BIG CONFLICTS LITTLE CONFLICTS

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ABSTRACT

Choice-of-law doctrine today increasingly presents two distinct faces. When it comes to garden-variety tort and contract cases, conflicts doctrine often produces uncontroversial results with surprisingly little drama. In more complicated litigation, however, the picture is starkly different. It is fair to say that choice-of-law issues represent perhaps the most serious obstacle to consolidating complex cases. Further, conflicts issues even in simpler cases have proven deeply problematic when they implicate not just the interests of individuals, but larger questions about the proper allocation of state power.

What accounts for the divergent performance of conflicts doctrine in, on the one hand, small-scale litigation and, on the other, litigation that affects more people or raises broader policy concerns? This Article argues that domestic U.S. choice-of-law doctrines serve two distinct functions, and are generally better at the former than the latter. The first of these is the negotiation of "little conflicts"—small-scale litigation that incidentally involves multistate contacts, in which courts must choose between two or more state rules that govern issues such as who may recover or what categories of damages are available. In these cases, the choice of decisional rule to apply, while obviously consequential to the litigants involved, rarely involves a genuine clash of interests between jurisdictions. This is true both because such rules generally do not reflect strongly held policy preferences on the part of a particular state and because—even to the extent that they do—those preferences cannot be effectuated in any meaningful way through individual litigation. In part because modern conflicts doctrines were developed to tackle such conflicts, they generally do a serviceable job of resolving them.

A second category of cases, however, involves "big conflicts"—cases in which a choice between two rules means favoring one state's policy agenda over another state's, or establishing a regulatory standard that will affect large numbers of people. Paradigmatic big conflicts include cases involving

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privacy regulation and the enforceability of noncompete agreements. Big conflicts also sometimes surface in class actions or other complex litigation, where the sheer number of parties may magnify an otherwise inconsequential difference between jurisdictions. In such cases, the court's decision about which rule to apply does not merely affect individual litigants; it also has implications for the territorial scope in which a given state's law can operate and the degree to which states can pursue their policy goals. Such cases, therefore, require courts to consider larger issues of comity, federalism, and the permissible extraterritorial reach of state law.

Conflicts doctrine has failed, however, to recognize the difference between little conflicts and big conflicts, leading to two undesirable results. First, courts have sometimes failed to recognize that some complex cases nonetheless present only little conflicts, thus resulting in needlessly complicated choice-of-law decisions that could be simplified. At the same time, however, courts have lacked guidance in identifying and analyzing genuinely big conflicts—situations, that is, that raise genuine extraterritoriality and comity concerns. This Article thus argues that disaggregating conflicts doctrine's procedural and comity/extraterritoriality functions will help courts better serve both aims in making conflicts decisions. It then goes on to suggest different principles that should guide courts' decision-making depending on whether the conflict in question is a big or little one.

INTRODUCTION

Choice-of-law doctrine today often seems to present two distinct faces. When it comes to garden-variety tort and contract litigation, academic discourse about choice of law sometimes seems to embody Warren Buffett's famous quip, "Well, it may be all right in practice, but it will never work in theory."[1] For many years, the scholarly consensus has been that choice-of-law doctrine is an unsalvageable mess, as reflected in influential articles with

1. Letter from Warren Buffet, Berkshire Hathaway's Chairman, to Shareholders, at ¶ 84 (1984), http://www.berkshirehathaway.com/letters/1984.html. For an understanding of why this remark might characterize choice-of-law discussion, see Frederick K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105, 105–06 (1989) ("Unlike their colleagues in other fields of law, conflicts teachers are apparently more concerned about the method than the results it produces."). *But see* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. Rev. 547, 553–54 (1996) [hereinafter Kramer, *Complex Litigation*] ("[C]onflicts scholars don't fight bitterly about the differences among approaches because we disagree about their aesthetic qualities. We fight because the differences matter in terms of outcomes.").

titles like "Rethinking Choice of Law"[2] and "The Myth of Choice of Law"[3] and characterizations of the conflicts field as a "swamp"[4] or "mush."[5] Yet despite the barrage of criticism, academics have recently begun to notice that conflicts doctrine produces surprisingly uncontroversial results in a great deal of day-to-day litigation.[6]

True, things are not perfect, particularly when one assesses conflicts cases from the standpoint of doctrinal coherence. State courts employ a bewilderingly diverse array of conflicts methodologies,[7] misunderstand completely what Brainerd Currie meant by a "state interest,"[8] and usually fall back on forum law in a pinch.[9] Yet when one considers whether courts are doing a serviceable job of dispensing justice on the choice-of-law issues before them, the picture looks much more positive. Symeon C. Symeonides's careful surveys of state-court practice provide strong evidence that, once one strips their opinions of doctrinal apparatus, state courts making choice-of-law decisions frequently see common conflicts fact patterns through the same

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2. *See* Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990).

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

4. *See* Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1845 (2006).

5. *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 253 (1992).

6. *See, e.g.*, Kermit Roosevelt III, *Brainerd Currie's Contribution to Choice of Law: Looking Back, Looking Forward*, 65 MERCER L. REV. 501, 519–20 (2014) (expressing optimism that "things will get simpler and easier" in choice of law as states are swayed by some of Currie's insights); Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 764–78 (2009) (presenting evidence from transnational tort litigation suggesting that choice-of-law decisions overall are unbiased, guided by choice-of-law principles, and "quite predictable"); *see also* Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 952 (1994) (arguing that judges properly focus on "substantive results in the cases before them" when making choice-of-law decisions).

7. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey*, 62 AM. J. COMP. L. 223, 282 (2014) [hereinafter Symeonides, *Survey*] (cataloguing seven categories of approaches used by states, some of which encompass multiple methods).

8. *See, e.g.*, Bruce Posnak, *Choice of Law—Interest Analysis: They Still Don't Get It*, 40 WAYNE L. REV. 1121, 1223 (1994) (devoted to the titular proposition, and contending that "the contagion of misunderstanding [of interest analysis] has affected courts and practitioners as well [as scholars].").

9. *See* Katherine Florey, *Bridging the Divide: The Case for Harmonizing State and Federal Extraterritoriality Principles After* Morrison *and* Kiobel, 27 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 197, 198 (2014) [hereinafter Florey, *Divide*] ("[A]lthough choice-of-law methodologies vary from state to state, many states have explicit preferences for forum law in close cases."); *see also* Juenger, *supra* note 1, at 112 ("In practice, interest analysis amounts to little more than a longwinded pretext for the refusal to apply foreign law.").

lens.[10] Many courts, that is, regardless of the methodology they ostensibly apply, will reach more-or-less similar results in similar cases, such as applying the law of the parties' domicile in a loss-allocation case in which the parties are from the same state.[11] Further, despite broad differences in methodology, surprising consensus exists among states on certain conflicts rules; most states, for example, enforce contractual choice-of-law provisions absent unusual circumstances.[12] The result is that, in a substantial though often unnoticed swath of cases, courts resolve conflicts issues without much drama. Indeed, a recent empirical study of choice-of-law in the transnational context found courts' decision-making to be generally free of bias and predictable, suggesting that "conventional wisdom exaggerates what is wrong with choice of law and underestimates its positive contributions to global governance."[13]

This relatively smooth resolution of conflicts problems in small-scale cases is (as previous commentators have noticed[14]) of interest in its own right. But it is particularly striking when contrasted to the starkly different picture that choice-of-law presents in complex litigation, including class actions, multi-district litigation (MDL), and mass tort cases involving the joinder of numerous parties. It is fair to say that choice-of-law issues represent one of the most serious obstacles—if not *the* most serious—to consolidating cases, even where joinder might otherwise serve the interests of efficiency and justice. Choice-of-law problems have played a significant role in rolling back the national mass-tort class action,[15] and threaten to do the same in

10. *See, e.g.*, Symeon C. Symeonides, *The American Choice-of-Law Revolution in the Courts: Past, Present, and Future*, HAGUE ACAD. INT'L L. 1, 37–62 (2006); *see also* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 540 (2006) ("[E]ven today, we can identify some harmonies within these [state choice-of-law] approaches.").

11. *See* Symeon C. Symeonides, *Oregon's New Choice-of-Law Codification for Tort Conflicts: An Exegesis*, 88 OR. L. REV. 963, 1001–07 (2009) (explaining that "the notion of applying the law of the parties' common domicile to certain torts committed entirely in another state has steadily gained ground—so much so that one can speak of the emergence of a true common-domicile rule," at least where loss-allocating decisional rules are involved). Of course, other recurring conflicts situations are less easily resolved, and different methodologies (and different judges) produce differing results.

12. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 AM. J. COMP. L. 217, 241 (2013) [hereinafter Symeonides, *Choice of Law 2012*] ("[I]n the vast majority of cases, American courts uphold choice-of-law clauses.").

13. *See* Whytock, *supra* note 6, at 723.

14. *See, e.g.*, Sterk, *supra* note 6, at 952; Whytock, *supra* note 6, at 723.

15. *See* Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 761 ("[C]hoice of law has presented a seemingly intractable problem for the nationwide, diversity-based, mass-tort class action."); Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001,

undermining the usefulness of MDL.[16] Further, even when choice-of-law issues do not interfere with aggregation, they pose fiendishly difficult problems of administration for judges, who sometimes stretch choice-of-law doctrine almost to the breaking point to avoid the unmanageable complexity that might otherwise result.[17]

In addition, a subset of cases involving individual litigants has proven persistently problematic notwithstanding its lack of procedural complexity. This category encompasses cases that implicate not just the interests of individuals, but larger questions about the proper allocation of state power. If a Georgia company, for example, records the telephone conversations of Californians in compliance with Georgia law but in violation of a California statute, has it or has it not done anything illegal?[18] If a worker leaves the employment of Company A, located in a state where noncompete agreements are legal, to telecommute to Company B, based in a state where such agreements are void, is Company A's noncompete clause enforceable?[19] Where conflicts cases raise questions transcending individual justice, courts often lack the doctrinal tools to approach them. The resulting uncertainty can create much deeper problems, including interstate (and international) tensions and unpredictability for people and corporations wishing to conform their conduct to the governing law.

What accounts for the divergent performance of conflicts doctrine in, on the one hand, small-scale litigation and, on the other, litigation that affects more people or raises broader policy concerns? This Article will argue that domestic U.S. choice-of-law doctrines serve two distinct functions—resolving "little conflicts" and resolving "big conflicts"—and are, in general, better adapted to the first task than the second. "Little conflicts" are the choice-of-law problems that arise in relatively small-scale litigation

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2002 (2008) (explaining that "choice of law has emerged as such a critical issue in the modern class action setting").

16. *See* Bradt, *supra* note 15, at 763 ("[T]he growth of MDL [as an alternative to class actions] is not a panacea for those concerned with choice of law—rather, it presents problems of its own.").

17. *See* Kramer, *Complex Litigation*, *supra* note 1, at 553–54 (noting that while he does not "want to appear jaded," the uniform results in multidistrict litigation applying ostensibly distinct choice-of-law approaches is an "astonishing coincidence" that smacks of judicial manipulation); Silberman, *supra* note 15, at 2011–14 (describing ways in which courts have applied questionable choice-of-law analysis to avoid undue complexity in complex cases).

18. *See* Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 917–18 (Cal. 2006).

19. *See* Application Grp., Inc. v. Hunter Grp., Inc., 72 Cal. Rptr. 2d 73, 76–77 (Ct. App. 1998) (finding unenforceable a noncompete agreement between a company incorporated and headquartered in Maryland and its Maryland-based employee, despite the fact that the agreement specified that it would be governed by Maryland law).

involving a minor difference between state rules—for example, differences on issues such as who may recover or what categories of damages are available. In these cases, the choice of which decisional rule to apply, while obviously consequential to the litigants involved, rarely involves a genuine clash of interests between jurisdictions. This is true in part because such rules generally do not reflect strongly held policy preferences on the part of a particular state. But even more important, little conflicts are "little" because—even to the extent that they do embody important state choices—those preferences cannot be effectuated in any meaningful way through individual litigation.[20] In such little conflicts, therefore, courts' conflicts decision-making should be guided by fundamentally *procedural* goals: choosing a rule in a way that appears fair and non-arbitrary to litigants, that does not subvert parties' reasonable expectations, and that discourages forum-shopping.

Existing conflicts principles often do a serviceable job of resolving such cases because—for various historical and doctrinal reasons this Article will discuss[21]—they generally serve such procedural goals at least moderately well. Thus, while not every little conflict has a clear or obvious resolution, many do.[22] Indeed, perhaps the most substantial problem that little conflicts cases create is that courts fail to recognize them for what they are. Particularly when little conflicts are embedded in procedurally complex cases, courts sometimes overstate their broader significance, thus needlessly complicating their resolution.[23]

By contrast, choice-of-law issues that resonate beyond the immediate parties to a case, because they concern the general public or the balance of power among governments, constitute "big conflicts."[24] A common type of big conflict is a case in which a choice between two rules means favoring one

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20. I will explore this issue in more depth in Section I.A. *infra*, but in brief, this remark describes scenarios in which individual lawsuits are too infrequent or haphazard to serve as meaningful tools for implementing policy.

21. *See infra* Section I.B.1.

22. *See supra* notes 11–13.

23. *See infra* Section III.A.

