

SYMPOSIUM ON THE THIRD RESTATEMENT OF CONFLICT OF LAWS

WHAT I LIKE MOST ABOUT THE RESTATEMENT (SECOND) OF CONFLICTS, AND WHY IT SHOULD NOT BE THROWN OUT WITH THE BATHWATER

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I'm a recent convert to the Restatement (Second) of Conflicts. In my thirty years of teaching the course, it's been all too easy to parrot the conventional wisdom—that the Second Restatement is conceptually muddled, self-contradictory, and bordering on vacuous.¹ I am now convinced, however, that there are both intellectual consistency and practical wisdom in its approach. (What better time to make this discovery than just as the American Law Institute decides to replace it?) I summarize below my reasons for believing that substantial parts of the Second Restatement's basic structure should be left as is.

The issues that I raise below are not the only ones that leave me skeptical about whether the Third Restatement is likely to be an improvement. This symposium's essay by the Reporter, Kermit Roosevelt III, seems to retain what may be the least defensible aspects of governmental interest analysis in trying to justify Tentative Draft 2's "two step" approach. In his contribution to this symposium, Roosevelt argues that the two step approach is not novel because it simply gives effect to Brainerd Currie's maxim that determination of interests is the "bread and butter of ordinary legal analysis"; "it is simply ordinary interpretation" of domestic substantive law.² It is not clear whether Roosevelt is citing his own views or reporting what he believes Currie to have said. But this symposium is not the place to address this claim—space is limited—and the continuing appeal of this argument cries out for serious evaluation. Time will come to give this maxim the attention it deserves.

So let us turn to the topic I have chosen to address: the flaw exhibited by methods as disparate as interest analysis and the First Restatement "vested rights" theory. That topic is what I call "single factor" analysis.

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¹ Brainerd Currie was the most successful of these critics. See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* ch. 14. The tradition of withering criticism has been carried on by top scholars in the field, starting with Albert Ehrenzweig. Albert Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230 (1964-1965); Roger Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230. See generally, LEA BRILMAYER ET AL., *CONFLICTS OF LAWS: CASES AND MATERIALS* (7th ed. 2015).

² Kermit Roosevelt III & Bethan Jones, *What a Third Restatement of Conflicts of Laws Can Do*, 110 AJIL UNBOUND 139, 143 (2016).

Contacts or Concepts?

Most of our various choice of law approaches involve “single factor” tests.³ They treat the choice of law process as designed to identify the single unique factor (place of injury, domicile of the defendant, location of the property, etc.) that points to the applicable law. Although vastly different in other respects, the First Restatement and modern interest analysis are predominantly single factor tests.

As single factor tests, the First Restatement of Conflicts and the governmental interest approach are highly reliant on conceptual reasoning. The former was built around the concept of “vested rights” and the latter around the concept of “interests,” both creatures of their authors’ creative imaginations. There is widespread agreement that the First Restatement falls into this category, but modern “interest analysts” purport to avoid the characterization by claiming that they are simply following the will of the legislature. This claim has been thoroughly debunked by now, however, and one rarely hears a defense of the modern theories by reference to legislative intent.⁴

That single factor tests should be conceptual should not be surprising, since it takes a certain amount of theory to explain how and why rights “vest” or states have “interests.” The explanations for such conclusions are not matters of simple fact; they are based on one’s understanding and acceptance of the underlying logic. In a court’s search for the proper interpretation of these concepts—an objective enterprise—judges suspend their usual deference to legislative supremacy and their own common sense and heed the call of Joseph Beale or Brainerd Currie.⁵

An “aggregate contacts” model, in contrast, attempts to be more straightforwardly factual.⁶ Moreover, it evaluates the factual contacts contextually and holistically, treating all of the connecting factors in a dispute as potentially relevant. In that respect, aggregation of contacts resembles determination of personal jurisdiction. When deciding whether personal jurisdiction exists, we group together and collectively weigh the totality of the contacts that tie the defendant to the forum. We do not assume that personal jurisdiction depends on having the right single factor connect the case to the forum, nor do we invest thousands of law review pages in trying to prove which “right” factor that might be.

The Restatement (Second) is the closest thing we have in present day choice of law to an aggregation of contacts approach. The cases that inspired it (e.g. *Auten v. Auten* and *Haag v. Barnes*) frame the choice of law process as “grouping” or weighing the contacts, determining the center of gravity, etc.⁷ There are no categorical premises, e.g., that the place of injury is where the rights vest, or that the state of the defendant’s domicile has an interest. “Center of gravity” is about as close as you can get to treating the various connecting factors equally

³ Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 99 IOWA L. REV. 1125 (2009-2010); Lea Brilmayer, *Hard Cases, Single Factor Theories, and a Second Look at the Restatement Second of Conflicts*, 2015 U. ILL. L. REV. 1969. As noted in Brilmayer & Anglin, *id.* at 1156-57, it could be argued that interest analysis is not a “pure” single factor test.

