Conflict of Laws in Florida: The Desirability of Extending the Second Restatement Approach to Cases in Contract

Harold P. Southerland*
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**I. INTRODUCTION**

For roughly a century and a half in United States legal history, territorial theory supplied largely uncontroversial solutions to problems in choice-of-law. For torts, it was the law of the place of injury; for contracts, the law of the place where a contract was made or was to be performed. Disputes involving real property were uniformly referred to the law of the state in which the property was situated, and those involving personalty to the law of the state where the owner was domiciled.

So sovereign-seeming were the states of the United States during this period that these handful of simple rules had about them the aura of ineluctability. Each state had its own distinct legal system, absolute within its territorial boundaries. These systems had much in common, but there were differences, often significant ones, and when these differences came to focus in the occasional conflict-of-laws case, it seemed natural to resolve them by reference to the law of the state where legally significant events occurred.¹

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* Associate Professor of Law, Florida State University; J.D., University of Wisconsin 1966; B.S., United States Military Academy, 1956.

The only debatable question—usually more of theoretical than practical importance—was why, exactly, a court with complete power to decide a case would use another state’s law rather than its own. To Joseph Story, who spoke for the nineteenth century, the answer lay in comity—the deference and respect that one sovereign state owed to the law making power of another. To Joseph Beale, who tried to cement territorial theory for all time in the 1934 Restatement of Conflict of Laws, the answer was one of obligation. One state applied the laws of another because it had to. Legal rights and liabilities came into existence in the first instance only by virtue of the law of some place; once created under that law, they were fixed and could thereafter be enforced in some other place only in the form of their creation.

Real dissatisfaction with territorial principles began to manifest itself in the first third of this century. Against a backdrop of monumental change in the larger society, territoriality and the results it dictated grew increasingly unpalatable to judges striving to do justice in individual cases and no longer overawed by notions of sovereignty. The result was the well known and still on-going choice-of-law revolution—a pattern of decision making in which territorial rules were first avoided and then gradually, starting in the 1960s, rejected outright in a growing number of states for one or another of

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   Mr. Justice Story’s “comity“ theory held that the forum was free to do as it wished; the forum, for reasons of practical convenience or moral obligation, might often permit foreign law to operate. . . . To Professor Beale and other vested-rights theorists, “comity“ was a fighting word. The term itself implied that the court possessed an undesirable degree of discretion concerning the applicable law, and the principle violated their view of the territorial premise. Thus the vested-rights approach stressed a legal obligation to recognize rights based on foreign law: “A right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere.”

Id. (quoting Beale, supra at 1969).
the so-called modern approaches. So much has been made of this revolution and the new learning it embodies that it is possible to lose sight of an important point. Most of the pressure for change was felt in just two areas—in torts primarily and, to a somewhat lesser extent, in contracts.

In all this, the Florida experience has been typical. Territorial theory fell as naturally to hand here as elsewhere, rationalized repeatedly in over a century's worth of opinions in the language of comity—a beneficial exercise in that deference and respect that one sovereign state owes the law-making power of another. In 1967, in a wrongful death case arising out of the crash of a commercial airliner, the Supreme Court of Florida moved to align itself with the modern approach for tort cases then being pioneered by the New York Court of Appeals, but on rehearing, it reconsidered and reversed itself. Thirteen years later, in Bishop v. Florida Specialty Paint Co., the court took this step. It discarded lex loci delicti, the inflexible place-of-injury rule, and replaced it with the most significant relationship approach of the Second Restatement of Conflict of Laws. After Bishop, it seemed probable that the venerable lex loci contractus doctrine for contracts cases would be the next to go, discarded and replaced with a modern approach, the obvious candidate being the Second Restatement. But when the opportunity squarely presented itself in 1988 in Sturiano v. Brooks, the court declined to make the change.

Sturiano involved an automobile insurance contract. The Sturianos, husband and wife, were lifelong residents of New York and had insured their

7. See, e.g., id. at 775-76.
8. See, e.g., Hertz Corp. v. Piccolo, 453 So. 2d 12, 16 (Fla. 1984) (Shaw, J., dissenting); Mobil Oil Corp. v. Shevin, 354 So. 2d 372, 375 (Fla. 1977); Gillen v. United Serv. Auto. Ass'n, 300 So. 2d 3, 6 (Fla. 1974); Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743, 746 (Fla. 1967); Beverly Beach Properties, Inc. v. Nelson, 68 So. 2d 604, 609 (Fla. 1953); Markham v. Nisbet, 60 So. 2d 393, 394 (Fla. 1952); Kellogg-Citizens Nat'l Bank v. Felton, 199 So. 50, 54 (Fla. 1940); Beckwith v. Bailey, 161 So. 576, 581 (Fla. 1935); Hartford Accident & Indemnity Co. v. City of Thomasville, 130 So. 7, 8 (Fla. 1930); Mott v. First Nat'l Bank, 124 So. 36, 37 (Fla. 1929); Herron v. Passailaigue, 110 So. 539, 542 (Fla. 1926); Warren v. Warren, 75 So. 35, 44-45 (Fla. 1917); Walters & Walker v. Whitlock, 9 Fla. 86, 96 (1860); Perry v. Lewis, 6 Fla. 555, 559 (Fla. 1856).
10. See Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963); see also Southerland & Waxman, supra note 1, at 536-42.
11. Hopkins, 201 So. 2d at 749.
12. 389 So. 2d 999 (Fla. 1980).
13. 523 So. 2d 1126 (Fla. 1988).
car there. At some point after the policy was issued and without notice to their insurer, they began to spend the winter months each year in Florida. While in Florida Mr. Sturiano negligently caused an automobile accident in which he was killed and his wife injured. She brought suit in Florida against her husband’s estate to recover under the policy. Under New York law, her claim was barred because the Sturianos had not elected coverage for claims between spouses as required by New York statute. Florida law had no corresponding provision.\footnote{Id. at 1127, 1129. See MCKINNEY, N.Y. INSURANCE LAW § 3420(g) (McKinney ed., 1985).} The Fourth District Court of Appeal reversed a jury verdict in Mrs. Sturiano’s favor, holding that New York law controlled because the contract of insurance had been made there.\footnote{Brooks v. Sturiano, 497 So. 2d 976, 979 (Fla. 4th Dist. Ct. App. 1986), aff’d, 523 So. 2d 1126 (Fla. 1988).} The court then certified the question whether \textit{lex loci contractus} should continue to be the conflicts rule in Florida, precluding consideration of “OTHER RELEVANT FACTORS, SUCH AS THE SIGNIFICANT RELATIONSHIP BETWEEN FLORIDA AND THE PARTIES AND/OR THE TRANSACTION?”\footnote{Id. at 979.}

In a majority opinion by Justice Kogan, the supreme court answered the certified question affirmatively, though expressly limiting itself to automobile insurance contracts.\footnote{Sturiano v. Brooks, 523 So. 2d 1126, 1129 (Fla. 1988).} The court recognized that \textit{lex loci contractus} was “inflexible” and that it had been replaced in other states by modern approaches.\footnote{Id.} But it was just this inflexibility that ensured “stability in contract arrangements;”\footnote{Id.}

Although \textit{lex loci contractus} is old, it is not yet outdated. . . Parties have a right to know what the agreement they have executed provides. To allow one party to modify the contract simply by moving to another state would substantially restrict the power to enter into valid, binding, and stable contracts. There can be no doubt that the parties to insurance contracts bargained and paid for the provisions in the agreement, including those provisions that apply the statutory law of that state.

. . . In the case of an insurance contract, the parties enter into that contract with the acknowledgment that the laws of that jurisdiction control their actions. In essence, that jurisdiction’s laws are incorporated by implication into the agreement. The parties to this...
contract did not bargain for Florida or any other state’s laws to control. We must presume that the parties did bargain for, or at least expected, New York law to apply.  

In the course of the opinion Justice Kogan quoted in its entirety section 188 of the Second Restatement, conceding that its view was “seemingly the trend of courts around the nation.” But it failed, he said, “to adequately provide security to the parties to a contract.”

Justice Grimes concurred in a separate opinion, joined by Justice Overton, in which he argued for adoption of the Second Restatement approach. “The emerging consensus, [he said], even in cases involving questions of contract validity, is to apply the most significant relationship test of section 188 of the Restatement (Second) of Conflict of Laws (1971).” He continued:

Because contractual disputes arise in such a great variety of settings, rules of broad application cannot do justice to the various interests and expectations involved. While the application of the significant relationship test may be less certain, it reflects a more realistic standard by which a choice of laws may be made. Furthermore, I believe the majority’s concern for predictability and the parties’ right to know what the agreement provides is adequately taken into account by factors (d) (the protection of justified expectations) and (f) (certainty, predictability and uniformity of result) of section 6 of the Second Restatement which is made applicable to section 188.

Notwithstanding his preference for the Second Restatement, he concurred in the majority’s opinion because he believed that the result would be the same under either approach.

The question certified in Sturiano is unlikely to go away. It has in fact arisen since—though not pressed by the parties to the supreme court level—and almost surely will arise again. Given the division within the court reflected in the Sturiano opinions, it seems appropriate to consider what the

20. Id. at 1129–30. (emphasis added).
21. Id. at 1129.
22. Sturiano, 523 So. 2d at 1129.
23. Id. at 1130 (Grimes, J., concurring).
24. Id. at 1130–31.
25. Id. at 1131.
court should do when it again confronts the issue. Should it take the same approach for contracts as it did for torts and abandon *lex loci contractus* for the approach of the Second Restatement? Certainly a good case can be made for the change. Writing in 1987 on the eve of *Sturiano*, Professor Michael Finch and his co-author, Lora Smeltzly, exhaustively surveyed the Florida cases and concluded that the Second Restatement would bring “to Florida conflicts law a structure and approach that impose some order on a seemingly disparate body of precedent and that can guide the courts as conflicts practice continues to evolve.”

Yet the prospect leaves me with distinctly uneasy feelings. For one thing, the doctrine of *lex loci contractus*, properly understood, has always been a far more malleable one than its torts counterpart, *lex loci delicti*. Despite the disparate contexts in which contracts cases can arise, I have no sense from the decisions that Florida’s courts have been unduly hampered in arriving at sensible and just results with a fair degree of simplicity and efficiency; nor am I persuaded that the actual results in cases would be that much different or necessarily more defensible under the Second Restatement approach than under the present one. For another, the Second Restatement approach is complex and alive with protean possibilities, combining as it does invitations to open-ended policy analysis with attempts to state specific rules for a variety of commonly occurring kinds of cases. It has found favor as a replacement for territorial methods with a number of courts around the country, but in actual use it has been much criticized. In its complexity, it has the potential to confuse and complicate decision making rather than

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simplifying it. This observation is borne out by the uneven and disappointing experience in Florida thus far with the torts provisions of the Second Restatement, particularly at the supreme court level.\(^{30}\)

In short, I am not convinced that it would be productive for the court to adopt the Second Restatement approach for cases in contract. I see little advantage and potentially much grief flowing from it. There is not much doubt that Florida can continue to survive with its traditional territorial approach. Whether that would be a good thing or not is more debatable; like almost any other method, *lex loci contractus* has shortcomings, but at least in Florida these problems would not be eliminated by substituting the approach of the Second Restatement. That is the thesis I shall try to develop in what follows. The time is ripe, for there is no more pressing issue on the court's rather meager conflict-of-laws agenda than this one.

II. FROM TERRITORIAL TO POLICY ANALYSIS: THE ROAD TO THE SECOND RESTATEMENT OF CONFLICT OF LAWS

A range of considerations bear on the question of whether *lex loci contractus* should be replaced in Florida with the approach of the Second Restatement. To raise these considerations and put some perspective on them, I want to discuss two cases, both staples in the literature of conflict-of-laws. They are *Milliken v. Pratt*,\(^{31}\) decided by the Massachusetts Supreme Judicial Court in 1878, and *Lilienthal v. Kaufman*,\(^{32}\) a 1964 decision of the Oregon Supreme Court. These cases stand at opposite ends of the spectrum of developments that have occurred in choice-of-law in the United States from the nineteenth century to the present. Either directly or by implication they have much to say about the traditional territorial approach and why it has lost favor in many quarters. In this way, it will be possible to convey a sense of what brought the Second Restatement into being so quickly on the heels of the First Restatement and thus provide a framework for evaluating its approach and how well or ill it deals with issues of contract and choice-of-law.

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31. 125 Mass. 374 (1878).
32. 395 P.2d 543 (Or. 1964).
A. Milliken v. Pratt

Daniel Pratt and his wife Sarah were life-long residents of Massachusetts. In 1870, Daniel, a businessman, applied to the Portland, Maine, firm of Deering, Milliken & Co. for a line of credit. The firm agreed on the condition that Sarah guarantee payment of the account up to the amount of five hundred dollars. She executed a separate agreement to this effect at her home and gave it to her husband, who mailed it to the firm in Portland. During the following year, Daniel bought goods on credit from time to time and paid for them promptly. Then in October 1871 he defaulted, leaving an unpaid balance of $560.12. In January 1872, Deering-Milliken demanded payment from Sarah under the guaranty. She refused. In 1875, the firm brought suit against her in Massachusetts to recover $500 of the unpaid balance.33

Sarah Pratt's refusal to honor her agreement, as well as her defense to the lawsuit, was grounded in the male-dominated society of nineteenth-century America and its attitude towards women. At the time she executed the agreement in 1870, portions of the common law rule that disabled married women from entering into contracts in their own name were still in force in Massachusetts.34 At common law, marriage was considered a true merger of two souls—one which only the husband survived as a legal entity.35 This fiction no doubt made a great deal of sense to the men whose business it was to lay down legal rules: wives, being women, were known to be inexperienced in the ways of the world and thus in need of protection. What better way to protect them than to insure that in any matter of importance—that is, one involving money or property—they could act only through and in the name of their husbands?

It seems patent that it was husbands whom this convenient fiction protected, but nevertheless that was the law in Massachusetts in 1870 when Sarah executed the guaranty. As far as Massachusetts was concerned, she had no capacity to enter into this kind of a contract in her own name, and her guaranty was unenforceable. In Maine, on the other hand, it was perfectly

33. Milliken, 125 Mass. at 374–75.
34. Id. at 376–77.
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enforceable; Maine had emancipated married women by statute in 1866, giving them the same power to contract that men and single women enjoyed. Massachusetts would likewise change its rule, but not until 1874, well after the execution of the guaranty and the subsequent events that gave rise to the lawsuit. The trial court held for Sarah, and Deering-Milliken appealed.

The opinion of the Supreme Judicial Court, written by Chief Justice Gray, began with a statement of the general rule:

[T]he validity of a contract is to be determined by the law of the state in which it is made; if it is valid there, it is deemed valid everywhere, and will sustain an action in the courts of a state whose laws do not permit such a contract.

The agreement executed by Sarah at her home in Massachusetts, the court said, was an offer which ripened into a contract only when Deering-Milliken received the guaranty in Portland and acted on it there by selling goods on credit to Daniel. The contract therefore had to be treated as one made and to be performed in Maine. The case fell within the general rule, and the only question was whether Sarah's incapacity under Massachusetts law made a difference.

On this point, the authorities were divided. On the continent, where the civil law largely prevailed, the view was that the capacity to enter into a contract was at all times governed by the law of a person's domicile, regardless of where the contract was made. The weight of authority in England and the United States went the other way, holding that capacity was a function of the law of the place of contracting. Was it possible that Sarah's contractual incapacity had traveled with her, so to speak, when she went to Maine and made the contract? Such a rule, the court said, would hardly be suitable for a nation like the United States:

[I]t is only by the comity of other states that laws can operate beyond the limit of the state that makes them. In the great majority of cases, especially in this country, where it is so common to travel, or

36. Miliken, 125 Mass. at 376.
37. Id. at 377.
38. Id. at 375 (citation omitted).
39. Id. at 376.
40. Id. at 381, 382.
to transact business through agents, or to correspond by letter, from one state to another, it is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicil of those with whom they deal, and to ascertain the law of that domicil, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all.

The place-of-making rule was clearly the preferable one. The court took note of the possibility that Sarah’s incapacity might be considered “so fixed by the settled policy...[of this] state, for the protection of its own citizens,...” as to justify a refusal to give effect to the otherwise applicable law of Maine. That condition plainly did not obtain in Massachusetts even at the time of the making of the contract in question, a married woman was vested by statute with a very extensive power to carry on business by herself, and to bind herself by contracts with regard to her own property, business and earnings, and, before the bringing of the present action, the power had been extended so as to include the making of all kinds of contracts, with any person but her husband, as if she were unmarried. There is therefore no reason of public policy which should prevent the maintenance of this action.

The court accordingly applied the law of Maine, upheld the validity of the contract, and enforced it against Sarah.

The most striking thing about the case is the result: the contract was enforced, notwithstanding that under Massachusetts law Sarah Pratt’s pen was bereft of ink when she signed the agreement. The reasoning of the opinion was beguilingly syllogistic. The question was whether the contract was valid. The court’s choice-of-law rule told it to make this determination by applying the law of the state where the contract was made. That state was Maine, and the contract was valid there. The outcome seems so unexceptional that it is easy to miss its implications.

42. Id. at 382–83.
43. Id. at 383.
44. Id.
There was a problem in the first place because the laws of Maine and Massachusetts differed as to matters of contractual capacity. The Massachusetts Legislature was in the process of changing the law to emancipate married women as Maine had done, but at the time this case arose it still retained so much of the older doctrine as disabled a married woman from agreeing to guarantee her husband's debts. What was it about this situation that warranted such focused attention? The prevailing climate of opinion held that married women were subservient to their husbands and were supposed to obey them in all things. It was therefore believed that they could easily be influenced, even coerced, and hence were unlikely to act in such a matter of their own free will or with full awareness of the consequences. The relationship of marriage created a potential for abuse—of wives most obviously, but also of creditors, who might otherwise rely on a signature that was really no better than the debtor's own. There was a need for special protection, or so the Massachusetts Legislature might reasonably have believed.

Sarah Pratt was a Massachusetts married woman. No matter what the court thought of the law and the wisdom of its underlying policy, it would have had no choice but to invalidate the agreement if the case had arisen entirely within Massachusetts—that is, if it had involved no out-of-state elements. But here there was a choice, and it was one that the court exercised with a will. Obviously it thought it was better to subordinate Sarah's claim to the protection of Massachusetts law in order to uphold the contract and enforce it in favor of a Maine creditor. The interesting question is why.

Much of the answer lies in the idea of contract and its importance to a society constituted not along lines of status—caste, class, accidents of birth—but on the radical proposition that "[t]he ideal way to organize social relations was through free voluntary agreement, by persons pursuing their own ends." The movement from status to contract had its origins in England, but nowhere did it reach fuller fruition than in the United States, which almost from the beginning was a business and market-oriented, profit-motivated society of individuals free to exercise their will and ambition in order to prosper and improve their condition in life. A society like this required the idea of contract, and the texture of this nation as it has evolved and exists today—the myriad of commercial, economic, and social interrela-

45. Friedman, supra note 35, at 464.
tionships that undergird and define the United States can hardly be imagined without it.\footnote{46}

Because it lay ready to hand, the legal system was given the important role of maintaining an environment in which this kind of structured activity could go on—an environment which not only encouraged the making of agreements but also gave assurance that where necessary they would be enforced. It was a role that courts took seriously, all the more so because the law of contract itself did not shape the contours of social and economic relationships so much as give tangible expression to deeply held beliefs about what society valued in life and what the ground rules ought to be in getting it.\footnote{47} At the turn of the century, freedom of contract was considered an essential part of the concept of ordered liberty enshrined in the due process clause of the fourteenth amendment.\footnote{48} If less than that today, it has nevertheless numbered among this nation's articles of faith. The quasi-religious overtones in that phrase are hardly misplaced.

It is easy to see the court's opinion as a reflection and affirmation of these values. The justices of the Supreme Judicial Court of Massachusetts were a group of men stamped in the mold of a state that was among the original centers of shipping, trade, commerce, business, and manufacturing in the United States—a state built, almost literally, on the ability of men to deal with one another at arm's length with the assurance that their bargains would be kept. To these men, the importance of business and commercial transactions was obvious; equally obvious was the need to encourage and facilitate these transactions when they crossed state lines. The states were sovereign, but not in the same way as the nation-states of Europe. Free and unfettered commercial intercourse was the norm. "Especially in this country," the court said, it would be unjust as well as inconvenient to allow quirks of local law to interfere with the security of transactions.\footnote{49} It would

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\footnote{47. See Friedman, supra note 35, at 244–47, 464–68; Conditions of Freedom, supra note 46, at 11–12; see generally Lawrence Friedman, Contract Law in America (1965).}

\footnote{48. See, e.g., Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897).}

\footnote{49. Milliken, 125 Mass. at 382.}
\end{footnotes}
“greatly cripple the power of contracting abroad at all.”

Far better to refer these cases uniformly to the law of the place of contracting, which was the law that parties presumably had in mind when they made agreements.

This typically hard-headed and practical assessment was leavened with an element of cold-blooded calculation. It was not lost on the court that its preferred set of values could be implemented only at the sacrifice of local policy and the fortunes of a local resident. Massachusetts law presumed that a married woman signed an agreement of this sort not of her own free will and with full awareness of the consequences, but only in obedience to her husband. It had to be presumed, therefore, that Sarah had not signed in the belief that she could never be held to her agreement: there was no bad faith or intention to deceive. She had never left her home in Massachusetts, much less the shelter of its protective laws. She was the quintessential innocent victim contemplated by the law. As to this aspect of the case, the opinion was silent, the court’s views appearing only by necessary implication in the result. The fair inference is that a little injustice at the local level was a small price to pay for furthering the orderly transaction of business.

This result was by no means inevitable. With a different order of values the court might have put another interpretation on the course of the parties’ dealings with one another. It might, for example, have construed the writing in question as a counteroffer by Deering-Milliken to sell goods to Daniel on credit in exchange for Sarah’s promise to guarantee payment. This offer would have ripened into a contract when Sarah signed the agreement at her home in Massachusetts and caused it to be placed in the mail there. The instrument in fact recited the payment of one dollar as consideration (although this sum was never paid). The result would then have been a separate contract between Deering-Milliken and Sarah, bilateral and executory in nature, but made in Massachusetts.

Another possibility for avoiding the application of Maine law lay in the aspect of public policy touched upon briefly at the end of the opinion. Territorial theory, in the version expounded by Joseph Story in his highly influential nineteenth-century treatise, recognized the right of a state to refuse to give effect to a law that would violate its own public policy. In Story’s view the territorial rules had their theoretical basis in the principle of

50. Id. at 382–83.
51. Id. at 382.
53. Milliken, 125 Mass. at 376.
comity. Enforcing another state’s laws was therefore always a voluntary act, and no state could be required “to yield up its own fundamental policy” to that of another. This was the root of the so-called public policy exception, perhaps the most important of the judicially developed techniques for avoiding the operation of territorial rules without rejecting them outright.