24. In *The Public-Private Distinction in the Conflict of Laws*, 18 DUKE J. COMP. & INT'L L. 371, 372 (2008), William S. Dodge notes a related distinction between foreign public law (such as antitrust) and foreign private law (such as tort law) that courts observe in some contexts. Professor Dodge argues that, in cases involving private rather than governmental plaintiffs, courts should treat private and public law similarly. *Id.* at 393. Although Professor Dodge's divide between private and public law maps imprecisely to the state conflicts context, where such a distinction is not formally observed, his argument that foreign public law should sometimes apply in U.S. courts is consistent with the position of this Article, particularly as it concerns the resolution of what I have called Category A conflicts. *See infra* Section I.B.1.

state's policy agenda over another state's, such as the issues of privacy regulation and noncompete agreements described above. Big conflicts may also sometimes surface in class actions or other complex litigation, in which the sheer number of parties may elevate in importance an otherwise insignificant difference between various jurisdictions' law.[25] In such cases, the court's decision about which rule to apply does not merely affect individual litigants; it also has implications for the territorial scope in which a given state's law can operate and the degree to which states can pursue their policy goals. While big conflicts manifest themselves in many ways, such conflicts are alike in that they require courts to consider larger issues of comity, federalism, and the permissible extraterritorial reach of state law—questions with which current doctrine is not particularly well-equipped to grapple.

These two categories, of course, represent more a continuum than an absolute divide. Some cases will involve bigger conflicts than others. But the distinction remains a meaningful one, and delineating it, even in rough fashion, has the potential to aid courts' current conflicts practice in two important ways.

First, drawing the distinction may help courts to better resolve choice-of-law problems in litigation that, despite being large or complex, nonetheless raises only little conflicts issues. Big cases and big conflicts are not synonymous,[26] and recognizing the difference may help courts to resolve some litigation in a simpler and more straightforward manner. In some cases, that is, class actions or MDL cases raise choice-of-law issues that are intricate and complicated to resolve yet have few wider implications for substantive state policies. Current conflicts doctrine, however, often requires courts to undertake a cumbersome analysis in which they must, for example, analyze the presence of state "interests" in the choice-of-law sense without considering whether any state is *actually* interested—in the lay understanding of the term—in the dispute. Where little conflicts are concerned, this focus is often both misplaced and distracting. In resolving little conflicts—whether in complex or simple litigation—courts should instead focus on the procedural virtues of fairness, non-arbitrariness, and predictability.

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25. This Article discusses four types of cases—not intended to be an exhaustive list—in which big conflicts typically surface. *See infra* Section I.B.

26. All things being equal, complex litigation is likely to involve big conflicts; the sheer scale of large cases makes their effects on current law greater, and thus increases the likelihood that comity and extraterritoriality concerns should come into play. This general rule, however, is far from universally true.

At the same time, courts are equally rudderless in navigating big conflicts. Current conflicts principles give relatively little attention to issues of extraterritoriality and comity, and often fail to draw from doctrines that deal with similar issues in other contexts, such as the general problem of extraterritoriality[27] or the applicability of federal statutes abroad.[28] Where conflicts doctrine makes use of such concepts as territoriality and state interests, it often does so in a narrow and formalistic manner, falling back on rules and fictions and often failing to grapple with the more significant underlying questions: which jurisdiction has the authority to regulate conduct that happens in a particular place? Does a particular jurisdiction have any stake in the legal rule established in a given case? The final section of this Article offers various suggestions for how courts might attend more to these other questions by—among other suggestions—aligning domestic conflicts doctrine more with international norms.

This Article proceeds in three parts. Part I explains, by discussing several illustrative cases, this Article's scheme differentiating between little conflicts and big ones. Part II then briefly surveys the history of choice-of-law doctrine to argue that its evolution has been guided by problems characteristic of little conflicts, and as a result is less well equipped to handle the concerns of big-conflict cases. Part III discusses the problems that can arise from failure to differentiate little conflicts from big ones, explaining how courts both overcomplicate little conflicts and ignore the wider issues that big conflicts present. The Article concludes by arguing for a better understanding of the difference between little and big conflicts and for the development of a new set of conflicts tools that will help achieve fair results in big conflicts as well as little ones.

I. CATEGORIZING CONFLICTS

What attributes differentiate a little conflict from a big one? One starting point for drawing this distinction is to consider the divide between simple and complex litigation. Complex cases are generally conceived of as cases that involve multiple parties, high stakes, and/or complicated legal and factual

27. *See* Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1134 (2009) [hereinafter Florey, *State Courts*].

28. *See* Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of* Morrison v. Australia National Bank, 92 B.U. L. REV. 535, 554–58 (2012).

issues.[29] In some cases, plaintiffs bring complex cases not merely to redress a perceived grievance but to bring about political and social change.[30] Simple litigation, by contrast, is defined in opposition to these characteristics: cases that involve few parties and straightforward issues, with relatively modest amounts in dispute, that are generally "of little interest to anyone except the parties."[31]

It is generally agreed that, prior to the 1960s or 70s, courts handled almost exclusively simple litigation.[32] After that time, however, a variety of developments—rule changes that made class actions and other complex cases easier to bring,[33] the growth of available civil rights claims,[34] the increasing interest in structural injunctions as a means of seeking social change[35]—significantly shifted the balance to make complex litigation an important part of courts' caseload.[36] As the following section will discuss, the complex/simple litigation distinction does not map precisely to the big/little conflict distinction. All things being equal, though, simple cases are more likely to have little conflicts.[37]

There are other important features, however, that distinguish a little conflict from a big one. In the classification scheme of this Article, the defining feature of a little conflict is that the resolution of the conflicts issue does not reverberate beyond the case at hand. Most notably, the way the case is decided will not have any impact on either (1) the daily lives, planning, and

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29. *See* RICHARD L. MARCUS ET AL., COMPLEX LITIGATION, CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 1–2 (2010).

30. *See* Linda S. Mullenix, *Problems in Complex Litigation*, 10 REV. LITIG. 213, 215 (1991).

31. *See* MARCUS ET AL., *supra* note 29, at 2.

32. *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664, 667 (1979) (noting in the late 1970s that "the dimensions of certain class actions are beyond anything previously seen in Anglo-American courts in terms of size, complexity, and longevity"); Mullenix, *supra* note 30, at 215 (1991) (explaining that the "complex litigation phenomenon did not fully evolve until mid-century" and describing the "massive electronics antitrust litigation" of the 1950s and the "vigorous prosecution of civil-rights class actions and institutional-reform litigation" in the 1960s as the judicial system's first experience with complex cases).

33. *See* Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 417–18 (1999) ("[T]he decade from the early 1960s to the early 1970s . . . marked an unusual convergence of both sweeping federal substantive legislation, coupled with massive federal procedural reforms.").

34. *See id.*

35. *See* John Minor Wisdom, *Rethinking Injunctions*, 89 YALE L.J. 825, 827 (1980).

36. *See* Mullenix, *supra* note 33, at 419–20 (discussing "burgeoning" of complex litigation since the 1960s and 1970s).

37. This is true because simple cases have fewer parties by definition and are less likely to have broad consequences for primary behavior.

conduct—what is sometimes called the "primary" behavior[38]—of people unrelated to the case or (2) the balance of power among states or countries—in other words, the issue of which primary transactions are permitted to fall under a particular state or nation's sphere of influence and be subject to its regulation. Rather, the case is primarily of concern only to the parties and those who know them. To the extent that anyone else is invested in the dispute, it is likely to be only to the extent that it might reflect larger procedural trends: Did the court handle the dispute fairly? Did the case reflect well or poorly on our overall system of justice? Did the case reveal some systemic bias or opportunity for manipulation?

If little conflicts are those that do not affect primary behavior and raise no larger questions about the sphere of different sovereigns' prescriptive authority, big conflicts, in the scheme of this Article, are precisely the opposite. Big conflicts, that is, are issues that either have the potential to drive primary behavior decisions or that raise questions having to do with the proper balance among the powers of states or nations, such as the degree to which a state law should apply extraterritorially even when such application would interfere with another jurisdiction's policy preferences.[39]

The following section seeks to describe the little-versus-big conflicts distinction in more detail. It first discusses the small-scale tort and contract cases that have served as laboratories for much modern conflicts doctrine, and argues that the conflicts these cases present are "little" because they are primarily meaningful to the litigants, not to the general public or to states. It then discusses four kinds of "big" conflicts in which the reverse is true—that is, in which the result of a particular conflicts decision raises issues of more widespread concern—and draws attention to their common attributes.

A. Little Conflicts

Anyone who has read many classic conflicts cases—*Babcock v. Jackson*,[40] say, or *Alabama Great Southern R.R. Co. v. Carroll*[41]—is already familiar with the basic way in which little conflicts present themselves. Indeed, nearly

38. *See* Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J. concurring) (distinguishing between merely procedural matters and "primary decisions respecting human conduct"); *see also* Barron v. Ford Motor Co. of Can. Ltd., 965 F.2d 195, 199 (7th Cir. 1992) (distinguishing between procedural rules that are "concerned solely with accuracy and economy in litigation" and substantive rules "concerned with the channeling of behavior outside the courtroom").

39. For an effort to identify a few sorts of characteristic big conflicts, see *infra* Section I.B.

40. 191 N.E.2d 279 (N.Y. 1963).

41. 11 So. 803 (Ala. 1892).

all of the canonical conflicts cases and hypotheticals qualify as both simple cases and little conflicts. The imaginations of conflicts thinkers have long been captured by a handful of scenarios from the case law, many of which still appear almost universally in conflicts casebooks today: guest statutes,[42] interspousal immunity,[43] availability of loss of consortium[44] or survival actions,[45] statutes of frauds,[46] other issues pertaining to contract validity,[47] and so on. Notably, most of these situations involved not a choice between different substantive standards for liability but a question whether an existing cause of action should be available to a particular sort of party. For example, states with guest statutes immunized drivers (but not other parties) from negligence actions by their passengers, but states without guest statutes did not.[48] Further, the bulk of these cases involved individuals (or perhaps an individual and an insurance company) as parties, with a relatively small amount at stake.

To see why these cases presented primarily "little" conflicts, consider the case that, perhaps more than any other,[49] is associated with the dawn of modern conflicts practice: *Babcock v. Jackson*.[50] *Babcock*'s well-known facts involved a group of friends, all New York residents, traveling from New York to Ontario, Canada for the weekend. Passenger Georgia Babcock was injured in an accident during the course of the trip, and attempted to sue the driver, William Jackson, for negligence.[51] The law of Ontario, where the accident had taken place, barred suits by passengers against drivers pursuant to its guest statute; the law of New York permitted recovery.[52] Deliberately departing from the traditional *lex loci delicti* approach, which would have automatically selected the law of Ontario because it was the place of injury,[53] the court applied the law of the parties' shared domicile. Its rationale was that

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42. For a discussion of guest statutes' role in the development of conflicts principles, see *infra* note 201.

43. *See, e.g.*, Haumschild v. Cont'l Cas. Co., 95 N.W.2d 814, 814 (Wis. 1959).

44. *See, e.g.*, Folk v. York-Shipley, Inc., 239 A.2d 236, 236 (Del. 1968).

45. *See, e.g.*, Grant v. McAuliffe, 264 P.2d 944, 944 (Cal. 1953).

46. *See, e.g.*, Bernkrant v. Fowler, 360 P.2d 906, 906 (Cal. 1961).

47. *See, e.g.*, Lilienthal v. Kaufman, 395 P.2d 543, 544 (Or. 1964) (involving a "spendthrift guardianship," an Oregon procedure that permitted voiding of contracts entered into by persons declared spendthrifts).

48. *See* Babcock v. Jackson, 191 N.E.2d 279, 280 (N.Y. 1963) (explaining guest statute).

49. *See* Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons*, 82 TUL. L. REV. 1741, 1749 (2008) (describing *Babcock* as "the seminal case that launched the [choice-of-law] revolution").

50. 191 N.E.2d 279 (N.Y. 1963).

51. *Id.* at 280.

52. *Id.*

53. *Id.* at 281.

"the concern of New York is unquestionably the greater and more direct and . . . the interest of Ontario is at best minimal."[54] In applying New York law as the law of the parties' domicile, the court helped to set in motion the so-called conflicts revolution, in which new conflicts methods came to predominate.[55]

Babcock clearly falls on the "simple" side of the simple/complex divide; it is a garden-variety negligence action between two individuals that presented no complicated issues of fact or law. More important for purposes of this Article, however, *Babcock* is also a "little" conflict because it easily satisfies the two criteria discussed above—lack of impact on primary behavior and absence of a genuine issue of state power allocation.

To begin with the first of these criteria, consider *Babcock*'s exceedingly modest impact on primary behavior. It is difficult, that is, to imagine how the result in *Babcock* could have any sway over such primary decisions as where and how carefully to drive, whether to permit a passenger to ride in a car, what sort of insurance to purchase, or what sort of insurance rates to charge.[56] This is true even if we assume counterfactually that *Babcock* had established a universal choice-of-law rule[57]—that every court in the United States would apply the law of the parties' shared domicile in a similar context—and that prospective drivers had earnestly attempted to read and apply *Babcock* to forecast their potential liability to passengers. Even in such a scenario, the case would have minimal importance because it would apply to only a small subset of driver/passenger situations—cases, that is, in which both parties were domiciled in one state and the accident occurred in another.[58] It would

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54. *Id.* at 284.

55. *See* Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1232 (1997) [hereinafter Borchers, *Some Observations*] ("With good reason, *Babcock* is viewed as the beginning of the conflicts revolution.").

56. Indeed, an article roughly contemporary to *Babcock* argued that guest statute conflicts decisions—contrary to the reasoning of many commentators—had insignificant effects on insurance rates, arguing that "[i]f these [guest] claims occur only infrequently, they will have practically no effect on insurance rates" because "[a]ctuarial techniques minimize the effects of any single claim." *See* C. Robert Morris, Jr., *Enterprise Liability and the Actuarial Process—the Insignificance of Foresight*, 70 YALE L.J. 554, 575 (1961).

