

HARD CASES, SINGLE FACTOR THEORIES, AND A SECOND LOOK AT THE RESTATEMENT 2D OF CONFLICTS

*Lea Brilmayer**

The modern academic and judicial critics whose attacks brought down the First Restatement of Conflicts repeated more of the First Restatement's mistakes than they might care to admit. This Article deals with a largely unexplored difficulty common to the First Restatement and modern interest-based theories: because both are "single factor" theories, in "hard cases," they sometimes call for the application of one state's law to disputes that are overwhelmingly connected to a different state. This has resulted in dubious decisions, as judges have tried to avoid such irrational and arbitrary results. This Article begins by explaining the difficulties inherent in "single factor" theories. It then explains how the Restatement 2d of Conflicts avoids these problems relatively successfully, although at a cost of decreased certainty and predictability.

TABLE OF CONTENTS

I.	INTRODUCTION.....	1970
II.	HARD CASES MAKE BAD TRANSITIONS	1971
	A. <i>Hard Cases in Choice of Law Theory</i>	1972
	1. <i>Territorialist Approaches</i>	1974
	2. <i>Modern Interest-Based Approaches</i>	1976
	B. <i>Transitions</i>	1979
	1. <i>Early Transition Cases: Auten, Babcock, and Grant</i>	1980
	2. <i>Transitions in the Intervening Years</i>	1985
III.	THE RESTATEMENT 2D AND THE "MOST SIGNIFICANT RELATIONSHIP" TEST	1987
	A. <i>The Origin of the "Most Significant Relationship" Test</i>	1988

* The author wishes to thank the panel members at the AALS Conflict of Laws section meeting who read earlier drafts and provided critical reactions: Herma Hill Kay, Joseph Singer, Peter Hay, Louise Weinberg, and Symeon Symeonides (chair). Thanks, also, to other readers: Erin O'Hara O'Connor, Yunsieg Kim, Carlos Vazquez, and Jay Alexander Hilton Butler.

1970	UNIVERSITY OF ILLINOIS LAW REVIEW	[Vol. 2015
	<i>B. Understanding the Restatement 2d</i>	1989
	1. <i>The Restatement 2d in Action</i>	1989
	2. <i>The Most Significant Relationship: Multifactor or Single Factor Approach?</i>	1994
	3. <i>Some Guidelines for Application</i>	1995
IV.	CONCLUSION	1997

I. INTRODUCTION

They say that those who do not remember the past are condemned to repeat it, and, in its own way, the modern choice of law revolution seems to back that up.¹ The modern academic and judicial critics whose attacks brought down the First Restatement of Conflicts repeated more of the First Restatement’s mistakes than they might care to admit.² This Article deals with a largely unexplored difficulty common to the First Restatement and the modern interest-based theories—a difficulty that helped to prompt the transition from traditional to modern theory, but that the modern theories never really fixed.

Both traditional and modern conflicts theories are vulnerable to a particular type of counterexample—what we will call “hard cases”—and for the same reason.³ Because both are “single factor” theories, they sometimes call for the application of one state’s law to disputes that are overwhelmingly connected to a different state.⁴ Judges’ efforts to avoid such irrational and arbitrary results lead to some rather dubious law, including some dubious decisions to transition from traditional to modern choice of law methods.⁵

The terrain chosen for jettisoning the First Restatement vested rights theory consisted largely of fact patterns slanted in favor of governmental interest analysis.⁶ Judges, the record shows, rarely opted to switch unless confronted with a case that highlighted the modern interest-based theories’ better side.⁷ This is understandable, because it is in

1. This adage is frequently attributed to the philosopher George Santayana, but other attributions of nearly identical quotations include Edmund Burke and Winston Churchill. See GEORGE SANTAYANA, *THE LIFE OF REASON* 312 (Floating Press 2009) (1906); Jim Johnson, *Be Responsible; Don’t Repeat Mistakes*, COLUMBIA DAILY TRIB. (June 10, 2012, 2:00 AM), http://www.columbia.tribune.com/arts_life/community/be-responsible-don-t-repeat-mistakes/article_d93e8a2d-d7cb-519f-8f2c-e0f2e9fabdc7.html.

2. See, e.g., Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 392 (1980) (“[W]hile promoted . . . as an antidote to the pernicious metaphysical assumptions that afflicted . . . the *First Restatement*, . . . [i]nterest analysis merely substitutes one set of metaphysical premises for another”); see also *id.* at 415 (“Interest analysis projects into multistate cases the other legislature’s willingness to have its residents pay claims but fails to consider its own demonstrated willingness to have the injured guest go uncompensated.”).

3. See *infra* Part II.A.

4. See *infra* note 27 and accompanying text.

5. See *infra* Part II.A.2.

6. See *infra* Part II.B.

7. See *infra* Part II.A.

such cases that the modern theories appear to be an improvement. But the relatively rapid transition to modern theory that resulted has led to the unwarranted conclusion that the modern theories won the day by dint of some overall theoretical superiority.⁸ In fact, the modern theories' proponents merely took advantage of a situation where their theory was at its strongest and the traditional theory at its weakest. Choosing between the First Restatement and interest analysis while focusing solely on cases where the Restatement is weak and the modern theory is strong—or the reverse—stacks the deck.⁹ The choice of law “revolution” stacked a lot of decks.

Considering that two such different theories share this vulnerability, it might at first appear that the problem is unavoidable. That is not entirely true. The Restatement 2d of Conflicts (“Restatement 2d”) is ideally constructed to avoid the sort of counterexamples that the First Restatement and interest analysis fall prey to.¹⁰ This Article starts by explaining the difficulties created by “single factor” theories such as the First Restatement and governmental interest analysis, showing how their strengths and weaknesses have influenced the transition from traditional to modern theories.¹¹ It then explains how the Restatement 2d avoids these problems relatively successfully, albeit by paying a price in decreased certainty and predictability.¹²

II. HARD CASES MAKE BAD TRANSITIONS

In his 1923 article about hard cases, Arthur Corbin could easily have had choice of law in mind. He wrote: “When a stated rule of law works injustice in a particular case, that is, would determine it contrary to ‘the settled convictions of the community,’ the rule is pretty certain either to be denied outright or to be undermined by a fiction or a specious distinction.”¹³ Corbin’s observation, radical in 1923, is more in line with today’s conventional wisdom.¹⁴

Hard cases are counterexamples to generally accepted legal norms, in which the accepted legal norms dictate unacceptable results. Hard cases are a legal fact of life; most legal norms and approaches turn out to have some applications that are intuitively attractive and some applica-

8. See *infra* Part II.B.

9. See *infra* notes 51–52 and accompanying text.

10. See *infra* Part III.A.

11. See *infra* Part II.

12. See *infra* Part III.

13. Arthur Linton Corbin, *Hard Cases Make Good Law*, 33 YALE L.J. 78, 78 (1923). It should be noted that Corbin disagreed about the usual characterization as “bad law.” *Id.* (“It is said that ‘hard cases make bad law;’ but it can be said with at least as much truth that hard cases make good law.”).

14. For instance, the U.S. Supreme Court has tried to avoid following an infamous past ruling (so as to avoid its disastrous consequences), while not actually overturning the said precedent. See David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U.L.Q. 1469, 1474 (2005) (“Recently, the ghost of *Lochner* has been kept very much alive by Justices Kennedy, O’Connor, and Souter, each of whom has praised *Meyer* and *Pierce* as engaging in appropriately aggressive due process review of police power regulations, while straining to distinguish those opinions from *Lochner*.”).

tions that are less so. “Hard cases make bad law” (as the familiar adage goes) because of the price we pay in loss of transparency and predictability when judges stretch, shrink, massage, or otherwise manipulate general rules to allow for a better result.¹⁵ Conflict of laws is no exception; hard cases have played an important role in the transition from traditional to modern choice of law theory—perhaps a more important role than they deserve.

A. *Hard Cases in Choice of Law Theory*

Hard cases arise in choice of law when the state designated by the choice of law method has only a minimal connection to the dispute. This can happen under both territorialist methods, such as the First Restatement, and under modern interest-based methods. The First Restatement has applications where its rules appear persuasive but also ones where its rules seem absurd, in fact, “fortuitous” or “adventitious.”¹⁶ The same is true for interest analysis; although false conflicts are treated as easy cases under modern theory, they constitute only a fraction of the docket, while the remaining true conflicts and unprovided-for cases—the hard ones—constitute the remainder.¹⁷

Choice of law case reports are strewn with judges’ best efforts to dodge unpalatable outcomes. In the context of traditional choice of law methods, the strategies for dealing with hard cases include such things as: “recharacterizing” a tort case as a contracts case (or vice versa); determining that an issue is “procedural,” thereby clearing the way for application of forum law; application of *renvoi* (the other state’s choice of law rules); and the “public policy” exception.¹⁸ Although such “escape devices” (as they have been called) might easily be taken as a testimonial to the flexibility of traditional choice of law rules, they more frequently have been depicted as discrediting an approach to choice of law that was already teetering on the brink.¹⁹ The modern theories also make shameless use of escape devices—indeed, some of the very same ones.²⁰ The phenomenon of hard cases is a general one; it is endemic to the application of generalized rules.

