law scholarship and paving the way for the future of the field.