57. In reality, no such uniformity exists at all; states today adhere to a good half-dozen conflicts methodologies at least, and even states applying nominally the same approach often apply it differently. *See* Symeonides, *Survey*, *supra* note 7, at 282. This diversity of approaches increases the overall unpredictability of conflicts decisions, thus further undermining the likelihood that people will rely on conflicts doctrine to shape behavior.

58. Professor Morris argued on a similar note that while some residents of guest-statute states will undoubtedly have accidents in states without such statutes, "[m]ost of these accidents will not give rise to guest claims. Some will not involve passengers; others will involve passengers who are not injured; and still others will involve injured passengers who cannot recover because

not apply to other situations: cases in which driver and passenger were from different jurisdictions, or where the place of the accident was the same place where one or both of them resided.[59] Finally, it would not meaningfully alter a driver's overall liability profile; because even a driver from a guest-statute state would face potential liability from other drivers she might injure, a prudent driver would be likely to abide by the operative standard of care regardless of whether the modest additional deterrent of a potential passenger suit was present.

Perhaps more important, however, is the fact that the case raises no issues about the proper spheres of authority that New York and Ontario may respectively occupy. That is, no matter whether the court applies New York or Ontario law, neither jurisdiction is likely to be offended, or to find that the failure to apply its law interferes with an important policy goal.

The preceding point requires a bit of explication. After all, isn't modern choice-of-law theory concerned precisely with the notion of state "interests,"[60] and the related idea that on certain facts the application of a particular jurisdiction's law may further or interfere with its underlying policy goals? For example, it is conventional conflicts wisdom that states are concerned with guest statutes because (if they have such statutes) they want to protect insurance companies from collusion between friends or to protect good-Samaritan drivers from their "ungrateful" passengers.[61] In states without such statutes, the animating purpose is generally understood to be providing passengers complete recovery[62] or, perhaps, to ensure that negligent driving in all circumstances is adequately deterred.[63]

This analysis, however, while perhaps useful as a problem-solving device, is highly misleading about the realities of the situation. As discussed in Part

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they are married to, or are minor children of, the driver." Morris, *supra* note 56, at 574–75. The subset of guest statute cases that specifically involves the common-domicile pattern will, of course, be even smaller.

59. *See* Neumeier v. Kuehner, 286 N.E.2d 454, 457–58 (N.Y. 1972) (discussing the different rules to be applied in various guest statute configurations).

60. *See infra* Section II.C.

61. *See* Susan Randall, *Only in Alabama: A Modest Tort Agenda*, 60 ALA. L. REV. 977, 990 (2009) ("The articulated purposes of guest statutes are to prevent collusive lawsuits and to encourage hospitality and generosity by drivers by protecting them from lawsuits by ungrateful passengers.").

62. *See* Babcock v. Jackson, 191 N.E.2d 279, 284 (N.Y. 1963) (absence of guest statute reflects "New York's policy of requiring a tort-feasor to compensate his guest for injuries caused by his negligence").

63. *See* Conklin v. Horner, 157 N.W.2d 579, 586 (Wis. 1968) (noting that "in addition to the compensatory aspect of our tort law, liability for ordinary negligence is deemed to be admonitory and deterrent in nature" and that application of a guest statute might "substantially dilute the deterrent . . . effect of our negligence law").

II.C *infra*, it is important not to confuse the analytical construct of a state "interest" with the more conventional understanding of a state interest as something that the state's legislature and citizens actually care about.[64] It should be self-evident that certain laws are more important than others, in some cases far more important, to a state's or country's policy goals. And it is difficult to imagine that guest statutes could fall into anything but the "unimportant" category. Most guest statutes were passed pursuant to a relatively short-lived fad, often at the insurance industry's insistance;[65] virtually all were eventually repealed or rendered invalid.[66] While it is possible to imagine an individual case involving a guest statute or a passenger suit stirring comment or outrage,[67] it is hard to imagine that a policy either to permit or to deny passenger recovery could ever be central to a state's policy goals. To appreciate this point, one needs only to reflect on the absurdity of imagining a state submitting an amicus brief in a guest statute case between private litigants[68] or to consider the unlikelihood that a guest statute's extraterritorial application might stir the sort of passions that other issues with

64. The idea of a "state" having "interests" is itself a potentially problematic concept, but this analysis also holds if we substitute "the state legislature" or "the state citizenry" for the "state" itself.

65. *See* Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 539 (1999) ("As automobiles proliferated after World War I, the insurance industry persuaded legislatures to make recklessness a prerequisite for driver liability to a gratuitous guest.").

66. *See* Patrick J. Borchers, *Back to the Past: Anti-Pragmatism in American Conflicts Law*, 48 MERCER L. REV. 721, 726 (1997) (noting that guest statutes have been repealed or declared unconstitutional in every state but Alabama); Randall, *supra* note 61, at 988–89 (discussing demise of guest statutes outside of Alabama).

67. For example, Ontario's Premier is rumored to have supported passage of a guest statute "because he personally had suffered the ingratitude of a pair of hitch-hikers who had sued him successfully." *See* Donald T. Trautman, *A Comment*, 67 COLUM. L. REV. 465, 470 (1967).

68. *See* Michael H. Gottesman, *Adrift on the Sea of Indeterminacy*, 75 IND. L.J. 527, 531 (2000) [hereinafter Gottesman, *Adrift*] ("States often appear as amicus curiae asserting interests they do hold dear.").

choice-of-law dimensions—such as abortion,[69] gun restrictions,[70] consumer privacy,[71] or same-sex marriage[72]—have aroused.

Second, even if we were to accept that a state might have strong policy rationales underpinning its law of passenger recovery, it is still difficult to imagine a state bestirring itself to care much about the outcome of an individual case like *Babcock*, because the result in such a case has a de minimis effect on the achievement of the overall scheme. This is true even if we agree with the *Babcock* court's conclusion that, on the facts at hand, "the concern of New York is unquestionably the greater and more direct."[73] For the very reasons that the result in an individual case like *Babcock* is unlikely to affect primary behavior, such a case cannot have much impact on a state's overall ability to implement its scheme of compensation. Whatever conflicts result a court might reach in such a case, that is, the vast majority of accidents that implicate the New York anti-guest statute policy will continue to occur within New York borders and involve primarily New York residents. Thus, whatever law the court chooses in an atypical case such as *Babcock* will not affect the statute's primary operation, and as a result will have only a marginal impact (at most) on the state's policy objectives.[74]

This is not to say that a decision whether to apply a guest statute or not is inconsequential. It is of course important to the individual litigants, for whom it may be determinative of their recovery (or conversely, liability). It may also be important for the message it sends to future litigants about the operation of the choice-of-law process in particular or judicial decision-making more generally. For example, a case that reflects a court's stronger sympathies for forum residents than out-of-state ones might create an

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69. *See* Mark D. Rosen, *"Hard" or "Soft" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers*, 51 ST. LOUIS U. L.J. 713, 714 (2007) (posing the question, "[i]f *Roe v. Wade* were overruled, could Mary, a citizen of a state that prohibited abortions (let's say Utah), be barred from obtaining abortions in a state (let's say California) in which abortions were legal?").

70. *See* Allen Rostron, *The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law*, 2003 L. REV. MICH. ST. U. DET. C.L. 115, 115 (2003) (discussing gun industry's argument "that it would be unconstitutional for them to be held liable under state tort law for the manufacture or sale of a gun that occurred outside the state").

71. *See infra* Section I.B.1.

72. *See* Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1711–12 (2011); Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2195 (2005).

73. *See* Babcock v. Jackson, 191 N.E.2d 279, 284 (N.Y. 1963).

74. For the same reason, it is difficult to imagine a state with a guest statute having a significant stake in whether or not its statute is applied—particularly by a foreign court—to extraterritorial events (regardless of whether or not its citizens are involved) or to out-of-state residents within its borders.

invitation to forum-shopping; a case that applies an unexpected law to deny a sympathetic plaintiff recovery might provoke local outrage about the quality of justice being dispensed in a state's courts. Generally, however, such decisions will have little to no impact on the state's *substantive* policy agenda.

Despite the immense growth of class actions and mass torts in recent years, conflicts that similarly lack broader relevance continue to form a substantial part of most courts' dockets today. Even a brief survey of Professor Symeon C. Symeonides's annual reviews of conflicts cases reveals conflicts that are primarily of the *Babcock* variety: which statute of limitations to apply, which parties are entitled to sue for a particular cause of action, and so forth.[75] As Part II.D will discuss, courts should certainly not ignore these bread-and-butter conflicts cases; the parties who litigate them deserve a fair, transparent, orderly process of selecting the relevant law. At the same time, these cases are mostly free of the difficult trade-offs that characterize big conflicts, as discussed in the following section.

B. Big Conflicts: Four Examples

Big conflicts are, to put it simply, conflicts that raise the sorts of issues that little conflicts do not. They are conflicts that stir political passions, present troublesome issues of the proper reach of state authority, and/or have wider significance beyond the individual parties.

Because big conflicts often involve multiple parties and complex issues, they can arise in various configurations, such that there is no single characteristic "big conflict." The following section, however, attempts to sketch out four common scenarios in which big conflicts may arise. For ease of reference, this Article will refer to these as Category A, B, C, or D conflicts. It should be noted, however, that this scheme of categorization is intended neither to be exhaustive nor to place cases in mutually exclusive categories. Further, despite some common themes, each big conflict also tends to present unique features, and thus the scheme described below is only an attempt to sketch out some recurring problems.

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75. *See, e.g.*, Symeonides, *Choice of Law 2012*, *supra* note 12, at 218. This recent survey discusses cases that deal with such questions as which state's statute of limitations to apply to a tort case, *id.* at 282 and *id.* at 283, whether individual plaintiffs or solely the estate representative could bring a wrongful death action, *id.* at 263, and whether an employer or insurer can "recoup worker's compensation benefits it paid to an injured employee who has also recovered damages from a third party who injured the employee." *Id.* at 269–70. Of course, some cases involved issues of somewhat broader societal significance, such as a bank's liability for facilitating money transfers to terrorist groups; nonetheless, the bulk of cases do not. *Id.* at 275–76.

1. Category A Conflicts: Territorial Clashes on Issues of Public Importance

Perhaps the most important category of big conflicts involves cases that raise issues of the territorial boundaries of a given state's law in circumstances where states differ sharply on important policy issues. In the taxonomy of interest analysis, these are usually "true conflicts," in which state law differs on a particular point and each state has an interest in applying its law to the dispute (typically because one of the parties belongs to a class that the state's law aims to benefit).[76] Only a minority of true conflicts, however, are also big conflicts. True conflicts can arise in cases involving a difference of law that is of relatively minor policy importance, such as having a guest statute or lacking one, or permitting or not permitting a loss of consortium action. For a true conflict to be elevated to big conflict status under the scheme of this Article, the differences must be of the sort that provoke debate and create interstate friction—issues in which the state or its people are interested in the ordinary sense of the word, not just in the technical sense in which the term "interest" is used in conflicts analysis.[77] The conflict must also be present in a case that will have some sort of wider effect (for reasons including but not limited to its precedential value) on the way in which the issue will be resolved for a large number of people.

An example of this sort of conflict is a fairly recent California case, *Kearney v. Salomon Smith Barney*,[78] in which several California clients of Salomon Smith Barney (SSB) sought a classwide injunction against SSB based on its practice of recording telephone calls between its Atlanta branch and California clients in California without such clients' consent.[79] This practice was illegal under a California privacy statute, which prohibited recording of telephone conversations without the consent of both parties,[80] but permitted under Georgia law, which required the consent of only one of the parties.[81] Following California's practice of governmental interest analysis, the California Supreme Court determined that a true conflict existed[82] and, again in keeping with California's standard practice, sought to

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76. *See* Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 172 (1959) [hereinafter Currie, *Methods*].

77. *See infra* Section II.D.

78. Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914 (Cal. 2006).

79. *Id.* at 917.

80. *Id.* at 930.

81. *Id.* at 932.

82. *Id.* at 933.

determine which jurisdiction's interests would be more impaired if its law were not applied.[83]

In the process, the court noted that both states had strong policy concerns underlying the substantive rule in question. As far as California was concerned, the court observed that "California decisions repeatedly have invoked and vigorously enforced the provisions of [the privacy statute]"[84] and that the California legislature had acted in various ways to "increase the protection of California consumers' privacy in the face of a perceived escalation in the impingement upon privacy interests caused by various business practices."[85] Georgia also had significant interests in "establishing the general ground rules under which persons in Georgia may act with regard to the recording of private conversations" and "not having liability imposed on persons . . . who have acted in Georgia in reasonable reliance on the provisions of Georgia law."[86] Although the court did not give explicit consideration to more substantive interests Georgia might have, it is not difficult to imagine possibilities. Perhaps, for example, Georgia's statute was intended to foster a business-friendly environment by enabling corporations to gather information from clients without the obstacle of gaining their consent.[87]

Both states, then, had a strong stake in the outcome, and if we consider Georgia's interests to be roughly on par with California's in importance, the case leaves a territorial tradeoff. The phone conversations in question had roughly equal ties to each jurisdiction—one party in Georgia, one party in California. Each party, acting within the territorial limits of its state of citizenship, might reasonably expect its actions to be governed by that law.[88] These expectations also likely comported with legislative intent: even if we assume that states do not generally intend laws to apply extraterritorially, each state legislature would have been reasonable to assume that its respective law would operate as to activities *within* that state.

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83. *Id.* at 933–34.

84. Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 934 (Cal. 2006).

85. *Id.* at 935 (noting that California has a constitutional privacy provision intended to achieve the same goal).

86. *Id.* at 933.

87. The court in *Kearney* acknowledged that "the application of California law to telephone calls between Georgia and California would impair Georgia's interests to the extent Georgia law is intended to protect a business's ability secretly to record its customers' telephone calls," though found this impairment to be "relatively minor." *Id.* at 936.