The court was heavily influenced by Story’s views and was therefore well aware that it had the power to deny enforcement to the law of Maine. It had only to characterize Massachusetts’ policy of protecting married women as “fundamental,” or, in its own words, as sufficiently “fixed by the settled policy of the state . . . .” Rationalizing this conclusion might have been tricky in light of the demise of the policy in 1874; but as we shall see, the contours of the public policy exception and the conditions necessary to its invocation have never been precise. It could have been done if the court

54. Story, supra note 2, § 25. “Much less,” he continued, “can any nation be required to sacrifice its own interests in favor of another; or to enforce doctrines, which, in a moral, or political view, are incompatible with its own safety, or happiness, or conscientious regard to justice and duty.” Id.

55. See, e.g., Cramton et al., supra note 3, at 141–45; Monrad G. Paulsen & Michael I. Sovern, “Public Policy” in the Conflict of Laws, 56 Colum. L. Rev. 969 (1956).

56. Justice Story’s treatise is approvingly cited at several points in the opinion, Milliken, 125 Mass. at 377, 378, 381, and the court plainly subscribed to the theory of comity as the basis for the enforcement of extraterritorial rights:

As the law of another state can neither operate nor be executed in this state by its own force, but only by the comity of this state, its operation and enforcement here may be restricted by positive prohibition of statute. A state may always by express enactment protect itself from being obliged to enforce in its courts contracts made abroad by its citizens, which are not authorized by its own laws . . . .

It is possible also that in a state where the common law prevailed in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such an utter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the state, for the protection of its own citizens, that it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract.

Id. at 383.

57. Id.


Proponents of [the public policy] exception hold that the ordinarily applicable conflict of laws doctrine will not be followed when to do so would violate the strong public policy of the forum. As so used the term “public policy” is so vague and general as to defy definition. The strength of the policy necessary to call the exception into operation is unclear and varies with the facts.
had wanted to protect Sarah Pratt, and it would have been neither the first nor the last time that the name “fundamental” was put to a policy reflected in some minor wrinkle of a state’s law. In the end, protecting the bargain was simply more important.

*Milliken* appears in many conflict-of-laws casebooks as a classic illustration of the *lex loci contractus* rule, but its deeper significance lies in the fact that it is utterly typical of the way in which American courts have tended to deal with matters of contract and choice-of-law. They take as a given that the institution of contract itself represents a value of fundamental importance to society. Those who enter into agreements do so with goals and purposes in mind; provided that an agreement is neither illegal nor contrary to public policy, the intentions of the parties and the expectations arising therefrom assume paramount importance. Courts perceive their function to be the essentially legitimating one of effectuating the intentions of the parties and thereby protecting their expectations.

With traditional methods, this disposition shows up in the decisions in two primary ways. The first is in the willingness of courts to give effect to the concept of party autonomy. Party autonomy has nothing to do with territoriality as such, but refers to the ability of the parties to contract with reference to the law of a particular jurisdiction. Sometimes their intent is implicit in their agreement, sometimes explicit in the form of a choice-of-law clause. The idea originated in the eighteenth century in England in an opinion by Lord Mansfield and quickly took hold in the United States. Its popularity here is an obvious reflection of the importance attached to party intentions, at least as long as the law chosen bears some sort of reasonable relation to the parties or their transaction.

The second has to do with the territorial doctrine of *lex loci contractus* and the way in which courts have used it in actual practice. The court’s

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*Id.; see also* Cramton et al., *supra* note 3, at 141–45; Paulsen & Sovem, *supra* note 55; Southerland & Waxman, *supra* note 1, at 463–69.

59. *See, e.g.*, Gillen v. United Services Auto. Ass’n, 300 So. 2d 3 (Fla. 1974) (refusing to give effect on public policy grounds to an “other insurance” clause contained in an insurance policy issued in New Hampshire).


61. *See, e.g.*, Leflar et al., *supra* note 60, at 413–14.

62. *See, e.g.*, id. at 413–19.


statement of the rule in *Milliken* is accurate as far as it goes, but misleading to the extent that it suggests that the law of the place of contracting governs in every case. The Latinism "*lex loci contractus*" literally means the law of the place of contracting, but the term is also loosely used to refer to the territorial approach in contracts cases generally, and in this sense means something more. In *Scudder v. Union National Bank*, 65 for example, the case relied upon by Chief Justice Gray, the Supreme Court set out the rule in these terms:

> Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought.66

It is apparent from this statement that *lex loci contractus* is not one rule, but three. It therefore comes with a built-in flexibility that courts have not hesitated to exploit in order to effectuate party intentions. Since this can rarely be done by choosing a law that invalidates a contract, the overwhelming observable tendency has been one of selective use of the three rules to produce a choice of validating law.67 The opinions frequently fail to make the distinction between issues of validity and issues of performance. Validity may be determined in one case by the law of the place of contracting and in another by the law of the place of performance; in like fashion, performance-related questions may, on one occasion, be determined by the law of the place of performance and, on another, by the law of the place of contracting.68 And there are cases in which courts characterize the course of

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65. 91 U.S. 406 (1875).
66. Id. at 412–13. In *Walling v. Christian & Craft Grocery Co.*, 27 So. 46, 49 (Fla. 1899), the Supreme Court of Florida adopted the rule in the form adopted by the *Scudder* Court, and it has been the law in Florida ever since. See, e.g., *Jemco, Inc. v. United Parcel Serv., Inc.*, 400 So. 2d 499, 501 n.4 (Fla. 3d Dist. Ct. App. 1981).
68. See, e.g., Beale, *supra* note 3, at 1105–09; Leflar et al., *supra* note 60, at 405–413. In surveying cases in the United States Supreme Court from 1825 to 1928, Professor Beale states:

> It will thus be seen that almost every rule ever suggested for determining the law applicable to the validity of a contract which has ever been seriously urged in
the parties' dealings with one another in such a way as to locate the place of making in a state whose law upholds the agreement. 69

Traditional practice might seem a doctrinal mess were it not for the striking fact that the law chosen is usually one under which the contract in question can be upheld. The wealth of judicial practice brings to mind one of the more profound observations about the choice-of-law process, which was made by Professor Robert Leflar. He said that choice-of-law has never been a purely

jurisdiction-selecting process, with courts first deciding which state's law should govern and checking afterward to see what that state's law [is] .... Everyone knows that this is not what courts do, nor what they should do. Judges know from the beginning between which rules of law, and not just which states, they are choosing. ...

... The inclination of any reasonable court will be to prefer rules of law which make good socio-economic sense for the time when the court speaks, whether they be its own or another state's rules. 70

The fair inference from the cases is that courts think that enforcing agreements makes good socio-economic sense and are not above using the choice-of-law decision itself as a way of furthering this value judgment.

The fact that courts engage in a certain amount of result-oriented decision making is not the shocking proposition it once was. Whether this is what they ought to do, as Leflar also asserts, is a different question and a much more difficult one. Every conflict-of-laws case involves two decisions. A court must first decide whose law governs, and then, under that law, what the outcome is. The catch, of course, is that the choice-of-law decision itself is often outcome-determinative. Hence the recurrent bedeviling question in choice-of-law centers on what "justice" means, or ought to

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mean, in such a case. Does it mean making the choice-of-law decision in a fair and impartial way, without regard to what result one law or the other would produce when applied to the facts of a case? Or does it mean reaching an end result that itself seems just, the choice-of-law decision being just another means to that end? The question is hardly academic. It has far-reaching implications for the kinds of choice-of-law rules that any particular court will prefer, as well as for the use it will make of them.

No one labored longer or harder to isolate the process of choice from its effect than Joseph Beale, the distinguished Harvard law professor who served as the Reporter for the 1934 Restatement of Conflict of Laws. Beale took the existing hodge-podge of traditional territorial practice and sought to impose logic and order on it in order to create a perfectly fair and impartial way of choosing law. To him, the content of the competing laws was irrelevant as was the result that one law or the other might produce in a given case. He was concerned only with how the choice-of-law decision was made. He predicated his system on the concept of “vested rights.” If acts had legal significance, it could only be by virtue of the law of the place where those acts occurred. Legal rights or liabilities created under that law were said to vest at the moment of their creation and could thereafter be enforced in some other place only in that form. It followed from this that acts valid where done ought to be valid everywhere. Beale found the idea of comity offensive; it implied discretion where in his view none existed. One state applied the law of another, not out of deference and respect, but because it was obligated to. 71

For contracts, Beale dispensed summarily with the concept of party autonomy. He argued that it was objectionable in theory because it conferred upon the parties permission “to do a legislative act,”72 and in practice because it was too uncertain and unpredictable: no one could say what effect a court might give to the expressed intent of the parties. 73 He attempted to transform the lex loci contractus doctrine into an instrument of precision, drawing the sharpest possible line between issues of contract validity and issues of performance. 74 All questions concerning validity,

71. See generally Beale, supra note 3.
72. See id. at 1079, 1080–83.
73. See id. at 1083–86.
74. In the comments, Professor Beale conceded that the process of separating the two could be problematical:

[The nature of the obligation and the duty to render the performance for which a party becomes bound is governed by the law of the place of contracting. . . . [While] matters concerning performance of a contract are determined by
including the nature of the obligation and the extent of the duty to perform it, he decisively referred to the law of the place of contracting—75—the place where "the principal event necessary to make a contract" occurred.76 This was sound in theory, he said, because the question whether or not there was a contract could "on general principles be determined by no other law

the law of the place of performance.... A difficult problem is presented in deciding whether a question in a dispute concerning a contract is one involving the creation of an obligation or performance thereof. There is no distinction based on logic alone between determining the creation of the contract and the rights and duties thereunder on the one hand, and its performance on the other.... Regardless of the lack of logic, however, problems arising out of disputes upon contracts are settled as if certain acts pertained to the making of the contract and other acts to its performance. The applicability of the rule that the complete control of all questions is determined by the law of the place of contracting is therefore modified upon practical considerations. One law is applied to what is regarded as the initiation of a contract and another to what is regarded as its final performance. The point at which initiation ceases and performance begins is not a point which can be fixed by any rule of law of universal application to all cases. Like all questions of degree, the solution must depend upon the circumstances of each case and must be governed by the exercise of judgment.

RESTATEMENT OF CONFLICT OF LAWS § 332 cmt. c (1934) [hereinafter RESTATEMENT]. Professor Beale pursued the distinction in the comments to section 358, which states the general rule that issues of performance are governed by the law of the place of performance:

While the law of the place of performance is applicable to determine the manner and sufficiency and conditions under which performance is to be made, it is not applicable to the point where the substantial obligation of the parties is materially altered. As stated in § 332, Comment c, there is no logical line which separates questions of the obligation of the contract, which is determined by the law of the place of contracting, from questions of performance, determined by the law of the place of performance. There is, however, a practical line which is drawn in every case by the particular circumstances thereof. When the application of the law of the place of contracting would extend to the determination of the minute details of the manner, method, time and sufficiency of performance so that it would be an unreasonable regulation of acts in the place of performance, the law of the place of contracting will cease to control and the law of the place of performance will be applied. On the other hand, when the application of the law of the place of performance would extend to a regulation of the substance of the obligation to which the parties purported to bind themselves so that it would unreasonably determine the effect of an agreement made in the place of contracting, the law of the place of performance will give way to the law of the place of contracting.

Id. § 358 cmt. b. It is worth noting that the comments in the First Restatement are unofficial; that is, unlike the black-letter rules, they did not receive the endorsement of the American Law Institute and therefore rest on the authority of the reporter alone.

75. See id. § 332.
76. Id. § 311 cmt. d.
It was practically the best rule because there was usually no doubt where a contract was made, and it was also the easiest for the parties to follow. Details relating to the performance of a contract, such as the manner, time, place, and sufficiency thereof, he referred to the law of the place of performance.

These rules were simple, logical, and ordinarily easy to apply. If widely adopted and faithfully followed, they offered a number of advantages. They would produce fair, impartial, and uniform results because courts everywhere would tend to make the choice-of-law decision in the same way. For this reason, it would make no difference where a particular suit was brought. The unseemly possibility of forum shopping would be eliminated altogether. Just as important, the rules would make the choice-of-law process easy, simple, certain, and predictable—qualities that the mass of conflicting decisions from the nineteenth and early twentieth centuries seemed to suggest were sorely needed.

Despite these virtues, the First Restatement has to be accounted a failure. Though intended as a definitive statement of territorial theory, its influence was never that great. Territoriality would remain the predominant approach until the 1950s, but not necessarily in the "vested rights" version prescribed in the Restatement; courts for the most part simply continued doing what they had always done. The clearest evidence of its rejection is the fact that in 1953 the American Law Institute found it advisable to commence work on a replacement. In essence the First Restatement failed because it tried to reduce choice-of-law to a purely mechanical process. Its rigidity left no room for maneuver; in taking the element of judgment out of judging, it became a victim of its own drive for perfection. No one can deny that fairness and impartiality, ease of application, simplicity, certainty, predictability, and uniformity of result are important values in choice-of-law, or indeed, in any area of law. What the fate of the First Restatement suggests is that these values count for less in the minds of courts than the freedom to decide cases in ways that are perceived to make good socio-economic sense.

77. BEALE, supra note 3, at 1091.
78. Id. at 1091–92.
79. See RESTATEMENT, supra note 74, § 358.
80. For example, the vast majority of conflicts cases in Florida have been decided with territorial rules, but the underlying theory has always been one of comity rather than vested rights. See cases cited, supra note 8. It is rare to find a Florida appellate opinion in which the First Restatement is even cited, much less relied upon.
If nothing else, the First Restatement's existence is a persistent reminder that choice-of-law itself involves a choice—one that pits the need for rules and the impulse to follow them against intuitions of justice in some larger sense. If a court's choice-of-law rule calls for Georgia law, but its sense of justice cries out for Florida law, then it has a choice—the more agonizing one of values rather than laws. The dilemma is apt to seem most acute when the otherwise applicable law is one that strikes a court as silly or unwise. What "justice" is then may seem clear. At the same time, every court knows there is only so much tolerance for decisions that depart from an announced set of rules or that cannot easily be squared with them. There is "justice" there, too, in considerations of fairness, expectations and reliance, and certainty and predictability. If a court is simply going to "think deeply and decide justly," it has no need for choice-of-law rules at all. The result of that can be chaos and confusion. What would happen as choice-of-law entered the modern era is ample proof of that.

B. Lilienthal v. Kaufman

Given the importance of contract in the nation's history, the result in Milliken is not surprising. But it makes all the more interesting the decision in Lilienthal v. Kaufman in which, almost a hundred years later, a similar case presented itself to the Oregon Supreme Court and was decided the other way.

Like Milliken, Lilienthal involved a question of contractual disability and its effect in a multi-state transaction. Leonard Kaufman had been declared a spendthrift by the courts in the State of Oregon and he had a guardian appointed for him. The pertinent Oregon statute provided that all contracts he might enter into thereafter, except for necessaries, were voidable by the guardian. Kaufman was apparently obsessed with binoculars and the buying and selling of them. He started a joint venture for that purpose with one Olshen, an Oregon resident, who advanced funds to underwrite the venture. When Kaufman tried to repay the loan with a bad check, Olshen sued. In that case, Olshen v. Kaufman, the Oregon Supreme Court held that the guardian had the right to void the contract and preclude recovery.

82. 395 P.2d 543 (Or. 1964).
83. Unless otherwise indicated, the facts are taken from the court's opinion.
84. 385 P.2d 161 (Or. 1963).
Kaufman then went further afield, to California, where he persuaded Philip Lilienthal, a California resident, to advance funds for a similar joint venture, giving two promissory notes in exchange. The notes were executed and delivered in California. Though Lilienthal made routine credit checks, these failed to disclose that Kaufman was a spendthrift. When he presented the notes for payment, the guardian once again asserted Kaufman's incapacity as a spendthrift and refused to pay. Lilienthal brought suit in Oregon to collect on the notes. He argued that California was the place of making since the notes were executed and delivered there, and that Oregon was bound under its conflicts rule—lex loci contractus—to apply the law of California. California law did not recognize the disability of a spendthrift. The trial court held for Kaufman, and Lilienthal appealed.

The opinion of the Oregon Supreme Court was written by Justice Denecke and ended by applying Oregon law and sustaining the spendthrift defense. Two justices dissented. The case has been the object of a considerable amount of criticism in the conflicts literature, and few agree with the result. I find it hard to share this view. To my mind, the majority opinion is remarkable not only for its reasoning and result, but also for the picture it gives of a conscientious court wrestling in a thorough and forthright way with a particularly thorny problem.

The first half of the opinion consisted of a frank concession that almost all of the existing conflicts theories called for the application of California law. It is worth tracing the court's discussion in some detail because it gives a concise picture of how far choice-of-law thinking had come in the years since *Milliken v. Pratt* was decided.

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**Lex loci contractus** of course pointed to the application of California law. But here the court qualified its traditional reliance on that approach, expressing doubt as to its correctness "if the only connection of the state whose law would govern is that it was the place of making."88 The qualification was a significant echo of the modern criticism of the jurisdiction-selecting rules89 of the First Restatement. In the vastly different, highly mobile society that America had become in the twentieth century, contracts could be made anywhere. Businessmen from two different states might meet for the weekend in New York City because they could take in a show while they settled their deal; they might finalize contracts while traveling cross-country by train or in a plane. These realities meant that the place where people happened to be when a contract came into existence under the familiar rules of the law of contracts could be wholly fortuitous, without connection either to the parties or their transaction. The court called this the "strongest criticism"90 of lex loci contractus, but the main thrust of the rebellion against territoriality ran deeper. The jurisdiction-selecting rules of the First Restatement took no account of the content of the competing laws or the policies that they reflected; nor did they, in theory at least, provide much latitude for courts in trying to achieve what they perceived to be just results in individual cases.91

But in this case, as the court readily conceded, the place of making was not California's only connection. Kaufman had gone to California to persuade Lilienthal to lend him money. The loan was actually made in California, and the promissory notes, in addition to being executed and delivered in California, were also by their terms to be paid there. California, in other words, was both the place of making and the place of performance.

89. The phrase "jurisdiction-selecting rule" was coined by Professor David Cavers and refers to a choice-of-law rule which uses a particular contact to select the state whose law is to govern without consideration of the content of the law so chosen. See David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 194 (1933); DAVID F. CAVERS, *The Choice-of-Law Process* at 9 n.24 (1965) ("The jurisdiction-selecting rule makes a state the object of choice; in theory it is only after the rule has selected the governing state by reference to the 'contact' prescribed in the rule that the court ascertains the content of the state's law.").
The court cited various authorities, including a Tentative Draft of the Second Restatement, for the proposition that the validity of a promissory note was governed by the law of the place where payment was to be made.92

Still another principle calling for the application of California law was the rule of validation—the idea that given a choice between a validating and an invalidating law, a court should choose the law that upholds the parties’ agreement. The rule of validation, the court said,

is appealing because it is founded upon the same reasoning that is followed in other aspects of the law of contracts. This court and all other courts reiterate that contracts are “sacred and shall be enforced by the courts of justice unless some other overpowering rule of public policy intervenes which renders such agreement illegal or unenforceable. * * * Without such a rule the commerce of the world would soon lapse into a chaotic state.” . . . In the general law of contracts we constantly strive to hold the contract valid and enforceable. The “rule of validation” has the same purpose in conflict of laws.93

And to all of this the majority might just as well have added the dissenters’ argument that California law would also apply under the approach then being pioneered by the New York Court of Appeals.94 In 1954, that court discarded the traditional rule of *lex loci contractus* in favor of what it called the “center of gravity” or “grouping of contacts” approach.95 This approach emphasized the law of the place “‘which has the most significant contacts with the matter in dispute’”96 in order to give that place “paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction ‘most intimately concerned

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92. *Lilienthal*, 395 P.2d at 546 (citing *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 332b(a) (Tentative Draft No. 6, 1960)).
93. *Id.* (citations omitted). According to the court, the rule of validation held that

if the contract is valid under the law of any jurisdiction having significant connection with the contract, i.e., place of making, place of performance, etc., the law of that jurisdiction validating the contract will be applied. This would also agree with the intentions of the parties, if they had had any intentions in this regard. They must have intended their agreement to be valid.

*Id.*
94. *Id.* at 552 (Goodwin, J., dissenting).
96. *Id.* at 102 (quoting Rubin v. Irving Trust Co., 113 N.E.2d 424, 431 (N.Y. 1953)).
with the outcome of [the] particular litigation.\textsuperscript{97} These seductive sounding but somewhat imprecise phrases would soon find a reinforcing echo in the Second Restatement's "most significant relationship" formulation. Whatever "significant contacts" were, exactly, it was pretty clear that California had them here.

It seemed that California law had to govern, yet the court avoided that conclusion. To understand how it managed to do this on a principled basis requires an understanding of the concept of interest analysis. Interest analysis had emerged on the scene only a few years earlier. It was a breakthrough in choice-of-law thinking at the time and has come to be recognized since as the most important theoretical advance in the area in this century. It was primarily the work of one man, Brainerd Currie, who proposed the idea and elaborated it in a series of influential law review articles that appeared between 1958 and 1963.\textsuperscript{98} As conceived by Currie, interest analysis was a radically different way of looking at conflict-of-laws problems. It seemed to be the catalyst that the choice-of-law revolution needed and more than anything else was responsible for liberating choice-of-law from its territorial constraints. Interest analysis quickly became an important conflicts method in its own right as well as an integral component of almost all of the other modern approaches, the Second Restatement among them.

Currie's method of analysis, in distilled form, ran along these lines. He began with several propositions that seem almost self-evident. Law makers, he said, ordinarily made rules of law with only the domestic situation in mind.\textsuperscript{99} They were mainly concerned with events that happened within their own borders and with the activities of their own residents; they rarely gave thought to the extraterritorial consequences of those rules—that is, to how they would want them to apply in the marginal conflict-of-laws case.\textsuperscript{100} All of these rules embodied or expressed some social, economic, or administrative policy\textsuperscript{101} which could be discovered through the familiar processes of statutory interpretation or case analysis.\textsuperscript{102} Having ascertained the policies embodied in the conflicting laws of two states, Currie said, a court should inquire whether the relationship of each state to the case was such that

\textsuperscript{97} Id. (quoting D. Martin Cook, Note, \textit{Choice of Law Problems in Direct Actions Against Indemnification Insurers}, 3 UTAH L. REV. 490, 498–99 (1953)).