But precisely which fact patterns generate hard cases and which do not is a function of what the particular rule requires and what its underlying

15. See Corbin, *supra* note 13 (“Even the common law judges themselves had a ‘conscience.’ When their stated rules developed hard cases, the rules were modified by the use of fiction, by exceptions and distinctions, and even by direct overruling.”).

16. See *supra* text accompanying notes 74–75.

17. See *supra* text accompanying notes 39–42.

18. Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Along Trigger*, 95 IOWA L. REV. 1125, 1134 n.39, 1135 (2010).

19. *Id.* at 1136.

20. See LEA BRILMAYER ET AL., CONFLICT OF LAWS: CASES AND MATERIALS 178 (6th ed. 2011) [hereinafter BRILMAYER, CONFLICT OF LAWS] (“Instead, judges typically applied one of the escape devices to the First Restatement rules when their instincts told them that a straightforward application of the rules should be avoided.”).

ing assumptions are. A case is hard *within a particular choice of law theory*; a dispute that is hard to solve within the parameters of the vested rights theory may be easy to resolve under interest analysis (or vice versa). The First Restatement is built on territorialist assumptions: application of a state's substantive law is justified by events that occur within the state's territory.²¹ Thus, if all of the territorial factors point towards the same state, the dispute will appear easy to resolve. Modern interest analysis, in contrast, is based on domiciliary assumptions; the relevant contacts tend not to be territorial, but based on the residence of the plaintiff and/or the defendant.²² For this reason, interest analysis has great difficulty in resolving cases where the parties are domiciled in different states, but the relative ease in deciding cases in which the domiciliary contacts all point towards the same state.²³

The influence of hard cases in the selection of a choice of law method is due precisely to this difference. Under the common law method, judges make decisions in the context of concrete cases: the contours of the dispute before it can easily influence a court's choice of what decision to reach and on what basis. When a judge purporting to apply the First Restatement is faced with a difficult fact pattern, he or she has several options. One, certainly, is simply to apply the Restatement rules as written, and to disregard the inconsistency between the result thus reached and the result that justice would, intuitively, require. Another is to employ one of the Restatement's recognized escape devices and avoid the unpalatable result by subterfuge. Still a third is to announce that the First Restatement is no longer the law and to adopt a modern theory in its place.

The last of these is the response of greatest interest here. The decision to take advantage of this opportunity to transition to another choice of law method depends on whether the modern interest-based result seems to be an improvement over the traditional one. The most inviting time to transition arises when traditional methods give unpalatable results and the interest analysis results are attractive. A judge would not be expected to adopt a modern theory in a case that looks easy under the First Restatement but hard from the point of view of interest analysis. Even if two theories are overall equally desirable, the advantage is likely to go to the theory that best resolves the particular case at hand. Unfortunately, this sometimes means a change from one theory to another based on nothing more than the specific fact patterns of an atypical minority of cases.

Hard cases play an important role in the transition from one choice of law theory to another; they explain a court's willingness to abandon the familiar and set off into the uncharted wilderness. The first hard case that came along might be dealt with adequately by escape devices, but,

21. Brilmayer & Anglin, *supra* note 18, at 1138.

22. *Id.* at 1156.

23. *See infra* pp. 117-18.

over time, a succession of hard cases would leave an indelible impression that the First Restatement choice of law theory just was not working.²⁴ Where the particular case before the court is a hard case for the First Restatement and an easy case for interest analysis, a court's decision to adopt the modern theory does not say much about the desirability of the modern theory overall. A decision of this sort may simply be an artifact of the particular fact pattern in the case before it. This was particularly true in the "revolution" that reframed choice of law in the middle of the twentieth century; transitions to the modern approach occurred almost entirely in cases that were difficult for the territorial approach and easy for interest analysis.

1. *Territorialist Approaches*

Examining the First Restatement "vested rights" approach reveals the chief source of hard cases in traditional theory. The First Restatement rules designate a single connecting factor that dictates which law applies. It does so based on the "last act" rationale: it applies the law of the state where the last event occurred that is necessary to make the cause of action complete.²⁵ The place of contracting supplies the substantive law for contract cases, the place of injury for torts cases, and so forth.²⁶

Choice of law approaches that operate through designation of a single contact can be called "single factor" approaches. The contact that identifies the state of the applicable law we call the "trigger"; in a single factor theory, all contacts other than the trigger are irrelevant.²⁷ Disputes in which the only contact pointing toward the designated state is the trigger can be called "stand-alone trigger" cases.²⁸ Choice of law rules and methods that cannot be reduced to a single factor are "multifactor" approaches. For example, a court could select the applicable law according to the rule and "apply the law of the state to which the largest number of contacts point," which would assign equal weight to every connection between the state and the case's constituent elements.

The reason that single factor approaches unavoidably generate hard cases is that there will inevitably be cases in which none of the other connecting factors support the trigger. The trigger may be the only factor pointing towards the result that the rule designates. Under the First Restatement, every contact other than the last act was irrelevant; all but the "last act" could be completely disregarded, and the merits of the choice of law issue would not be affected.²⁹ Because in theory only a sin-

24. Many thanks to Erin O'Hara O'Connor for bringing the importance of this point to my attention.

25. Brilmayer & Anglin, *supra* note 18, at 1127.

26. BRILMAYER, CONFLICT OF LAWS, *supra* note 20, at 23.

27. Brilmayer & Anglin, *supra* note 18, at 1127.

28. For a discussion of the "stand-alone" trigger, see generally *id.*

29. *Id.* at 1129.

gle connecting factor dictates the result, it is not a problem if all other factors point towards a different state. For the staunch territorialist, the lack of any other contacts pointing toward the law of the designated state case would not matter. Under the First Restatement, only the trigger makes a difference.

Although under the First Restatement it is not considered a problem that only one single connecting factor points to the designated result while the other factors all point towards a different state, this result is likely to strike some as counterintuitive. Such a tenuous connection is likely to be dismissed as “arbitrary” or “fortuitous.”³⁰ Such outcomes prejudice judges, practitioners, and scholars against territorialism, especially when the same set of facts would be resolved in an intuitively more appealing way by another theory. One well known case of this sort is often disparaged as the *reductio ad absurdum* of the territorialist theory: *Alabama Great Southern Railroad v. Carroll*.³¹

Carroll involved a railroad accident in which a defective coupling gave way and injured a brakeman.³² The events leading up to the injury all took place in Alabama (see Table 1). These included the formation of the employment relationship between the railroad and the brakeman, the negligent maintenance that ultimately culminated in the brake’s malfunction, the domicile and place of incorporation of the plaintiff and the defendant railroad, respectively, and miscellaneous other connecting factors.³³ The vested rights theory, however, required application of the law of the place of injury and that the court choose to be loyal to the traditional vested rights theory, despite the random and inconsequential character of the timing and location of the triggering event.³⁴

30. See *infra* note 75 and accompanying text.

31. 11 So. 803 (Ala. 1892).

32. *Id.* at 803–04. This case did not apply the First Restatement—it was decided several decades before the Restatement was published. However, its reasoning was symptomatic of the body of law that Joseph Beale sought to “restate.”

33. *Id.* at 807.

34. See *id.* at 809.

TABLE 1: *ALABAMA GREAT SOUTHERN RAILROAD V. CARROLL*

	Alabama	Mississippi
Employment contract	X	
Negligent maintenance	X	
Trip starts	X	
RR company incorporated	X	
Injured employee is domiciled	X	
Negligently maintained equipment breaks, injuring trainman (TRIGGER)		X

It is easy to generate hard cases within the Restatement system. Because it is a single factor theory, one can simply hypothesize a situation where the trigger factor is the only contact pointing toward the chosen state. The trigger factor is unsupported; it is a “stand-alone” trigger and, as such, is less convincing a basis for applying the designated state’s law than a large group of contacts pointing toward that law would be. The difficulty is aggravated when all of the other contacts are concentrated in the same state, which in *Carroll* was Alabama.³⁵ The state where the remaining contacts are concentrated is a more appealing answer to the choice of law problem. In the precise situation of *Carroll*, Alabama intuitively seems a much better choice than Mississippi, and nothing in the First Restatement is likely to change that intuition. *Carroll* is a genuinely hard case from the Restatement point of view, because only one contact favors Mississippi while many more favor Alabama.