⁴ Indeed, one of the foremost proponents of the theory—Herma Hill Kay—explicitly denies that Currie ever meant to ground his theory on legislative intent. Herma Hill Kay, *A Defense of Currie’s Governmental Interest Analysis*, 215 RECUEIL DES COURS 9, 119-20 (1989).

The reason for treating the modern theory as a single factor test is that it assumes that there is a single “correct” answer to the question whether an interest exists, and does not aggregate the contacts as a whole. See generally, Brilmayer & Anglin, *supra* note 3.

⁵ Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 399-401 (1980) (arguing that despite Currie’s expressions of deference to legislative will, Currie’s proposed approach merely substituted one set of *a priori* principles for another”).

⁶ I do not want to get into the philosophically treacherous subject of whether there are any questions that can be framed in purely factual terms. Probably there are not; but it seems undeniable that some questions are more dependent on facts and others are more dependent on *a priori* theorizing. My point is that aggregate contacts models are much closer to the “dependent on facts” end of the spectrum and single factor models are much closer to the opposite end.

⁷ *Auten v. Auten*, 308 N.Y. 155 (1954); *Haag v. Barnes*, 9 N.Y.2d 554 (1961).

and simply “toting up the contacts” (as Currie put it, derisively).⁸ Since no contact has any greater innate significance than the others, aggregate contacts models do not have to be top-heavy with theory.

Interpreting the “Choice of Law Revolution”; An Aggregate Contacts Perspective

The weakness of the single factor theories employed by American choice of law is revealed by historical developments in the case law. In an age before television, fax machines, efficient mail service—let alone internet or cell phones—disputes for the most part could only arise between parties having some direct communication. This typically meant face to face transactions; most disputes would be between people from the same community, relating to one another in places relatively close to their homes, and inflicting injury on people or property fairly close nearby. The contacts were typically clustered together in a single state. It would not have mattered much whether one’s choice of law theory designated the place of contracting, the place of performance, or the place of negotiations as the single relevant connection. So long as these all took place in the same state, the result would turn out to be the same.

Although relatively satisfactory in a time when transactions were mostly tightly clustered, single factor theories such as the First Restatement should be expected to become increasingly unsatisfactory when technologically mediated long distance transactions replaced face to face disputes with one’s neighbors. Most contracts now are made over the phone, the internet, or by fax and are between people or entities from different states who travel by car or plane—or meet by Skype. Single factor tests are at their least convincing in disputes where the designated connecting factor (e.g. the place where the acceptance is made) is the only contact between the dispute and the forum, and all of the other factors point to a particular different state.⁹ At first, “escape devices” become irresistibly attractive; after a series of escapes, the pressure to change theories becomes compelling.

This dynamic, effectively, was the origin of the modern choice of law revolution. Examination of the cases in which the First Restatement was abandoned for a more “modern” approach reveals an almost universal pattern. In one state after another, the designated choice of law factor (the place of contracting, the place of the injury, etc.) was the only connection between the dispute and the chosen law, and all of the other connections pointed to a particular alternative source of the applicable law.¹⁰

This empirical pattern is not easy to accommodate within the First Restatement, because all contacts other than the place of injury or place of contracting are supposed to be irrelevant, and adding up a large number of irrelevant contacts does not change this. Zero plus zero plus zero still equals zero; it does not matter how many zeroes (or irrelevant contacts) there are. But under an aggregate contacts approach, the single designated factor was outweighed by the cumulative effect of the numerous contacts with the other state—contacts which had possessed positive weight all along.

A judge truly committed to the First Restatement (or any other single factor method) can simply deny that this is a problem; contacts other than the single designated factor might be declared irrelevant by fiat. Or, a judge might take the position that every rule has some awkward applications and his or her job is to apply the rule even if the individual result is indefensible. In the alternative, a judge might create an exception to the rule to accommodate its unconvincing applications. All of these strategies were tried during the mid-twentieth century choice of law “revolution”; in general, they failed to save the First Restatement from the dustbin of history, as many states simply adopted one or the other of the modern approaches.

⁸ CURRIE, *supra* note 1, at 727-728.

⁹ The special characteristics of such “stand alone trigger” cases are discussed in Brilmayer & Anglin, *supra* note 3.

¹⁰ For a state-by-state tabulation of the contacts patterns of cases resulting in adoption of modern choice of law theories, see *id.* at 1176 (2009-2010).

But the problem cannot be solved by switching to a different single factor theory—if a high enough percentage of relationships are long distance, then sooner or later the same difficulty will once more arise with the new single factor. The way to avoid repeating the problem is to employ a theory that does not vest all choice of law authority in a single factor, but instead is sensitive to the appearances of clusters of contacts in different states. The Restatement (Second) is just such a theory; it designates a presumptively applicable law, but overrides that presumption if there is some other state with a significantly larger number of connections to the dispute.¹¹

Aggregate Contacts and the Restatements

We do not, of course, know what the Restatement (Third) will say (if anything) about this problem. By identifying the position of the Restatement (Second) on this issue, however, we can speculate about what direction the Restatement (Third) might take.