\textsuperscript{98} The major essays are collected in \textit{Brainerd Currie, Selected Essays on the Conflict of Laws} (1963).

\textsuperscript{99} See id. at 81–86.

\textsuperscript{100} See id.

\textsuperscript{101} See id. 85–86, 141–46.

\textsuperscript{102} See id. 183–84.
applying its law would further or advance its policy. 103 If so, the state was said to have an “interest” in the application of its law. 104

It was hardly coincidental that one of the earliest and most influential of his articles—“Married Women’s Contracts: A Study in Conflict-of-Laws Method” 105—dealt with Milliken. It was a case rife with policy implications, 106 and Currie used it to demonstrate the inanity of the traditional territorial rules—lex loci contractus, of course, in particular. Taking as significant variables for choice-of-law purposes the states where the parties resided, the place where suit was brought, and the place of making of the contract, 107 he showed that of the fourteen possible conflict-of-laws problems that could arise, ten were false problems. They were false problems in the sense that while the laws of the two states were in conflict, the policies underlying them were not. 108

To illustrate this point, suppose that the residence of the parties were reversed in Milliken, with the contract made in Massachusetts at the place of business of the merchant and the suit brought in Maine where Sarah Pratt resided. The application of Massachusetts law called for by the place-of-making rule would subvert Maine’s policy of enforcing contracts and upholding commercial transactions; moreover, it would do so without any corresponding advancement of Massachusetts’ policy of protecting married women because Sarah Pratt, in this variation, would not be a Massachusetts married woman. Massachusetts, Currie argued, had no intention of protecting married women generally, but only those married women with whose

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103. See generally Currie, supra note 98.
104. See id.
105. See generally Currie, supra note 91.
106. In order to sharpen his discussion of the conflicting legislative polices of Massachusetts and Maine, Currie asked his readers to assume that in 1870 the Massachusetts Legislature duly considered but refused to enact a bill that would have removed the contractual disabilities of married women. He appeared to think that the actual change made in 1874 brought the policies of the two states into alignment and destroyed any real conflict of interests. See Currie, supra note 98, at 80–81. The Massachusetts Supreme Judicial Court, however, did not appear to view the case in that light, although its decision was undoubtedly made easier by the change; rather, it considered the case on the basis of the laws as they existed in 1872 when the cause of action arose. What effect should a post-occurrence change in law have on a conflict-of-laws case? There is no definitive answer to this question. See, e.g., id. at 736–39; Cramton et al., supra note 3, at 275–77; Robert A. Sedler, The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation, 25 U.C.L.A. L. Rev. 181, 236–42 (1977); Note, Post Transaction or Occurrence Events in Conflict of Laws, 69 Colum. L. Rev. 843 (1969).
107. See Currie, supra note 98, at 83.
108. See id. at 107.
welfare it was concerned—namely, Massachusetts married women. In the terminology of interest analysis, Maine would have an interest in the application of its law upholding the contract because that would further its policy of security of transactions; Massachusetts would have no interest in the application of its rule invalidating certain married women’s contracts because there was no Massachusetts married woman to protect. Maine would therefore be the only state with an interest in the application of its law. The place-of-making rule, blind to these kinds of considerations, would woodenly call for the application of Massachusetts law and would thus defeat the interests of both states.

The other false problems in this group of ten were similar, though not always so perverse in defeating one state’s interest without advancing the interest of the other. They were similar in that all were cases in which only one state was interested in the application of its law. Currie then asked the obvious question: if a state had no interest in the application of its law, why apply it? That the place-of-making rule said so was hardly an answer. He conceded that the territorial rules, at least in theory, were uniform, certain, and predictable in operation and thus dissuasive of forum shopping, but he thought that systematic subversion of state interests was too high a price to pay for benefits that in practice were apt to be more illusory than real. His own solution was simple: in a case of false conflict, a court should apply the law of the only interested state.

This way of looking at a conflicts case was revolutionary, and conflict-of-laws has not been the same since Currie launched his withering attack on the inanity of invariant use of territorial rules in cases of false conflict. He told judges what they had instinctively known all along—that there was a rational way to dispose of these cases and to do so forthrightly, without resort to the subterfuge of escape devices. Today, virtually every modern approach to choice-of-law resolves false conflicts by applying the law of the only interested state.

109. See id. at 85–86.
110. See id. at 91.
111. See id. at 98.
113. Id. at 184.
114. Courts dissatisfied with the inexorable operation of territorial rules, especially as laid down by Professor Beale in the First Restatement, showed considerable ingenuity in avoiding them when the occasion demanded. Characterization, the substance-procedure distinction, and the public policy exception were the principal techniques employed. See, e.g., Southerland & Waxman, supra note 1, at 458–69.
The remaining four of the fourteen possible cases, however, were qualitatively different. These were cases in which the conflict-of-laws was real. In these cases, both states were interested in the application of their laws, and it was therefore impossible to apply one state’s law and advance its policy without simultaneously suppressing the policy of the other.\textsuperscript{115} \emph{Milliken} was such a case, and, as we shall see, so was \emph{Lilienthal}. In \emph{Milliken}, the Massachusetts court could not apply the law of Maine, thereby advancing the policy of security of transactions, without at the same time sacrificing its own policy of protecting Massachusetts married women such as Sarah Pratt. One policy or the other had to yield. To Currie, true conflicts posed problems of uncommon difficulty. They were so difficult, in fact, that he said there was “no conceivable choice-of-law rule that will solve the problem, even though both states adopt it and consistently apply it.”\textsuperscript{116} His own solution confounded a lot of people: “The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law. In this way it can be sure at least that it is consistently advancing the policy of its own state.”\textsuperscript{117} Currie characterized his proposal for resolving true conflicts as a “give-it-up attitude,” arguing that such an attitude was the only constructive one when the task at hand was “impossible of accomplishment with the resources . . . available.”\textsuperscript{118} He probably sensed that his proposal would not sit well with judges bred in the bold and innovative tradition of the common law and deeply committed, like the rest of the nation, to the belief that rational solutions exist and can be discovered for any problem, however thorny. In the event, he was right; his own solution has for the most part been ignored by courts and commentators in favor of approaches that either attempt to weigh one state’s interest in the application of its law against another’s or, in some other way, strike a comparative balance between the two.\textsuperscript{119} Yet Currie’s considered judgment compels reflection, the more so as

\begin{footnotesize}
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  \item \textsuperscript{115} See \textsc{Currie}, supra note 98, at 117.
  \item \textsuperscript{116} \textit{Id.} at 119.
  \item \textsuperscript{117} \textit{Id.}
  \item \textsuperscript{118} \textit{Id.} at 121.
  \item \textsuperscript{119} See, e.g., \textsc{Cramton Et Al.}, supra note 3, at 242; \textsc{Korn}, supra note 6, at 816–20. In her valuable article surveying existing choice-of-law approaches and their actual use by courts around the country, Professor Herma Hill Kay noted that “Currie’s proposal that the forum court, as an instrument of state policy, should apply forum law to advance its own state’s interests in true conflicts cases is unacceptable even to courts otherwise committed to interest analysis.” Herma Hill Kay, \textit{Theory into Practice: Choice of Law in the Courts}, 34 \textsc{Mercer L. Rev.} 521, 551 (1983). Two states, Kentucky and Michigan, have adopted a forum law
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his objections to solutions of this kind have never, in my opinion, been adequately answered.

Conflicts of laws exist in the first place because, within very broad limits set by the Constitution, each state has sovereign power to determine for itself the legal consequences of acts or events that occur within its territory. Nothing in the Constitution prohibits different states from making the same kinds of determinations in different ways. Oregon may choose to treat contracts entered into by its spendthrifts as voidable if it wants to, while California may choose to treat the financially irresponsible like everybody else and hold them to their bargains. There is nothing startling in this. From a sovereign standpoint, neither state is wrong in the course it has chosen. Because both rules are equally correct, there can be no logical way to choose between them. Like choosing between apples and oranges, it is possible to prefer one over the other, but it makes no sense to say that one is "better." All that can logically be said is that the two laws and the policies they reflect are different.

Choosing law is always a legislative act, but never more profoundly so than in cases of true conflict. In these cases, the choice-of-law decision operates to nullify the valid legislative judgment of either one state or the other. It is a qualitatively different choice from the ones courts routinely make in domestic cases where there is only one "correct" rule of law. Currie argued that "assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy." As a matter of separation of powers, he did not think courts should perform this function, nor did he think they were equipped to, isolated as they were from legislative facts and lacking in the resources necessary to discover them. Though his forum-law solution has not been widely adopted, there is still nothing approaching general agreement about how true conflicts should be resolved. It is the most hotly debated issue in choice-of-law today.

The influence of Currie's ideas is plainly evident in the second half of the Lilienthal opinion, which began with a consideration of whether Ore-
gon's policy of protecting spendthrifts was sufficiently strongly held to warrant invoking the familiar public policy exception and refusing to give effect to the otherwise applicable law of California. Within the concept of "public policy," the court said

we must consider the economic and social interests of Oregon. When these factors are included in a consideration of whether the law of the forum should be applied this traditional approach is very similar to that advocated by many legal scholars. This latter theory is "that choice-of-law rules should rationally advance the policies or interests of the several states (or of the nations in the world community)." 123

In making this radical statement, the court was talking about interest analysis, as the citations to and about Currie's writings made clear. 124 For a definition of public policy, the court had traditionally relied on Justice Cardozo's classic statement that the law of another state would not be applied if to do so "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." 125 But the trouble with this formulation, the court concluded, was that it was difficult to determine which policies were "fundamental" and which weren't because of the "lack of any even remotely objective standards." 126 Then came the turning point of the opinion:

[As previously stated, if we include in our search for the public policy of the forum a consideration of the various interests that the forum has in this litigation, we are guided by more definite criteria. In addition to the interests of the forum, we should consider the interests of the other jurisdictions which have some connection with the transaction.] 127

The court found that Oregon's spendthrift policy was aimed at protecting the spendthrift's family, presumably an Oregon family, and at avoiding

\[123. \text{Lilienthal, 395 P.2d at 547 (quoting Alfred Hill, Governmental Interest and the Conflict of Laws—A Reply to Professor Currie, 27 U. Chi. L. Rev. 463, 474 (1960)).}
\[124. \text{See id.}
\[125. \text{Id. (quoting Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918) (citations omitted)).}
\[126. \text{Id. at 548.}
\[127. \text{Id.} \]
having to support the spendthrift and his family at public expense.\footnote{128}{Lilienthal, 395 P.2d at 548–49.} It also acknowledged Oregon's "strong policy favoring the validity and enforceability of contracts,"\footnote{129}{Id. at 549.} regardless of where made, as well as one of protecting innocent persons from fraudulent conduct of the sort engaged in by Kaufman.\footnote{130}{Id.} And of course it was in Oregon's interest to encourage persons from other states to transact business with Oregonians.\footnote{131}{Id.} Obviously these interests cut both ways, but the "substance of these commercial considerations," the court said, "is deflated by the recollection that the Oregon Legislature has determined, despite the weight of these considerations, that a spendthrift's contracts are voidable."\footnote{132}{Id.} California's most direct interest was in "having its citizen creditor paid."\footnote{133}{Lilienthal, 395 P.2d at 549.} It was California's policy "that any creditor, in California or otherwise, should be paid even though the debtor is a spendthrift."\footnote{134}{Id.} And, like Oregon, California also wanted to be a state "in which contracts can be made and performance be promised with the certain knowledge that such contracts will be enforced."\footnote{135}{Id.}

This comprehensive analysis of underlying policies and interests led the court to the conclusion that it was dealing with a true conflict: "[w]e have, then, two jurisdictions, each with several close connections with the transaction, and each with a substantial interest, which will be served or thwarted, depending on which law is applied. The interests of neither jurisdiction are clearly more important than those of the other."\footnote{136}{Id.} In such a case, the court thought, Oregon policy should prevail, and the law of Oregon should be applied. The rationale showed just how deeply in Currie's debt this court was:

> Courts are instruments of state policy. The Oregon Legislature has adopted a policy to avoid possible hardship to an Oregon family of a spendthrift and to avoid possible expenditure of Oregon public funds which might occur if the spendthrift is required to pay his obligations. In litigation Oregon courts are the appropriate instrument to enforce this policy. The mechanical application of choice-of-law rules would be the only apparent reason for an Ore-
gon court advancing the interests of California over the equally valid interests of Oregon. The present principles of conflict of laws are not favorable to such mechanical application. 137

Lilienthal was a remarkable decision in several respects. Despite the strength of California's ties to the case, the court's method of analysis, explicitly in terms of underlying policies and state interests, brought it to the recognition that it was dealing with a true conflict-of-laws—one in which it could not possibly advance the policies of one state without nullifying those of the other. Significantly, the court treated these interests as being of equal dignity. It made no pretense of reasoning its way out of the impasse by delving into the content of the laws in order to assess the wisdom of the policies that each expressed; it made no effort to assess the relative degree to which each state was attached to its policy or the strength with which it was held. It refused, in short, to weigh Oregon's interest in its rather special policy aimed at protecting the occasional spendthrift against the obviously strong interests both states shared in enforcing contracts and upholding commercial transactions. It recognized that the Oregon Legislature had already made that judgment and refused to substitute its own. In the end, this was not a case in which Oregon's spendthrift policy was characterized as "strongly held" and that familiar exception invoked as a ground for refusing to apply the otherwise applicable law of another state. It was a decision cast altogether in the entirely new mold of interest analysis.

The decision also gives a good indication of just how far choice-of-law had come in the slightly-less-than one hundred years since Milliken was decided in 1878. The choice-of-law revolution began to brew in earnest in the 1930s. 138 It was characterized by the increasingly scathing attacks of commentators on the rigid mechanization of conflicts rules that Beale's theories and his First Restatement imposed, and by a corresponding willingness on the part of distinguished courts to avoid those rules by invoking escape devices. It took Brainerd Currie and his synthesis of interest analysis, however, to catalyze smoldering discontent into full-blown revolution.

What Currie did, most decisively, was to restore prominence to a fact that territorial theory obscured: all laws reflect some policy and are intended to serve some purpose. He showed how destructive the traditional rules were of policies and purposes. By defining a state's interest in the applica-

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137. Id.

138. The literature of conflict-of-laws is replete with accounts of the revolution. See, e.g., Korn, supra note 6, at 775–77; Southerland & Waxman, supra note 1, at 458–80.
tion of its law in terms of furthering the policy underlying it, he provided an intellectually satisfying way of identifying false conflicts and distinguishing them from true conflicts. The distinction, it turned out, was one between easy cases and hard cases. The simple and sensible disposition of the easy cases was almost self-evident: apply the law of the only interested state. For the hard cases, Currie had no ready answer, only the recognition that reasoned resolution was impossible and that a court, as an instrument of state policy, should do what it was constitutionally sworn to do, which was to uphold the policies and laws of its own state.

Territorial theory made the choice-of-law turn on a single event and the place where that happened. Currie demonstrated in graphic fashion just how irrelevant such a single connector could be when measured against the purposes and policies that laws were intended to serve. But even before his work appeared, there was widespread dissatisfaction with the rigid jurisdiction-selecting rules of territorial theory, particularly in their dogmatic 1934 Restatement by Beale. The discontent was by far most acute in the area of torts, whose whole underlying purpose had undergone drastic rethinking in the face of the spiraling costs of death and accident-related injury that rapid industrialization and technological growth had brought in their wake. Punishment and admonition gave way in the twentieth century to the compensation imperative. And here, in case after case, the inflexible place-of-injury rule frustrated the growing trend toward finding ways to compensate accident victims for their injuries. 139 By comparison, the pressure for change was far less intense in the area of contracts, where the dominant values—maintaining the security of transactions, effectuating party intentions, and protecting party expectations—seemed so well understood. These values did not change from one century to the next, and in the perception of many courts the familiar rules of territorial theory were adequate to subserve them.

This was true only to a point. As we have seen, lex loci contractus, loosely treated, did lend itself to value-oriented decision making more readily than its torts counterpart. But in a strict sense, it was not designed that way, and this was nowhere more evident than in the 1934 Restatement. In his effort to reduce conflicts law to an exact science and achieve the cherished virtues of certainty, predictability, and uniformity of result, Beale distinguished sharply between issues of contract validity and those of performance. He was adamant in insisting that where validity was the issue,

139. See, e.g., Southerland, supra note 5, at 786–90.
the law of the place of making had to govern; vested rights theory and logic required it. This was problematic for anyone who took the First Restatement as the final and definitive statement of territorial theory it was meant to be and who tried to follow its dictates literally. In the more closely knit, infinitely more mobile United States of the twentieth century, the place where a contract was made could easily be fortuitous, unrelated either to the parties themselves or to their transaction. This concern was evident in Lilienthal in the majority’s qualification of its long-standing adherence to lex loci contractus. In such a world it was increasingly hard to see how any single connector could possibly be decisive.

In the First Restatement, Beale constructed the perfect machine for achieving conflicts justice—that is, for choosing the governing law in as fair and just a way as possible. He was indifferent to the result the law so chosen might produce in a given case. His uncompromising attitude was useful in a way, for it forced courts to confront the question whether perfect conflicts justice, according to Beale, was worth the price. Increasingly at mid-century the answer was no. Compared to end results that made good socio-economic sense, the attainment of logical rigor and with it the promised land of simple and easy application, certainty, predictability, and uniformity of result seemed secondary. This was especially true in the area of contracts where the “right” result—one that enforced contracts and protected party expectations—was usually uppermost in the minds of courts.

In the hundred years from Milliken to Lilienthal, the nation had changed. It had grown smaller, more interrelated and interwoven. Cataclysmic events—the Great Depression and World War II in particular—increased the power of the federal government at the expense of the states. They were sovereign still, but in a much diminished way. State lines no longer stood as high barriers to resolving cases in ways that seemed to make good sense. Territoriality itself was no longer talismanic. What was increasingly evident was a disposition on the part of courts to treat the choice-of-law decision as a means to an end rather than an end in itself.140

The first real break with Beale’s systematics came in 1954, when the New York Court of Appeals discarded territoriality and replaced it with the center-of-gravity or grouping-of-contacts approach.141 In its simplicity, the idea had to seem appealing: if a single contact such as the place of making was no longer to be decisive, then why not consider all of the contacts that the parties, their transaction, and the litigation had with the states con-

140. See, e.g., id. at 787-90, 811-14.
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It was this period of turmoil, growth, and change that formed the matrix for the American Law Institute's second effort to restate the law of conflict-of-laws. With Columbia law professor Willis L.M. Reese as the Reporter, work began on the project in the early 1950s and continued for almost twenty years. The Second Restatement appeared in final form in 1971. In its many tentative drafts, it both influenced the choice-of-law revolution and in turn was influenced by it. A sense of the scope and magnitude of the undertaking, as well as of the forces that drove it, can be gathered from the comments of Herbert Wechsler, the Institute's director, in the "Introduction." The Second Restatement, he said:

[I]s a treatment that takes full account of the enormous change in dominant judicial thought respecting conflicts problems that has taken place in relatively recent years. The essence of that change has been the jettisoning of a multiplicity of rigid rules in favor of standards of greater flexibility, according sensitivity in judgment to important values that were formerly ignored. Such a transformation in the corpus of the law reduces certitude as well as certainty, posing a special problem in the process of restatement. Its solution lies in candid recognition that black-letter formulations often must consist of open-ended standards, gaining further content from reasoned elaboration in the comments and specific instances of application given there or in the notes of the Reporter. That technique is not unique to Conflicts but the situation here has called for its employment quite pervasively throughout these volumes. The result presents a striking contrast to the first Restatement in which dogma was so thoroughly enshrined.\(^{144}\)

Just how striking, we shall soon see. We can profitably turn at this point to the Second Restatement itself to see what it made of all the turmoil and
change and how effectively its provisions deal with issues of contract and choice-of-law.

III. THE SECOND RESTATEMENT OF CONFLICT OF LAWS AND ITS APPROACH TO CASES IN CONTRACT

The Second Restatement is organized on a single fundamental principle. It is that rights and liabilities with respect to any given issue are determined by the law of the state which, with respect to that issue, has "the most significant relationship" to the occurrence and the parties.145 This principle entirely supplants the vested-rights doctrine of the First Restatement, which, the Reporter says, "has not prevailed in the courts and is rejected" throughout.146

Chapter 8 deals with contracts. It is subdivided into six topics, only the first of which—"Validity Of Contracts And Rights Created Thereby"—bears on the present discussion. This topic has three subparts. Title A states the "General Principles" and contains the all-important sections 187 and 188. Title B, comprising sections 189 to 197, deals with particular types of contracts, and Title C, sections 198 to 207, with particular issues in contract. Extensive comments follow each section, and they are of considerable help in understanding the black-letter rules. Particular note should be taken of the fact that these comments are "official," which is to say that they, like the black-letter rules themselves, have received the endorsement of the American Law Institute.147 This was not true of the comments in the original Restatement.

One of the most important doctrinal changes made by the Second Restatement is in the area of party autonomy, which refers to the practice of allowing the parties to choose the law that will govern their agreement. American courts, it will be recalled, were quick to recognize this power in contracting parties and ratified it with a will in their decisions. The use of choice-of-law clauses became increasingly common in the twentieth century, particularly in contracts important enough to be drafted by attorneys. Beale opposed the concept and refused to incorporate it in the original Restatement, but his views on the subject were largely ignored by the courts.

Section 187 of the Second Restatement—stating one of the two "General Principles" which dominate the chapter on contracts—takes the

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145. See id. at vii–viii.
146. See id. at 557 (ch. 8, Introductory Note).
147. See id. at viii.
eminently sensible approach and gives explicit recognition to the power of
the parties to choose the governing law as long as there is a reasonable basis
for their choice, as where the state chosen bears a "substantial relationship"
either to the parties or the transaction. For many years, the Supreme Court
of Florida, following the well-known decision in Seeman v. Philadelphia
Warehouse Co., has taken the position that the parties' choice of a
particular state's law to govern their agreement will be upheld if the agree-
ment bears a "normal and reasonable relation" to that state. Section 187 is
largely congruent with existing doctrine in Florida and would not be likely to
effect the trend of decisions in this area if the Restatement approach were
adopted here.