88. For an example of this frequently expressed sentiment, see Cipolla v. Shaposka, 267 A.2d 854, 856 (Pa. 1970) ("[I]t seems only fair to permit a defendant to rely on his home state law when he is acting within that state.").

Yet notwithstanding that neither state would seem to be overreaching in applying its law to its citizens' in-state actions, it is clear that one side in *Kearney* had to lose. The court, that is, faced the choice between, on the one hand, permitting Californians to have their constitutionally protected privacy rights invaded to some degree and, on the other, requiring Georgia businesses (who might have deliberately elected to locate in a state with weaker privacy law) to pay the costs of obtaining consumer consent in conformity with California's requirements.[89]

In the end, the California Supreme Court applied California law and found that the injunction that plaintiffs sought should be granted on the basis that California's interests would be the more impaired if its law did not apply in this situation.[90] Given the common preference of state courts for forum law, this result is unsurprising. Nor is it necessarily wrong or improper. Bias toward forum law, at least to the extent of elevating it to tiebreaker status, is an explicit and accepted part of many choice-of-law systems,[91] including California's.[92] Courts must resolve these issues somehow, and forum law has many advantages, such as the court's presumed familiarity with it and the sense that it is the "default" option in any court.[93] Further, the court in this instance was careful to avoid some of the pitfalls of applying a law that may cause unfair surprise to the defendant. It limited the remedy to protect defendant's justified expectations, applying Georgia law "with respect to SSB's potential monetary liability for its past conduct," thus ensuring that SSB would not have to pay damages.[94] (At the same time, the court was not willing to extend this limitation prospectively; it emphasized that "out-of-state companies that do business in California now are on notice that, with regard to future conduct, they are subject to California law."[95])

Yet the court's comparative impairment analysis, while entirely defensible on its own terms, points up some some of the limits of current doctrine in addressing Category A problems. For example, the court defended its resolution of the case by observing that the application of California law would not prevent Georgia businesses from recording calls for legitimate

89. A third alternative might potentially have been the controversial option of finding some middle ground between the relevant state rules, but this seems both administratively difficult and perhaps an overly aggressive use of judicial power.

90. Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 937 (Cal. 2006).

91. *See* Florey, *Divide*, *supra* note 9, at 198.

92. *See id.* at 208 ("Like many choice-of-law regimes, California's version of governmental interest analysis has a built-in forum bias.").

93. *See id.*

94. *Kearney*, 137 P.3d at 938.

95. *Id.*

business purposes; it would simply require them to obtain customer consent before doing so.[96] This seems a reasonable point. At the same time, there is something inevitably subjective about some of the court's conclusions—for example, its finding that while application of California law "would impair Georgia's interests to the extent Georgia law is intended to protect a business's ability secretly to record its customers' telephone calls, we believe that . . . this consequence would represent only a relatively minor impairment of Georgia's interests."[97] However defensible this view, it requires little effort to imagine a Georgia court reaching precisely the opposite conclusion. Further, even if we accept that California's interest here is greater, it is still a fair assumption that Georgia nonetheless has *some* interest in applying its own law. Thus, the case shows the limits of the apparently reasonable principle that a state should be able to apply its own law to its own citizens acting within its borders.[98] *Kearney* also suggests that courts faced with such scenarios have few tools for resolving them, and thus will inevitably fall back on implicit or explicit preference for the laws of their own state.

None of this, again, is to criticize the California Supreme Court's resolution of the issue; it would be equally or more problematic had the court applied Georgia law to California citizens acting at home. The point is that there is no obvious way to resolve this issue that honors conventional ideas about the territorial scope of legislation, and that current doctrine lacks adequate tools to identify and navigate such clashes.

Little conflicts cases—those involving guest statutes and interspousal immunity—can also, of course, result in the application of a given state's law outside its borders. But such cases are different from the *Kearney* scenario both because they do not involve serious public policy clashes and because they govern only what happens between isolated individuals; they do not settle the question of the territorial scope of a given state's law in general. Conversely, *Kearney* presents a big conflict because it is about an issue—consumer privacy—that actually moves public opinion.[99] Further, cases like *Kearney* are also "big" because they have the potential to resolve the issue in question more or less definitively. In *Kearney*, a decision by the California Supreme Court essentially set the standards by which not only the defendant

96. *Id.* at 936.

97. *Id.*

98. *See* Cipolla v. Shaposka, 267 A.2d 854, 856 (Pa. 1970) ("[I]t seems only fair to permit a defendant to rely on his home state law when he is acting within that state.").

99. *See, e.g.*, Jeff Sovern, *Protecting Privacy with Deceptive Trade Practices Legislation*, 69 FORDHAM L. REV. 1305, 1305 (2001) ("Informational privacy . . . is much in the air these days. It has attracted considerable attention from the legal media, the general media, and various governmental entities.").

but other Georgia-based parties (and parties in states with laws similar to Georgia's) would need to abide when communicating by phone with California citizens.[100] Unlike the highly individual and unpredictable circumstances of, say, a car accident, calls from Georgia to California (and vice versa) are routine and predictable events, presenting mostly similar facts. Thus, *Kearney* has implications for people's primary behavior in ways that a guest statute case does not.

One can find numerous examples of *Kearney*-style big conflicts in many situations involving predictable, repeated interstate conflicts regarding important issues of policy. Should bars operating in Nevada have to comply with California law restricting service to intoxicated guests (and does it matter whether the bar is close to the California border or not)?[101] When consumer fraud laws differ in their strictness from state to state, which state's law should apply to the actions of a nationwide manufacturer?[102] When a decision made at corporate headquarters in one state causes predictable harm in another, which state's law should govern the available damages?[103] Such scenarios involve direct conflicts between the territorial scope of one jurisdiction's strongly held policies and that of another. While there may be better or worse ways of resolving these questions, all possible solutions present unavoidable and important tradeoffs that current conflicts doctrine does not necessarily help courts to assess.

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100. The proposition that *Kearney* presents a big conflict does not hinge merely on its status as a putative class action. Even if the case had involved a single individual seeking an injunction, it would have, through stare decisis, effectively settled the matter for other parties.

101. This was the situation in *Bernhard v. Harrah's Club*, 546 P.2d 719, 725–26 (Cal. 1976), in which the California Supreme Court, applying comparative impairment analysis as in *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006), found that a Nevada casino could in fact incur liability for such conduct under California law. The court in *Bernhard* minimized the differences between the jurisdictions by noting that Nevada criminalized such service and thus adhered to a similar policy as California's, 546 P.2d at 725; however, the criminal statute cited by the court had been repealed by the time the case was decided, and given the importance of the casino industry to Nevada's economy, it seems reasonable to think that Nevada's policy was a strongly held one. Interestingly, the court ultimately decided the issue primarily based on the defendant's conduct and expectations; because the defendant operated near the border and advertised in California, that is, it was not unfair to apply California law to it under the circumstances. *See id.* ("Defendant by the course of its chosen commercial practice has put itself at the heart of California's regulatory interest.").

102. *See In re* Vioxx Prods. Liab. Litig., 861 F. Supp. 2d 756, 760–61 (E.D. La. 2012).

103. *See* Arabie v. Citgo Petroleum Corp., 89 So. 3d 307, 312 (La. 2012). It is worth noting that, in the actual case, there was some dispute about the location of the relevant conduct. *See id.* at 317. Nonetheless, the basic issue remains, since corporate conduct undertaken in one state will often have consequences in another jurisdiction.

2. Category B Conflicts: Recurring Issues That Result in Unpredictable Law

Cases like *Kearney* present big conflicts because they deal with the law that governs wholesale patterns of conduct. Category B conflicts, a variation on this theme,[104] occur in cases that are fact-specific and individualized, but that present recurring issues on which people need legal guidance. In such situations, the multiplicity of circumstances in which a certain issue may arise can lead to serious uncertainty about the legal consequences of conduct.

An excellent example of this phenomenon is the ongoing conflicts battle over noncompete clauses that restrict the circumstances under which an employee leaving the service of one employer can seek work with a competitor. Particularly in certain industries, noncompete clauses are ubiquitous, and their use is growing.[105] Moreover, states have divergent and often passionately held policies concerning noncompetes. Some states generally enforce such clauses,[106] which can be defended on the grounds that they are a matter of employee honesty and loyalty[107] and that they encourage employers to invest in their employees.[108] Other states have a blanket public policy against enforcing such clauses in order to permit employee mobility and the recruitment of talent.[109] Many states fall somewhere in the middle,

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104. I do not intend for the line between these categories to be a sharp one; many scenarios may be legitimately classified as either.

105. *See* Stephen Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES, (June 8, 2014), http://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html ("From event planners to chefs to investment fund managers to yoga instructors, employees are increasingly required to sign agreements that prohibit them from working for a company's rivals.").

106. *See* Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 135 (2008) (noting that many states apply a "modern" approach under which "[e]mployers can more easily justify and enforce such [noncompete] agreements," even as other states have begun to give such agreements more scrutiny).

107. *See* Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1210–11 (2001) (discussing current role of noncompetes as a way for employers to "enforce . . . a new understanding of loyalty and commitment").

108. *Id.* at 1203.

109. Cal. Bus. & Prof. Code § 16600 (West 2015) provides that, with limited exceptions not applicable here, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Because of the strong public policy reflected in Section 16600, California courts have applied California law to invalidate noncompetes even where the agreement contains a choice-of-law provision selecting the law of another state. *See, e.g.*, Application Grp. v. Hunter Grp., Inc., 72 Cal. Rptr. 2d 73, 81–88 (Ct. App. 1998).

enforcing noncompetes in particular circumstances and to varying extents.[110] The decision whether to enforce noncompetes likely has larger economic consequences; various analyses have found, for example, that California's anti-noncompete policy has contributed to Silicon Valley's success.[111]

Normally, when there is some uncertainty about the law to be applied to a contract, one possible remedy is a contractual choice-of-law clause. In the case of noncompetes, however, uncertainty about whether employees have adequate bargaining power and the strong anti-noncompete policies of certain states have resulted in courts declining to enforce the parties' chosen law where such clauses are at issue. States have sometimes been aggressive in the types of clauses they will invalidate. In the much-discussed case of *Application Group, Inc. v. Hunter Group, Inc.*,[112] a California court refused to enforce a noncompete agreement between a company incorporated and headquartered in Maryland and its Maryland-based (though telecommuting) employee, despite a Maryland choice-of-law clause in the agreement.

These cases are like *Kearney* in the sense that they involve essentially irreconcilable clashes between state policies. States that act on the belief that noncompetes impede employee freedom or stunt economic growth will be considerably hindered in furthering their policy if their employers cannot hire out-of-state employees subject to noncompetes. Likewise, if a state's goal is to enforce noncompetes in the interests of stability and employee/employer loyalty, such interests will be considerably undermined by the prospect that a distant court may invalidate noncompetes on which its resident employers have insisted.

An additional feature of Category B cases, however, is that they also create an inevitable degree of uncertainty among the public. If an employee signs a

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110. *See* Arnow-Richman, *supra* note 107, at 1775 (noting that many courts engage in a "balancing of interests [that] takes place within a developed doctrinal framework that contains specified prerequisites to enforcement [of noncompetes]").

111. Ronald J. Gilson explored this possibility in a classic article, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 575 (1999). The argument continues to be made today. *See, e.g.*, Greenhouse, *supra* note 105 (noting that many argue that "the proliferation of noncompetes is a major reason Silicon Valley has left Route 128 and the Massachusetts high-tech industry in the dust" and quoting Paul Maeder, the co-founder of a venture capital firm, describing noncompetes as "a dampener on innovation and economic development"); Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 641 (2014) (noting that employee mobility "do[es] much to explain the dynamism of Silicon Valley relative to other parts of the United States"). Interestingly, a forthcoming paper argues that the presence or absence of noncompete enforcement also has important interstate effects, causing "a 'brain drain' of knowledge workers . . . from regions that enforce non-competes to those that do not." Matt Max et al., *Regional Disadvantage? Non-Compete Agreements and Brain Drain*, 44 RES. POL'Y 394, 394 (2015).

112. Application Grp. v. Hunter Grp., Inc., 72 Cal. Rptr. 2d 73, 76–77 (Ct. App. 1998).

noncompete agreement with an employer in New York, the enforceability of that agreement depends on the employee's future plans—something that is unlikely that the parties will know in advance. As a result, both parties signing such an agreement may be uncertain as to what, if anything, they are agreeing to, a state of affairs that hinders bargaining and informed choice. *Kearney* at least makes clear what legal result businesses in Georgia can expect if they communicate with California customers, and shapes relief in those cases in a way intended to provide fair notice.[113] By contrast, a court deciding a noncompete case cannot establish a general, like-it-or-not rule, because individual circumstances and plans relating to the issue can differ in legally meaningful ways.

Although noncompete agreements are among the more commonly occurring Category B problems, similar issues may arise in other scenarios. An emerging area of choice-of-law concern is telemedicine—that is, allowing a physician to provide care remotely through phone or video conferencing (or, occasionally, more exotic technologies like remote-controlled robots).[114] By its nature, telemedicine tends to generate at least two jurisdictions in which relevant conduct took place, since the jurisdiction in which the physician provides medical care is often different from the one in which the patient receives it.[115] Because states may differ significantly in the standard of care they apply in malpractice claims, choice-of-law uncertainty makes it difficult for telemedicine providers to predict their legal exposure.[116] While physicians practicing telemedicine can include choice-of-law provisions in the contracts they enter into with their patients, courts may sometimes decline to enforce such clauses just as they do with noncompetes.[117]

This problem may prove somewhat less intractable than the noncompete issue in the sense that physicians practicing can take steps to learn the location of their patients, whereas employees signing contracts containing noncompetes may have no idea where an employer for which they may later wish to work will be located. Nonetheless, the telemedicine issue contains

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113. *See supra* notes 94–95 and accompanying text.