The Restatement (Second)'s *modus operandi* is best explained with an example. Section 188 lays out the familiar principles regarding choice of law in contract, in disputes in which the parties' agreement does not specify the applicable law.¹²

§ 188. Law Governing In Absence Of Effective Choice By The Parties

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

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

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

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

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-99 and 203.

¹¹ California and New York were two of the earliest states to abandon the First Restatement for some form of governmental interest analysis. Both of these states subsequently abandoned unvarnished interest analysis for other approaches (in one case, for comparative impairment and in the other for an *ad hoc* approach that came to be called “the Neumeier rules”). The abandonment took place in cases where the contacts of the initially selected state were not supported by the remaining factors. The process of replacing one modern approach for another thus corroborates the aggregated contacts view of choice of law's historical development. *Id.* (appendix with list of states).

¹² RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (AM. LAW INST.1971).

The Restatement has three different levels of analysis. The most general is the precept in Section 6 that the applicable law is that of the state with “the most significant relationship”; the same point is made in Section 188(1).¹³ The second level consists of a list of contacts potentially to be taken into account. The eligible contacts for contracts are those listed in Section 188, Paragraphs 2(a) through 2(e). Finally, there is a specific presumption (which for contracts is set out in Section 188 Paragraph 3) providing the law that “will usually be applied.” For contracts disputes, that is the local law of the place of negotiation and performance, where they are the same.

Application of the contracts sections of the Second Restatement ordinarily proceeds by first checking for a relevant specific rule. For example, if the dispute fits under Section 188 Paragraph 3, because the place of negotiation and performance are the same, then there is a presumptive answer: that state’s law applies.

The next step is to determine whether this presumption about what “usually” happens should be rebutted. This requires checking the geographical distribution of the other connecting factors in the case. The other connecting factors are listed in Paragraphs 2(a) through 2(e). The strongest case for rebutting the presumption would be where all of those connecting factors point to the same other state, different from the state or states identified in Paragraph 3. In such circumstances, there is a good case for using that other state’s law.

The Restatement says to consult Section 6 in making that determination. This means, in essence, we go back to the drawing board to try to produce a result using the same method, but having eliminated the place of performance and place of negotiation. If all other factors point to the same alternative state, then that will necessarily be the chosen law. Even if the other factors don’t all point to the same alternative state, there may still be a cluster of factors that rise to the level of “most significant relationship.” And that is what the Restatement requires.

If we want to retain whatever advantages this method produces, therefore, there are three elements that should be incorporated in the Restatement (Third). These are: (1) a list of eligible connecting factors; (2) a presumption of what ordinarily the result will be; and (3) instructions on how the presumptions can be rebutted. This is not the place to flesh out the details of the suggested approach, but a short explanation can be given about a likely response to each of the three sets of issues:

- (1) First, a person, item of property, or event establishes a relevant connection to the state where it occurred if it is of substantive relevance to the particular legal matter that the choice of law will ultimately bear on;¹⁴
- (2) The presumption should be established by determining how—as an empirical matter—the events of this kind of dispute are likely to be clustered together. For example, in a guest statute case the passenger and driver are likely to know each other from personal acquaintance;¹⁵ their common

¹³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971).

¹⁴ The principle that eligibility of contacts for consideration in choice of law issues depends on their being of substantive relevance is discussed in Lea Brilmayer, *Legitimate Interests in Multi-State Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315, 1331-32 (1981).

¹⁵ The choice of law revolution was sparked in part by a series of cases dealing with choice of law in guest statute cases. See, e.g., *Babcock v. Jackson*, 12 N.Y.2d 473 (1963); *Tooker v. Lopez*, 24 N.Y.2d 569 (1969).

In earlier times, some states adopted a higher burden of proof and/or stricter substantive requirements for recovery when a passenger in the car was a friend or relative of the driver. The reason was the fear of collusion between the driver and the passenger against the insurer.

domicile represents a cluster (of only two contacts) that will ordinarily be situated in a single state.¹⁶ The presumption should reflect the largest and most likely cluster;

- (3) Finally, where the only contacts pointing to a particular state's law are the ones identified in the presumption, then the court should examine the remaining connections with other states. The court should determine whether there is another state with connections that outweigh the state with the presumptively applicable law, according to the same criteria that established the presumption.

This simplified account of the aggregated contacts method is not designed to make the issues seem any less difficult than they really are. For example, the examination of substantively relevant contacts has numerous potential pitfalls; one obvious problem is whether in order to avoid double counting, two similar contacts should really only be counted once.¹⁷

The three principles sketched above are admittedly skeletal, but they point the way for further development by the Restatement's reporters and advisers, as well as scholars.

¹⁶ Note the similarity of this result to the result in common domicile cases under interest analysis or under the Second Restatement. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. LAW INST. 1971); Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178.

¹⁷ See LEA BRILMAYER, ET AL., *supra* note 1, at 176-77 (discussing *Haag v. Barnes* and raising issue about possible redundancy of two similar facts).