Section 188, which states the second of the two "General Principles," is
more problematic. This section deals with those cases that would formerly
have been decided under the lex loci contractus doctrine—those in which the
parties have made no attempt to choose their own law. Section 188(1)

148. See id. § 187. This section, entitled "Law of the State Chosen by the Parties" pro-
vides:

(1) The law of the state chosen by the parties to govern their contractual rights
and duties will be applied if the particular issue is one which the parties could
have resolved by an explicit provision in their agreement directed to that issue.
(2) The law of the state chosen by the parties to govern their contractual rights
and duties will be applied, even if the particular issue is one which the parties
could not have resolved by an explicit provision in their agreement directed to
that issue, unless either
(a) the chosen state has no substantial relationship to the parties or the trans-
action and there is no other reasonable basis for the parties' choice, or
(b) application of the law of the chosen state would be contrary to a funda-
mental policy of a state which has a materially greater interest than the chosen
state in the determination of the particular issue and which, under the rule of §
188, would be the state of the applicable law in the absence of an effective choice
of law by the parties.
(3) In the absence of a contrary indication of intention, the reference is to the lo-
cal law of the state of the chosen law.

RESTATEMENT (SECOND), supra note 144, § 187.
149. 274 U.S. 403 (1927).
150. See Morgan Walton Properties, Inc. v. International City Bank & Trust Co., 404 So.
2d 1059, 1063 (Fla. 1981); Continental Mortgage Investors v. Sailboat Key, Inc., 395 So. 2d
507, 512 (Fla. 1981).
151. See Finch & Smeltzly, supra note 27, at 282–84.
152. RESTATEMENT (SECOND), supra note 144, § 188. This section, entitled “Law Gov-
erning in Absence of Effective Choice by the Parties,” provides:

(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
provides that in the absence of an effective choice by the parties, their rights and duties with respect to an issue in contract are determined by the local law of the state having "the most significant relationship to the transaction and the parties under the principles stated in § 6." 153 Section 188(2) then lists five contacts that a court is to consider in applying the principles of section 6. These are the place of contracting, the place of negotiation, the place of performance, the location of the subject matter of the contract, and the geographical location of the parties—their domicile, residence, place of incorporation, or place of business. 154

The reference to section 6 is a critical one. Section 6 is by far the most innovative and important section in the entire Restatement 155 and is applicable to choice-of-law in all areas. 156 Section 6(1) first directs a court to follow a statutory directive of its own state on choice-of-law if there is

153. See id. § 188(1).
154. See id. § 188(2).
155. See id. § 6, entitled "Choice-of-Law Principles," which provides:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

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

156. See id. § 6(2) cmt. c.
one. If there is none, which is typically the case, section 6(2) lists seven choice-influencing considerations that a court is to take into account in making its decision. The comments say that the enumeration is not exclusive and that the factors are unranked and unweighted. The seven factors are:

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

The central theory of the Second Restatement, Professor Reese has written elsewhere, is that "the values stated in section 6 underlie the entire field of choice of law and that all of the black letter rules stem from these values." The choice-influencing considerations of section 6, in other words, represent an attempt to distill those values that various courts and commentators at various times and places have thought to be of importance in the choice-of-law process. Professor Reese is quick to concede that in a given case these values may point in different directions and that from one area of law to another some may be of greater importance than others. But "the fact remains that these are the values that underlie choice of law and that have guided the courts in their decisions." He believes that the ultimate success of the Restatement depends on the correctness of this perception.
The seven choice-influencing considerations of section 6 fall into five groups, each representing a distinct choice-of-law value. The first of these comes mainly from section 6(2)(a)—"the needs of the interstate and international systems"—and is reminiscent of the ideas reflected in the principle of comity. It is a fundamental caution that a state should not ruthlessly pursue its own self-interest at the expense of another state or of the community of states. According to the comments, choice-of-law rules should "seek to further harmonious relations between states and to facilitate commercial intercourse between them. . . . [A] state should have regard for the needs and policies of other states and of the community of states." Rules that reflect this sensitivity and concern for the needs of other states, it is believed, will commend themselves for widespread adoption, and this, in turn, will promote the "certainty, predictability and uniformity of result" spoken of in section 6(2)(f).

The second value centers on interest analysis, which has a prominent place among the choice-influencing considerations of section 6. The provisions are sections 6(2)(b) and (c)—"the relevant policies of the forum" and "the relevant policies of other interested states . . . ." These sections, Professor Reese has written, give "support to the views of Professor Brain- erd Currie and of those other advocates of what is popularly referred to as the 'governmental interest' approach to choice of law." The comments that accompany these provisions are strongly reminiscent of Currie:

Every rule of law, whether embodied in a statute or in a common law rule, was designed to achieve one or more purposes. A court should have regard for these purposes in determining whether to apply its own rule or the rule of another state in the decision of a particular issue. If the purposes sought to be achieved by a local statute or common law rule would be furthered by its application to out-of-state facts, this is a weighty reason why such application should be made.

166. See Restatement (Second), supra note 144, § 188(1) cmt. b; Reese, supra note 161, at 508–13.
167. Restatement (Second), supra note 144, § 6(2) cmt. d.
168. See id. § 6(2)(f).
169. Id. § 6(2)(b)–(c).
170. Reese, supra note 161, at 509.
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...[T]he forum should give consideration not only to its own relevant policies... but also to the relevant policies of all other interested states.\(^{171}\)

The third value is concerned with the needs of the parties and is reflected in sections 6(2)(d), "the protection of justified expectations,"\(^{172}\) and 6(2)(f), "certainty, predictability and uniformity of result."\(^{173}\) This value is obviously of pre-eminent importance in the area of contracts\(^{174}\) and in this context gains support from the fourth value, which is stated in section 6(2)(e), "the basic policies underlying the particular field of law."\(^{175}\) The comments to section 188(1) say flatly that "[p]rotection of the justified expectations of the parties is the basic policy underlying the field of contracts."\(^{176}\) The fifth value concerns the needs of judicial administration and is reflected mainly in section 6(2)(g), "ease in the determination and application of the law to be applied."\(^{177}\)

Section 188, read in conjunction with the principles and values of section 6, obviously invites an open-ended policy analysis of the broadest sort in determining the state whose relationship to the transaction and the parties is "most significant." Considering that the Restatement nowhere defines a "significant" relationship or differentiates it from one that is not significant, the calculus called for by these two sections may strike some as intolerably vague and uncertain. But the sections immediately following section 188, which deal with particular types of contracts and particular issues in contract, attempt to dispel some of the uncertainty. Though the general principle of section 188 is "applicable to all contracts and to all issues in contract,"\(^{178}\) the Reporter nevertheless believes it possible, "on the basis of existing knowledge, to lay down more precise rules for determining the state of the applicable law.... It seems clear that the best way to bring precision into the field is by attempting to state special rules for particular contracts and for particular issues."\(^{179}\) Or put more bluntly, the wonderfully open-ended, policy-oriented approach of sections 6 and 188 collapses for

\(^{171}\) RESTATEMENT (SECOND), supra note 144, § 6(2) cmts. e–f.

\(^{172}\) Id. § 6(2)(d).

\(^{173}\) Id. § 6(2)(f).

\(^{174}\) See Reese, supra note 161, at 511–12.

\(^{175}\) RESTATEMENT (SECOND), supra note 144, § 6(2)(e).

\(^{176}\) Id. § 188(1) cmt. b.

\(^{177}\) Id. § 6(2)(g).

\(^{178}\) Id. § 186 cmt. a.

\(^{179}\) Id.
particular types of contracts and issues in contract into a series of presumptive rules as to the state of most significant relationship.

With respect to particular types of contracts, the Reporter believes it possible from existing experience to state that a "particular contact plays an especially important role in the determination of the state of applicable law." The rules stated in these specific sections presume, in other words, that a state having a certain geographical connection or contact with a case will ordinarily be the state of most significant relationship. These are of course jurisdiction-selecting rules, and in their territorial bias they are strikingly similar to the traditional approach under the *lex loci contractus* doctrine.

Here, for particular types of contracts, are the important contacts and resultant presumptions as to the state of most significant relationship: for contracts involving transfers of interests in land, the state where the land is situated; for contracts for the sale of a chattel, the state where the seller is to deliver; for life insurance contracts, the state where the insured was domiciled at the time the policy was applied for; for contracts of fire, surety, or casualty insurance, the state where the parties understood the principal location of the insured risk to be; for contracts of suretyship, the state whose law governs the principal obligation; for contracts for the repayment of money lent, the state where the contract requires repayment; for contracts for the rendition of services, the state where the services are to be rendered; and for contracts of transportation, the state from which the passenger departs or the goods are dispatched. It is important to bear in mind that these rules are presumptions only. Each section contains the explicit qualification that the presumption is subject to displacement if some other state has "a more significant relationship" to the transaction and the parties "under the principles stated in § 6."
Particular issues in contract receive considerably less categorical treatment. Some of the rules simply state that an issue is to be determined by the law selected by application of the general principle of section 188. Issues in this group are those which concern the validity of a contract in respects other than capacity and formalities; the effect on a contract of misrepresentation, duress, undue influence, and mistake; the construction of words used in a contract; the nature and extent of the rights and duties created by a contract; and the measure of recovery for a breach of contract. Others are in two parts, the first part stating that the issue is to be determined by application of the rule of section 188, the second then offering a tentative suggestion as to what the result of such application would ordinarily be. Thus, a party's contractual capacity will be upheld if she has such capacity under the law of her domicile; formalities meeting the requirements of the place of execution "will usually be acceptable"; and contracts calling for performance which is illegal in the place of performance "will usually be denied enforcement."

Additionally, two issues are singled out for special treatment: usury and details of performance. Section 203 provides that a contract will be upheld against a charge of usury "if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted" by the law of the state that would otherwise have the most significant relationship under section 188. And section 206 states that "[i]ssues relating to details of performance . . . are determined by the local law of the place of performance."

I think it is important to stress that the general approach of the Restatement aims at identifying the state of most significant relationship under sections 6 and 188. The presumptions and suggested answers of the specific

made, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

RESTATEMENT (SECOND), supra note 144, § 195.

190. Id. § 200.
191. Id. § 201.
192. Id. § 204.
193. Id. § 205.
194. RESTATEMENT (SECOND), supra note 144, § 207.
195. Id. § 198(2).
196. Id. § 199(2).
197. Id. § 202(2).
198. Id. § 203.
199. RESTATEMENT (SECOND), § 206.
sections are simply the Reporter's view of the result that would usually follow from using that approach. For particular types of contracts, all of the presumptions are subject to displacement if some other state has a more significant relationship to the parties and the transaction under the principles stated in section 6, and most of the particular issues are determined by the law selected by application of section 188. It is obviously important to understand just how a court should go about identifying the state of most significant relationship using sections 6 and 188.

Section 188(2) says that the five enumerated contacts are to be taken into account in applying the principles of section 6 to determine the applicable law. But exactly how do sections 6 and 188 interrelate? The comments to section 188 offer considerable guidance on this point. The comment to section 188(2) states that

the forum, in applying the principles of § 6 to determine the state of most significant relationship, should give consideration to the relevant policies of all potentially interested states and the relative interests of those states in the decision of the particular issue. The states which are most likely to be interested are those which have one or more of the following [five] contacts with the transaction or the parties.200

This language is an obvious reference to the interest analysis provisions of section 6—section 6(2)(b) and (c). The comment to section 188(1) makes this clear by saying that these two principles of section 6 focus "upon the purposes, policies, aims and objectives of each of the competing local law rules urged to govern and upon the concern of the potentially interested states in having their rules applied. The factors . . . are at times referred to as 'state interests' or as appertaining to an 'interested state.'"201 The five contacts, then, are important not in themselves, but because of the likelihood that a state having one or more of these contacts with the parties or the transaction will have an interest in the application of its law.

The appropriate starting point is therefore with the interest analysis provisions of section 6. A court should first identify the relevant policy underlying the law of each state having one or more of the five contacts with the case. It should then ask whether that state's policy would be furthered by application of its law. If the answer is yes, that state will be interested in the

200. Id. § 188(2) cmt. e.
201. Id. § 188(1) cmt. b.
application of its law. The majority of cases, as Currie demonstrated, will be false conflicts because only one state will have such an interest.202 In that event, the only interested state will presumably be the state of most significant relationship. The comments to section 6 say that a state’s interest in the application of its law is a “weighty reason” favoring such application.203 They do not actually state the converse proposition—that courts should not apply the law of a state having no interest in such application—but there can be little doubt that the basic philosophy of the Restatement, in common with most of the other modern approaches, is to resolve false conflicts by application of the law of the only interested state. Professor Reese has said elsewhere that “a court should seek to avoid applying a law whose underlying policy would not be served by such application.”204

This is certainly the easiest and most practical way to proceed. The interest analysis provisions of section 6 may, without more, identify the state of most significant relationship; if the conflict is false, the only interested state will be that state. This, in turn, makes it unnecessary to consider the other choice-influencing considerations of section 6 or to consult any of the sections dealing with particular types of contracts and issues in contract since the interest analysis principles of section 6 will have overridden any contrary result that these sections might call for.

Up to this point, the method of the Restatement is clear enough. Matters become more complex, however, if the interest analysis called for by sections 6(2)(b) and (c) reveals that both states are interested in the application of their laws—a true conflict, in other words. The comments to section 6 say that the state whose interests are “most deeply affected” should have its law applied,205 but nothing is said, there or elsewhere, about how this determination is to be made. The Restatement leaves a court at this point with a jumble of contacts, principles, policy-oriented provisions, and jurisdiction-selecting rules to sort through and no guidance on how to do it.

One thing seems clear. The Restatement invites a court to do what Brainerd Currie said neither could nor should be done, and that is to weigh or compare the respective interests of two states in the application of their

203. Restatement (Second), supra note 144, § 6(2) cmt. e.
204. Reese, supra note 161, at 510 (citation omitted). See, e.g., Cramton et al., supra note 3, at 245–51; Scales & Hay, supra note 60, at 583–88; William A. Reppy, Jr., Eclecticism in Choice of Law: Hybrid Method or Mishmash?, 34 Mercer L. Rev. 645, 647–48 & n.12 (1983); see generally Cramton et al., supra note 3, at 193–379 (summarizing principal modern approaches); Scales & Hay, supra note 60, at 15–41.
205. Restatement (Second), supra note 144, § 6(2) cmt. f.
laws. Currie, whose proposal it first was that conflicts cases be analyzed in terms of governmental interests, deplored the weighing of interests as a way of choosing between the competing laws and policies of two states. If both states were interested, he said, no one, not even the Supreme Court, was in a position to say which state’s policies were “the more important, or the more deserving, or the more enlightened.” Yet the Restatement’s most basic premise—that for every case there is a state of most significant relationship—requires a court to make this relative judgment. Any state interested in the application of its law will have a significant relationship to a case. If two states have such a relationship, there appears to be no escape from determining in some way that one state’s relationship is more significant than the other’s. In effect, the Restatement assumes its own conclusion: one state’s relationship must be more significant than another’s because there must be a state of most significant relationship.

The Restatement’s failure to say how a court is supposed to make this determination opens a Pandora’s box of possibilities. Courts as unimpressed with Currie’s arguments as the Reporter, apparently will undoubtedly try to assess the degree to which the interested states are attached to the policies embodied in their laws as a measure of whose interests are “most deeply affected.” Some policies will no doubt strike some courts as more strongly held than others, but this will necessarily be an individual and highly subjective judgment, much like that involved with traditional methods in deciding whether to invoke the public policy exception. In practice it has proven difficult enough for a forum court to make that judgment with respect to its own state’s public policy, much less compare its degree of “strength” with that of another state in any meaningful way.

206. CURRIE, supra note 98, at 117.
207. RESTATEMENT (SECOND), supra note 144, § 6(2) cmt. f.
208. In Lilienthal v. Kaufman, 395 P.2d 543, 548 (Or. 1964), Justice Denecke made the following, refreshingly candid observation:
   The difficulty in deciding what is the fundamental law forming a cornerstone of the forum’s jurisprudence and what is not such fundamental law, thus allowing it to give way to foreign law, is caused by the lack of any even remotely objective standards. Former limitations on the capacity of married women to contract illustrate the difficulty. Milliken v. Pratt, 125 Mass. 374 (1878), is used in many case books as an example. There, the Massachusetts court held that the Massachusetts law that a Massachusetts married woman was incapable of contracting as a surety was not such a cornerstone of Massachusetts jurisprudence and economy that Maine law to the contrary could not be applicable. However, in Union Trust Co. v. Grosman, 245 U.S. 412 (1918), Mr. Justice Holmes, writing for the court, held that a similar Texas limitation on a Texas married woman

https://nsuworks.nova.edu/nlr/vol21/iss3/2
In this sort of calculus, policies that coincide with a court’s own sense of values are likely to appear more strongly held than those that do not, and it will be tempting to credit a state with little attachment to a policy that seems wrong-headed or archaic or that is plainly on its way out, as was the case with Massachusetts’s protective policy in *Milliken v. Pratt*. It will also be difficult for a court to ignore the result that application of the one law or the other will produce in a given case, for once the content of competing laws is taken into account, weighing interests almost inevitably shades into weighing results. Courts that think they know a good socio-economic result when they see one will have a field day with the Restatement’s “most deeply affected” formulation.

Another possibility is contact counting. New York’s adoption of the “grouping of contacts” approach has had a fair measure of influence with other courts. This approach counts “significant contacts” in an attempt to locate the state “having the most interest in the problem” or “most intimately concerned with the outcome.” Its simple arithmetic creates an aura of objectivity that courts, unwilling to engage in the unseemly business of interest weighing, may find appealing. Although the similarity in terminology makes it easy to guess that the Reporter took a few leaves from New York’s book in designing the Second Restatement, the comments to section 188(2) never say that the five contacts of the section are quantitatively important; they are important only because they are likely to be the ones that implicate a state’s interest in the application of its law under the principles of section 6. “Interest” in this sense means that the relevant policies embodied in the law would be furthered by its application. A state is either interested or it is not—not more or less interested depending on the number

*Compare* Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743 (Fla. 1967) (holding that the historical absence of any limitation on wrongful death damages in the Florida wrongful death statute fails to reflect strongly held public policy), with Gillen v. United Services Auto. Ass’n, 300 So. 2d 3 (Fla. 1974) (holding that the statutory prohibition of “other insurance” clauses in automobile insurance policies issued in Florida reflects strongly held public policy).

209. 125 Mass. 374 (1878).

210. *RESTATEMENT (SECOND)*, supra note 144, § 6(2) cmt. f.

211. See, e.g., SColes & Hay, *supra* note 60, at 691-93 (“[A] significant number of states have adopted the more flexible center-of-gravity approach or that of the Second Restatement”); Kay, *supra* note 119, at 535 (“North Dakota appears to be the only state that has adopted New York’s center of gravity approach without merging it into the ‘most significant relationship’ doctrine of the Restatement Second.”). *See generally id.* at 525-38.

of contacts it has with a case. All the same, confronted with a true conflict of interests and stuck for a way to break the tie, some courts will turn to contact counting in the intuitively appealing if analytically superficial belief that the interests of the state with the most contacts must be those that are "most deeply affected."\(^{213}\)

For courts that understand Currie's objections and take them seriously, the inexorable demand of the Restatement to locate the state of most significant relationship will pose a thornier dilemma. Currie's own proposal—that the forum apply its own law in a case of true conflict—was essentially arbitrary, intended for a problem not capable of solution with the resources at hand, but for which a solution nevertheless had to be found. \(Lilienthal\) is a perfect example, but few courts have followed its lead,\(^{214}\) apparently regarding a forum-law solution as too self-serving to commend itself as a settled rule of decision. Certainly the Restatement lends no support to Currie's proposal, but it does contain other possibilities for courts that value arbitrary solutions in preference to the "apples and oranges" comparison involved in interest weighing.

Professor Russell Weintraub has proposed that true conflicts be resolved by applying the law that validates the parties' agreement.\(^{215}\) "It makes sense," he says, "to have a choice-of-law rule in accord with widely shared and clearly discernible trends in the domestic laws whose conflicts we are trying to resolve."\(^{216}\) In this, of course, he draws on the near-sacrosanct status that contracts have enjoyed throughout the nation's history and the well-known predilection of courts for enforcing them wherever possible. Ample support for this result—essentially that argued for by all proponents of the rule of validation\(^{217}\)—can be found in the principles of section 6. Choosing the validating law protects the justified expectations of the parties and serves their need for certainty and predictability. This in turn

\(^{213}\) \textit{RESTATEMENT (SECOND)}, \textit{supra} note 144, § 6(2) cmt. f.

\(^{214}\) \textit{See} Kay, \textit{supra} note 119, at 551.

\(^{215}\) \textit{See} \textit{WEINTRAUB, supra} note 52, at 386–98. His proposal is more complex than the statement in the text suggests; it is limited to questions of contract validity and is intended to operate as a presumption subject to rebuttal in certain cases. "[F]acilitating the planning of interstate and international commercial transactions," he says, "is far better served by a rebuttable presumption that the contract will be valid under the local law of any contact state provided that the validating policies underlying that law will be advanced by application to the interstate transaction in issue." \textit{Id.} at 387.

\(^{216}\) \textit{Id.} at 359 (referencing torts cases); \textit{see also id.} at 388.

\(^{217}\) \textit{See, e.g., EHRENZWEIG, supra} note 63, at 465–90; \textit{STUMBERG, supra} note 90, at 237–39.
furthers the basic policy underlying the field of contract law. Such an approach is simple and easy to use and, considering that most cases have come out this way anyhow, could hardly cause disruption in the smooth workings of the interstate system.

The other obvious possibility is simply a default reference to the presumptions and suggested answers of the sections that follow section 188. These black-letter rules represent the Reporter's attempt to distill for each kind of contract and issue in contract the one particular territorial contact that courts themselves have tended to emphasize in their choice-of-law determinations. Since many of the decisions from which these rules derive were made with territorial methods, it is not surprising to find the place of contracting and the place of performance figuring prominently as the important contacts. The net effect, somewhat ironically, is a more highly refined and particularized version of the *lex loci contractus* doctrine. The territorial bias of these sections reflects the Reporter's own view of the profound and continuing importance of territoriality in conflicts thinking. He has said elsewhere that to ignore the significance of territoriality is "to ignore the basic reason for the existence of choice of law."218 These sections also reflect his personal preference for a rule-based approach rather than one that is open-ended and policy-oriented.219

For some, perhaps many courts, the appeal of an approach of this sort should not be underestimated. In saying this, I have in mind the kind of court that might approach a case in this way.220 Suppose it has determined through the interest analysis provisions of section 6 that both states are legitimately interested in the application of their laws. It recognizes, with Currie, that it is in no position to "weigh" these conflicting interests. It cannot say that one state is more deeply committed than the other to the policies embodied in its law, or that the policies of one are more strongly held or are somehow better, wiser, or more important than the other. Contact counting strikes it as too simplistic, subjective, and uncertain. Contacts, after all, can be multiplied and manipulated, and in practice

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220. In discussing choice-of-law methodology, I assume throughout, for the sake of simplicity, that only two states are involved and that the action is brought in the courts of one of them. This is in fact far more often the case than not. But it is of course possible that a conflicts case can involve more than two states, and it is also possible that the forum will be "disinterested"—that is, its only connection with the case is that the parties have chosen to litigate there.
someone has to decide which ones are to be counted, whether some are more important than others, and what happens if the contacts are more or less evenly divided between the two states.