114. *See* J. Kelly Barnes, *Telemedicine: A Conflict of Laws Problem Waiting to Happen—How Will Interstate and International Claims be Decided?*, 28 HOUS. J. INT'L L. 491, 497 (2006).

115. *See id.* at 500–01 (noting that physicians must generally be licensed to practice in a specific state, but that "in regards to telemedicine, it is unclear whether the practice of medicine occurs where the patient is located, where the physician is located, or both").

116. *See id.* at 526–27.

117. *See id.* at 514–15.

the potential for choice-of-law uncertainty that has the potential to significantly impede the growth of an otherwise promising field.[118]

Category B conflicts have the potential to surface in many other situations as well. For example, speech in one jurisdiction may have unpredictable legal consequences in a second jurisdiction where it causes harm.[119] Employees who expose the bad acts of U.S. corporations may seek to avail themselves of state whistleblower protections notwithstanding the fact that their employment is centered abroad.[120] In such scenarios, it is not only the case that state or national agendas may clash; it is also true that individuals may have difficulty predicting which legal regime will govern conduct in which they plan to engage.

3. Category C Conflicts: Cases Implicating Foreign Relations

The third example of a big conflict need only be touched upon briefly. Some cases with an international dimension may be "little" in the sense that they primarily concern individuals and have few precedential implications, but are nonetheless more widely significant because they raise significant foreign policy concerns. Many such cases are dismissed on personal jurisdiction or forum non conveniens grounds, [121] but those that proceed to the merits are often "big" simply by virtue of their subject matter.

Bowoto v. Chevron Corp.,[122] a Ninth Circuit case applying California conflicts law, is a case of this kind. The *Bowoto* plaintiffs alleged that Chevron, acting through a subsidiary, had paid for a "series of brutal attacks" on them while they were engaged in political protests.[123] The attacks had been

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118. *See id.* at 528–29 ("[D]espite telemedicine's amazing opportunity to increase worldwide access to quality health care and to improve the cost effectiveness of this care for developing and rural areas of the world, telemedicine providers have the unenviable task of trying to manage their potential risk of liability in every area of the world reached by their telemedicine services.").

119. *See, e.g.*, Sommer v. Gabor, 48 Cal. Rptr. 2d 235, 239 (Ct. App. 1995), involving remarks made to a German journalist in a German hotel. Although the court in this case ultimately found that the defendants had not adequately established either the content of German law or the presence of a German interest, *see id.* at 243–44, many similar scenarios arise in situations where the defamation laws of various jurisdictions clearly differ, or where, for some other reason, different consequences attach to speech in different jurisdictions.

120. *See* D'Agostino v. Johnson & Johnson, Inc., 628 A.2d 305, 307–08 (N.J. 1993).

121. *See, e.g.*, Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1081 (2010) (noting that courts "have expanded the doctrines of forum non conveniens and prudential standing to dismiss a growing number of transnational cases").

122. Bowoto v. Chevron Corp., No. C 99-02506 SI, 2006 WL 2455761, at *1 (N.D. Cal. Aug. 22, 2006).

123. *Id.*

ordered and carried out in Nigeria, although plaintiffs alleged that they had been "approved and later ratified in California."[124] Plaintiffs asserted several California tort-law claims based on this alleged conduct,[125] and the court, faced with various potential conflicts between the law of California and that of Nigeria, determined that California law applied to all but one.[126]

The case ultimately proceeded to a jury verdict, which Chevron won.[127] Thus, Chevron was not in the end required to pay damages under California law. Nonetheless, the possibility certainly existed that it could have been liable under California law had the jury gone the other way.

Despite the profoundly horrifying nature of the alleged conduct at issue, in its structure *Bowoto* follows the pattern of a little conflict more than a big one. The case was primarily of importance to the individuals involved and, while it might perhaps have implications for future corporate conduct abroad, it seems unlikely that the precise issues at stake would manifest themselves again in a similar way, thus minimizing *Bowoto*'s potential influence. Further, the official policy stances of Nigeria and California were not wildly divergent; indeed, the court's rationale for applying California law to some of the claims was that the law of Nigeria and of California did not materially differ on those matters.[128]

Notwithstanding these characteristics, however, cases like *Bowoto* present big conflicts because, even in the absence of explicit policy differences between the countries, such cases have, for obvious reasons, the potential to spark international friction. Courts are frequently aware of this possibility, and in consequence sometimes use various techniques, from forum non conveniens[129] to Rule 19,[130] to avoid reaching their merits—a tactic that is justifiably controversial in its own right.[131] Nonetheless, whether courts ultimately choose to dismiss or retain such cases, they could benefit in some

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124. *Id.* at *10.

125. Plaintiffs stated claims for wrongful death, intentional infliction of emotional distress, negligent infliction of emotional distress, loss of consortium, civil conspiracy, assault and battery, negligence, and survival actions. *Id.* at *7–*9.

126. *See id.*

127. *See* Bowoto v. Chevron Corp., 621 F.3d 1116, 1122 (9th Cir. 2010).

128. *See* Bowoto v. Chevron Corp., No. C 99-02506 SI, 2006 WL 2455761 at *9 (N.D. Cal. Aug. 22, 2006).

129. *See* Robertson, *supra* note 121, at 1081.

130. As I have argued elsewhere, courts have occasionally used Rule 19's provisions for dismissal when a required party cannot be joined as a quasi-abstention device, first finding that an absent foreign government is a required party, then dismissing on the basis that sovereign immunity precludes its joinder. *See* Katherine Florey, *Making Sovereigns Indispensable: Pimentel and the Evolution of Rule 19*, 58 UCLA L. REV. 667, 724 (2011).

131. *See* Robertson, *supra* note 121, at 1081 ("[T]he judiciary's restriction of access to federal courts [through forum non conveniens dismissals] ignores important foreign relations, trade, and regulatory considerations.").

situations from understanding the nature and distinctiveness of the problem they present.

4. Category D Conflicts: Cases That Settle Legal Issues for a Broad Population

The final situation giving rise to potential "big conflicts" is a case in which the law applied will necessarily settle one or more significant legal issues at stake for a large population. Perhaps the most high-profile scenario in which this occurs is through the res judicata effect of large class actions, particularly national ones. Other types of cases, however, from mass actions to cases with potentially far-reaching stare decisis effects, can also have significant effects on the law applicable to many people, including strangers to the action.

Category D conflicts differ from other types of big conflicts for an important reason: where courts have the power to deny aggregation, they can sometimes prevent Category D conflicts from arising. Thus, Category D conflicts raise two sorts of issues: First, are courts overzealous (or insufficiently so) in seeking to avoid them? Second, how should courts treat this category of conflict where aggregation is inevitable?

The foundational case of *Phillips Petroleum Co. v. Shutts*,[132] in which the Court ultimately found the application of Kansas law to a nationwide class action to violate constitutional principles of due process and full faith and credit, presents a paradigmatic Category D conflict. *Phillips Petroleum* involved claims by a class of natural gas leaseholders who sought interest on royalties the defendant had suspended pending the Federal Energy Regulatory Commission's approval of gas price interest.[133] The case involved the question of which state's interest rate should be assessed during the relevant period.[134] In this context, the Court considered whether a Kansas court could constitutionally "appl[y] Kansas contract and Kansas equity law to every claim in this case."[135] The Court concluded that it could not, notwithstanding the presence of reasonably significant Kansas connections: Phillips Petroleum "own[ed] property and conduct[ed] substantial business" in Kansas; "hundreds" of Kansas plaintiffs had been affected by its conduct; and "oil and gas extraction is an important business to Kansas."[136] Nonetheless, the case presented abundant non-Kansas contacts as well: More

132. 472 U.S. 797, 823 (1985).
133. *Id.* at 799–800.
134. *Id.* at 802.
135. *Id.* at 814.
136. *Id.* at 819.

than 97 percent of the plaintiff class members resided in states other than Kansas, and 99 percent of the leases in the case were located outside Kansas[137] (primarily in Texas and Oklahoma).[138] Under those circumstances, the Court found application of Kansas law to be inappropriate, citing both "Kansas' lack of 'interest' in claims unrelated to that State"[139] and party expectations: "There is no indication that when the [non-Kansas] leases . . . were executed, the parties had any idea that Kansas law would control."[140]

The Court's application of the constitutional test thus recognized the big-conflict dimension of *Phillips Petroleum*. The reason why *Phillips* and similar cases present big conflicts is straightforward: if such cases proceed to final judgment, they will affect many people and give one court (and likely one state) disproportionate power over an issue. The possibility of such skewed territorial influence appears to have been a driving factor in the Court's conclusion that application of Kansas law under the circumstances of *Phillips Petroleum* violated constitutional limits.[141]

The Court's implicit recognition that *Phillips Petroleum* presented a "big" conflict is apparent in the sharp contrast between its reasoning and the Court's seemingly far more relaxed approach to constitutional choice-of-law limits in *Allstate Insurance Company v. Hague*.[142] *Allstate*, which essentially established the modern test for choice-of-law decisions' constitutionality,[143] was a motor vehicle insurance dispute in which the Court found that a Minnesota court's application of forum law was constitutionally proper despite both extremely tenuous connections between the dispute and that state and far greater ties between the dispute and the state of Wisconsin.[144] While

137. *Id.* at 815.

138. *Id.* at 816.

139. *Id.* at 822.

140. *Id.*

141. Justice Stevens advocated a two-part analysis to determine whether a choice-of-law decision was constitutionally proper: first, whether such a decision might "unjustifiably infring[e] upon the legitimate interests of another State" under the Full Faith and Credit Clause, and second, whether such a decision might constitute a due process violation because it came as an "unfair surprise" to the defendant by producing an "unexpected result arrived at by application of [a particular] law." *Id.* at 836–37 (Stevens, J., concurring in part and dissenting in part) (citations omitted). The Court did not adopt his approach, but was perhaps influenced by it.

142. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 320 (1981).

143. *See* Laycock, *supra* note 5, at 257–58.

144. *Hague* concerned an insurance dispute over an accident in Wisconsin between Wisconsin residents; the Court found, however, that Minnesota law could be applied based on the accident victim's incidental employment in Minnesota, the defendant insurer's contacts there as part of its nationwide business, and the fact that the victim's widow had moved to Minnesota after the accident. *See Hague*, 449 U.S. at 313–19. The tenuousness of these connections has received

the scenarios presented by the cases are not identical, they are similar enough that it seems reasonable to conclude that the Court's concern in *Phillips Petroleum* was not with the absence of connections to Kansas per se[145] but with the possibility that one upstart state court might end up making law for the nation, while lacking a proportionate interest in the dispute as a whole. To put it another way, *Allstate* involved a little conflict, *Phillips Petroleum* a big one.

In other settings, courts are frequently attuned to the potentially negative effects of allowing one court to set policy for the nation. At the most extreme manifestations of this phenomenon, of course, such cases may raise constitutional problems of the kind seen in *Phillips Petroleum*. But even when constitutional issues do not seem to be at stake, courts often approach such cases with a sense of unease. Thus, courts have developed a crude but effective tool for dealing with Category D conflicts, which is to prevent whenever possible the aggregation that would turn a garden-variety conflict into a big one. As a result, and in contrast to other categories of big conflicts, Category D conflicts thus rarely come to fruition; it is the *threat* of a Category D conflict and not its actuality that generally drives courts' behavior.

Thus, the specter of a Category D conflict is, for example, often a primary point of discussion in class certification. In deciding whether to certify a class, courts often find that variations in state choice-of-law principles and/or state-to-state law preclude a case from satisfying the "commonality"[146] or "predominance"[147] requirements for class actions. In his well-known opinion in *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*,[148] for example, Judge Easterbrook relied heavily on the variance among states' law in denying certification to a class of plaintiffs seeking to recover on a relatively novel theory of "seek[ing] compensation for the *risk* of failure [of certain Firestone tires], which may be reflected in diminished resale value . . . and perhaps in mental stress."[149] The court found that the variety in the state

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widespread attention; one commenter has contended that *Hague* marks "[t]he apparent end of all meaningful limits" on state choice-of-law decisionmaking. *See* Laycock, *supra* note 5, at 257.

145. Nominally, the constitutional standard for application of a particular state's law to a dispute requires only "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818–19 (1985) (quoting *Hague*, 449 U.S. at 312–13).

146. *See* FED. R. CIV. P. 23(a)(2); *see also, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 739 (5th Cir. 1996).

147. This requirement applies only to class actions proposed to be certified under FED. R. CIV. P. 23(b)(3).

148. 288 F.3d 1012 (7th Cir. 2002).

149. *Id.* at 1015.

laws to be applied was in itself sufficient to preclude certification.[150] Further, in reaching this result, the court expressed skepticism of *any* attempt to apply a single law to geographically dispersed claims.[151] While acknowledging that the denial of certification might have the effect of "scatter[ing] the suits to the winds,"[152] the Seventh Circuit nonetheless found consolidation of the claims to follow "the model of the central planner" that would "suppress[] information that is vital to accurate resolution," including the question of how state courts might adapt state law to confront the relatively novel legal theory the plaintiffs had put forward.[153] Even more important, the court worried that such a result would do "violence . . . to principles of federalism," given that "[d]ifferences across states . . . are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court."[154]

On one level, *Bridgestone/Firestone* is not centrally a choice-of-law case, since it was not Indiana's choice-of-law principles per se but the results they might dictate that precluded certification.[155] Yet *Bridgestone/Firestone* has an important choice-of-law dimension. The Seventh Circuit explicitly rejected the district court's effort to employ a choice-of-law methodology that would have limited the number of states whose substantive law would apply—and thus make certification more practicable, because the court would not have to contend with numerous jurisdictions' laws potentially applicable to class members' claims.[156] It is also significant that, choice-of-law technicalities aside, the court seemed to see an inherent impropriety—perhaps even one with constitutional implications—in permitting the law of only one or two jurisdictions to govern a defendant's legal obligations to

150. *Id.* at 1018.