2. Modern Interest-Based Approaches

When time finally came to modernize, the obvious choice of a theory to substitute for the First Restatement was governmental interest analysis. It was the first formulated of the alternative theories, and im-

35. *Id.* at 803.

mediately upon its emergence it received substantial attention in both the academy and the courts.³⁶

But similar problems attended the application of governmental interest analysis as the First Restatement, and for the same reasons. Under interest analysis, as under the First Restatement, the result often turns on a single factor that the proponents identified as appropriate.³⁷ The factor is different—it tends to be domicile-oriented rather than territorial—but the problem is the same.³⁸ After a switch to interest analysis was made, it was only a matter of time until interest analysis would be challenged by hard cases of its own.

There is little doubt that interest analysis possesses its share of both hard and easy cases. The proudest boast of the modern theories is their solution to what have become known as “false conflicts.”³⁹ False conflicts are cases in which only one state has an interest in having its law applied, so that the forum should apply that state’s law.⁴⁰ Since the theory was first articulated, proponents have claimed that there can be no objection to applying that state’s law when (by definition) no other state has an interest in the case.⁴¹ It is almost equally agreed that Brainerd Currie’s solution to “true conflict” and “unprovided-for” cases—apply forum law—was less satisfying.⁴² Efforts have continued to find solution to those cases, in which either both states or neither state has an interest in supplying the applicable law.

By the theory’s own terms, therefore, certain cases are easy and certain are hard. The easy ones, the false conflicts, turn out to be those cases in which plaintiff and defendant share a common domicile.⁴³ This should not be surprising because interest analysis downplays the importance of territorial connecting factors, elevating in their place the domicile of the plaintiff and the defendant. If one takes as an article of faith that domiciliary, and not territorial, factors typically create interests—as many interest analysts do—then, from the interest analysis perspective, a case in which the opposing parties share a domicile is for all intents and purpos-

36. Other authors were accepted more for their critical attacks on the First Restatement than for their alternative theories. See, e.g., David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 176–77 (1933).

37. Brilmayer & Anglin, *supra* note 18, at 1127.

38. *Id.* at 1138.

39. See, e.g., BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 183–84 (1963) (proposing that false conflicts should be resolved by applying the law of the only jurisdiction that has a genuine interest in the resolution of the dispute at hand).

40. See Brilmayer & Anglin, *supra* note 18, at 1154.

41. *Williams v. Rawlings Truck Line, Inc.*, 357 F.2d 581, 586 (D.C. Cir. 1965) (“[T]his case presents a classic ‘false conflicts’ situation. Adoption of the New York doctrine of estoppel will further the interests of New York, but will not interfere with any . . . policies of the District of Columbia. . . . As a false conflicts case, our decision becomes simple: we apply the estoppel rule of New York, the only jurisdiction with an interest in having its law applied . . .”).

42. Russell J. Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases*, 46 OHIO ST. L. J. 493, 493 (1985).

43. William A. Reppy, Jr., *Codifying Interest Analysis in the Torts Chapter of a New Conflicts Restatement*, 75 IND. L. J. 591, 591 (2000).

es a purely domestic case.⁴⁴ It is an easy case because the only significant factors (according to interest analysis' perspective) point to the same state.

The hard cases are the true conflicts and unprovided-for cases. These occur where the plaintiff and defendant come from different states that have different legal rules. Either both states have interests (a true conflict, arising in cases in which each state's laws favor the party from that state) or neither state has an interest (an unprovided-for case because each state's law favors the party from the opposing state).⁴⁵ Currie saw these cases as essentially insoluble and recommended applying the law of the forum.⁴⁶

The structure of modern interest analysis guarantees that hard cases will arise; as with the First Restatement, they exist whenever the trigger has no support from any other factor and the other contacts point towards a single other state. A familiar example is the case of *Lilienthal v. Kaufmann*.⁴⁷ In *Lilienthal*, an Oregonian spendthrift entered into a business deal with a California party in California.⁴⁸ When the California party later sued him in Oregon, the Oregon court applied Oregon spendthrift law despite the lack of any other connection to Oregon.⁴⁹ *Lilienthal* is a true conflict and a hard case, because (as Table 2 graphically illustrates) only one connecting factor supports the result, and the remainder all favor the California alternative.

Table 2: *Lilienthal v. Kaufman* Under Interest Analysis

	California	Oregon
Business enterprise formed	X	
Plaintiff is domiciled	X	
Defendant goes there to form start-up	X	
Defendant domiciled (TRIGGER)		X

Cases that are hard for the First Restatement are easy for interest analysis, and cases that are hard for interest analysis are easy for the First Restatement. The Restatement's hard cases are ones where a single territorial factor acts as the trigger and all the remaining contacts point towards a single other state.⁵⁰ By hypothesis, in such cases the plaintiff and

44. See Brilmayer & Anglin, *supra* note 18, at 1173.

45. See Weintraub, *supra* note 42.

46. Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 179 (“[When] neither state has an interest in the application of its law and policy[,] . . . the forum would apply its own law simply on the ground that that is the more convenient disposition.”).

47. 395 P.2d 543 (Or. 1964).

48. *Id.* at 543.

49. *Id.*

50. See Brilmayer & Anglin, *supra* note 18, at 1138.

defendant share a common domicile in that other state; the case is therefore a false conflict and an easy one for interest analysis to resolve. The hard cases for interest analysis are ones where the parties are from different states (with different substantive rules), and the activities all took place in one of those two states.⁵¹ If the activities all took place in that same state, the case will be an easy one for the First Restatement.

When confronted with a decision whether to switch from the First Restatement to interest analysis, a judge in a First Restatement state will compare the likely outcome under the First Restatement to the outcome under interest analysis. If the case is a hard one for the First Restatement, it will be a false conflict (and thus easy) under interest analysis.⁵² That means that those cases that are most likely to present a serious challenge to traditional theory will be false conflicts, and as such will present a misleadingly upbeat picture about how well interest analysis works in practice.

Modern theory cannot be evenhandedly evaluated by considering only the impact it has in common domicile cases; both theories should be evaluated by comparing easy cases to easy cases and hard cases to hard cases. Yet as we will shortly see, the important transition cases in the modern conflicts revolution are all common domicile cases—ones that are hard for the First Restatement and easy for interest analysis—and it should be no surprise that when assessment is limited to this subset of disputes, interest analysis puts its best foot forward.

B. Transitions

Starting around the middle of the last century, certain judges became increasingly dissatisfied with reliance on the First Restatement's escape devices and forthrightly declared an end to the old regime.⁵³ But the revolution was misleading in one important respect. Judges typically took the plunge in common domicile cases, where the dispute presented a hard case from the point of view of the First Restatement and an easy case from the point of view of interest analysis.⁵⁴ The general impression created has been that the Restatement was rejected because it was all around inferior to the modern interest-based theories.⁵⁵ In fact, the playing field was far from level; a preference for the modern solution in these particular cases said little about the desirability of the modern theories overall.

51. *Précis*, Louise Weinberg, A Radically Transformed Restatement for Conflicts (Feb. 9, 2015) (unpublished manuscript presented at the AALS Annual Meeting in Washington D.C.).

52. The reason is that a hard case under the First Restatement (like *Carroll*) has one factor, the trigger, pointing at State A and all of the rest pointing at another state (State B). If all of the rest point to State B, then the domiciles of the parties, P and D, point towards State B, and the case is a false conflict.

53. See Brilmayer & Anglin, *supra* note 18, at 1140–45.

54. See *id.* at 1137–38, 1145.

55. See *Bi-Rite Enters., Inc. v. Bruce Miner Co.*, 757 F.2d 440, 442 (1st Cir. 1985).

Proponents of interest analysis (including its founder, Brainerd Currie) erred in seizing upon this “revolution” as an opportunity to claim victory for interest analysis.⁵⁶ The consequence of changing methods was simply to impose a system that produced equally implausible results. To illustrate the dynamics of this transition period, we will start with three familiar early transition cases: *Grant v. McAuliffe*, *Babcock v. Jackson*, and *Auten v. Auten*.⁵⁷ But we will see that the same pattern continued for the decades following those early cases; courts that transitioned at a later time also tended to do so in cases that were difficult for the First Restatement but relatively easy for governmental interest analysis.