What the court feels the need for at this point is an arbitrary solution. It wants a way of deciding that does not involve the appearance of deciding. Its instinct, however, is for a method that will be as impartial and free from bias as possible, much like the simple toss of a coin. Hence, it rejects both Currie's and Weintraub's proposals because, though arbitrary, each takes a bias already present in these cases—one favoring application of forum law, the other favoring the law that would validate the contract—and reintroduces it into the process as a basis of decision. Like many courts, this court also happens to be busy and overworked. With its crowded docket, it has neither the time nor the inclination to make a "three-dimensional chess game" of these cases. It wants a quick, simple, and easy way to dispose of the case before it and all others likely to arise, both for its own sake and that of the lower courts who look to it for guidance. With a view to minimizing rather than encouraging litigation, it wants a method that is certain and predictable so that affected parties can suitably orient their actions and attorneys can advise their clients with confidence. What this court wants, in short, is a simple and easy-to-use approach that will be impartial in operation, certain, and predictable in result. For these purposes the black-letter rules of the specific sections should do nicely.

I want to emphasize that the suggested use of the Restatement in this way is intended only for true conflict resolution. The first step in any case should always be to determine the nature of the conflict by relating the contacts of section 188(2) to the interest analysis provisions of section 6. If the conflict is false, the law of the only interested state should be applied. Only if it is true should the territorial contact identified in the appropriate specific section be used and then only for the limited purpose of providing an arbitrary way of resolving the conflict.

The Reporter supports his choice of particular contacts with a rationale in the comments that accompany each black-letter rule, often to the extent of saying that a certain state, by virtue of its territorial connection, is likely to have a "dominant" or "natural" interest in the determination of an issue.\[222\] This line of thought revives the territorial bias of the original Restatement in an unfortunate way, attaching as it does near-talismanic significance to some

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221. Rosenberg, supra note 81, at 644.
222. See, e.g., RESTATEMENT (SECOND), supra note 144, § 192 cmt. c (dominant interest); id. § 193 cmt. c (natural interest); id. § 196 cmt. c (natural interest).
one particular contact. The danger is that the state with the identified contact may have no interest in the application of its law. A court can miss this important point altogether if it omits the interest analysis step and simply consults the black-letter rules directly. The point here has nothing to do with the soundness of the Reporter’s reasons for singling out a particular contact; it is that those reasons, sound or otherwise, are essentially irrelevant when the black-letter rules are used as default solutions for cases of true conflict.

If all of this seems complex, it is a complexity inherent in the design of the Restatement. Obviously it is not the monolith its predecessor was. It is an agglomeration of just about every approach to choice-of-law that anyone has ever thought of, and its eclectic assortment of contacts, principles, policy-oriented provisions, and jurisdiction-selecting rules can accommodate just about any approach a court might want to take. It is like an Erector set with no directions. The only attempt at a unifying conception is the notion of “a state of most significant relationship,” yet that term is never defined. Interest analysis is a major component, but its function and importance in relation to other components are left unclear. In particular, no guidance is provided for the critical case where each of two concerned states is legitimately interested in the application of its law. There is only the unhelpful assurance that one state must be more interested than the other because there must be a state of most significant relationship. How that determination is to be made is never specified. Nowhere does the Restatement confront Currie’s central insight that a court of one state may have no business in making that sort of relative judgment between its own law and policy and that of another state.

Let me illustrate these concerns by returning to Lilienthal in order to consider how a court might work through the Second Restatement in deciding that case. It would probably start by referring to section 195, which deals with “contracts for the repayment of money lent.”223 That section states that the governing law is that of the state “where the contract requires that repayment be made,”224 which in this case would be California. Ergo, the contract is valid and should be enforced against Kaufman, the Oregon spendthrift. With this, we are essentially back to the traditional territorial approach—albeit in a more refined version—and all the simplicity, ease, certainty, and predictability that it affords. Some courts have taken just this

223. See id. § 195.
224. Id.
approach, using the black-letter rules to the exclusion of everything else. But there is a catch if the court reads carefully. Section 195 directs it to apply California law unless some other state has a more significant relationship to the transaction and the parties under the principles of section 6. What is a "significant relationship"? The term is not defined. Does California have one, or Oregon either, for that matter?

In search of guidance, the court might turn back to the general principle of section 188(1), which only repeats the admonition to apply the law of the state having the most significant relationship to the transaction and the parties under the principles of section 6. Section 188(2) is more specific. It says that in applying those principles, the court should take account of five contacts. California has four. They are the place of contracting, the place of negotiation, the place of performance, and the domicile of the lender. Oregon has, at most, two. They are the location of the subject matter of the contract—presumably the money lent—and also the domicile of the debtor.

But quantity is not the issue. The comments instruct the court, in applying the principles of section 6, to consider the relevant policies of all potentially interested states. They add that the states "likely to be interested...having one or more" of the five contacts with the transaction or the parties. California's policy is one of security of transactions. Application of its law would further that policy by enforcing the contract and thereby insuring that its resident creditor is paid. Oregon is likewise an interested state. Its legislatively determined policy is one of protecting resident spendthrifts by relieving them of their contractual obligations. Application of Oregon law would plainly serve that end.

What now? Both states are interested states. The comments to section 6 say that generally the law of the state whose interests are "most deeply affected" should be applied, but unfortunately there are no directions on how to make this determination. Nor is there anything to warn the court that perhaps it is not its proper role to say that policies arrived at by its own

225. See Cramton et al., supra note 28, at 132 ("Other courts essentially end their analysis with the rules: little or no attention is paid to § 6, and instead the court makes the presumption effectively irrebuttable. For these courts the Second Restatement is little more than an updated version of the first.").
226. See Restatement (Second), supra note 144, § 195.
227. See id. § 188(1).
228. See id. § 188(2).
229. See id. cmt. e.
230. Id.
231. See Restatement (Second), supra note 144, § 6(2) cmt. f.
legislature after full debate and consideration should yield to those of California, or, for that matter, that California’s should yield to Oregon’s. Some sort of resolution, of course, is not hard to come by. The point is that the result reached, whatever it is, will necessarily represent a subjective judgment that depends far more on the court’s attitude and temperament than on anything contained in the Restatement.

Compelled by the Restatement to make this relative judgment, how should the court go about it? It knows, of course, that both Oregon and California share a strong interest in the security of transactions, which in this context means that contractual obligations should be enforced and, more specifically, that debtors should be required to pay their debts. But the Oregon Legislature, though well aware of this precept and generally in full agreement with it, has nevertheless seen fit to carve out a special exception for a discrete group of Oregonians who, by reason of psychiatric or personality disorder, cannot control their compulsion to spend money. For their own protection and the protection of those close to them, the legislature has empowered courts to declare such persons spendthrifts, the practical effect of which is to deprive them of the power to enter into valid contracts.

In other words, the Oregon Legislature has already struck the very balance that the court is wrestling with: for the special class of persons known as spendthrifts, it has determined that Oregon’s interest in protecting them takes priority over its more general interest in enforcing contracts. The court also knows that the number of Oregonian spendthrifts is small, especially in relation to the number of potential debtors, and that it will not be called upon very often to depart from the normal practice in order to protect them. Enforcing the contract will therefore have a much greater impact on the policy of protecting spendthrifts than not enforcing it will have on the policy of security of transactions.232 Not only would enforcement deal a serious blow to Oregon’s protective scheme, but it would also require the court to second-guess the legislature in order to do it. From this sort of perspective, Oregon’s interests might well strike the court as more deeply affected than California’s interests.

On the other hand, consider how easily a court with a different set of values could reach the opposite result. It could reinforce California’s interest in the application of its law by counting contacts and concluding that it is the center of gravity, hence the state most intimately concerned with the outcome and, thus, the state whose interests are most deeply affected. Or it

could bring into play the other choice-influencing considerations of section 6, which, for contracts cases, boil down to enforcing agreements in order to protect the justified expectations of the parties, thereby promoting certainty and predictability and insuring that the interstate system continues to hum along. Alternatively, if already at odds with its legislature, it could sniff condescendingly and point out that Oregon’s spendthrift policy is a legislative aberration, undoubtedly intended only for home consumption, and therefore weak in comparison with California’s policy of enforcing contractual obligations. California has a policy shared, not coincidentally, by Oregon as well as most other states in the United States. On the other hand, it could simply acknowledge the impasse and break the tie in an arbitrary way with section 195’s presumption that the governing law is that of California, the state where the money was to be repaid.

Ironically, the one solution not readily available to a Second Restatement court is the one actually adopted in Lilienthal. The Restatement requires a court to determine that one state’s relationship is more significant than another’s and then in some way to rationalize that determination. For a court that thinks like the Lilienthal court, this will necessitate a degree of dishonesty, or at least sophistry, for it will not be able to say, as the Oregon Supreme Court did, that the policies of both states are important and would be equally affected by non-application of their respective laws. Nor will it be able to acknowledge forthrightly that it is an instrument of state policy with a sworn constitutional duty to uphold the laws and policies of its own state wherever possible.

It seems obvious that value judgments are involved here. To some courts, separation-of-powers and role-and-function concerns will carry little weight. It will not matter that they are dealing with the laws of two sovereigns; they will be only too happy to engage in the familiar task of weighing and balancing competing considerations of social and economic interest to reach what they think is a sound result, just as if the case were a run-of-the-mill domestic one. Others may take pause, struck with the seriousness of what it means to have to nullify, if only for one case, the laws and policies of their own state. It is a decision as profound in its way as one declaring a statute unconstitutional, and they will not be happy making it just because the Restatement says so.
IV. TEMPERAMENT AND ATTITUDE IN THE FLORIDA COURT'S DECISION MAKING IN CHOICE-OF-LAW CASES

The Restatement's assortment of riches makes it an extraordinarily flexible instrument for the resolution of conflicts problems. It contains something for everybody, and it is not surprising that it has become the most popular of the modern approaches as a replacement for traditional methods. A number of commentators have pointed out, however, that the results it has produced around the country thus far have not been noticeably certain, predictable, or uniform, or even very satisfactory; rather, they bear out the assertion that the use that any particular court makes of the Restatement is more likely to depend on what it values in a choice-of-law method than on the Restatement itself.

In considering the desirability of extending the Restatement approach in Florida, the most pertinent question to ask, it seems to me, is what the Supreme Court of Florida values in a choice-of-law method. Obviously there can be no definitive answer to this question. The court's membership has changed frequently over time, and what it has done in the past is no guarantee of what it will do in the future. All the same, there are marked indications of attitude and temperament in the court's pattern of decision making in conflicts cases over the years, especially in the torts cases it has decided thus far with the approach of the Second Restatement. An examination of this history in some detail should prove instructive.

Drama in the conflicts arena usually comes when a court manipulates the choice-of-law decision in order to produce what it obviously thinks is the right result for the case before it. The bolder and more imaginative the manipulation, the better, as witness the conjuring-act quality of the best of


235. Of the seven justices who participated in the 1980 decision in Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980), in which the court adopted the Second Restatement approach for torts cases, only two Justices, Justices Overton and McDonald, were still on the court in 1988 when Sturiano v. Brooks, 523 So. 2d 1126 (Fla. 1988) was decided. Of the justices who participated in that decision, four Justices, Chief Justice Kogan and Justices Grimes, Shaw, and Overton remain on the court today.
Justice Roger Traynor’s opinions for the California Supreme Court. But if that sort of performance has been the stuff of soap opera, then the Supreme Court of Florida’s opinions, by comparison, have tended to resemble the weather report on the nightly news.

The most innovative of these was, undoubtedly, Justice Robert’s short-lived 1967 opinion in Hopkins v. Lockheed Aircraft Corp., a case arising out of the death of a Florida resident in an airline crash in Illinois. In the ensuing wrongful death action, brought in federal court in Tampa and sounding in both tort and contract, the Supreme Court of Florida was asked by way of certified question to say whether Florida, for reasons of public policy or otherwise, would refuse to apply an Illinois limitation on wrongful death damages, Florida having none.

Writing for five members of the court, Justice Roberts found in earlier cases a strongly expressed policy of giving “primary consideration, in choice-of-law cases, to the public policy—legislative as well as organic—or ‘any salutary interest’ of this state and to decline to enforce a foreign law when contrary thereto . . .” But he did not stop with that. He went on to declare that “the strict lex loci delicti rule should be abandoned in favor of a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court.” He quoted with apparent approval the “most significant relationship” principle from a tentative draft of the Second Restatement and stressed the importance of analyzing:

[T]he policies underlying and the purpose of the conflicting laws and of the relationship of the occurrence and of the parties to such policies and purpose. By giving full effect to the law of a foreign state when—and only when—such purposes or policies would be served or effectuated, the forum state does, as a practical matter, accord due ‘deference and respect’ to such foreign law . . .

236. See People v. One 1953 Ford Victoria, 311 P.2d 480 (Cal. 1957); Grant v. McAllister, 264 P.2d 944 (Cal. 1953).
237. 201 So. 2d 743 (Fla. 1967).
238. Id. at 744–45.
239. Id. at 747.
240. Id.
241. See id. at 747 (quoting RESTATEMENT (SECOND), supra note 144, § 379(1) (Tentative Draft No. 9, 1964)).
242. Hopkins, 201 So. 2d at 747.
He failed to see that the happenstance of a plane crash in Illinois gave that state any interest in the application of its law and concluded that Florida would refuse to apply the Illinois limitation on wrongful death damages.243

But on rehearing, the court reversed itself.244 A new majority of four plainly thought the Illinois wrongful death statute the only one applicable.245 It could find no basis in the rules of statutory interpretation for separating the damage limitation from the underlying right to sue and posed the issue squarely in terms of whether such a limitation was so repugnant to Florida's statutory policy of unlimited damages as to be unenforceable. With no discussion, it found that it was not.246 The New York Court of Appeals' controversial decision in Kilberg v. Northeast Airlines, Inc.,247 in which that court had done precisely what the court here was refusing to do, was sharply distinguished in a footnote as basing its contrary conclusion on a constitutional rather than a statutory prohibition of damage limitations.248 And, in the majority's view, any discussion of tort conflicts doctrine was inappropriate in a case "explicitly characterized" as a warranty proceeding.249

In its wooden and mechanical insistence on territorial principles, the final opinion in Hopkins is the typical one. Whatever policy the absence of damage limitations in Florida's wrongful death statute reflected, it was not strong enough to override the normally applicable territorial rule that wrongful death damages are a function of the law of the place of wrong.250 As a result, Florida's policy, and with it the claim of a Florida resident to the protection of that policy, was subordinated to that of another state. The bias so often apparent in these cases—the tendency of the forum to choose its own law, particularly when that law would allow an injured plaintiff to recover, and particularly when the plaintiff happens to be a forum resident251—was entirely missing. No one reading the final opinion could accuse the court of result-oriented decision-making. With the abrupt reversal, Justice Roberts lost his bid to place Florida in the forefront of the choice-of-law revolution, which had erupted only five years earlier with the

243. Id. at 747-48.
244. Id. at 749.
245. See id. at 751.
246. Id.
248. Hopkins, 201 So. 2d at 751 n.3.
249. Id. at 751.
250. See, e.g., RESTATEMENT, supra note 74, § 417 (1934).
251. See, e.g., Korn, supra note 6, at 780.
New York Court of Appeals' watershed decision in *Babcock v. Jackson.* More significantly, it was the first and last time that the Supreme Court of Florida would speak in the language of interest analysis in a conflict-of-laws case.

Despite the importance claimed by Justice Roberts for the public policy exception in Florida's conflicts jurisprudence, it has never been invoked in a torts case; and in contracts cases it has been used only infrequently, especially in recent years. The most notable example is *Gillen v. United Services Automobile Ass'n,* decided in 1974, which involved an “other insurance” clause in an automobile insurance policy. The clause was valid in New Hampshire where the policy was issued and delivered and the Gillens were resident at the time, but invalid in Florida where, with notice to the insurer, they had permanently relocated and were living when Mr. Gillen was killed and Mrs. Gillen seriously injured in a collision caused solely by the negligence of an uninsured motorist. In an opinion by Justice Adkins, the court refused to give effect to the clause, declaring that public policy “requires this Court to assert Florida’s paramount interest in protecting its own from inequitable insurance arrangements.”

Justice Adkins never said why the statutorily based public policy in this case was strongly held whereas that in *Hopkins* was not, illustrating once again the subjectivity inherent in the exception. The solicitude expressed for Florida's policies and its residents would be more striking were *Gillen* not such an isolated instance. The result should not obscure the fact that in most of its conflicts decisions the court has been content to apply the traditional territorial rules in mechanical fashion, letting the chips fall where they may.

The same kinds of considerations that underlie the public policy exception are present in the interest analysis provisions of section 6, but they have received remarkably short shrift in the cases which the court has decided since 1980 when it adopted the Second Restatement approach for

253. See, e.g., *Gillen v. United Services Auto. Ass'n* 300 So. 2d 3 (Fla. 1974); *Cerniglia v. C & D Farms, Inc.*, 203 So. 2d 1 (Fla. 1967); *Sherbill v. Miller Mfg. Co.*, 89 So. 2d 28 (Fla. 1956); *Kellogg-Citizens Nat'l Bank v. Felton*, 199 So. 50 (Fla. 1940). Despite specific urging, the court refused to invoke the exception in *Burroughs Corp. v. Suntogs of Miami, Inc.*, 472 So. 2d 1166 (Fla. 1985); *Morgan Walton Properties, Inc. v. International City Bank & Trust Co.*, 404 So. 2d 1059 (Fla. 1981); and *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So. 2d 507 (Fla. 1981).
254. 300 So. 2d 3 (Fla. 1974).
255. *Id.* at 4–5.
256. *Id.* at 7.
torts cases in *Bishop v. Florida Specialty Paint Co.* In fact, it would be fair to say that the Restatement itself has received remarkably short shrift at the hands of the court.

*Bishop* itself was an easy case, a paradigm false conflict, which the court used only as a vehicle for abandoning its traditional adherence to *lex loci delicti* and adopting the approach of the Second Restatement instead. It seems safe to say that had the court reached the merits, it would have applied Florida law. Members of the Bishop family, all Florida residents, were guests aboard a small airplane leased and operated by Florida Specialty Paint, a Florida corporation. They were flying to North Carolina for a holiday weekend. The plane, piloted by the company’s president, also a Florida resident, crashed en route in South Carolina, allegedly due to the pilot’s negligence. The Bishops brought suit in Florida against the company and its president to recover for their injuries. An airplane guest statute was in effect in South Carolina that required guests to show intentional misconduct or recklessness on the part of their host in order to recover. Florida had no such statute and required only a showing of simple negligence.

A quick section 6 analysis would have revealed that South Carolina had no interest in the application of its airplane guest statute, the purpose of which was the protection of hosts from suits by ungrateful guests and the elimination of collusive lawsuits. The intended beneficiaries of this policy were South Carolina residents and the insurance carriers who insured them, none of whom were present in the case. Florida, in contrast, was interested in the application of its law to further its policy of full compensation for negligently inflicted injuries. As Florida was the only interested state, its law should have been applied.

Since *Bishop* there have been only three cases—*State Farm Mutual Automobile Insurance Co. v. Olsen,* *Hertz Corp. v. Piccolo,* and *Celotex Corp. v. Meehan*—but they have a good deal to say about what the court values in a choice-of-law method. And because the torts and contracts provisions of the Restatement are so similar, these cases offer consider-

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257. 389 So. 2d 999 (Fla. 1980).
258. *Id.* at 1000.
261. 406 So. 2d 1109 (Fla. 1981).
262. 453 So. 2d 12 (Fla. 1984).
263. 523 So. 2d 141 (Fla. 1988).
264. See *RESTATEMENT (SECOND), supra* note 144, § 188. Compare *id.* section 145 (stating “The General Principle” for torts cases). Section 145 provides:
able insight into the use to which the court might put the Restatement, were it to extend its approach to contracts cases.\textsuperscript{265}

\textit{Olsen} was decided in 1981 and arose out of a 1976 car accident in Illinois between an Illinois uninsured motorist and Johnnie Olsen, a Florida resident, who died from injuries sustained in the crash. Both drivers were negligent in some unspecified degree. At the time of the accident, Illinois was still a contributory negligence state; Florida had recently adopted pure comparative negligence. Under the uninsured motorist provisions of Olsen's insurance policy with State Farm, his widow was entitled to recover from the company the damages that she was "legally entitled to recover" from the Illinois uninsured motorist. Whether she could recover from that person turned in the court's view on whose law would govern if she actually brought such a suit.\textsuperscript{266}

The court held that Illinois law controlled.\textsuperscript{267} It singled out and reinforced with italics the presumptive place-of-injury language of section 146\textsuperscript{268} and reiterated \textit{Bishop}'s cautionary injunction that the state of injury "would,

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

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

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

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

\textit{Id.} Section 145 is followed by a number of specific sections dealing with particular torts and important issues in tort. In most instances these rules call for application of the law of the state where injury occurred unless the principles of section 6 displace that law.

\textsuperscript{265} For a more detailed treatment of these three cases, see Southerland \textit{supra} note 5, at 817–27, 847–63; Southerland & Waxman, \textit{supra} note 1, at 497–512. The discussion in text is drawn largely from these sources.

\textsuperscript{266} \textit{Olsen}, 406 So. 2d at 1110.

\textsuperscript{267} Id. at 1111.

\textsuperscript{268} \textit{Id.} Section 146, entitled "Personal Injuries," provides:

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

\textit{Id.} at 1111 (quoting \textsc{Restatement (Second), supra} note 144, § 146).
under most circumstances, be the decisive consideration in determining the applicable choice of law.” 269 Illinois “certainly” had the most significant relationship to the occurrence since the accident happened there. 270 So far as the “relevant policies” of section 6 were concerned, the court simply asserted, without discussion, that Illinois’ interest in protecting its resident uninsured motorist from a subrogation suit by State Farm was “paramount to the relevant policies of Florida as the forum state.” 271 It stressed throughout the section 6 values of “certainty, predictability and uniformity of result” and “ease in the determination and application of the law to be applied.” 272 Justice Adkins wrote the majority opinion, Justice Sundberg alone dissenting.