151. *Id.* at 1020.

152. *Id.* at 1019–20.

153. *Id.* at 1020.

154. *Bridgestone/Firestone*, 288 F.3d at 1020.

155. In *Bridgestone/Firestone*, the choice-of-law analysis was relatively straightforward once the Seventh Circuit determined that Indiana would apply a lex loci delicti (i.e., law of the place of injury) approach to determine which state's law was applicable to each claim. *Id.* at 1016. Because the plaintiffs' injuries, however, occurred in all fifty states, a broad diversity of state substantive law principles still potentially applied. *See id.*

156. The Seventh Circuit explicitly rejected the district court's alternative choice-of-law approach, under which it would have applied the law of defendants' headquarters, as the place "where the products are designed and the important decisions about disclosures and sales are made" to all claims. *Id.* at 1015. Plaintiffs had established at least a potential ambiguity in Indiana's choice-of-law principles; even if those principles pointed more in the direction of lex loci than place of headquarters, had the court chosen to follow the latter, it would not be the first time a court had liberally interpreted state choice-of-law principles to avoid unnecessary complexity. *See* Kramer, *supra* note 2, at 305–06.

consumers nationwide.[157] In other words, the court was concerned about letting the law of a single state attain an unusually broad geographic scope—a characteristic problem of big conflicts—and this concern drove both the court's choice-of-law analysis and its general stance toward the desirability of certification.

Bridgestone/Firestone illustrates the way in which Category D conflicts are unique among big conflicts: in such cases, courts are typically able to *preclude* aggregation, thus obviating whatever conflict the case might involve if permitted to go forward. This practice presents important issues of conflicts policy in itself. A later part of this Article[158] will consider briefly the degree to which avoidance of big conflicts is a justifiable reason to prevent aggregation that would otherwise serve the purpose of justice or efficiency.

Category D conflicts raise an additional issue; however, in some contexts, this category of conflict may be impossible to avoid, because outside of the class action context it is more difficult for courts to deny aggregation. Such may be the situation, for example, in mass tort cases joined under Rule 20 or in multi-district litigation ("MDL").[159] In these scenarios, Category D conflicts have some of the features of the other sorts of big conflicts described previously. An unavoidable Category D conflict, for example, may raise issues of the territorial scope of state power in a manner similar to Category A conflicts. Thus, in some cases, other sorts of big conflict concerns are also at play in Category D.

II. BIG AND LITTLE CONFLICTS IN THE EVOLUTION OF CHOICE-OF-LAW DOCTRINE

The preceding section has sought to delineate the contours of the divide between big and little conflicts. The following section considers the tools that courts have at their disposal to resolve conflicts of any scale.

In many ways, the problems that big conflicts present are new ones. For most of U.S. history, courts have spent the bulk of their time deciding relatively simple disputes between individuals. Indeed, prior to the 1960s, complex litigation of all stripes—mass torts, class actions, institutional reform litigation—was virtually nonexistent and its subsequent explosion

157. *See Bridgestone/Firestone*, 288 F.3d at 1020 ("Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court").

158. *See infra* Section III.C.1.

159. *See, e.g.*, discussion *infra* at Section III.C.2.

unforeseen.[160] Thus, before that time, the choice-of-law questions that arose generally involved minor differences in state law, often reflecting the fact that some states had modernized doctrine in a certain area while others had not yet done so.[161] Conflicts thinkers prior to the late twentieth century, then, understandably focused on such relatively small-scale problems in formulating their ideas.

The following section traces this history. It argues that in general, conflicts principles evolved to deal primarily with the problems that little conflicts present. As a result, this section contends, conflicts doctrine is better suited to resolving little conflicts than big ones. Indeed, certain aspects of common choice-of-law methodologies, such as their restrictive understanding of both territoriality and governmental interest, may actively impede the resolution of big conflicts.

A. Beginnings: The Traditional Choice-of-Law Approach

Prior to the choice-of-law revolution of the mid-twentieth century, thinking about conflicts was largely animated by a theoretical puzzle: Why might one court ever be bound to enforce the laws of another jurisdiction?[162] The traditional approach, often referred to as the "vested rights" approach and associated perhaps most strongly with Joseph Beale,[163] presented a fairly straightforward answer to this question: the laws of the place where the last liability-creating event occurred created a cause of action, and once this cause of action had "vested," other jurisdictions were bound to enforce it.[164]

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160. *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664, 670 (1979) ("The class action onslaught caught everyone, including the draftsmen [of the revised Rule 23], by surprise.").

161. *See* Juenger, *supra* note 1, at 105–06.

162. *See, e.g.*, Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1281 (1989) [hereinafter Brilmayer, *Rights*] (noting that territorial view of state authority gave rise to the following question: "If the effect of a state's laws supposedly stopped at its borders, then how could those laws have any force in the forum which was called upon to adjudicate legal claims arising within the first state?").

163. *See* Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 890 (2002) ("The 'vested rights' approach . . . is most commonly associated with Joseph Beale"). Beale's work built on an earlier treatise by Justice Story, although Beale differed from Story on certain points. *See* Florey, *State Courts*, *supra* note 27, at 1069.

164. Beale argued that, "[t]he creation of a right is . . . conditioned upon the happening of an event . . . . When a right has been created by law, this right itself becomes a fact . . . . A right having been created by the appropriate law, the recognition of its existence should follow everywhere." 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 107 (1919). The law of the place where the last liability-producing event occurs, therefore, gives rise (in Beale's view) to

Notably, the idea of vestedness focused on the relationship between the cause of action and the individual. Once vested, a cause of action became essentially akin to a plaintiff's property right, and courts did not have to consider any further the policies of any of the relevant jurisdictions.

Under the traditional approach, courts looked to a single connecting factor between cause of action and a particular jurisdiction that would determine the law applied—generally the place in which the last event necessary to create liability had occurred.[165] Thus, courts in tort cases applied the law of the place where the injury occurred, regardless of where relevant conduct had taken place, and courts assessing the validity of a contract applied the law of the place of contracting.[166] Similarly straightforward (if rigid) rules governed most conceivable conflicts problems.[167]

Beale's precepts were ultimately embodied in the Restatement (First) of Conflict of Laws[168] (for which he was a reporter[169]) and were accepted by state courts almost universally until the middle of the twentieth century.[170] While this widespread adherence to vested rights principles had many disadvantages, as discussed below, it also had the significant advantage of consistency; in theory, anyway, courts of a variety of different states considering the same facts would reach the same choice-of-law result, making forum-shopping on this basis unproductive at least in principle.[171]

The First Restatement approach is frequently described as a territorial one.[172] Because the vested rights theory both rests on a territorial conception of state power and fixes on the physical location of a particular event as the determinant of the law that should apply, it is easy to see why the First Restatement has become synonymous with territoriality; indeed, Beale

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the cause of action because it is the only law that can create such a right. In applying the law of such a place, other courts are only recognizing a pre-existing cause of action.

165. *See* JOSEPH H. BEALE, TREATISE ON THE CONFLICT OF LAWS, §§ 377.1–378.3, at 1286–90 (1935).

166. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (AM. LAW INST. 1934).

167. *See id.* § 332.

168. *See* Guzman, *supra* note 163, at 890–91.

169. *See id.* at 891.

170. *See* Nelson, *supra* note 10, at 540 (discussing ubiquity of First Restatement conflicts rules).

171. *See* Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 5 (1991) (observing that "[e]ven if [First Restatement] choices were not inherently 'right' at least they could be easily and mechanically applied in most cases and could be counted on by the parties at the time they acted").

172. *See, e.g.*, Brilmayer, *Rights*, *supra* note 162, at 1281 ("Beale's theory of vested rights rested upon a set of territorial assumptions about the proper geographical scope of a state's authority.").

himself viewed it in these terms.[173] In some ways, however, describing the First Restatement as "territorial" is misleading, because its formalist conception of territoriality bears little resemblance to the more modern understanding of the term.[174] The vested rights theory of choice of law, that is, while seemingly focused on the absolute supremacy of a sovereign within its borders, does not attempt to answer a broader and more important question of state territorial power (what might be called the ultimate "big" conflicts problem): How far, and to what places, should a given state's law legitimately extend? This question involves the extent of the state's "prescriptive jurisdiction"[175]—that is, a state or nation's ability to prescribe substantive law governing particular conduct.[176]

As later sections of this paper will discuss, the traditional approach, while nominally "territorial," tells us little about the problem of prescriptive jurisdiction. Notably, current ideas about the territorial reach of a sovereign's prescriptive jurisdiction depart substantially from Beale's notion of the meaning of territory. Under current understanding, the mere fact that a liability-creating event has occurred on a sovereign's soil, that is, does not

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173. Beale argued, "In the modern world, sovereigns who are parties to international law are regarded as possessed of a territory of which the boundaries are definitely limited . . . . Through this territory the sovereignty extends and outside it the sovereign's territorial power ceases." Beale, *supra* note 164, at 118.

174. The problems of viewing Beale's approach as a territorial one were adeptly catalogued by a contemporary observer. *See* Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 Yale L.J. 736, 743 (1924) (arguing that "the rules of the Conflict of Laws are not based upon, nor are they derivable from, any uniform theory of territoriality").

175. Jurisdiction to prescribe is the power of a state "to make its law applicable to the activities, relations, or status of persons," by various means. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (AM. LAW INST. 1987). Prescriptive jurisdiction is normally contrasted with judicial jurisdiction, which is the power of a given sovereign "to subject persons or things to the process of its courts or administrative tribunals." *See id.* There may be some overlap between these two powers; personal jurisdiction doctrine as developed in the United States, for example, arguably contains some elements of both.

176. The Restatement (Third) of Foreign Relations recognizes certain bases on which nations may exercise their power to prescribe. *Id.* For example, nations may prescribe law relating to conduct that occurs within its territory, outside-territory conduct that has "substantial" within-territory effects, the status of persons within its territory, some activities of its nationals (wherever located), and "certain conduct . . . that is directed against the security of the state." *Id.* at § 402. Under certain circumstances, a nation may not have jurisdiction to prescribe law regarding conduct that falls into one of these categories if the exercise of such jurisdiction would be "unreasonable," because, for example, it would conflict with the laws of another state. *See id.* at § 403. Some of these bases, such as a nation's extension of its law to citizens abroad, are well-established; other bases, such as regulation of extraterritorial actions based on its effects within a jurisdiction, have historically been more controversial, but have increasingly gained acceptance. *See* John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 356–57 (2010).

necessarily confer on that sovereign the right to regulate extraterritorial conduct that played some role in causing that event.[177] At the same time, however, current law recognizes various bases for more robust regulation of conduct and events within a sovereign's territory than the vested rights theory would allow. For example, modern authorities agree that sovereigns may regulate conduct occurring on their territory.[178] By contrast, under Beale's framework, states would have no power to apply their own law to within-territory conduct if the last liability-creating event occurred elsewhere. Thus, even as most courts have abandoned Beale's territorial formalism, the modern understanding permits a broader view of a sovereign's territorial powers.[179]

Indeed, it is the absence of a clearly territorial basis for sovereign authority that creates a central problem for the First Restatement approach, particularly as applied to "big conflicts"—the danger of inconsistent regulatory standards where particular conduct has widely dispersed effects. Suppose, for example, that the manufacture of products in New Jersey harms various people in Connecticut, New York, and Pennsylvania, all of which have different—perhaps even contradictory—standards for assessing whether product design is defective. The First Restatement approach, in such a case, precludes the possibility of subjecting such conduct to a uniform or predictable standard. Thus, while the across-court consistency of the vested rights era was an

177. Indeed, "the extension of jurisdiction by a state to extraterritorial actions on the sole ground that the actions caused effects within its territory" remains "controversial," particularly in the absence of intent to cause effects there. *See* Knox, *supra* note 176, at 356. By contrast, regulation based on within-jurisdiction conduct has been more widely accepted. *See id.* Yet, the vested rights approach enabled essentially this precise phenomenon of effects-based regulation to occur. The famous case of *Alabama Great Southern Railroad Co. v. Carroll* involved a train accident that occurred to an Alabama employee of an Alabama-based railroad, on a route that passed predominantly through Alabama, as a result of negligent conduct that had likely occurred in Alabama. 11 So. 803, 803–04 (Ala. 1892) (noting that railroad employees had a duty to inspect links at various points in Alabama that the evidence suggested they had not performed). Nonetheless, because the accident itself had occurred just over the border from Alabama into Mississippi (the train's final destination was Meridian, Mississippi, a city close to the Alabama border), Mississippi law applied. *Id.* at 803, 809.

178. *See* Knox, *supra* note 176, at 356 ("[E]ach state undoubtedly has legislative jurisdiction over events taking place and persons found within its own territory, and territory is often called the normal or primary basis for jurisdiction.").

179. Even at the time Beale was writing, territorialism meant something different in other contexts. For example, the Court in *Pennoyer v. Neff* speaks of each state's "exclusive jurisdiction and sovereignty over persons and property within its territory." 95 U.S. 714, 722 (1877). Although the vested rights theory existed side by side with *Pennoyer's* notion of territorial jurisdiction and shared with it a similarly formalistic emphasis on the physical location of key events, the *Pennoyer* and vested rights views of territory's significance are nonetheless somewhat in tension. *See, e.g.*, Knox, *supra* note 1776.

advantage of the regime,[180] the approach nonetheless created the danger that conflicting state standards could apply to the same conduct.