1. *Early Transition Cases: Auten, Babcock, and Grant*

The three early transition cases examined here had certain important characteristics in common. In particular, the overall pattern of geographical features appeared almost identical. Of the events, property, and people comprising the dispute, only one contact pointed toward the result that the Restatement designated, and all other contacts pointed towards a particular, different state. This aspect of the traditional Restatement method left it vulnerable to counterexamples that made its rules look rigid, if not ridiculous. These early cases expose the methodological problems that followed as a consequence of the Restatement’s reliance on a single factor methodology. *Auten v. Auten*, in 1954, was the New York Court of Appeals’ first major foray into the modernization of choice of law theory; up to that point, the New York courts had by and large maintained their loyalty to the First Restatement.⁵⁸ *Auten* involved the validity and finality of an alimony and child-support agreement made by and for an estranged English husband and wife and the couple’s English children.⁵⁹ *Auten* did not, on its face, definitively reject the Restatement as a whole; the opinion argued that the same conclusion could be reached under the Restatement, suitably interpreted.⁶⁰ And it

56. See Brilmayer & Anglin, *supra* note 18, at 1152.

57. *Grant v. McAuliffe*, 264 P.2d 944 (Cal. 1953); *Babcock v. Jackson ex rel. Jackson*, 191 N.E.2d 279 (N.Y. 1963); *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954).

58. *Auten*, 124 N.E.2d at 101. An English woman brought the case against her husband, who had deserted her and moved to New York. She followed him there, and the two entered into a separation agreement. The wife then immediately returned to England and sued for divorce the following year. Thirteen years later, she brought suit in New York for the arrears. Her former husband defended on the ground that her filing for divorce in England violated the separation agreement and forfeited any right to payments under it. This defense was legally inadequate under English law, but would have been recognized in New York. *Id.* (noting that, under New York law, “plaintiff’s commencement of the English action and the award of temporary alimony constituted a rescission and repudiation of the separation agreement, requiring dismissal of the complaint”).

59. It is arguable that *Auten* is not a common domicile problem because the husband was residing in New York when many of the relevant activities took place. See *id.* at 100, 102. However, according to the New York court, the marital domicile was in England and that jurisdiction had “the greatest concern in defining and regulating the rights and duties existing under [the separation] agreement, and . . . in determining the circumstances that effect a termination or repudiation of the agreement.” *Id.* at 103.

60. *Id.*

did not unambiguously endorse interest analysis, although it did speak of interests.⁶¹ But disclaimers notwithstanding, *Auten*'s result and reasoning were a serious departure from longstanding Restatement jurisprudence. The New York court dismissed as "entirely fortuitous" the connection with New York—the place where the estranged British spouses met up and signed the agreement—and instead applied the English law permitting the enforcement proceeding to go ahead.⁶² The New York Court of Appeals was probably not completely prepared as early as 1954 to take the radical move of abandoning the Restatement definitively.

The next important early New York transition case came in 1963—*Babcock v. Jackson*—and over the intervening years the Court had become increasingly receptive.⁶³ A group of New York domiciliaries set off from New York on a weekend trip to Ontario in a vehicle registered, garaged, and insured in New York.⁶⁴ The accident occurred while the group was in Ontario, and when one member of the group brought suit in New York against the driver, the crucial objection was the Ontario guest statute.⁶⁵ The New York Court of Appeals dismissed the defendant's argument that, as the place of injury, Ontario's law should apply.⁶⁶ Echoing a complaint heard in *Auten*, the court explained that the place of injury was "purely adventitious."⁶⁷

The present action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile, garaged, licensed and undoubtedly insured in New York, in the course of a week-end journey which began and was to end there. In sharp contrast, Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there.⁶⁸

Application of New York law was the end result.

Of course it was not just New York judges that played a role in getting the conflicts revolution underway. *Grant v. McAuliffe*, decided by the California Supreme Court almost simultaneously with *Auten v. Auten*, displays the same pattern of contacts.⁶⁹ *Grant* involved the applicability of an Arizona survival statute to an accident that occurred in Arizona but otherwise involved only Californians and California.⁷⁰ Justice Traynor—who went on to become famous for his choice of law decisions, among other things—detailed the geographical connections: an accident in Arizona involving only Californians, a California-administered estate of the California deceased, and a legal rule arguably relating to the pro-

61. *Id.* at 102–03.

62. *Id.* at 102.

63. See Brilmayer & Anglin, *supra* note 18, at 1137–38.

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

65. *Id.*

66. *Id.*

67. *Id.* at 284.

68. *Id.*

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

70. *Id.*

cedure for administering an action in a California court.⁷¹ The California court considered the Restatement provisions that would have required application of Arizona law, explained why they did not really apply, and allowed the case to proceed under California law.⁷²

These three case examples have substantial similarities. Tables 3, 4, and 5 highlight how precisely parallel the connecting factors' patterns really are. In all three of these cases, all the contacts but one point towards the same state—a state *not* selected by the Restatement. There is one contact, but only one, that points toward the state selected by the Restatement's rules.

TABLE 3: *AUTEN V. AUTEN* UNDER THE 1ST RESTATEMENT

	England	New York
H and W marry	X	
Place of marital domicile	X	
Location of the children (at all times)	X	
W still lives there	X	
W brings suit there	X	
Separation agreement signed while W present only for that purpose TRIGGER		X

71. *Id.* at 946, 949.

72. *Id.* at 946–49.

TABLE 4: *BABCOCK V. JACKSON* UNDER THE 1ST RESTATEMENT

	New York	Ontario
Plaintiffs domiciled	X	
Defendant domiciled	X	
Relationship between P and D	X	
Car registered and insured	X	
Trip started and was supposed to end there	X	
Accident occurred there TRIGGER		X

TABLE 5: *GRANT V. MCAULIFFE* UNDER THE 1ST RESTATEMENT

	California	Arizona
All three plaintiffs domiciled	X	
Defendant was domiciled	X	
Estate administered there	X	
Both autos belong to domiciliaries of this state	X	
Estate was located there	X	
Automobile accident TRIGGER		X

The common pattern of contacts—these three are all stand-alone trigger cases—suggest the reason that these cases were able to lure the judges away from territorialism and to the modern domiciliary approach. All three are attractive applications for a theory that privileges domiciliary connections over territorial ones. The common structure of these three cases sheds light on a characterization by the New York Court of Appeals that would otherwise be somewhat mysterious. The Court of Appeals dismissed the location of the contract signing (in *Auten*) and the

automobile accident (in *Babcock*) as “adventitious.”⁷³ It did not explain what it meant by the characterization—almost anything that happens in a private legal dispute might loosely be referred to as “adventitious” or “fortuitous.” But this characterization was soon picked up by other courts intent on avoiding the First Restatement’s rules. They justified rejection of the vested rights theory on the grounds that the stand-alone trigger factor was “fortuitous”⁷⁴ or some similar pejorative—if not “adventitious,” then “arbitrary,” “random,” or “happenstance.”⁷⁵

The use of “adventitious” in *Auten* and *Babcock* is suggestive; the Court seems to have been hinting at New York’s and Ontario’s status as stand-alone trigger cases. Generally speaking, it seems, the absence of any other connection between the designated state and the dispute increases the perception of randomness or arbitrariness. In *Babcock* the supposedly adventitious feature of the dispute was the location of the car crash.⁷⁶ Another classic example of an arbitrary or fortuitous place of injury is an airplane crash. When a plane engine malfunctions and the plane falls to earth, there is typically no discernible reason why it hits the

73. *Babcock*, 191 N.E.2d at 284; *Auten v. Auten*, 124 N.E.2d 99, 102 (N.Y. 1954).

74. See Brilmayer & Anglin, *supra* note 18, at 1149–50 & nn. 145–52 (discussing the connection between fortuity and stand-alone triggers).