Olsen was far more complex than the court’s brief opinion made it seem. It was a case with which a Second Restatement court with a different set of values could have had a field day. It was first of all a case of true conflict. Both states were interested in the application of their laws because the policies of each would have been furthered by such application. Florida’s policy, moreover, was not just any policy; it was one that plainly was strongly held. When Olsen reached the Fifth District Court of Appeal, the inflexible rule of lex loci delicti was still the law in Florida. That court refused to apply the law of the place of injury, and instead invoked the public policy exception to find that application of the contributory negligence rule would offend Florida’s public policy favoring comparative negligence. 273 In this the court relied on Justice Adkins’ majority opinion in Hoffman v. Jones, 274 the 1973 case in which Florida discarded contributory negligence and adopted pure comparative negligence in its stead, roundly condemning the rule as “unjust,” “inequitable,” “harsh,” “wrong,” “primitive,” and no longer responsive to modern conditions. 275 It also noted the subsequent legislative recognition of the new rule in the Uniform Contribution Among Tortfeasors Act of 1976. 276 All of this, it said, clearly

269. Olsen, 406 So. 2d at 1111 (quoting Bishop v. Florida Specialty Paint Co., 389 So. 2d 999, 1001 (Fla. 1980)).
270. Id.
271. Id.
272. Id. (quoting Bishop, 389 So. 2d at 1001).
274. 280 So. 2d 431 (Fla. 1973).
275. Id. at 436–37.
implied "that the concept of contributory negligence as a bar to recovery is contrary to the public policy of this state." 277

Justice Adkins, the author not only of Hoffman but of Gillen too, passed over this point in silence. It is true of course that the public policy exception as such has no place in a Restatement analysis, but the considerations that underlie it necessarily come into play in the assessment of policies and interests called for by sections 6(2)(b) and (c), particularly for courts that believe that state interests can be "weighed" in some way and then compared. From this perspective, Florida's relevant policy was strong, but Illinois' was not. Contributory negligence was on its last leg in that state. Two months before the Olsen opinion appeared in slip-sheet form, the Illinois Supreme Court repudiated contributory negligence and adopted pure comparative negligence in its stead. 278

Moreover, Florida's interest in the application of its law to further its policy could likewise be characterized as strong. Mrs. Olsen was a Florida resident—a widow whose husband, also a Florida resident, had been tortuously killed by an uninsured motorist. The application of Illinois law would mean that she would recover nothing for her husband's death under an insurance contract negotiated, issued, and paid for in the state of Florida, insuring a risk principally centered here, and under which, without dispute, she would have been able to recover had the accident occurred in Florida, or for that matter in any number of other states. In all likelihood, the Olsens purchased this coverage believing that it would protect them in the event of an accident with an uninsured motorist. It strains belief to suppose that State Farm ever told them that their right to recover might vary drastically depending on the happenstance of where such an accident might occur.

By comparison, Illinois' interest in the application of its all but defunct contributory negligence rule was virtually nil, especially in light of the fact that the individual claiming its protection was driving without insurance, almost surely in violation of his state's financial responsibility laws and very possibly in violation of other laws as well. Justice Adkins expressed concern for the rights of an Illinois resident subjected to a subrogation suit by State Farm to recover any claim it might pay. A moment's thought makes clear that the individual could never have been subjected to personal liability even had Florida law been applied. Mrs. Olsen's right to recover against State Farm turned on her hypothetical right to recover from the uninsured

277. Olsen, 386 So. 2d at 601.
motorist. Had she actually brought suit against that individual, the contributory negligence doctrine would have barred her claim in Illinois, and she could not have sued in Florida because there was no basis for obtaining personal jurisdiction over the Illinois motorist. Any attempt by State Farm to enforce its subrogation rights against the Illinois tortfeasor would have foundered on these considerations. As a practical matter, the only loser had Florida law been applied would have been State Farm.

These considerations make it easy to say that from almost any standpoint of comparison—weight, strength, or degree of enlightenment—Florida’s interest in furthering its policy far outweighed that of Illinois and that Florida’s interests were therefore “more deeply affected.” Olsen was a case in which any court predisposed to “weighing” interests, to assessing the wisdom of underlying policies or the strength with which those policies are held, or to incorporating some or all of the familiar preferences for forum law, recovery, and local residents in the search for “justice” in some larger sense would have had no difficulty in rationalizing the application of Florida law with the Second Restatement.

Florida’s law and its policies likewise took a back seat in Hertz Corp. v. Piccolo, 279 decided in 1984. Frank Piccolo, a Florida resident, was injured in Louisiana when his car was struck by a truck that had been rented in Louisiana from the Hertz Corporation. Piccolo brought suit in Florida under the Louisiana direct-action statute directly against Hertz as the insurer of the truck to recover for his injuries. The alleged tortfeasor, a Tennessee resident named John Kiern, was not joined in the action. The trial court dismissed the complaint for failure to join an indispensable party, considering this a procedural matter governed by Florida rather than Louisiana law. 280 The first district reversed, holding that the issue was substantive and that the Louisiana direct-action statute controlled. 281

The supreme court agreed and devoted most of the opinion to saying why. But it said first that even if the question of joinder was substantive, it would still be possible for Florida law to apply if Florida had a more “significant relationship” to the issue under the Second Restatement approach adopted in Bishop. 282 Which state, then, had the “most significant relationship?” The court made that complex choice-of-law determination in

279. 453 So. 2d 12 (Fla. 1984).
280. Id. at 13.
282. Piccolo, 453 So. 2d at 14.
a single sentence: "clearly in the instant case Louisiana has a more signifi-
cant relationship to the issue than Florida."283

This unsupported and painfully brief assertion all but obscured the
profound conflict in underlying policies. Louisiana’s direct-action statute in
terms permitted any person injured in Louisiana, resident or nonresident, to
sue the tortfeasor’s insurance company directly.284 The real problem, never
mentioned by the majority, was focused by Justice Shaw in his dissent.285
Section 627.7262 of the Florida Statutes provided in pertinent part that

[i]t shall be a condition precedent to the accrual or maintenance of
a cause of action against a liability insurer by a person not an in-
sured under the terms of the liability insurance contract that such
person first obtain a judgment against a person who is an insured
under the terms of such policy for a cause of action which is cov-
ered by such policy.286

The constitutionality of this statute had been upheld a few months earlier in
VanBibber v. Hartford Accident & Indemnity Insurance Co.,287 ending, as
Justice Shaw observed, “some fourteen years of effort by this Court and the
legislature to resolve the issue of whether an injured party could concur-
cently sue both the insurer and the insured.”288 The relevant policy of the
statute, in other words, was about as forcefully hammered out, sharply
focused, and strongly held as a policy can be. That policy prohibited
precisely what the court allowed, the use of Florida courts for the mainte-
nance of a direct action against an insurance company.

Piccolo, like Olsen, was a true conflict, but one in a different pattern.289
Louisiana was interested in the application of its direct-action statute to

283. Id.
284. See LA. REV. STAT. ANN. § 22:655 (West 1978). The statutory language is set out in
the margin of the opinion, Piccolo, 453 So. 2d at 13 n.2. Compare Watson v. Employers
Liab. Assurance Corp., 348 U.S. 66, 72 (1954) (“Persons injured or killed in Louisiana are
most likely to be Louisiana residents, and even if not, Louisiana may have to care for them.”).
285. Piccolo, 453 So. 2d at 16 (Shaw, J., dissenting).
286. FLA. STAT. § 627.7262 (1) (Supp. 1982).
287. 439 So. 2d 880 (Fla. 1983).
288. Piccolo, 453 So. 2d at 16.
289. If a state’s law is enacted for the benefit or protection of its own residents, then it
will be interested in the application of that law only when the party urging its application is
such a resident. Cases arise in which the parties are from different states, and each claims the
benefit of the other state’s law. This, Currie said, was an “unprovided” case, because
“[n]either state cares what happens.” CURRIE, supra note 98, at 152. A classic example is
Neumeier v. Kuehner, 286 N.E.2d 454 (N.Y. 1972), a case in which, as a result of an accident
further its policy of protecting all persons tortuously injured in Louisiana, even though Hertz, seen as a Louisiana resident, would be disadvantaged as a result. Florida was similarly interested in the application of section 627.7262 to prevent the use of its courts for the maintenance of a direct action against an insurer, even though such application would work to the disadvantage of a Florida resident.

After these two cases, one had to wonder whether any policy embodied in Florida law would ever be considered sufficiently strongly held or important enough to override the place of injury as the decisive factor, at least in a case of any difficulty. Indeed, for all the use made of it, it was hard to see why the court adopted the Second Restatement approach in the first place. The comments to section 6 counsel the forum to give consideration to the policies and purposes of its own law, saying that if they would be furthered by the law's application to out-of-state facts, "this is a weighty reason why such application should be made." 290 They likewise direct the court to give the same consideration to the relevant policies of other concerned states. 291 Yet in neither case did the court do this, much less attempt the relative determination that one state's interests were more deeply affected than the other's. Instead, for the announced reasons of ease and simplicity in decision making and certainty, predictability, and uniformity of result, it simply followed the presumption of section 146, which is nothing more than lex loci delicti by another name.

Both Olsen and Piccolo were true conflicts, the kinds of cases which, in Currie's view, could not be resolved by any rational calculus. In light of the results, it was at least possible to suppose that the court had imaginatively hit

in Ontario, an Ontario plaintiff sued a New York defendant in New York claiming the benefit of New York's ordinary negligence standard, while the New York defendant sought the application of Ontario's stricter gross negligence standard. The purposes of neither state's law would have been furthered by its application. Critics have used the phenomenon of the "unprovided" case to argue that interest analysis, as a choice-of-law method, is fundamentally flawed. See, e.g., Cramton et al., supra note 28, at 173. See generally id. at 171–75.

Piccolo, however, was not an "unprovided" case since the policies of both Florida and Louisiana would have been furthered by the application of their laws. It is a good case with which to make the point that a state's interest in the application of its law is not necessarily tied to cases in which such application would benefit or protect its own residents. A statute or common law rule may be intended by its makers to work to the disadvantage of the individual residents of a state in order to further a public purpose of a different order. The only question that interest analysis asks is whether the policy underlying a law would be furthered by its application. See Sedler, supra note 87, at 624; see generally Bruce Posnak, Choice of Law-Interest Analysis: They Still Don't Get it, 40 WAYNE L. REV. 1121 (1994).

290. RESTATEMENT (SECOND), supra note 144, § 6(2) cmt. c.

291. Id. at cmt. f.
on the place of injury as an arbitrary solution for these difficult cases, primarily for reasons of certainty, predictability, uniformity of result, and simplification of the judicial task, but also as the most neutral and least biased way of making the choice-of-law determination. There would have been much to commend such an approach.\textsuperscript{292} It avoids the subjectivity that always seems to infect the apples-and-oranges comparison of state interests, and it is deferential to the legitimate interests of other states, thus contributing to the maintenance of interstate order and harmony. Commentators and academicians are prone to discount the fact that courts are busy and over-worked,\textsuperscript{293} and they often fail to appreciate the dilemmas that practicing lawyers face in mapping litigation strategy and trying to give their clients cost-effective advice. From this point of view, a simple and relatively inflexible rule can be preferable to some more complex, cumbersome, and less predictable approach.

Unfortunately, these considerable virtues were lost altogether in \textit{Celotex Corp. v. Meehan,}\textsuperscript{294} decided in 1988. In that case, the court managed to transform the Restatement’s “most significant relationship” approach into the “significant relationships test.”\textsuperscript{295} According to Justice Overton’s majority opinion, “[t]he criteria for determining whether significant relationships exist” are the four contacts of section 145(2):\textsuperscript{296} 1) the place of injury; 2) the place of the injury-causing conduct; 3) the domicile or residence of the parties; and 4) the place where their relationship, if any, is centered.\textsuperscript{297} This amounted to the adoption of a contact-counting method in its simplest possible form. After \textit{Meehan}, presumably, one simply adds up the contacts of section 145(2) by state and applies the law of the state with the most. It would be a profound understatement to say that with this case the court left

\begin{itemize}
  \item 292. See Southerland & Waxman, \textit{supra} note 1, at 549–58; Southerland, \textit{supra} note 5, at 815–17.
  \item 293. But see Currie, \textit{supra} note 98, at 629 n.2.
  \item 294. 523 So. 2d 141 (Fla. 1988). The case consolidated for argument and decision three cases from the Third District Court of Appeal—\textit{Meehan v. Celotex Corp.}, 466 So. 2d 1100 (Fla. 3d Dist. Ct. App. 1985) (revised panel opinion adopted on rehearing en banc); \textit{Nance v. Johns-Manville Sales Corp.}, 466 So. 2d 1113 (Fla. 3d Dist. Ct. App. 1985); and \textit{Colon v. Celotex Corp.}, 465 So. 2d 1332 (Fla. 3d Dist. Ct. App. 1985)—all of which involved the application of Florida’s borrowing statute to claims arising out of asbestos-related injuries. \textit{Meehan} was the principal case. For a discussion of the facts and disposition in \textit{Nance} and \textit{Colon}, see Southerland, \textit{supra} note 5, at 851–52.
  \item 295. \textit{Meehan}, 523 So. 2d at 144.
  \item 296. Id.
  \item 297. See \textit{RESTATEMENT (SECOND), supra} note 144, § 145(2). See \textit{supra} note 264 (providing full text of section 145).
\end{itemize}
conflicts resolution under the Second Restatement more muddled than it found it.

*Southerland* is a perfect illustration of all that is wrong with contact counting. The case involved the application of Florida's borrowing statute to a claim arising out of an asbestos-related injury. Charles Meehan was exposed to asbestos products while working at the Brooklyn Navy Yard in New York from 1942 to 1944. At the time, he was a New York domiciliary and continued to make his home there until 1969, when he moved permanently to Florida. He had been a Florida domiciliary for eight years when, in 1977, he was diagnosed as having asbestosis and mesothelioma, a rare form of lung cancer, both diseases caused by the inhalation of asbestos fibers. He died from these diseases in 1978.\(^{298}\)

In 1979 his wife, Carmella Meehan, filed a wrongful death suit in Florida against the Celotex Corporation and a number of other defendants, all corporations engaged in the manufacture and sale of asbestos products.\(^{299}\) Her action was brought on theories of strict liability, failure to warn, breaches of implied warranty, and negligence.\(^{300}\) Celotex, a Delaware corporation, had at some point after 1944 acquired the successor corporation to the Philip Carey Corporation, which was the Ohio company that had actually manufactured the asbestos products to which Meehan was exposed. None of the asbestos products involved were manufactured in New York, nor did any of the corporate defendants have its principal place of business there.\(^{301}\) Meehan's former employer was not named as a defendant.

Florida's borrowing statute, section 95.10, provides that a cause of action that arises in another state and is barred there by the statute of limitations cannot be maintained in Florida.\(^{302}\) Where Meehan's cause of action arose was, therefore, the critical issue, and it was one on which the domestic rules of New York and Florida differed sharply. Under New York law, Meehan was injured when he was last exposed to asbestos during the period 1942 to 1944; his cause of action arose at that point, and any claim for damages resulting from this exposure was barred by the New York three-

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\(^{298}\) Meehan, 523 So. 2d at 144.

\(^{299}\) Id.

\(^{300}\) See Southerland, supra note 5, at 852 n.327 (citation omitted).

\(^{301}\) Meehan, 523 So. 2d at 151 (Barkett, J., concurring in part and dissenting in part).

\(^{302}\) See FLA. STAT. § 95.10 (1979). In 1987, while *Meehan* was pending, the supreme court decided *Bates v. Cook, Inc.*, 509 So. 2d 1112 (Fla. 1987), in which it determined that the question of where a cause of action arose for borrowing statute purposes was substantive rather than procedural, and was to be resolved under the "significant relationships test" of the Second Restatement. *Id.* at 1114–15.
year statute of limitations by 1947, at the latest. The exposure rule, a distinctly minority view, was not the law in Florida. Florida considered that Meehan’s cause of action arose when he knew or should have known that he had been injured. If that event occurred in Florida in 1977 as the plaintiff claimed, then the borrowing statute was inapplicable and the suit was timely. In short, the two states defined the concept of “injury” in different ways.

Applying the so-called “significant relationship criteria,” the court found that New York clearly had “the significant relationship with Meehan.”

Meehan was a resident of New York at the time of his exposure; the employer was domiciled in New York; the entire asbestos exposure was at one place of employment in New York; and Meehan continued to reside in New York for twenty-five years after his exposure to asbestos. These circumstances establish that the place where the conduct causing the injury occurred, Meehan’s domicile, and the domicile of Meehan’s employer at the time of the conduct causing the injury were all in the state of New York. The only significant contact with Florida is that the injury manifested itself and was discovered in this state. We find these circumstances establish a significant relationship with New York and, consequently, under the law of New York at the time of the district court of appeal decision, section 95.10 barred the action in Florida.

This was not the end, however. While Meehan was pending, the New York Legislature enacted a statute that revived any time-barred claim for personal injury caused by the latent effects of exposure to asbestos, whether previously dismissed or otherwise, provided the action was brought within the one-year period from July 1986 to July 1987. The majority briefly discussed the effect of this statute and concluded that Meehan’s claim had been revived and could proceed in Florida, conditioned on the application of New York substantive law to other issues in the case.

The court was straightforward enough in its adoption of a contact-counting method and in its identification of the contacts that were relevant

303. Meehan, 523 So. 2d at 145.
304. Id.
305. Id. at 146
306. Id. (citations omitted).
307. Id.
308. Meehan, 523 So. 2d at 146.
for this purpose—the four contacts of section 145(2). But the first problem with the majority’s approach was that the addition was wrong. The court never dealt with the place where injury occurred because it never decided whether it was exposure or discovery that constituted Meehan’s “injury.” The fact that New York and Florida defined injury differently lay at the heart of the dispute, intertwined with the place of injury and with the ultimate issue, the question of which state, by virtue of “significant relationships,” should determine where a cause of action based on the injury arose. The court simply fudged the question, saying that “Meehan was a resident of New York at the time of his exposure,” and that “injury manifested itself and was discovered in . . . [Florida].” Presumably, the place-of-injury contact belonged to neither state.

As to the second contact, the court assumed without analysis or discussion that the place of injury-causing conduct was New York, apparently because Meehan was exposed to asbestos dust there. The wrongful conduct complained of, however, was not the fact of exposure. It was the manufacture and sale of products in an unreasonably dangerous condition with no warning of that fact. Carmella Meehan chose to sue the manufacturers of these products in strict liability—Celotex in particular as the successor in interest to Philip Carey, an Ohio corporation whose asbestos products had been manufactured in Ohio, and from there sold and shipped to various states, among them New York. It is hard to see how this “significant relationship” could fall to New York.

The court’s treatment of the third contact was equally superficial. So far as the facts in the opinion disclosed, none of the defendants were New York corporations or had principal places of business there. Their products, manufactured elsewhere, found their way into New York and were used there, as in many other states. Celotex itself was a Delaware corporation, present and doing business in any number of states, including Florida. Since the Brooklyn Navy Yard, Meehan’s former employer, was not a party to the action, it is hard to see how its domicile was significant. The court asserted that decisively significant relationships with New York existed

309. Id.
310. Id. at 145–46.
311. Id. at 146.
312. Id.
313. See Meehan, 523 So. 2d at 151 (Barkett, J., concurring in part and dissenting in part).
314. Id.
because Meehan was a resident of New York, was exposed to asbestos there, and continued to make New York his home for some time thereafter. It failed to mention in this part of its analysis that he was, and had been for eight years, a resident of Florida when his illness was discovered, continued to make his home in Florida thereafter until his death, and was survived by his wife, plaintiff in the action, who was also a Florida resident. If New York domicile at the time of exposure was a significant relationship with New York, then surely Florida domicile at the time of discovery was an equally significant relationship with Florida.

The particular facts of the case gave little scope to the place where the relationship between the parties, if any, was centered. An Ohio corporation manufactured the injury-causing product in Ohio. By chance, Meehan was exposed to that product in New York, where he lived and worked at the time; by chance, he was living in Florida when it first became apparent that he had suffered injuries from this exposure. Meehan’s widow brought suit in Florida against the defendant, Celotex, a Delaware corporation who had stepped into the shoes of the original manufacturer through a series of corporate acquisitions, and who was present and doing business in Florida. Whatever the “center” of a relationship between parties is, and the court’s opinion contained no discussion of this abstraction, no obvious one existed here.

The facts thus provided little basis for the court’s conclusion that the significant relationships added up to New York rather than Florida. The contacts were either split between the two states, belonged to neither, or were too diffuse to be of help. The chief flaw in the majority’s arithmetic was in attempting to decide where Meehan’s cause of action for injury arose without first deciding what constituted his injury. In fact, the case presented the rather rare situation in which the place of injury was not a given, but itself was the underlying issue in dispute.

The second problem with the court’s approach was that it effectively read section 6 and its interest analysis provisions out of the Restatement. The Restatement never suggests counting the four contacts of section 145(2); it directs a court to take them into account in applying the principles of

315. Id. at 146.

316. In her dissenting opinion, Justice Barkett argued that “the plaintiff had been a Florida resident for eight years before the disease manifested. All of the witnesses and testimony on damages will be in Florida. Thus, on the damages issues, the relationship between the parties clearly is centered in Florida.” Id. at 151 (Barkett, J., concurring in part and dissenting in part).
section 6. The court’s utter failure to do this left it blind to the fact that it was dealing with a false conflict, one in which Florida was the only state interested in the application of its law. This point was sharply focused by Justice Barkett in her dissent:

Several of . . . [the section 6] criteria are applicable here. For example, Florida clearly has an interest in protecting its residents from the hazards of occupational disease and allowing resident victims a right of action in such cases, based not upon the time of exposure but upon the victim’s reasonable discovery of the disease. In light of New York’s recent legislation, New York has the identical interest and policy. In fact, the recent legislation indicates that New York now favors the plaintiff’s right to sue in such actions over the defendant’s right not to be subjected to such suits even where the incubation period of the disease is great. Thus, there is no countervailing policy consideration to . . . [Florida’s] interest in allowing this action to proceed.317

Justice Barkett also pointed out that there would be no conflict of policies even without New York’s one-year revival statute.318 No defendant was sufficiently connected with New York, either at the time of exposure or the time of suit, to claim the protection of its exposure rule. In light of this, Justice Barkett stated, “it is difficult to see what interest New York has in the action at all.”319

New York’s exposure rule reflects a policy of “outlawing stale claims”320 in order to grant repose “to every person and industry who could be a potential defendant.”321 But the intended beneficiaries of this policy, as Currie might have said, are those defendants with whose welfare New York is legitimately concerned—namely, those who are residents or domiciliaries of New York, or possibly, with corporations, those having their principal places of business there. Since none of the corporate defendants had such a relationship with New York, application of its law would not have furthered that policy. Conversely, because Carmella Meehan was a Florida resident, as was her husband during the last nine years of his life, the compensatory policy reflected in Florida’s rule delaying accrual of a cause of action until

317. Id.
318. Meehan, 523 So. 2d at 151.
319. Id.
discovery would have been furthered by its application. Florida was the only interested state, and its law should have been applied.