Until the late 20th century, however, with the growth of national markets, product liability doctrine, and mass tort actions,[181] this inconsistency problem was a largely latent one. In other words, the risk that a given state's law might be unpredictably applied via a choice-of-law decision was relatively minor, simply because fewer large-scale or high-stakes conflicts problems arose in litigation. Nonetheless, it is worth recognizing that the supposedly "territorial" First Restatement concerned questions of territory only in a limited, formalistic sense, and can thus be expected to be of little aid in grappling with current problems of prescriptive jurisdiction.

Indeed, perhaps ironically for an approach often maligned as needlessly cumbersome, the true advantages of the First Restatement approach may be primarily procedural. That is, while the traditional approach has had occasional defenders, its supporters generally point to the virtues such as efficiency and predictability that are furthered by the First Restatement's straightforward set of rules.[182] Thus, although the traditional approach may have initially evolved as a way of fitting choice of law into nineteenth century ideas of territorial power, it is increasingly irrelevant to modern problems of allocating spheres of territorial jurisdiction.

B. The Conflicts Revolution and Its Concerns

Starting in the 1920s and 1930s and continuing through the mid-twentieth century, a series of academics began both to engage in trenchant criticism of the vested rights approach to conflicts and to argue for a new conflicts regime, thus launching the so-called choice-of-law "revolution"[183] that would form the basis for modern conflicts law. For the most part, however, the reformers did not address the issue of prescriptive jurisdiction or the potential limitations of the vested rights approach in grappling with it. It was, instead,

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180. *See* Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1184 (2000) (arguing that the First Restatement's territorial analysis is "most likely to lead to efficient results because its clear rules promote predictability").

181. *See* Richard L. Marcus, *Reassessing the Magnetic Pull of Mega Cases on Procedure*, 51 DEPAUL L. REV. 457, 463 (2001).

182. *See* O'Hara & Ribstein, *supra* note 180, at 1184.

183. *See*, *e.g.*, David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 208 (1933); Walter W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 487–88 (1924); Currie, *Methods*, *supra* note 76, at 179–81; Symposium, *Comments on* Babcock v. Jackson, *A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1213–14 (1963).

the procedural flaws in the First Restatement—the fact that it often put courts to a choice between unfair results and judicial manipulation—that attracted the reformers' ire.

Although the choice-of-law scholars who launched the choice-of-law revolution took a variety of perspectives, some of them conflicting, toward the future of conflicts law, they shared some common motivations. In particular, the reformers—and the courts that gave them a sympathetic ear—objected to the First Restatement because of its arbitrariness and rigidity, and the consequent temptations courts felt to create escape devices to avoid its results.[184] A principal complaint was that the First Restatement often called for the application of a law that had no meaningful connection to the dispute or the parties.[185]

To understand the frustration felt by many courts and scholars, consider some of the scenarios with which courts were faced in the pre-"revolution" era. New York tourists, whose car was garaged and insured in their home state, might become involved in an accident during a short trip to Ontario. In such a case, did the parties' minimal contacts with Ontario really justify the application of an Ontario guest statute to bar the passenger from recovering from the driver, as the First Restatement approach dictated?[186] Likewise, parties respectively domiciled in Missouri and New Jersey might travel to New York to negotiate a contract, and then discuss the matter further on the phone from Philadelphia and Kansas City. If, decades later, a choice-of-law issue then arose as to the contract's validity, did it make sense in these circumstances for the question to turn on the law of a single state where the contract had been "made," as the traditional approach demanded?[187]

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184. Reformers did not object to the First Restatement solely on grounds of arbitrariness; some also criticized the vested rights approach on legal realist grounds, although Brilmayer and Anglin argue that this was a secondary motivation. *See* Lea Brilmayer & Rachael Anglin, *Choice-of-Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1133 (2010) (noting that the choice-of-law revolution is traditionally explained as "both a response to the first Restatement's rigidity and a consequence of legal realism disavowing the underlying legal theory of vested rights[,]" but suggesting that the former motivation was the more important one).

185. *See id.* (explaining that reformers criticized the First Restatement on the grounds that "[o]nly the last act [was] given any weight, even when its location is entirely arbitrary").

186. This is the scenario of *Babcock v. Jackson*, 191 N.E.2d 279, 280 (N.Y. 1963), that prompted New York to abandon the traditional approach in torts cases. *See id.* at 285.

187. These facts are roughly those of *Linn v. Employers Reinsurance Corp.* in which the court reversed and remanded to permit consideration of new evidence that might indicate that the contract was made in a state other than New York. 139 A.2d 638, 639, 640–41 (Pa. 1958). Because the application of New York's statute of frauds might otherwise have resulted in invalidation of a twenty-seven-year-old contract it is easy to see why the court was eager to reach this result. *Id.* at 639. While the court applied the traditional approach, it arguably did so in a way calculated to

In such nuanced situations, the First Restatement's firm dictates as to which law should prevail came to seem purely capricious. What was the advantage, reformers asked, of applying an inflexible rule that produced results no one would have wanted or intended? Thus Brainerd Currie, perhaps the most influential of the reformers, blasted existing choice-of-law rules as "irrational" because they often worked to "defeat[] the interest of one state without advancing the interest of another."[188]

At the same time, the reformers criticized the First Restatement from a more pragmatic perspective. As the reformers recognized, judges often disliked the results that the First Restatement, applied honestly, had the potential to produce.[189] Such distaste for First Restatement outcomes led judges at times to manipulate the rules.[190] For example, judges commonly used what the reformers called "escape devices" to avoid egregiously unfair applications of the First Restatement—concluding, for example, that a particular state's rules were against public policy and applying forum law instead, or straining to characterize a tort dispute as a contract one in order to fall under the purview of a different First Restatement rule.[191] This habit was, to many critics, both offensive conceptually because it undermined the rule of law[192] and troublesome in practice because it made outcomes potentially hinge on the whims of courts and hence difficult to forecast. Currie, for example, argued that the use of escape devices "introduce[d] a very serious element of uncertainty and unpredictability."[193]

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reach its desired result—by, for example, adopting a subrule that, for choice-of-law purposes, the place where a contract is made is "where the words [of acceptance] are spoken." *Id.* at 640.

188. Currie, *Methods*, *supra* note 76, at 174.

189. Brilmayer & Anglin, *supra* note 184, at 1132 (noting that "judges faced with applying the first Restatement's rules lacked the flexibility to avoid irrational outcomes and were forced to rely on 'escape devices' to avoid absurd results"). For example, in *Kilberg v. Northeast Airlines*, the court complained that the First Restatement approach was particularly inappropriate in cases involving air crashes, where the last event necessary to create the cause of action could occur anywhere; in such cases, "[t]he place of injury becomes entirely fortuitous." 172 N.E.2d 526, 527 (N.Y. 1961). The court in *Kilberg* ultimately avoided the result dictated by the First Restatement by applying various escape devices, including a public policy exception. *See id.* at 528.

190. *See* Earl M. Maltz, *The Full Faith and Credit Clause and the First Restatement: The Place of* Baker v. General Motors Corp. *in Choice of Law Theory*, 73 TUL. L. REV. 305, 318–19 (1998) (noting that critics of the First Restatement "contend that in both theory and practice, the existence of these escape devices rob[s] the First Restatement of the constraining force that is generally seen as the prime virtue of rule-based systems.").

191. *See* Brilmayer & Anglin, *supra* note 184, at 1133–35 (discussing various escape devices).

192. *See id.* at 1133 ("A frequent critique launched against the first Restatement was that it forced judges to resort to subterfuge and manipulation to avoid irrational results.").

193. *See* Currie, *Methods*, *supra* note 76, at 175.

The argument that the First Restatement produced arbitrary results—and that judges too-readily bent the rules in their efforts to avoid them—was a particularly powerful one for the state courts that chose to give an ear to the reformers' ideas. As Lea Brilmayer and Rachael Anglin have noted, state courts choosing to depart from the First Restatement generally did so on the grounds that the vested rights approach led to the application of law with a purely fortuitous connection to the dispute,[194] particularly in cases in which the determinative connecting factor was "the *only* factor pointing in the direction of applying a particular state's law."[195] For judges, the rigid precepts of the First Restatement were confining and unnatural, and the idea that reform methods could produce a better fit between the choice-of-law decision and the rule itself had particular appeal.[196]

C. The Limited Role of Territoriality Concerns in Modern Choice-of-Law Methods

Scholars and judges, then, turned away from the First Restatement because it produced choice-of-law selections that seemed arbitrary and because (as a consequence of judges' resistance on the first point) it failed to yield predictable results. But missing from the dialogue over the conflicts revolution was the idea that choice-of-law doctrine might produce systemic problems by, for example, according the law of a particular jurisdiction too much weight beyond its borders or by creating uncertainty about which substantive standards should govern a particular behavior. Indeed, the choice-of-law problems that reformers used as thought experiments and test cases involved quintessentially "little" conflicts issues. Almost invariably, they dealt with questions arising in straightforward tort or contract suits between two parties, with none of the characteristics of the complex litigation in which conflicts questions frequently arise today.[197] Moreover, the decisional rules on which they turned could often frankly be characterized as trivial. Many involved doctrines and practices that were already outdated or on the wane,[198] such as interspousal immunity,[199] prohibitions on married women's

194. *See* Brilmayer & Anglin, *supra* note 184, at 1136.

195. *See id.* at 1139 (emphasis added).

196. *See id.* at 1136–37 (noting that references to the First Restatement's arbitrariness surfaced in numerous state cases rejecting the First Restatement in favor of reform principles).

197. At the time the reformers were writing, complex cases were few and far between. *See supra* notes 33–36 and accompanying text.

198. *See* Juenger, *supra* note 1, at 106 (criticizing conflicts doctrine for its "obsessions" with such "dead and moribund issues").

199. *See, e.g.*, Haumschild v. Cont'l Cas. Co., 95 N.W.2d. 814, 814 (Wis. 1959).

contracting,[200] statutes of frauds,[201] damages limitations that inflation rendered increasingly onerous,[202] and the fad for "guest statutes" barring suits by passengers against drivers.[203]

Such rules, of course, still mattered to litigants—in most cases they made the difference between winning and losing—and to courts concerned with delivering a just result in the cases at hand. But rarely, if ever, did the conflicts that fueled the choice-of-law revolution involve issues of acute policy concern to large numbers of people.

The fundamental inconsequentiality of the legal rules on which the reformers focused has not gone unnoticed. Frederick K. Juenger memorably blasted conflicts thinkers for engaging in "legal pointillism" and focusing on "microconflicts."[204] As Juenger trenchantly observed, "[s]uch humdrum mishaps as a collision on an interstate highway, or even a single-car accident, have served as the vehicle (no pun intended) for entire symposia."[205]

Of course, a focus on minor rules does not render the reformers' contributions of trivial value. Courts' predominant business, after all, is to manage simple and straightforward litigation—this was certainly the case at the time the conflicts reformers were writing, and remains so to a great extent today[206]—and they need well-crafted tools for doing so. At the same time, it is important to appreciate that the issues on which the reformers actually focused are ones that had modest import for larger questions of policy, and that this limited scope informed the way in which the reformers approached the development of new methodologies. The reformers, that is, wanted rules

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200. The conflicts chestnut *Milliken v. Pratt*, was decided under the traditional approach, but Currie famously turned various permutations of its facts into hypothetical test cases for his new method. 125 Mass. 374 (1878); *see* Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 229 (1958) [hereinafter Currie, *Married Women*].

201. *See, e.g.*, Linn v. Emp'rs Reinsurance Corp., 139 A.2d 638, 639 (Pa. 1958).

202. *See, e.g.*, Kilberg v. Ne. Airlines, 172 N.E.2d 526, 527 (N.Y. 1961).

203. Guest statutes figured in numerous choice-of-law "revolution" cases, perhaps most famously in *Babcock v. Johnson*. 191 N.E.2d 279, 280 (N.Y. 1963). The issue was so pervasive in New York alone that a subsequent case, *Neumeier v. Kuehner* developed conflicts rules specifically applicable to different guest statute configurations. 286 N.E.2d 454, 457–58 (N.Y. 1952). Although Alabama is the sole state to have a guest statute in place today, they were still creating choice-of-law problems as recently as 2013. *See, e.g.*, Smith v. Ford Motor Co., No. 3:12–CV–1084–WKW, 2013 WL 5231981, at *1 (M.D. Ala. Sept. 16, 2013).

204. *See* Juenger, *supra* note 1, at 105.

205. *Id.*

206. Mass tort cases, for example, did not exist until the 1960s and were not common until the 1980s. *See* Marcus, *supra* note 181, at 463. Proceduralists' frequent preoccupation with large cases has been criticized as being "stimulated by . . . the problems of a small subset of cases" and ignoring the more routine litigation issues that remain important. *See id.* at 464.

that would be sensible, seem fair to courts, and not invite or allow manipulation. They did not seek to find ways of mediating the sort of large-scale policy differences that the word "conflicts" may summon to mind.

To a large extent, many choice-of-law problems even today involve little conflicts. The routine business of courts continues to involve many simple cases as well as complex ones.[207] Further, as Michael Gottesman has noted, differences among the laws of various states tend to be modest.[208] U.S. citizens share values that transcend state lines and states are subject to uniform constitutional limits.[209] Thus, conflicts between states tend to concern issues such as the difference between comparative and contributory negligence that "do[] not implicate the fundamental ethos of a nation."[210]

This point is particularly important because, despite the reformers' focus on little conflicts, some of the language and tools the reformers used—particularly their invocation of state "interests"—misleadingly suggest that their concern is actually with bigger ones. The following section will briefly explore the role of interest analysis and other seemingly big-picture concerns within modern conflicts methodologies.