75. See *Grant*, 264 P.2d at 1136 (citing *Armstrong v. Armstrong*, 441 P.2d 699, 703 (Alaska 1968)) (referring to the parties’ contact with Canada as “fortuitous, transitory, and insubstantial”); *First Nat’l Bank v. Rostek*, 514 P.2d 314, 317 (Colo. 1973) (“harsh, unjust results”); *O’Connor v. O’Connor*, 519 A.2d 13, 19 (Conn. 1986) (“[T]he virtue of simplicity [as embodied in the *lex loci delicti* rule], must . . . be balanced against the vice of arbitrary and inflexible application of a rigid rule.”); *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999, 1000 (Fla. 1980) (“happenstance”); *DeMeyer v. Maxwell*, 647 P.2d 783, 786 (Idaho Ct. App. 1982) (“Considering that they both lived in Idaho, where this trip originated, and that only through fortuitous circumstances were they passing through Oregon at the time of the accident, we cannot infer that either of them had any expectation that the Oregon guest statute would apply.”); *Ingersoll v. Klein*, 262 N.E.2d 593, 596 (Ill. 1970) (concluding that “[t]he arbitrary nature of the doctrine is quite evident in this case where determination of the applicable law is based upon what spot in the Mississippi River the decedent met his death.”); *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071, 1074 (Ind. 1987) (“The place of the tort is insignificant to this suit.”); *Fuerste v. Bemis*, 156 N.W.2d 831, 833 (Iowa 1968) (“The presence of the parties in Wisconsin at the time of the accident was entirely fortuitous.”); *Wessling v. Paris*, 417 S.W.2d 259, 260 (Ky. Ct. App. 1967) (“By fortuitous circumstances the accident happened on the other side of the Ohio River instead of on this side.”); *Beaulieu v. Beaulieu*, 265 A.2d 610, 613 (Me. 1970) (referring to *lex loci delicti* as the “arbitrary stereotyped course”); *Mitchell v. Craft*, 211 So. 2d 509, 513 (Miss. 1968) (“Louisiana’s sole relationship with the occurrence is the purely adventitious circumstance that the collision happened there.”); *Phillips v. Gen. Motors Corp.*, 995 P.2d 1002, 1009 (Mont. 2000) (“The Restatement approach is preferable, in our view, to the traditional *lex loci* rule which applies the law of the place of the accident which may be fortuitous in tort actions.”); *Babcock*, 191 N.E.2d at 284 (“adventitious”); *Auten*, 124 N.E.2d at 102 (“fortuitous”); *Issendorf v. Olson*, 194 N.W.2d 750, 755 (N.D. 1972) (“The locus of the accident was fortuitous . . .”); *Woodward v. Stewart*, 243 A.2d 917, 923 (R.I. 1968) (“All the interest factors, other than the fortuitous locus of the accident, point to the application of Rhode Island law.”); *Chambers v. Dakotah Charter, Inc.*, 488 N.W.2d 63, 68 (S.D. 1992) (“It was merely fortuitous that Charlotte slipped while the bus was passing through Missouri.”); *Hataway v. McKinley*, 830 S.W.2d 53, 60 (Tenn. 1992) (“We think the fact that the injury occurred in Arkansas was merely a fortuitous circumstance, and that the State of Arkansas has no interest in applying its laws to this dispute between Tennessee residents.”); *Gutierrez v. Collins*, 583 S.W.2d 312, 317 (Tex. 1979) (explaining that the results reached by the place-of-injury rule is “often arbitrary and unjust”); *Wilcox v. Wilcox*, 133 N.W.2d 408, 416 (Wis. 1965) (describing the place of accident—Nebraska—as “fortuitous”).

76. *Babcock*, 191 N.E.2d at 285.

ground in one place rather than another.⁷⁷ In all of these cases, the state designated by the Restatement has only a single tie to the dispute.

If the single tie were more thoroughly integrated into the narrative of the dispute, it would not be “fortuitous,” but it would also not be a stand-alone trigger case. Whether the location of some occurrence is perceived as fortuitous depends somehow on whether there is a plausible reason why it happened where it did.⁷⁸ The background of a dispute is relevant to establishing whether the location of an injury is fortuitous because it is background connections between the state and the dispute that make it logical for the injury to have happened where it did instead of at another place. Rebutting the fortuity argument, accordingly, requires tying the state and the dispute together with background facts, that is, with additional connections (contacts) between the state and the dispute.

The reason that a court will perceive the trigger contact in a stand-alone trigger case as arbitrary or fortuitous is most likely the relative lack of additional connection between the trigger state and the dispute. A dispute’s connection with a state does not seem arbitrary when there is a web of other factors pointing towards and connecting to that same state, but in a stand-alone trigger case there is, by hypothesis, nothing connecting the dispute to the trigger state other than the trigger itself.

2. *Transitions in the Intervening Years*

Fact patterns such as these were enough of a challenge to conventional choice of law practice that many state courts found abandoning the First Restatement to be the best long term solution. The pattern was repeated as at least 41 states, one after another, switched to one or another of the modern approaches.⁷⁹ A comprehensive study of the transition cases in other states shows that a large majority of the states that abandoned the First Restatement to take up another theory did so in hard

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

78. *Cf. Dym v. Gordon*, 209 N.E.2d 792, 794 (N.Y. 1965). The *Dym* opinion linked this question—the existence of a reason—to the question of whether there were other background contacts between the dispute and the State of Colorado. *Id.* at 795. In *Dym*, any explanation for the injury occurring in Colorado would obviously have to be grounded in the dispute’s multiple Colorado connections—the parties’ temporary Colorado residences, the Colorado formation of the parties’ relationship, and so forth. *Id.* at 797. An explanation that made no reference to Colorado could hardly have rationalized how it was that the accident happened to take place there. With no background connection of any kind to single out Colorado, it would be no more logical for the accident to happen in Colorado than in any of the other states that had no connection to the dispute. But given the number of connections between the dispute and Colorado, it was much more likely that the injury would happen there, and thus the location of the accident was not fortuitous.

79. Brilmayer & Anglin, *supra* note 18, at 1144.

“stand-alone trigger” cases.⁸⁰ Courts, one might say, have been responding less to the inadequacies of the First Restatement than to the difficulty of applying a legal norm to a case that is loaded against territorialism and in favor of modern interest-based accounts.

Modern theories promised more rational and satisfying choice of law decisions that consistently delivered results and that, as much as possible, were faithful to the policies of the involved states. But of course, as time went on, not all of the cases that courts had to face were as easy to resolve as the ones that led them to adopt interest analysis in the first place. Once a court accomplished its switch to modern theory, the docket had to include hard as well as easy cases; judges could not simply decline to answer the hard ones. For the hard cases, setting out an alternative to traditional theory has proven to be a long, drawn out, and frustrating task. These courts have been notorious for false starts, false stops, backtracking, and dead ends.⁸¹ To this day, the New York Court of Appeals’ choice of law jurisprudence is still something of a work in progress.⁸² California has tried almost every method in the conflicts theorist’s bag of tricks, and closure is, still, out of reach.⁸³

The same issues plague the modern interest-based theories that had plagued the beleaguered First Restatement. The primary difficulty facing judges deciding cases under the interest-based theories continues to be what to do about the hard cases. For interest analysis, this means true conflicts and unprovided-for cases. These are cases where the home states of the two parties are different, and their home state laws differ as well. As to these, Brainerd Currie said that no theory on earth could resolve problems that were intrinsically unsolvable, and it was acceptable to simply throw up one’s hands and apply forum law.⁸⁴

A number of interest analysis courts, when faced with a true conflict or unprovided-for case, have found it necessary to depart from interest analysis altogether.⁸⁵ They break the tie by referring to territorial contacts (e.g. where the accident happened, where the contract was signed, etc.), despite the theorists’ conviction that such factors should not be dispositive. At least one court (New York) has started to develop rules for hard cases while continuing the interest analysis approach for the easy ones.⁸⁶

80. *Id.* at 1144–45.

81. *Id.* at 1175.

82. See *Neumeier v. Kuehner*, 286 N.E.2d 454, 457 (N.Y. 1972) (“There is . . . no reason why choice-of-law rules, more narrow than those previously devised, should not be successfully developed, in order to assure a greater degree of predictability and uniformity . . .”).

83. The comparative impairment theory is the current stop in the California courts’ search for a viable method of resolving conflicts. See *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 937 (Cal. 2006) (using comparative impairment analysis to rule that California law applied to recorded phone conversations initiated from California to Georgia).

84. CURRIE, *supra* note 39, at ch.4.

85. See, e.g., *Hurtado v. California*, 110 U.S. 516 (1884); *Bernkrant v. Fowler*, 360 P.2d 906, 910 (Cal. 1961); *People v. One 1953 Ford Victoria*, 311 P.2d 480, 482–83 (Cal. 1957).

86. *Neumeier*, 286 N.E.2d at 454 (developing rules for guest statute cases that required the law of the common domicile in false conflict cases and specified rules influenced by territorialism for true

If judges and academics had been optimistic, at the start, about the likelihood that adoption of the modern methods would constitute a permanent solution, the intervening years must have been a disappointment. In the long run, interest analysis is riddled with as many exceptions, subterfuges, and escape devices as the First Restatement.⁸⁷ And the reason is the same: the lack of flexibility of single factor approaches to choice of law.

III. THE RESTATEMENT 2D AND THE “MOST SIGNIFICANT RELATIONSHIP” TEST

That both the First Restatement and governmental interest analysis might sooner or later spell trouble seems to have been apparent to many judges. The choice of law method most popular with American state court judges, it now appears, is neither of the two, but instead the Restatement 2d of Conflict of Laws.⁸⁸ It is a lot different from either of the other two approaches, and it has a lot to recommend regarding treatment of hard cases.