The court’s opinion in *Meehan* shows that despite its seeming arithmetical simplicity and certainty, contact-counting as a method can be highly subjective and unpredictable. Even an accurate and exacting count would have left the contacts split at best, with no obvious “center of gravity.” And if the contacts are fairly evenly divided, what can arithmetic tell a court then? One danger at this point is that a court may yield to the temptation to ascribe more “weight” to some contacts than others, to multiply them, or invent new and possibly irrelevant ones in order to make the count seem more decisive, much as the court did, for example, with the domicile of Meehan’s employer. That contact had no actual relevance since the employer was not a party; it was, in any case, only another way of saying that Meehan lived and worked in New York at the time of exposure.

More critically, the method adopted in *Meehan* is at complete variance with the plain text of the Restatement. Section 6 was never mentioned except as part of the quotation of section 145(2), and most certainly its principles were never applied. In reading section 6 and its interest analysis provisions out of the Restatement, the court left itself with no way of distinguishing the easy cases of false conflict from the harder ones in which the clash of underlying policies is real. It is a little stunning to realize that after *Meehan*, a paradigm false conflict like *Bishop* could conceivably be resolved by the application of South Carolina law since two of the four contacts, the place of injury and the place of injury-causing conduct, would fall immediately to South Carolina. Presumably the Restatement was adopted in the first place to avoid this sort of result. Almost all of the modern approaches, the Restatement prominently among them, make use of interest analysis to identify false conflicts, and almost all resolve such cases in the same way, by applying the law of the only interested state. Flexible and eclectic though the Restatement approach may be, it simply cannot be used to support the result reached in *Meehan*.

323. See supra note 211.
324. See *Meehan*, 523 So. 2d at 146.
325. Compare the comment of Chief Judge Schwartz in *Proprietors Ins. Co. v. Valsecchi*, 435 So. 2d 290, 299 n.8 (Fla. 3d Dist. Ct. App. 1983) (Schwartz, J., dissenting), that “*Bishop* did not hold that the lex loci might not be applied, upon proper analysis, in the case itself.”
326. See sources cited supra note 204.
327. In fairness, this assertion requires qualification. Florida is not alone in indulging in what I consider to be a misuse of the Restatement’s methodology. Many commentators have
These three cases, then, represent the sum total of the court’s decision making with the Second Restatement to date. Even though the approach taken in Meehan differs radically from that of Olsen and Piccolo, the three cases nevertheless have important elements in common. Most striking, perhaps, is the fact that all end with the application of the law of some state other than Florida. There is no reason to believe that the Supreme Court of Florida is indifferent to the policies embodied in Florida’s laws or thinks them unimportant. Yet it is clear that when these policies come into conflict with those of another state, it is Florida’s that will yield. This pattern is evident in the whole of the court’s conflicts jurisprudence, which literally bristles with references to comity, the principle by which the courts of one state give effect to the laws of another out of deference and respect. The court has rested much of its conflicts doctrine on comity and evidently takes seriously its role in “the fostering of amiable and respectful relations among individual states.”

A second striking feature in these cases, closely related to the first, is the court’s marked unwillingness to employ the techniques of interest analysis. Section 6 and its interest analysis provisions are a major component of the Restatement approach. Yet in none of these cases did the court give serious consideration to the content of Florida’s laws and the importance of the policies they reflect, much less the extent to which Florida might be interested in the application of its laws to further those policies. In like fashion, the court paid little attention to the relevant policies reflected in the competing laws of the other states involved or the degree to which they were interested in their application. Even had it wanted to, the court was obviously in no position to make the comparative judgment that the Restatement calls for, the determination of which state’s interests are “most deeply affected.”

Also apparent in these cases is the court’s preference for a simple and easy approach, one likely to produce certain, predictable, and uniform results without much fuss or bother. This tendency can be seen in the cases that identified the parallel between the “most significant relationship” concept and the contact-counting approach pioneered by the New York Court of Appeals in Auten v. Auten, 124 N.E.2d 99 (N.Y. 1954). See, e.g., Kay, supra note 119, at 527–28. The courts of several states appear to treat the two as virtually the same. See id. at 557 & n.229, (citing as examples Schwartz v. Schwartz, 447 P.2d 254, 256–57 (Ariz. 1968); Fuerste v. Bemis, 156 N.W.2d 831, 833 (Iowa 1968); Pioneer Credit Corp. v. Carden, 245 A.2d 891, 893–94 (Vt. 1968); Baffin Land Corp. v. Monticello Motor Inn, Inc., 425 P.2d 623, 625 n.1 (Wash. 1967)).

328. See cases cited supra note 8.

329. Gillen v. United Services Auto. Ass’n, 300 So. 2d 3, 7 (Fla. 1974).
antedate the Restatement, and it is especially pronounced in Olsen and Piccolo. Even Meehan, unwise and misguided though I think it is, can be read as an attempt to simplify and streamline the Restatement’s complex approach. Given the mess that some courts have made of conflicts cases, it is hard to fault this attitude, but neither should its implications be missed. The cases show that the court’s primary emphasis in conflicts cases is on the choice-of-law decision itself, not the result it produces. In a purely domestic case, the court is as diligent as any in its search for substantive justice—in reaching a result, that is, that seems fair and just and that makes good socio-economic sense for the case as a whole. In a conflicts case, on the other hand, what the court seems to value most is a quick and uncomplicated way of choosing the governing law, leaving the chips to fall thereafter where they may.

This sort of decision making is not to everyone’s taste. It is unspectacular and passive, perhaps excessively deferential to the interests of other states, and usually results in the suppression of the policies embodied in Florida’s laws, and along with them, frequently, the fortunes of Florida residents claiming their protection. In all three cases the policies implicated in Florida’s laws were ones that could have been fairly characterized under traditional theory as “strongly held,” and in all three Florida was interested in the application of its laws to vindicate those policies. With a case like Gillen on the books and the open-ended, policy-oriented provisions of the Restatement at its disposal, it is a little hard to understand why none of this seemed to count with the court.

After Olsen and Piccolo, it was at least possible to ascribe to the court a principled basis for its decision making, the use of the place of injury as an arbitrary solution for cases of true conflict, primarily for reasons of simplicity, certainty, and convenience, it is true, but principled nonetheless. Meehan changed all that. There is no warrant in the Restatement for simply counting the contacts of section 145(2) and in the process reading the principles of section 6, the Restatement’s most important single section, out of it altogether. In taking this approach in Meehan, the court cut itself off from interest analysis and now has no way of distinguishing easy cases like Bishop, in which the choice-of-law is clear, from hard ones like Olsen, in which it is more difficult. Certainty, predictability, and ease of decision making were lost as well. Contact counting can be messy, indecisive, uncertain, and subjective. Meehan proves that, if nothing else.
V. CONCLUSION

A great deal of experimentation in choice-of-law methodology has gone on around the country in this century, particularly in the last forty years. From near unanimity at the turn of the century, the states have arrived today, with the choice-of-law revolution, at a point of astonishing diversity. Some continue to use traditional territorial methods in all areas; others have adopted one of the modern approaches; others, like Florida, use a combination of the two; and still others use a blend or synthesis of modern approaches in what has aptly been called "judicial eclecticism."

Across the states, the elusive goal of uniformity of result has become unattainable as a practical matter. Without knowing in what state a lawsuit will be brought, it is impossible to predict whose law will govern. For those who can afford it, forum shopping has become the order of the day.

The source of all the diversity, some might say confusion, is not hard to identify. With the steady erosion of territorial constraints, it has become increasingly evident that there is no widely shared agreement on what it is that a choice-of-law method is supposed to accomplish. Everyone has an opinion, but there is still no consensus on the basic underlying question whether it is the method that should count or the results that it produces. About the most that any one court can do is to adopt an approach with which it is temperamentally comfortable and then adhere to it consistently. At least in that way there can be a measure of uniformity, predictability, and certainty within a single jurisdiction.

Today there are almost as many choice-of-law theories as there are scholars and commentators. Of the modern approaches, at least nine have found sufficient favor to be adopted as rules of decision by one or more of

330. See LEFLAR ET AL., supra note 60, at 281–82. The authors say that "[j]udicial decisions in choice-of-law cases in the 1980's are not as diverse as the variety of [modern] theories and approaches ... might suggest. The majority of American courts are synthesizing most of the theories, bringing them by loose interpretation closer together.... The effect is that all the modern theories are being bundled together by the courts, to make up 'the new law' of choice of law." At a later point, the authors assert that "most of the modern decisions, regardless of exact language, are substantially consistent with each other. [Whatever]... the opinion language... the real reasons and the results are likely to be about the same." Id. at 304. This "coming together" assessment of current developments is not a universally applauded one. See, e.g., Reppy, supra note 204. For an invaluable survey of the approaches in use in courts around the country through 1989, see Kay, supra note 119.

the states. 332 The Second Restatement is the most popular of these, but it has also been the most criticized. 333 In my view, it has suffered unfairly at the hands of its critics. It can hardly be faulted for reflecting the confusion and uncertainty of the choice-of-law revolution in its combination of open-ended, policy-oriented provisions and presumptive, jurisdiction-selecting rules. The thrust of the criticism seems to be that it is too “flabby and amorphous” to be of real help in the choice-of-law process. 334 Yet the blueprint provided by the text and the accompanying comments is a good deal more precise than this criticism would suggest.

The comments to section 188(2) direct a court to relate the enumerated contacts to the interest analysis provisions of section 6. 335 The purpose of this is to determine whether a state having one or more of these contacts with the parties or the transaction is interested in the application of its law. 336 “Interest” in this sense means that the relevant policy of the law would be furthered were it applied. If so, this constitutes a “weighty reason” for applying it. 337 It seems self-evident that this process also supplies content to the term “significant relationship,” which is not otherwise defined. Any state interested in the application of its law will have such a relationship. If there is only one such state, then it is the state of “most significant relationship.”

To this point, the Restatement’s method is clear. If there is fault, it is that at this point the Restatement fails to provide exact guidance for the resolution of cases in which both states are interested in the application of their laws—for true conflicts, in other words. Yet this is the Gordian knot that no court or commentator has thus far been able to cut in a satisfying or convincing way. It seems idle to criticize the Restatement for leaving a court to its own devices at this juncture. Everybody knows the game cannot end in a tie. To avoid the appearance of bias, or perhaps for reasons of ease, certainty, and predictability, some courts will want an arbitrary way of denoting the state of “most significant relationship”; others will prefer

332. See Kay, supra note 119, at 585. Professor Kay states that along with the “traditional vested rights” approach, “American courts follow, either singly or in combination, a ‘center of gravity,’ ‘governmental interest,’ ‘comparative impairment,’ ‘most significant relationship,’ ‘better law,’ ‘principles of preference,’ ‘functional,’ [or] ‘lex fori’ . . . approach to choice of law questions.” Id.

333. See, e.g., Cramton et al., supra note 28, at 132–33.

334. See Cramton et al., supra note 3, at 300.

335. Restatement (Second), supra note 144, § 188(2) cmt. e.

336. See id. § 188(1) cmt. b.

337. Id. § 6(2) cmt. e.
to debate degrees of significance as a way of rationalizing the conclusion that one state’s relationship is more significant than another’s. The Restatement seems to invite a relative judgment with its “most deeply affected” language, but it can support either approach.

In the final analysis, how these difficult cases ought to be resolved has to remain for each court a matter of individual attitude and outlook rather than methodology. Use of the Restatement approach in the manner described quickly and easily enables the untroubling cases of false conflict to be recognized and disposed of, leaving a court free to spend its time and energies in deciding how it wants to resolve the harder cases of true conflict with the other values of section 6 as a guide. Taken on its own terms, the Restatement provides as sound an approach as any to choice-of-law. The problems that have arisen in actual use are not so much with the Restatement as with the courts themselves.

Florida is a case in point. The supreme court adopted the Restatement approach for torts cases in 1980 and has used it in three cases since. In the first, the analysis was painfully superficial, in the second, nonexistent. Though each was a true conflict, *lex loci delicti* better explains the results than anything contained in the Restatement. In the third case, *Meehan*, the court transmuted the “most significant relationship” approach into one of counting “significant relationship criteria.” In the process it read section 6 and its interest analysis provisions out of the Restatement and managed to end with New York law, even though the conflict was false and Florida was the only interested state. This is Second Restatement decision-making in name only.

One can only wonder why the court adopted the Restatement in the first place. The court has barely mentioned section 6, the Restatement’s single most important section, and in particular has made no use of its interest analysis provisions. This is hard to understand. Interest analysis represents the most profound advance in choice-of-law thinking in this century and is an integral part of most modern approaches. It is not a novel idea, nor an

338. See *id.* cmt. f.
341. *Id.*
342. See sources cited *supra* note 204.
overly complex one.\textsuperscript{343} Certainly lack of awareness cannot explain it; Justice Barkett employed the technique with telling effect in her dissent in \textit{Meehan}\textsuperscript{344}—an opinion, incidentally, which can stand as a textbook example of how the Restatement ought to be used.

It was presumably to avoid the sterile and indefensible results that \textit{lex loci delicti} was wont to produce in false conflicts like \textit{Bishop v. Florida Specialty Paint Co.}\textsuperscript{345} that prompted the court to make the change originally. One of the Restatement’s great strengths is the emphasis it places on the relevant policies of the states whose laws conflict. The Restatement allows a court to distinguish false conflicts like \textit{Bishop} and \textit{Meehan} from true conflicts like \textit{Olsen} and \textit{Piccolo}, and it opens the road to serious thought about how the more difficult cases should be resolved. That strength was dissipated in \textit{Meehan}, along with the simplicity, certainty, and predictability that the court has always seemed to favor in a choice-of-law method. \textit{Meehan}’s effect was to confuse choice-of-law, not to simplify it or make it more rational. It seems clear that the court has yet to reach the stage of considering what approach to take to true conflict resolution, and it has now left itself with no way of recognizing one when it arises.

At the supreme court level, the adoption of the Restatement for torts cases has gained little while costing much,\textsuperscript{346} and that is reason enough in itself to oppose its extension to the area of contracts. It is obvious that the court is free to use the Restatement in any way it wishes. It is also obvious that what today’s court or tomorrow’s might do is at best a matter of conjecture. Still, it seems all too likely that the court would soon call the five contacts of section 188(2) the “significant relationship criteria” and use the sum of these as its basis for choice. Contact counting is not the approach of the Second Restatement: it ignores the relevant policies of the states whose

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343. The enormous literature that has grown up around Currie’s work, much of it critical, might suggest otherwise. \textit{See}, \textit{e.g.}, CRAMTON ET AL., \textit{supra} note 28, at 152 (listing some of the more important critiques and responses thereto). \textit{See generally id.} at 152–206.
344. \textit{Meehan}, 523 So. 2d at 151 (Barkett, J., concurring in part and dissenting in part).
346. The same cannot be said of the district courts of appeal. At this level, the effect of adopting the Second Restatement has been profound and decidedly salutary. Most of the cases decided by the district courts with the approach of the Second Restatement thus far have been false conflicts. These have been sensibly resolved under the new freedom conferred by \textit{Bishop} in favor of the law of the only interested state, although with a somewhat uneven appreciation for the method of the Restatement generally and interest analysis in particular. \textit{See} Southerland, \textit{supra} note 5, at 803 nn.121 & 123; Finch, \textit{supra} note 30, at 683–84.
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laws conflict and their interests in furthering those policies. As a method, it is subjective. Contact counting allows a court to rationalize an intuitive sense of whose law should govern without the need to articulate, even to itself, the nature or source of the intuition. It is subjective also in that someone must decide what contacts are to be counted and whether some are weightier than others; it can tempt a court to the manipulation, multiplication, and invention of contacts. And finally, it is inexact and uncertain, with no clear answer for cases where the contacts are closely divided or the count is indecisive.

From its general pattern of decision-making in conflicts cases, it also seems clear that the court feels no real need for a method as complex as the Restatement’s. Bishop itself was something of a fluke; the opinion began life as a lone dissent by Justice England, and the court’s use of the Restatement has been grudging since, as if it were still of two minds in the matter. The court has seldom shown any inclination to control the outcome of a case by manipulating the choice-of-law decision; it has never seemed concerned with results in this sense, only with a quick and easy way of making the determination, preferably one reflecting an over elaborate concern for the laws and policies of other states. The bias for forum law so often detect-

347. See Weintrob, supra note 52, at 378–382.
348. See, e.g., Currie, supra note 98, at 726–39.
349. This is particularly true in the area of torts. In its application of the law of some state other than Florida, the court’s record is almost unblemished. See Southerland, supra note 5, at 863 n.355 and accompanying text.

In contracts cases, on the other hand, the overall impression is rather one of randomness. There is no clear pattern in the decisions apart from the fact that they are rather faithfully rule oriented; the “chips fall where they may” cliche best describes the tone of the opinions and the results reached. In chronological order, the cases are: Perry v. Lewis, 6 Fla. 555 (1856) (forum law) (Florida law applied to permit Alabama plaintiff to recover from Florida defendant); Walters & Walker v. Whitlock, 9 Fla. 86 (1860) (place of making) (no conflict between South Carolina and Florida law); Walling v. Christian & Craft Grocery Co., 27 So. 46 (Fla. 1899) (place of making) (Florida married woman cannot invoke emancipated status under Alabama law to validate contract made in Florida); Brown v. Case, 86 So. 684 (Fla. 1920) (forum law) (Florida five-year statute of limitations bars action to recover on promissory notes made and enforceable in New York from defendant who thereafter relocated to Florida and resided there for six years prior to institution of suit); Lloyd v. Cooper Corp., 134 So. 562 (Fla. 1931) (public policy) (married woman’s contract made in Ohio and valid there not enforceable in Florida); Kellogg-Citizens Nat’l Bank v. Felton, 199 So. 50 (Fla. 1940) (public policy) (refusing enforcement of Florida married woman’s contract valid in Wisconsin where made and plaintiff resided, but invalid in Florida where she subsequently became domiciled); Scott v. Scott, 61 So. 2d 324 (Fla. 1952) (place of making) (enforcement in Florida of separation agreement valid in Pennsylvania, where not contrary to Florida public policy); Sherbill v. Miller Mfg. Co., 89 So. 2d 28 (Fla. 1956) (public policy) (clause in
able in the choice-of-law decisions of courts elsewhere has been notably lacking in Florida. Relevant policies and state interests are clearly not a

contract waiving execution on homestead property valid in Virginia where made denied enforcement in Florida on public policy grounds; Ray-Hof Agencies, Inc. v. Petersen, 123 So. 2d 251 (Fla. 1960) (place of making) (finding that place of making of employment contract was Georgia and not Florida, and denying workmen's compensation benefits to Florida resident injured outside of Florida); Cerniglia v. C. & D. Farms, Inc., 203 So. 2d 1 (Fla. 1967) (per curiam) (public policy) (noncompetition agreement valid where made denied enforcement in Florida on public policy grounds); Colhoun v. Greyhound Lines, Inc., 265 So. 2d 18 (Fla. 1972) (place of making) (contract of carriage for interstate transportation made in Florida, where ticket was purchased so that Florida contract statute of limitations applied in damages suit for breach of contract); Wingold v. Horowitz, 292 So. 2d 585 (Fla. 1974) (forum law) (applying Florida remedial law favoring Canadian resident suing Florida resident for breach of contract made in the Bahamas and expressly subject to Bahamian law); Gillen v. United Services Auto. Ass'n, 300 So. 2d 3 (Fla. 1974) (public policy) (denying effect to "other insurance" clause in policy issued in New Hampshire as contrary to Florida public policy); Goodman v. Olsen, 305 So. 2d 753 (Fla. 1975) (place of making) (usurious nature of lending agreement made in New York governed by New York and not Florida law in suit by New York lender against Florida borrower); Government Employees Ins. Co. v. Grounds, 332 So. 2d 13 (Fla. 1976) (place of performance) (clause prohibiting excess judgment recovery valid in Mississippi where contract was made held invalid in Florida where insured was sued and insurer was obligated to provide good-faith defense); Continental Mortgage Investors v. Sailboat Key, Inc., 395 So. 2d 507 (Fla. 1981) (party autonomy) (upholding choice-of-law clause in interstate loan contract made in Massachusetts, even though interest rate was usurious under Florida law); Morgan Walton Properties, Inc. v. International City Bank & Trust Co., 404 So. 2d 1059 (Fla. 1981) (party autonomy) (upholding choice-of-law clause in mortgage agreement valid in Louisiana where made, but usurious under Florida law); Burroughs Corp. v. Suntogs of Miami, Inc., 472 So. 2d 1166 (Fla. 1985) (party autonomy) (contractual provision fixing shorter limitation period, valid in Michigan where contract entered into but void under Florida law, enforced in Florida lawsuit as not contrary to Florida public policy); Sturiano v. Brooks, 523 So. 2d 1126 (Fla. 1988) (place of making) (applying New York law where insurance contract was entered into to prohibit interspousal suit in Florida to recover for negligently inflicted personal injury); and Lumbermens Mut. Cas. Co. v. August, 530 So. 2d 293 (Fla. 1988) (place of making) (applying Massachusetts statute of limitations in Florida lawsuit against insurer for uninsured motorist benefits arising out of accident in Florida).

350. See, e.g., LEFLAR ET AL., supra note 60, at 263. A good example of apparent bias in favor of forum law can be found in the New York Court of Appeals' well-known line of guest statute decisions in the 1960s. The majority notes in Tooker v. Lopez, 249 N.E.2d 394 (N.Y. 1969), that Judge Breitel, in his dissenting opinion, went so far as to suggest that the court's choice-of-law method amounted to nothing more than "a rule which will always result in the application of New York law." Id. at 401. Criticizing the majority's indifference to the significance of the place of injury, he said: "What has happened of course, is that lip service is paid to the factor of place, and promptly ignored thereafter, if the forum prefers its own policy preconceptions and especially if it requires denial of recovery to a plaintiff in a tort case." Id. at 411 (Breitel, J., dissenting).
concern. For a court with these predilections, an approach as sophisticated as the Second Restatement’s is largely redundant.