The American Law Institute’s Restatement 2d was drafted around the same time as the other modern theories.⁸⁹ The essential standard for which the Restatement 2d is known is its “most significant relationship” test, based on *Auten’s* “grouping of contacts” and “center of gravity” formulae.⁹⁰ These latter two formulae were both multifactor in their orientation, as is the Restatement 2d “most significant relationship” test, which drew inspiration from them.⁹¹ The center of gravity theory should be adopted as an interpretive device for filling in conceptual gaps and resolving ambiguities in those states that have adopted the Restatement 2d. In those states that have not, the center of gravity can still function as a freestanding choice of law method should the states’ courts or legislatures become dissatisfied with their current methodology. The essential attribute that makes the Restatement 2d so attractive is that it is a multifactor theory; all possible connecting factors are taken into account. The Restatement 2d does not generate hard cases the way that the First Restatement or modern interest-based theories do. The flexibility built into the Restatement 2d avoids allowing a single contact, no matter how inconsequential or fortuitous, to dominate a case as happens under both

conflicts and unprovided-for cases); *see also* *Schultz v. Boy Scouts of Am.*, 480 N.E.2d 679 (N.Y. 1985); *cf. Padula v. Lilarn Props. Corp.*, 644 N.E.2d 1001, 1003 (N.Y. 1994) (reserving common domicile principle for loss allocating and not conduct regulating substantive laws).

87. BRILMAYER, CONFLICT OF LAWS, *supra* note 20, at 177–297 (treating the “escape devices” used by judges to avoid applying the First Restatement).

88. Brilmayer & Anglin, *supra* note 18, at 1167; *see also* Symeon C. Symeonides, *Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey*, 62 AM. J. COMP. L. 223 (2014).

89. *See Publications Catalog*, AM. L. INST., http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=27 (last visited Apr. 4, 2015).

90. Sonja M. Haller, Note, *Ohio Choice-of-Law Rules: A Guide to the Labyrinth*, 44 OHIO ST. L.J. 239, 256 n.158 (1983).

91. *See* Jean F. Rydstrom, Annotation, *Modern Status of Rule That Substantive Rights of Parties to a Tort Action are Governed by the Law and the Place of the Wrong*, 29 A.L.R.3d 603 (1970).

the First Restatement and interest analysis. This flexibility explains, at least in part, its attraction for American judges.

A. *The Origin of the “Most Significant Relationship” Test*

The Restatement 2d grew originally out of the same New York Court of Appeal cases that inspired governmental interest analysis. These earliest New York cases signaling dissatisfaction with the First Restatement, in particular *Auten v. Auten*, were tremendously influential in the Restatement 2d’s drafting.⁹² “Center of gravity” and “grouping of contacts” were described as a continuation of earlier New York precedents that called for application of the law of the state that “has the most significant contacts with the matter in dispute.”⁹³

Although perhaps possessing antecedents in New York case law, the distinctive character of the “grouping of contacts”/“center of gravity” approach was evident from the start. Judge Fuld wrote of its virtues in *Auten*,

Although this ‘grouping of contacts’ theory may, perhaps, afford less certainty and predictability than the rigid general rules, the merit of its approach is that it gives to the place ‘having the most interest in the problem’ 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 with the outcome of [the] litigation.’⁹⁴

Even though the opinion included language concerning interests, its “center of gravity”/“grouping of contacts” approach was fundamentally different from interest analysis. When alluding to interests, the “center of gravity” approach still requires taking all of the contacts into account,⁹⁵ in

92. Patrick J. Borchers, *New York Choice of Law: Weaving the Tangled Strands*, 57 ALB. L. REV. 93, 98 (1993).

93. *Auten v. Auten*, 124 N.E.2d 99, 102 (N.Y. 1954) (quoting *Rubin v. Irving Trust Co.*, 113 N.E.2d 424, 431 (N.Y. 1953)). Also playing a prominent role in the opinion were “significant contacts” and “relative interests of the several jurisdictions involved”; and the court described England as “the jurisdiction most intimately concerned with the outcome of [the] particular litigation.” *Id.* at 161.

94. *Id.*

95. This much was clear to Brainerd Currie, who found this a weakness of the approach; other authors likewise have complained that the method treated all contacts as potentially of equal interest. Currie complained that the method took all manner of factors into account rather than narrowing down the list—one contact was “about as good as another”: “The ‘grouping of contacts’ theory provides no standard for determining what ‘contacts’ are significant, nor for appraising the relative significance of the respective groups of ‘contacts’ The process of ‘grouping contacts’ . . . deals in broad generalities about the ‘interest’ of a state in applying its law without inquiry into how the ‘contacts’ in question relate to the policies expressed in specific laws. One ‘contact’ seems to be about as good as another for almost any purpose.” Brainerd Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, 39–40 (1963); see also William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417, 423 n.32 (2000) (“[The grouping-of-contacts approach] offers no way of measuring the significance of contacts, and, without a measure of significance, the center of gravity system amounts to little more than contact counting.”) (citing Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 BUFF. L. REV. 329, 359–61 (1997)). Currie objected to the air of confident objectivity that the enterprise projected, by comparing the grouping-of-contacts approach to the place-of-injury rule.

contrast to the practice of the interest based choice of law approaches. The metaphors of grouping contacts and finding the center of gravity both evoke weighing and balancing and not strict jurisdiction-selecting rules. The importance of these two concepts lies in the flexibility that they convey to avoid the sort of counterintuitive results that both the First Restatement and interest analysis produce in hard cases. As will be shown below, the Restatement 2d is a multifactor and not a single factor theory, a characteristic that it shares with the “grouping of contacts”/“center of gravity” approach that informed cases like *Auten v. Auten*.⁹⁶

B. Understanding the Restatement 2d

The Restatement 2d was drafted in an academic environment largely hostile to the First Restatement’s jurisdiction-selecting rules.⁹⁷ From the very start, it must have been clear that the First Restatement’s rigidity was largely what did it in. To some, the flexibility deliberately built into the Restatement 2d has been its chief attraction; to its detractors, however, that flexibility is the Restatement 2d’s chief liability.⁹⁸ What is uncontested is that it preserves for the judge a much greater degree of discretion than other theories—modern or traditional—ever did.⁹⁹

1. The Restatement 2d in Action

The Restatement 2d provision for flexibility is found in the interplay between presumptive jurisdiction-selecting rules and open-ended exceptions. It allows sufficient discretion for a judge to be able to avoid illogical or perverse outcomes, while containing sufficient guidance to ensure a certain degree of predictability and certainty. It is a multifactor method, which has the potential to resolve hard cases better than a single factor would, and it deserves the level of acceptance it has received by American judges.

The Restatement 2d has a three-tiered approach, with three different types of norms.¹⁰⁰ The most general of these, which has been called

96. See *Auten*, 124 N.E.2d at 101.

97. See, e.g., Brainerd Currie, *The Disinterested Third State*, 28 L. & CONTEMP. PROBS. 754, 754 (1963) (describing Walter Wheeler Cook’s protest against the adoption of the First Restatement, led by Beale); Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 268 (1966) (describing the First Restatement as being motivated by “the urge for mechanical simplicity”); see also WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 344 (1942); CURRIE, *supra* note 39, at 613; Cavers, *supra* note 36, at 208 n. 59; Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 736 (1924); Hessel E. Yntema, *The Restatement of the Law of Conflict of Laws*, 36 COLUM. L. REV. 183, 183 (1936).

98. See Currie, *supra* note 97, at 754.

99. See CURRIE, *supra* note 39, at 615.

100. Richman & Reynolds, *supra* note 95, at 420 (“Three basic elements define the choice-of-law approach of the *Second Restatement*: (a) section 6 and the most significant relationship, (b) a few grouping-of-contacts sections, and (c) numerous sections that provide choice-of-law rules for specific legal claims and issues.”).

the “intellectual heart of the Second Restatement” is Section 6.¹⁰¹ Section 6, commonly referred to as the “most significant relationship” test, sets out the basic principles for choice of law decision making.¹⁰² The considerations listed in Section 6 include general desiderata such as promoting uniformity and predictability, simplification of the judicial task, and respect for substantive policies (among other things).¹⁰³ At the second level, the Restatement 2d lays out the basic principles for deciding choice of law questions in broad general substantive areas, such as torts (Section 145)¹⁰⁴ and contracts (Section 188).¹⁰⁵ Section 145 and Section 188,¹⁰⁶ respectively, provide:

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 § 6.¹⁰⁷

101. *Id.*; see also *id.* at 424 (“Thus, whether it uses the specific sections or the general grouping-of-contacts sections, eventually the court will need to apply the section 6(2) factors.”).

102. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

103. *Id.* § 6.

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

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

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

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

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

Id. (emphasis added).

105. Section 188 has a rebuttable presumption like those found in the Restatement’s most specific provisions:

(3) Section 188 also contains a rebuttable presumption of the sort that is contained in the most specific Restatement provisions. *Id.* § 188. (“If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189–199 and 203.”).

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

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

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

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

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

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

Id. § 188 (emphasis added).

107. *Id.* § 145(1).

The rights and liabilities of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.¹⁰⁸

Both of these sections list what the relevant contacts might be for that area of law. In both the tort¹⁰⁹ and contract¹¹⁰ contexts, the Restatement instructs that “[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue” and with due regard to the principles of Section 6.¹¹¹ The Restatement 2d lists of contacts provide the outer bounds of Section 6 analysis.¹¹² At the third tier of the analysis, the Restatement 2d provides rebuttable presumptions for cases involving certain recurrent fact patterns.¹¹³ Section 148, for example, addresses the torts of fraud and misrepresentation, providing that where the defendant’s actions and the plaintiff’s reliance took place in the same state, that state’s laws will apply “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”¹¹⁴ Section 192, similarly, addresses life insurance contracts, setting out a rebuttable presumption of applying the law of the state where the purchaser was domiciled when the policy was purchased.¹¹⁵ Although different verbal formulations are used to create the presumption in different subsections, the

108. Section 188 employs similar language: “The rights and duties of the parties with respect to an issue in contract are determined by the local law of *the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.*” *Id.* § 188(1) (emphasis added).

109. *See id.* § 145. The judge is instructed to take into account the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile, residence, nationality, place of incorporation, place of business of the parties, and the place where the relationship, if any, between the parties is centered. *Id.* § 145(2).

110. *See id.* § 188(2). The contacts for contract cases include: the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation, and place of business of the parties. *Id.*

111. *Id.* §§ 145(2), 188(2).

112. Thanks to Erin O’Hara O’Connor for drawing my attention to this point.

113. *See, e.g.,* RESTATEMENT, *supra* note 102, § 154 (addressing “Interference with Marriage Relationship[s]”) (“The local law of the state where the conduct complained of principally occurred determines the liability of one who interferes with a marriage relationship, unless, *with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.*”) (emphasis added).

114. *Id.* § 148 (“When the plaintiff has suffered pecuniary harm on account of his reliance on the defendant’s false representations and when the plaintiff’s action in reliance took place in the state where the false representations were made and received, the local law of this state determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.”).

115. *Id.* § 192 (“The validity of a life insurance contract issued to the insured upon his application and the rights created thereby are determined, in the absence of an effective choice of law by the insured in his application, by the local law of the state where the insured was domiciled at the time the policy was applied for, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.”).

important point is that even though generally reliable, absent unusual circumstances, the norm is not a rigid rule.¹¹⁶ The designated contact, generally but not universally applicable to identify the applicable state law, might be called a “soft trigger” to indicate that it is rebuttable.

These specific subsections seem at first to be problematic in their relationship to the other, more general, provisions. They designate a contact that presumptively, or “usually,” will indicate the state with the “most significant relationship.”¹¹⁷ But then they specify that an exception exists to that presumptive answer for cases in which some other state “has a more significant relationship.”¹¹⁸ That is to say, a particular state is the state of most significant relationship unless some other state has a more significant relationship. This seems extraordinarily unhelpful, critics have pointed out, if not in fact vacuous.¹¹⁹ This argument misunderstands the relationship between the more specific subsections and the more general ones. The exceptions provision in Section 192 is not designed to identify the applicable law, other than by confirming that the principle broadly applicable to contracts cases (Section 188) provides the answer. The provision instead simply indicates that there may be circumstances where the domicile of the beneficiary is *not* the state of the most significant relationship. And it is entirely possible to decide that the presumptive answer (domicile at the time of purchase) is not the state of the most significant relationship, even when it is not yet decided which state *is* the state of the most significant relationship. If no other factors point to the same state as the domicile at the time of purchase—it is a stand-alone trigger case—and all the other factors point to a single other state, then one can easily conclude that the purchaser’s domicile at the time of purchase is not the state of the most significant relationship. The wording of Section 192 approves the choice of the alternative state, to which all the other contacts point.¹²⁰

To illustrate, consider once more the case of *Lilienthal v. Kaufman*.¹²¹ Under the Restatement 2d, the spendthrift’s capacity to contract would be determined by Section 198, “Capacity to Contract.”¹²² That section creates a rebuttable presumption that the applicable law will “usually” be the domicile of the person whose capacity has been challenged.¹²³ Under interest analysis, the contract was considered unenforceable be-

116. See e.g., *id.* § 198 (“[C]apacity of a party to contract will *usually* be upheld if he has such capacity under the local law of the state of his domicil.”) (emphasis added).

117. See *id.* §§ 145(1), 188(1).

118. See, e.g., *id.* §§ 148, 192.

119. Cf. Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L.J. 475 (2000).

120. RESTATEMENT, *supra* note 102, § 192.

121. 395 P.2d 543 (Or. 1964) (en banc).

122. RESTATEMENT, *supra* note 102, § 198 (“Capacity To Contract: (1) The capacity of the parties to contract is determined by the law selected by application of the rules of §§ 187–188. (2) The capacity of a party to contract will usually be upheld if he has such capacity under the local law of the state of his domicil.”).

123. *Id.* § 198(2).

cause Oregon had an interest in protecting the spendthrift and his family, and because the case was brought in Oregon court.¹²⁴ Under the Restatement 2d, however, the presumption of Oregon law would probably be rebutted by the overall weight of the contacts pointing towards California. *Lilienthal*, quite plausibly, is a good candidate for rebuttal of the assumption that capacity is “usually” dependent on the law of the domicile. It is a stand-alone trigger case, with only one state (Oregon, the place of the spendthrift’s domicile) pointing toward invalidation of the security interest and all the others pointing towards California (which would have enforced the agreement).

The fact that the exception is phrased in terms of the “most significant relationship” test is not problematic. Although the exceptions provision does not define what counts as sufficient to rebut the presumption, or give precise instructions about how the “most significant relationship” should be determined, it is helpful in other respects. Not only does it underscore that the spendthrift’s domicile is not necessarily the place of most significant relationship, it also distributes the burden of proof, placing that burden on the party wishing to avoid the presumption’s effect. The general import of this way of structuring Section 198 is that, in a close case, the designated contact ought to be followed. If the contacts were distributed evenly between the two states whose law might apply, or if all the contacts other than the trigger were dispersed among several different states, some with substantive law resembling Oregon’s and some not, then the presumption would not be rebutted. But in hard cases, the presumption will probably not apply because the very thing that makes it a hard case—the fact that a state other than the designated trigger has a great deal more connection—is enough to rebut the generalization.

This is sufficient flexibility to avoid obviously unsuitable resolution of hard cases. In *Lilienthal*, the designated trigger was the spendthrift’s domicile—Oregon—but every other connection pointed towards California.¹²⁵ One does not need a complete and detailed definition of “most significant relationship” in spendthrift trust cases to see that the Oregon contacts are dominated by the California contacts. And for this reason, it is possible to declare the presumption rebutted even without knowing what should be done in other, more nearly balanced, cases. As the process works itself out in hard cases, the exceptions provision applies to rebut the usually applicable law only where it is clear that the weight of the contacts points unambiguously to another state.

124. *Lilienthal*, 395 P.2d at 549; see also RESTATEMENT, *supra* note 102, § 198.

125. *Lilienthal*, 395 P.2d at 546.

2. *The Most Significant Relationship: Multifactor or Single Factor Approach?*

The conceptual apparatus that the Restatement 2d creates is multifactor in orientation, and therefore significantly different from either the traditional vested rights or the interest analysis methods of choosing the applicable law. Although some parts of it seem to support a single factor interpretation, at the end of the day, application of the Restatement 2d does not amount to the search for a single right answer—one contact that acts as the trigger—but a contextual assessment that takes into account a whole set of considerations that define the particular dispute.

The difference between multifactor and single factor choice of law approaches is fundamental to what the choice of law process is all about. Single factor approaches designate the applicable law by identifying one dominant contact as the “trigger.”¹²⁶ Whether framed in terms of vested rights or governmental interests, choice of law methods other than the Restatement 2d do not attach importance to how *much* contact overall the state has with the events in question; what matters is only whether a particular state displays the *right* contact, the trigger.¹²⁷ The conventional choice of law processes are designed to differentiate the single relevant connecting factor—the trigger—from the other, irrelevant, contacts.¹²⁸ Most of the analysis (and much of the disagreement among the choice of law scholars) deals with which contact that should be.¹²⁹

Textual analysis of the three levels of norms uncovers reasons to treat the Restatement 2d as a multifactor approach. Consider the phrasing of Section 6, the “most significant relationship” test. Some academic writers rephrase the Section 6 test as “most significant contact” instead of “most significant relationship.”¹³⁰ The use of the word “contact,” in the singular, suggests that the Restatement 2d requires designation of a single contact for a particular issue; this would make the Restatement 2d a single factor theory. However, the “contact” formula does not appear in the Restatement 2d’s text; the verbal shorthand actually employed in the Restatement 2d is “most significant relationship.”¹³¹ The use of the word “relationship” leaves open the possibility that the relationship in question is between a state and the case as a whole (making it a multifactor theory) rather than between a state and a single contact (as in a single factor theory).

When put together with the framing of the generalized tort and contracts sections (Sections 145 and 188), the phrasing of Section 6 supports

126. Brilmayer & Anglin, *supra* note 18, at 1127.

127. *Id.* at 1128.

128. *Id.* at 1127.

129. *See e.g., id.*

130. Professor Weinberg apparently adopts this position, referring to the Restatement 2d as imposing a “most significant *contact*” test. Weinberg, *supra* note 119, at 479 (referring to the Restatement 2d’s master rule as “the law of the place of ‘most significant contact’”); *see also id.* at 479–80 (“Courts are told to go to the ‘place of most significant contact,’ but where is that place?”).

131. RESTATEMENT, *supra* note 102, § 6 cmt.c.

the assumption that the Restatement drafters envisioned a multifactor approach. Both of these sections list a range of contacts that ought to be considered in deciding which state has the most significant relationship. Section 188 (for contracts) lists more than a half dozen contacts to take into account.¹³² In Section 145 (for torts), analogously, the judge is instructed to take into account even more.¹³³ The only part of the Restatement 2d that would arguably support a single factor interpretation is the most specific sections, such as Sections 148 and 192 (the tort of fraud and contracts disputes about life insurance, respectively).¹³⁴ These are drafted so as to resemble the First Restatement's jurisdiction-selecting rules, and seem to identify a single connecting factor as determinative of choice of law. But as we have seen, these are merely presumptions; in order to determine whether the presumption is rebutted, it is necessary to consider the contours of the dispute as a whole. Determining whether the presumption has been rebutted requires examining factors other than the trigger.

The Restatement 2d was deliberately drafted not to operate by identifying a single relevant factor.¹³⁵ There is no single trigger contact, such as the place of acceptance of the contract or the place where the injury manifested itself, that reliably identifies the applicable law. The object of the choice of law process is not which single contact is the one that matters, but rather what is the overall distribution of contacts among the involved states such that the state with the closest relationship to the particular issue in the dispute at hand can be identified. The point of the "center of gravity" approach is that the applicable law should be the one that matches, to the greatest degree possible, the body of the contacts as a whole. The metaphors of "grouping of contacts" and "center of gravity" suggest that the determinative consideration is how well the contact pointing toward a particular state's law represents or typifies the overall distribution of activities in a dispute.

3. *Some Guidelines for Application*

This is not the place to announce a complete and thoroughly argued account of what a multifactor approach would look like. But there are several obvious questions that need to be addressed in order to establish the credentials of the "center of gravity" approach.

The first of these is: How do we put it to use? There are at least three answers to this question. First, the notion of "center of gravity" has

132. These are: the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation, and place of business of the parties. *Id.* § 188(2).

133. These are: the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile, residence, nationality, place of incorporation, place of business of the parties, and the place where the relationship, if any, between the parties is centered. *Id.* § 145(2).

134. See, e.g., *id.* § 148; *id.* § 192.

135. See Brilmayer & Anglin, *supra* note 18, at 1165.

metaphorical value; it illustrates the conceptual possibility of multifactor choice of law approaches. The concept seems to have been used this way in the early transition cases (e.g. *Auten*). Since we are accustomed to thinking in single factor terms—the most familiar theories being single factor—this metaphor has a utility of its own.

Second, the concept of “center of gravity” could be useful as a free standing choice of law approach. In that sense, it would be on a parallel with other choice of law theories such as comparative impairment, better law, and (most importantly) governmental interest analysis. To be used this way, the center of gravity approach would have to be fleshed out by academics and judges—as it currently stands, there is almost no meat on the bones.

Third, and probably most useful, the center of gravity theory could be used as an interpretive device to inform those academics and judges who find themselves charged with applying the Restatement 2d. We have already seen several places where the Restatement 2d intersects with the concept of “center of gravity.” This is not surprising, considering the role that the concept played in the Restatement 2d’s historical development. The phrase “most significant relationship,” for example, is never defined precisely in the Restatement 2d’s text; “center of gravity” can operate as an interpretive tool, explaining how the various tiers of analysis fit together and how the Restatement 2d’s presumptions are to be applied.

The next obvious question is more practical. How is the center of gravity to be determined? It is all well and good to say that the entire context of the dispute should be taken into account, rather than simply one jurisdiction-selecting contact, but *how*? In particular, should a judge simply count up the number of contacts that each state has with the dispute, or should the contacts be weighted to reflect their importance to the choice of law issue? It seems that the various contacts ought to have influence on the result only to the extent that they are important to the dispute; trivial contacts should receive less weight than contacts that are central to the policies implicated by the various contending laws. But of course this increases the complexity of the enterprise tremendously, perhaps to the point of unworkability.

And how is the list of relevant contacts to be formulated? If “center of gravity” is seen primarily as an adjunct to the Restatement 2d, then this problem has a relatively straightforward solution. Sections 145 and 188 contain lists of the relevant contacts for torts and contracts, respectively.¹³⁶ How this task would be accomplished outside of the Restatement 2d—as a freestanding choice of law method—is much less clear.

On the one hand, the list should be expansive enough to include everything that is relevant to the dispute. On the other hand, one need not, and should not, factor in irrelevant contacts, such as the state where

136. See *supra* notes 106–09 and accompanying text.

the defendant's attorney went to high school, or the state in which the plaintiff's daughter went on vacation last summer. But these factors are obvious. What should be done about after-acquired domicile? Does the plaintiff's current residence count as having contacts with the dispute if the plaintiff moved there after the accident happened but before suit was filed? And what about contacts that significantly overlap one another; should the plaintiff's domicile and her residence both be counted towards the overall weight, or are they so similar that this amounts to unacceptable double counting? What standards should be used to address these questions?¹³⁷

IV. CONCLUSION

Single factor approaches have certain attractions, perhaps the greatest being simplicity and predictability (relatively speaking). Choice of law requires the making of a choice between laws—of deciding to apply one law and not the other—which, in turn, would reasonably seem to require making a decision about which state's connection with the issue is in some way more important. This means a choice between the various factors that connect the dispute to the particular states that those laws come from. This, in turn, seems to require a theory explaining the greater importance, *per se*, of one certain factor in comparison to others.

The claim that contextual analysis is necessary to increase the flexibility of rigid rules is likely to prove controversial. But holistic methodologies exist elsewhere in the conflict of laws. The minimum contacts test for personal jurisdiction, which has some parallels to choice of law, is one context where multifactor reasoning predominates.¹³⁸ The determination whether personal jurisdiction exists does not require exclusive focus on the single most important contact. A single contact can in theory be enough, but jurisdiction is more frequently based on a variety of contacts. The plaintiff aggregates all of the defendant's contacts with the state and uses the resulting accumulation to argue that jurisdiction is not fundamentally unfair. The same sort of aggregation could be employed in choice of law, but it is not.

Proponents of interest analysis erred in seizing upon these transitions as an opportunity to claim victory for interest analysis. The consequence was simply to impose a system that was just as likely to produce implausible results as the First Restatement. It should have been quite predictable, even from shortly after Currie began to publish his ideas, that the tables would eventually be turned on interest analysis.

The choice of law revolution was set in motion in the courts when cases began to arise that could not be resolved within the First Restate-

137. This question is addressed in Lea Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315 (1981).

138. Lea Brilmayer, *How Contacts Count: Due Process Limitations on the State Court Jurisdiction*, 1980 SUP. CT. REV. 77.

ment's single factor methodology. But it is a mistake to see this as a victory for the so-called "modern" choice of law approaches. They, also, are challenged by the problem of single factor theory and the stand-alone trigger. The courts and theorists ought to consider moving to a method that takes account of weight, number, and interrelationships of contacts, rather than a deeply problematic insistence that choice of law process can be reduced to the identification of one talismanic factor that identifies the applicable law.