Extending it to contracts cases, moreover, has the potential for causing a great deal of unnecessary confusion and uncertainty at the level of the district courts of appeal, where most of the decision-making in conflicts cases goes on. Since 1980, the supreme court’s sporadic and doctrinally inconsistent opinions have given these important appellate courts little in the way of guidance, and they have been left to find their way through the Restatement’s labyrinth pretty much on their own. In contrast to the supreme court, the district courts have tended to approach conflicts cases as if they mattered, but the opinions reflect some striking variations in methodology with nothing like consensus emerging from the considerable number of cases decided at this level.\(^{351}\) To the extent that there is a predominant approach, it is, unfortunately, that of counting contacts or “significant relationships”\(^{352}\)—a method, as I have said, that finds little support in the Restatement and that is fraught with uncertainty, unpredictability, and subjectivity.

Decisions in this vein, in fact, are probably responsible for the approach taken by the supreme court in \(Meehan;\) and with that case now it place, it is almost certain that contracts cases would be dealt with in the same way, certainly by panels already inclined in that direction. In relatively few instances has there been much attempt to relate contacts to the policies underlying laws in conflict and thus little in the way of identification or discussion of the interests of concerned states in the application of their laws.\(^{353}\) In the district courts, as in the supreme court, reluctance to employ the interest analysis provisions of section 6 is the most striking methodological feature of decision making with the Second Restatement.\(^{354}\)

The opinions of Chief Judge Schwartz of the third district are notable exceptions to this generalization,\(^{355}\) however, and Judge Baskin continues to utilize interest analysis in her opinions though expressly disclaiming its

\(^{351}\) See Finch, supra note 30, at 680–81; Southerland, supra note 5, at 827–28.

\(^{352}\) See Finch, supra note 30, at 687–90; Southerland, supra note 5, at 827–29, 839–42.

\(^{353}\) See Southerland, supra note 5, at 839 & n.261; Finch, supra note 30, at 690–703.

\(^{354}\) See Southerland, supra note 5, at 839 & n.261.

appropriateness to a Second Restatement analysis. As a court, the fifth District has made the most determined use of policy-oriented methodology in its decision making. In *Stallworth v. Hospitality Rentals, Inc.*, the first district rested the result there on a section 6 policy analysis that resembled a weighing of interests more than anything else. What this suggests, unfortunately, is that there are significant differences of opinion among the judges of the district courts as to how the Restatement ought to be used. These differences would undoubtedly carry over into the area of contracts with the result that decision making in that area would be far less certain and predictable than it is at present.

The confusion and uncertainty that have surrounded the use of the Second Restatement at all levels in Florida make for the strongest argument against extending its approach to the area of contracts. The Second Restatement was designed to accommodate a variety of outlooks on choice-of-law, but not all in one place and at the same time. The district courts would probably welcome the Restatement’s greater flexibility and sensitivity and on the whole would probably make imaginative use of its protean possibilities. But without strong leadership from the supreme court—something that so far has been significantly lacking—its virtues could all too easily become liabilities in an area like contracts, where the need for certainty and predictability is so great.

*Lex loci contractus*, as Justice Kogan observed in *Sturiano*, is old but not yet outdated. It has been the rule in Florida for almost a hundred years and has fit well on the whole with the temperament and interest of Florida’s courts. If nothing else, it has familiarity to commend it, ingrained not only in judicial thinking and that of the practicing bar, but, as much as any rule, understood and relied upon by those who enter into contracts. It hardly needs to be said that the area of contract is quintessentially one in which it is more important to have a certain and predictable approach rather than one

356. See *Valsecchi*, 435 So. 2d at 297; *Harris v. Berkowitz*, 432 So. 2d 613, 616 (Fla. 3d Dist. Ct. App. 1983).


358. 515 So. 2d 413 (Fla. 1st Dist. Ct. App. 1987).

359. See *Southerland*, supra note 5, at 844–47.

360. See *Sturiano*, 523 So. 2d at 1129.
that can be manipulated on an ad hoc basis to produce the result that strikes a particular court on a particular day as most "just."

Yet in marked contrast to its torts counterpart with its relentless mandate for the law of the place of injury, *lex loci contractus* has survived and continues to enjoy a significant measure of popularity today precisely because it has never been a rule just for the sake of having a rule; it actually bears a certain correspondence to the world of people and affairs of which it is a part. There is widely shared agreement as to what constitutes a "just" result in a contracts case. It is one that effectuates the intentions of the parties and protects their expectations. People ordinarily intend to make valid agreements, and it is still apt to be more true than not that they tend to gauge such matters by the law of the place where they act.361 To find on a later day some court upholding and enforcing an agreement that was valid where it was made may be disappointing, yet not out of line with the parties' original expectations. There is probably no such thing as a "good" or "bad" accident, but American society freely tolerates, even applauds, the idea of bad bargains. Without losers, after all, there can be no winners.

Moreover—and again in sharp contrast to the place-of-injury rule—there has always been some play in the joints of *lex loci contractus*. In *Government Employees Insurance Co. v. Grounds*,362 for example, the court invoked the performance branch of the rule to uphold an excess judgment award against an insurance company which had breached its obligation to provide its insured a good faith defense. The company's insured caused an accident in Florida and was sued there. Though liability was clear, the company refused to accept an offer to settle for the policy limits, and the case went to trial. The resulting judgment far exceeded the policy limits, and the insured sued his company to recover the excess. Florida law permitted such an action; the law of Mississippi, where the contract of insurance was made and entered into, did not.363 The court applied Florida law, holding that "the place of performance was Florida, where the cause of action against...[the insured] was maintained and was defended by...[the company]."364 *Wingold v. Horowitz*365 involved a real estate financing deal that was concluded in the Bahamas between a Florida resident and a resident of Canada, the contract being made in the Bahamas and expressly subject to

362. 332 So. 2d 13 (Fla. 1976).
363. *Id.* at 14.
364. *Id.* at 15.
365. 292 So. 2d 585 (Fla. 1974).
Bahamian law. When the Florida resident defaulted on his obligations and was sued in Florida, the supreme court invoked the forum law branch of the rule to give the Canadian partner the benefit of Florida's more favorable remedial law.

Decisions like these have tended to be the exception rather than the rule in Florida, but they suggest that Justice Kogan may have overstressed the inflexibility of lex loci contractus a bit in his Sturiano opinion. There will no doubt be cases where the place of making is fortuitous and has little to do either with the parties or their transaction, but it is unlikely that this will also be true of the place of performance. Lex loci contractus offers enough choices to be useful, but not so many as to become unpredictable. And for the relatively rare case where the otherwise applicable law would produce an intolerable result, there is always the public policy exception to fall back on. The main flaw in using territorial connecting factors as a basis for choosing law is that this approach either ignores or at least tends to obscure the policies underlying laws in conflict and the interests of the concerned states in their application. But in its studied refusal to utilize the techniques of interest analysis, the Supreme Court of Florida, as well as most of the district courts of appeal, seems committed to this course already. As long as state interests are going to be ignored, they might as well be ignored in as simple and uncomplicated a way as possible.

366. Id. at 585–86.
367. Id. at 586.
368. In contrast to the First Restatement, the Second Restatement takes the position that the place of contracting, standing alone,

is a relatively insignificant contact. . . . Issues involving the validity of a contract will, in perhaps the majority of situations, be determined in accordance with the local law of the state of contracting. In such situations, however, this state will be the state of the applicable law for reasons additional to the fact that it happens to be the place where occurred the last act necessary to give the contract binding effect. . . . By way of contrast, the place of contracting will have little significance, if any, when it is purely fortuitous and bears no relation to the parties and the contract . . . .

RESTATEMENT (SECOND), supra note 144, § 188(2) cmt. e.
369. See, e.g., Gillen v. United Services Auto. Ass'n, 300 So. 2d 3 (Fla. 1974).
370. Compare the remarks of the West Virginia Supreme Court in Paul v. National Life, 352 S.E.2d 550 (W. Va. 1986), a guest-statute case in which the court refused to abandon its long-standing adherence to the lex loci delicti rule. The court said: “Nevertheless, we remain convinced that the traditional rule, for all of its faults, remains superior to any of its modern competitors. Moreover, if we are going to manipulate conflicts doctrine in order to achieve substantive results, we might as well manipulate something we understand.” Id. at 556. The
Despite its richness, the scholarship of the choice-of-law revolution has not succeeded in reconciling the conflicting demands of "justice" in cases with multistate implications. Considerations of substantive justice—in a nutshell, the impulse to decide cases in ways that make good socio-economic sense—continue to compete with the array of values associated with the need for rules and the attendant pressure to follow them. It is no denigration of contemporary scholarship to say that much of it seems to skirt the role that value judgments play in the process, perhaps in tacit recognition of the fact that the whole subject represents a wildly unpredictable variable that no theory can control for.

Yet long ago Holmes identified value judgments as the "very root and nerve of the whole proceeding," cautioning that courts decide cases not so much by rules as by value judgments. These, like beauty, exist only in the eye of the beholder; they are statements not of what is but of what ought to be, and so are necessarily as subjective as the individual who holds them. Whether an open-ended approach that allows a court to concentrate on good socio-economic results is better than a set of hard and fast rules like those of the First Restatement that offer neutrality, ease, simplicity, certainty, and predictability is a question that can only be answered with a value judgment. So, too, for that matter, is the question whether a particular socio-economic result is "good" or "bad," "just" or "unjust." The reality is that almost any conceivable choice-of-law method can be manipulated to achieve the result court invoked the public policy exception to refuse enforcement of the guest statutes of other states. Id.

371. See, e.g., Lea Brilmayer, Conflict of Laws: Foundations and Future Directions (1991); Kramer, supra note 87; Laycock, supra note 29; Sedler, supra note 106; Singer, supra note 29.

372. See Leflar, supra note 70, at 1588; see also LEFLAR ET AL., supra note 60, at 297-300.


374. The writings of Professor Joseph Singer are a notable exception to this generalization. See Singer, supra note 29, at 74-127.

375. O.W. Holmes, Collected Legal Papers 181 (1920).

376. See id.; see also The Common Law 1 (1881). In his separate opinion in Brooks v. Sturiano, 497 So. 2d 976 (Fla. 4th Dist. Ct. App. 1986), Judge Hugh Glickstein made the following remark: "In less than eloquent fashion, this writer has often described our work as appellate judges to be, more often than not, a verbalizing of our individual value judgments, however relative and nonabsolute they may be." Id. at 980 (Glickstein, J., concurring in part and dissenting in part).
that a court wants to reach. In the end, the method is less important than the use a court makes of it.

To make this point more concretely, I want to return to Gillen v. United Services Automobile Ass’n, a case in which the Supreme Court of Florida, in an opinion by Chief Justice Adkins, invoked the public policy exception to avoid giving effect to an “other insurance” clause in an automobile insurance policy that had originally been delivered not in Florida, but in New Hampshire. The Gillens were residents of New Hampshire when they separately insured their Karmann Ghia and Volkswagen bus with United Services. The two policies, issued for one year, both contained uninsured motorist coverage, and separate premiums were paid on each. Six months after the issuance of the policies, the Gillens relocated permanently to Florida. They notified United of the move. A month later they sold the bus and bought a Volkswagen Squareback. United canceled the policy covering the bus and issued a new policy on the Squareback. A month after that, while riding in the Squareback, they were involved in a collision with an uninsured motorist in which Mr. Gillen was killed and Mrs. Gillen seriously injured.

United refused to pay the combined total amount of both policies, taking the position that the “other insurance” clause in the Karmann Ghia policy was applicable because other similar insurance was available under the policy on the Squareback. Mrs. Gillen and the personal representative of her husband’s estate brought a declaratory judgment action against United seeking to recover under both policies. The trial court found that “other insurance” clauses were valid and enforceable in New Hampshire but void in Florida because contrary to its public policy. Since the Gillens were Florida residents at the time of the accident and the cars were licensed and garaged in Florida, all with United’s knowledge, the court held the clause invalid and awarded Mrs. Gillen and her husband’s estate the combined total of the coverage under both policies.

377. 300 So. 2d 3 (Fla. 1974).
378. Id. at 6–7.
380. See id. at 53–54. The critical language in the policy provided that “if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance . . . .” Id. at 53 n.1.
381. Id. at 54.
382. See id.
The Fourth District Court of Appeal reversed, holding that the Karmann Ghia policy was governed by the law of New Hampshire where the policy was issued and the insureds were living at the time. 383 "The rights and obligations of the respective parties under the contract, once entered into, should not vary or fluctuate from state to state depending upon fortuitous circumstances of where an accident might occur, or the arbitrary decision of where the insured might elect to thereafter reside." 384 The Florida statute in question, which the supreme court had earlier interpreted as invalidating "other insurance" clauses, in terms applied to policies delivered or issued for delivery in Florida. 385 Hence the question confronting the supreme court when the case reached it on certiorari was whether underwriting considerations applicable to insurance contracts made in Florida could also be applied to contracts made elsewhere, at least in a case where the principal location of the risk had shifted to Florida during the policy term.

*Lex loci contractus* certainly gave an unequivocal answer: the contract was made in New Hampshire and was valid there, and recognition of that fact should follow everywhere. But Justice Adkins left no doubt what he thought "justice" required in the case. He conceded United's point that Florida's statute applied to policies delivered in Florida but rejected the expressio unius implication that a case like this one was thereby meant to be excluded. 386 United specialized in insuring officers in the armed services, "a rather mobile group." 387 The fact that United had been notified of the Gillens' move to Florida and had issued a new policy on the Squareback constituted knowledge on its part that the risks covered by the policies had been shifted to Florida. "Yet premiums were collected on both policies by United, who now says it is liable under only one. There is nothing in law or equity which should aid an insurance company in so one-sided an arrange-

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383. *Gillen*, 280 So. 2d at 54.
384. *Id.*
385. *See Sellers v. United States Fidelity & Guaranty Co.,* 185 So. 2d 689, 692 (Fla. 1966). In construing section 627.0851 of the Florida Statutes, the court said that the statute does not permit "other insurance" clauses in the policy which are contrary to the statutorily limited amounts of coverage. It is clear that the statute does not limit an insured only to one $10,000 recovery under said coverage where his loss for bodily injury is greater than $10,000 and he is the beneficiary of more than one policy issued under § 627.0851.
*Id.* at 692.
386. *See Gillen*, 300 So. 2d at 6.
387. *Id.* at 6.
ment." The Gillens were in the process of becoming permanent residents of Florida. Comity, "in theory a beneficial exercise in interstate harmony," was not a sufficient basis for ignoring their status as "proper subjects of this Court's protection from injustice or injury."

In their effort to escape the mandate of *lex loci contractus*, the plaintiffs had urged the court to apply the "most significant relationship" test of section 188 of the Second Restatement. In light of the view he took of the case, Justice Adkins found it unnecessary to take that step; but he then proceeded to demonstrate how the Restatement approach would work and with what effect. Florida, he said, had a "significant relationship" to the case because the Gillens had become Florida residents and had given their insurer notice to that effect; their cars were now garaged in Florida, and the risk covered by the policy was centered there. In contrast, "[t]he only relationship with New Hampshire was established during the making of the contract. Although the place of negotiation was New Hampshire, very little importance should be attached to this fact. The Gillens merely received a standard form insurance policy from...[United's] main office in Texas which was completed and returned."

New Hampshire's relevant policy was "grounded in general on freedom of contract principles...[and its main purpose] was to provide protection only up to the minimum statutory limits." Florida's statute had "no similarly restricted purpose and, in fact, has been interpreted...to implicitly forbid 'other insurance' clauses." He then said that

> while it is generally undesirable to unduly criticize the decisions of a sister state, it becomes necessary to evaluate one court's position on an issue and the reasons behind it in order to accurately assess the respective states' interests. Here, the substantial interest of Florida in protecting its citizens from the use of "other insurance" clauses rises to a level above New Hampshire's interest in permitting them. Public policy requires this Court to assert Florida's

388. *Id.*
389. *Id.*
390. *Id.*
392. *Id.* at 7.
393. *Id.*
394. *Id.*
paramount interest in protecting its own from inequitable insurance arrangements.\textsuperscript{395}

He might just as well have said that Florida's interests were those "most deeply affected." It was really a Restatement opinion; the only difference was the substitution of "public policy" at the end for the conclusion that Florida was the state of "most significant relationship."\textsuperscript{396}

\textsuperscript{395} Id.

\textsuperscript{396} It is obvious, of course, that Justice Adkins did not intend this portion of his opinion to represent a complete and authoritative exposition of the Second Restatement approach. If he had so intended, he would undoubtedly have made mention of section 193, the specific section dealing with contracts of casualty insurance, which calls for application of the law of the state "which the parties understood was to be the principal location of the insured risk during the term of the policy," subject to the usual qualification as to displacement under the principles of section 6. See \textit{Restatement (Second)}, supra note 144, § 193. At the time the policy was applied for and issued, the parties certainly understood that the principal location of the risk was New Hampshire. The comments raise the possibility that that location may change during the policy term:

There may also be occasions when following the issuance of the policy the principal location of the risk is shifted to some other state. In such a situation, this other state will have a natural interest in the insurance of the risk and it may be that its local law should be applied to determine at least some issues arising under the policy. In any event, application of the local law of the other state would hardly be unfair to the insurance company, at least with respect to some issues, if the company had reason to foresee when it issued the policy that there might be a shift to another state of the principal location of the risk.

\textit{Id.} cmt. 4. Citing two cases and an ALR annotation, the Reporter's Note following section 193 adds that "[a] shift in the principal location of the risk has been held not to affect the applicable law in the absence of a novation." \textit{Id.} at 615. The \textit{Gillen} case itself is the subject of a later ALR annotation which deals specifically with "other insurance" clauses and concludes in the usual way that the authorities are divided on the question. See Robert A. Brazener, Annotation, \textit{Automobile Liability Policy: Choice of Law as to Validity of "Other Insurance" Clause of Uninsured Motorist Coverage}, 83 A.L.R.3d 321, 326 (1978).

None of this helps that much in assessing what effect a shift in the principal location of the risk should have on the validity of terms contained in the policy at the time of issuance and delivery. Dissenting in the court below, Judge Mager thought that the "grouping of contacts" test set forth in section 188 gave Florida a more significant relationship to the issue than New Hampshire. See \textit{Gillen}, 280 So. 2d at 56-57 (Mager, J. dissenting). This illustrates once again what Professor Finch has aptly called the "inscrutable hold" that contact counting seems to have on many of Florida's courts in their reading of the Second Restatement. Finch, \textit{supra} note 30, at 687. "The phenomenon of contact counting," he continues, "usually takes the form of a court's enumeration of the various facts that associate a dispute with particular states, together with a summary conclusion that one state has the most 'significant relationship'" to the issue. \textit{Id.} Judge Mager's assessment of the contacts fits this description precisely:
Gillen was a true conflict, and the opinion is a graphic example of the kinds of subjectivity inherent in the Restatement approach when it is used as a device for weighing interests in that kind of case. Because the Gillens had become Florida domiciliaries, Justice Adkins plainly thought that Florida had a strong interest in extending to them the protection of its statutory policy prohibiting the use of “other insurance” clauses in insurance policies. This would follow, of course, only if one accepts his unsupported assertion that the legislature did not necessarily intend to limit the statute’s application to policies delivered or issued for delivery in Florida.\(^\text{397}\) He was perhaps a trifle disingenuous, too, in minimizing New Hampshire’s interest as he did, an interest which stemmed from that state’s desire to protect the integrity of contracts entered into under its auspices and authority, here an insurance contract made in New Hampshire between New Hampshire residents and an insurer licensed to do business in the state and conditioned on New Hamp-
shire underwriting policies and requirements. Even though the Gillens had left New Hampshire, United was a continuing presence there and was entitled to invoke that interest in order to secure the benefit of its original bargain.

Certainly in terms of the “justified expectations of the parties,” the Second Restatement’s supreme criterion in matters of contract, United arguably had a stronger claim than the Gillens. If we indulge the unlikely assumption that they had read and understood their policies, then they would have expected to recover at most the limits of a single policy in any accident with an uninsured motorist. That expectation, certainly United’s also, could hardly have changed simply because they chose to move to Florida. And yet it is precisely here that the elusive and not-to-be-controlled for element of “justice” enters the picture. Justice Adkins knew perfectly well that there had been no real bargaining between the parties over the terms and conditions of the policy and, at least on the Gillens’ part, probably even less understanding of its provisions. As he noted, they had “merely received a standard form insurance policy” from United which was dutifully completed and returned. Nor was it lost on him that United could reasonably have foreseen that the Gillens, part of “a rather mobile group” which the company specialized in serving, would relocate at some point during the policy term. They were diligent in notifying United of the move, and there was ample opportunity for the company to rewrite the policy to conform to Florida law and to adjust the premiums to reflect the change if it had wished to do so.

The opinion, by a man who in my opinion was one of the truly great judges to serve on the Supreme Court of Florida in this century, is rich in its appreciation of the realities of life in a complex, technologically advanced society in thrall to the automobile and utterly dependent on the insurance

398. See RESTATEMENT (SECOND), supra note 144, § 188(1) cmt. b.
399. Gillen, 300 So. 2d at 7.
400. Id. at 6.
401. See also Dedication—The Honorable James C. Adkins, Jr., 46 FLA. L. REV. vi–xi (1994).
402. Part of the price of the car and the freedom it bestows to go where we please when we please is the death of approximately 50,000 persons a year. In the forty-year period from 1944 to 1984 alone, 1,787,600 persons lost their lives in automobile accidents at an approximate cost of almost two trillion dollars. See Southerland, supra note 5, at 788 n.27. I am aware of no study that has attempted to calculate what the automobile has cost this society in gross over its approximately 90-year history, but if the direct and long-term costs of nonfatal accidents were added in, the dollar figure would probably approach the incomprehensible. By
industry as the only available, if never quite adequate, offset against the catastrophic risks and hazards attendant on its use. Justice Adkins would certainly have been the last person to deny the importance of contract or the general societal interest in providing stability in contractual arrangements and protecting the integrity of bargains. 403 But his strong-handed treatment of the competing claims of the parties in this case left no doubt where he thought the equities lay. He simply made a value judgment. And for that purpose, as his opinion amply demonstrated, one conflict-of-laws method was as good as another.

403 Cf. Sturiano v. Brooks, 523 So. 2d 1126 (Fla. 1988). Unlike the Gillens, the Sturianos had not come to Florida with the intention of taking up permanent residence there; they were described as "lifelong residents of New York" who, for several years prior to their accident, had migrated to Florida to spend the winter months. See id. at 1129. Also important in the court's mind was the fact that they had given their insurer no notice of this practice. See id. at 1129. See also id. at 1131 (Grimes, J., concurring).