D. The Conflicts Revolution and the Role of State "Interests"

As the preceding section has argued, reformers were motivated by predominantly process-oriented concerns—the desire to create non-arbitrary rules that judges would apply fairly and uniformly—and less so, if at all, by concerns about territorial authority. Courts, however, have sometimes been confused—and reasonably so—about the relationship between modern conflicts methods and larger issues of state power. This is because modern conflicts doctrines tend to make liberal use of the notion of state "interests." Although conflicts reformers, particularly Currie, generally used "interest" as a term of art with a precise and narrow meaning, the term over time has inevitably become somewhat muddled up with the more usual meaning of the term.

As the previous section has discussed, both scholarly and judicial reformers agreed broadly about why the First Restatement approach to conflicts was problematic. More discord existed, however, about the proper solution. The methodologies that conflicts reformers hoped would supplant the First Restatement were diverse and reflected different underlying theories

207. *See id.* at 464.
208. Gottesman, *Adrift*, *supra* note 68, at 530.
209. *Id.*
210. *Id.*

of the qualities that made for a well-functioning choice-of-law system. Some theories contained an acknowledged bias for forum law;[211] one theory permitted courts in close cases to choose the "better" (that is, the more modern and progressive) law;[212] other theories looked for the "center" of the parties' relevant contacts.[213] Whatever their other differences, however, the majority of the new approaches had an important feature in common: they made reference, to a greater or lesser degree, to the new concept of state "interests" and whether such interests were engaged in the dispute.

From the start, state interests were central to Currie's methodology, which rested on the notion that ordinary methods of statutory interpretation were adequate to resolve choice-of-law disputes and that specialized conflicts rules were thus unnecessary.[214] Roughly stated, Currie's method required the court, in cases "[w]hen it is suggested that the law of a foreign state should furnish the rule of decision," to determine whether either of the potentially interested states had an actual "interest" in seeing its law applied to the dispute.[215] In situations in which only one state had such an interest (generally known as a "false" conflict),[216] the interested state's law should apply.[217] Currie's methodology provided less satisfying rules about what should happen in cases where no state (the "unprovided-for case"),[218] or more than one state (a "true conflict"),[219] had an interest in the dispute, but he initially felt that forum law should govern such cases.[220]

As an analytical device, the notion of the state interest caught on. Frameworks that were at least to some extent interest-based drove conflicts theory much more than their main competitor: "center of gravity" approaches that focused not on state interests but on which jurisdiction had the most numerous and important contacts with the dispute.[221] (To be fair, the most

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211. *See* Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301, 1303 (1989) ("The precept that there is a rebuttable presumption in favor of forum law is fundamental to interest analysis.").

212. *See* Brilmayer & Anglin, *supra* note 184, at 1158.

213. *See id.* at 1160.

214. *See* Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 392 (1980) ("Proponents of 'governmental interest analysis' have marketed their theory as a species of legislative interpretation").

215. *See* Currie, *Methods*, *supra* note 76, at 178.

216. *See* Brilmayer & Anglin, *supra* note 184, at 1154 (explaining vocabulary).

217. *See* Currie, *Methods*, *supra* note 76, at 178.

218. *See* Brilmayer & Anglin, *supra* note 184, at 1153–54.

219. *Id*.

220. *See* Currie, *Methods*, *supra* note 76, at 178.

221. *See* Brilmayer & Anglin, *supra* note 184, at 1160 (describing center of gravity approaches as the "[r]oad [n]ot [t]aken").

commonly used methodology today—the Second Restatement—is arguably flexible enough to accommodate a center of gravity approach as well as an interest-based one.)[222] While only a handful of courts today strictly follow Currie's methodology,[223] both the notion of the state interest and Currie's taxonomy of conflicts cases (false conflicts, true conflicts, and no-interest) have proved widely influential.[224] Many states borrow concepts from Currie even if they apply a modified version of his analysis.[225]

The Restatement (Second) of Conflicts of Laws[226] represented an effort by its drafters to take into account the various insights of the conflicts revolution and reconcile them to the extent possible with the traditional approach.[227] Seventeen years in the making, the Second Restatement was, amid some controversy, published in 1971[228]—almost a half-century after the choice-of-law revolution had first been set in motion by the scholarship of Cavers, Currie, and other conflicts scholars. In part because the drafters could not agree on a single conflicts methodology,[229] the Second Restatement offered a grab-bag of conflicts approaches.[230] Overall, the Second Restatement in most cases exhorted courts to choose the law of the place with the "most significant relationship" to the dispute,[231] based on factors that varied depending on the nature of the dispute[232] but that might include, for example, the location of

222. For an argument to this effect, see *id.* at 1159–66.

223. *See* Symeonides, *Survey*, *supra* note 7, at 281–82, Table 2.

224. *See* Giesela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT'L L. 801, 823 (2006) ("Without exaggeration, Currie's governmental interest analysis can be classified as the most important and most influential modern approach to choice of law.").

225. *See id.* (arguing that elements of Currie's unilateralist approach "are present in virtually all contemporary choice-of-law systems.").

226. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (AM. LAW INST. 1971).

227. Symeon C. Symeonides, Symposium, *The Silver Anniversary of the Second Conflicts Restatement: The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1250 (1997) [hereinafter Symeonides, *Silver Anniversary*] (describing Second Restatement as a "compromise among [the] conflicting philosophies" of traditional and modern approaches).

228. *See id.* at 1249 (noting that the Second Restatement's "reception by academic opinion in this country ranged from lukewarm to hostile.").

229. Borchers, *Some Observations*, *supra* note 55, at 1237 (describing the drafting history of the Restatement and noting that it involved an effort to placate traditionalists while incorporating the work of reformers).

230. *See id.* (describing the Second Restatement as "amalgamation of different conflicts approaches").

231. *See* Brilmayer & Anglin, *supra* note 184, at 1166.

232. The Second Restatement, that is, presents an overarching set of factors applicable to all disputes. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (AM. LAW INST. 1971). It also includes numerous additional factors that may be particularly relevant to determining the place of

the injury[233] (or, in contract disputes, the place of contracting or performance)[234]; the place where the conduct causing the injury had occurred;[235] the domicile of the parties;[236] the place where the parties' relationship was "centered";[237] the "relevant policies" both of the forum and of "other interested states";[238] and numerous additional factors.[239] While the Second Restatement has attracted much criticism for incorporating too many factors and failing to give courts adequate guidance,[240] it remains by far the most widely used of the reform approaches.[241]

Although the Second Restatement does not highlight interest analysis to the degree that some methodologies do, the concept of state interests nonetheless figures among the six overarching factors that courts are supposed to consider in all conflicts cases.[242] In practice, many courts applying the Second Restatement have engaged in some form of interest analysis.[243] Because the Second Restatement is currently the most widely used conflicts methodology by far,[244] its nod to interest analysis makes the idea of a state interest widely available as a tool to courts that wish to use it.[245]

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the "most significant relationship" for a particular subject area. *See, e.g.*, *id.* § 145 (discussing factors "to be taken into account" in finding the most significant relationship in torts case).

233. *Id.* § 145.

234. *Id.* § 188.

235. *Id.* § 145.

236. *Id.*

237. *Id.*

238. *Id.* § 6.

239. *Id.* (discussing multiple factors applicable to all conflicts problems).

240. *See* Symeonides, *Silver Anniversary*, *supra* note 227, at 1269–70 (arguing that the Second Restatement provides judges with "virtually unlimited discretion").

241. *See* Symeonides, *Survey*, *supra* note 7, at 281–82, Table 2.

242. *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §6(2)(c) (AM. LAW INST. 1971) (listing "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue" as "factors relevant to the choice of the applicable rule of law").

243. *See* James P. George, *False Conflicts and Faulty Analyses: Judicial Misuse of Governmental Interests in the Second Restatement of Conflict of Laws*, 23 REV. LITIG. 489, 533–34 (2004) (case study finding that, of 119 Texas choice-of-law cases purporting to apply the Second Restatement, in twenty-five a "Currie-type approach . . . guide[d] the analysis," and that in many others, governmental interest was a factor, even if not the controlling one); Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 469–70 (1991) (noting the trend toward "eclecticism" in choice-of-law approaches, such as "combining interest analysis and the Second Restatement").

244. *See* Symeonides, *Survey*, *supra* note 7, at 281–82, Table 2.

245. In some sense, the Second Restatement might be said to be a synthesis of traditional and modern methods. *See* Borchers, *Some Observations*, *supra* note 55, at 1237 (noting that the Second Restatement evolved as a compromise between these approaches).

E. The State "Interest" as Misleading Term of Art

At first glance, the notion of a state "interest" suggests a big-picture view of conflicts doctrine. A preoccupation with such interests, that is, suggests that what is at stake in conflicts questions is some sort of accommodation of the regulatory goals of two or more jurisdictions. In general, though, Currie (and conflicts thinkers who built on his work) have treated "state interests" as a term of art with a much more specific meaning.[246]

Currie believed that a state interest arose when (and only when) the "policy [that] can reasonably be attributed to the legislature" could be "effectuated" by the application of state law by a court in the particular case.[247] Thus, Currie analyzed a Massachusetts rule providing that "a married woman could not bind herself by contract as surety . . . for the accommodation of her husband."[248] This rule, Currie argued, reflected Massachusetts' decision to "subordinate[] its policy of security of transactions to its policy of protecting married women."[249] This policy, however, was limited in its scope to "those with whose welfare Massachusetts is concerned . . . *i.e.*, Massachusetts married women."[250] Thus, in a case involving the validity of a contract in which a Massachusetts married woman had agreed to act as surety, Massachusetts would have an interest.[251] In other scenarios—in cases, say, involving a married woman from another jurisdiction—it would not.[252] Although Currie did not explicitly reduce state interests to domicile, his analysis in practice tends to make domicile extremely influential, if not determinative, in many situations—a fact that has served as the basis for much criticism of his methodology.[253]

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246. *See* Posnak, *supra* note 8, at 1124 ("[W]hen Currie wrote that a state had an 'interest,' he used this phrase as a term of art.").

247. *See* Currie, *Married Women*, *supra* note 200, at 233.

248. *Id.* at 228.

249. *Id.* at 233.

250. *Id.* at 234.

251. *Id.* at 237.

252. *Id.*

253. *See* Brilmayer & Anglin, *supra* note 184, at 1127 (arguing that interest analysis, no less than the traditional approach, focuses on a single connecting factor: the parties' domicile). Further, as with the traditional approach, emphasis on such a factor creates the possibility, in interest analysis cases, of a result that is to some degree "extraterritorial," in the sense that it permits a given state's law to apply to events outside its borders. Under classic interest analysis, if friends from New York (a state without a guest statute) were taking a trip to a jurisdiction with no such statute, the right of passenger to recover from driver in the event of an accident would nonetheless be governed by New York law. This result is certainly uncontroversial in the light of international prescriptive jurisdiction norms after all, the right of sovereigns to regulate their citizens' conduct is fairly widely accepted. *See* Knox, *supra* note 178, at 351. Nonetheless, it is

Currie himself made clear that the notion of a state interest was a construct, a device for resolving cases rather than a serious effort to glean what the legislature actually wanted or what the outer bounds of a given state's authority actually were. In reality, Currie did not think "that any actual legislative preference was involved in the determination of the territorial reach of a particular state's statute."[254] Further, Currie felt, even if evidence of such a preference existed, it would not necessarily matter to the determination of the state interest.[255] Rather than trying to discern actual legislative intent, Currie's primary focus was the avoidance of "disuniformity and uncertainty,"[256] a goal he thought would best be achieved by returning to "the hard task of dealing with [conflicts problems] realistically by ordinary judicial methods, such as construction and interpretation."[257]

At least initially, then, interest analysis was not primarily a method for discerning what legislatures actually wished or of balancing competing legislative preferences. Rather, Currie intended it to be a practical scheme for resolving cases by using methods already in a court's toolbox. Nonetheless, a strain of thought in interest analysis sees the doctrine as a genuine attempt to accommodate state spheres of influence. For example, William Baxter, advocating for a version of interest analysis, described true conflicts cases as being about "allocating spheres of lawmaking control."[258] Thus some courts have seen interest analysis as a valuable tool for tackling conflicts issues in which states have a genuine stake and in which policy differences are real and meaningful—in other words, issues that are genuinely "big conflicts." As Part III A will discuss, however, interest analysis has not always been a suitable device for navigating such cases.

F. Choice-of-Law Doctrine's Suitability for Little Conflicts

The previous section has argued that neither the traditional approach nor the reformers' various methods were intended to navigate genuine policy clashes between states or to allocate spheres of territorial authority. Rather, they were intended to give courts practical tools for resolving conflicts in way that was both transparent and fair. These claims lead to a more controversial

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worth noting that, in a sense, this case would involve the application of New York law on another sovereign's territory.

254. *See id.* Brilmayer & Anglin, *supra* note 184, at 1153.

255. *See id.* at 1154.

256. *See* Currie, *Methods*, *supra* note 76, at 173.

257. *Id.* at 179.

258. *See* William Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 17 (1963).

one: because current choice-of-law doctrine was designed for little conflicts, courts generally handle these sorts of conflicts in a fashion that, while sometimes messy and less logically well-grounded than it might be, is capable of producing acceptable results in a broad swath of cases.

This is true for a few reasons. First, for reasons described below, it is likely that modern approaches are likely to appear, to both litigants and judges, intuitively more fair and reasonable than the formalistic First Restatement analysis. Although courts apply a broad diversity of modern approaches (and a handful, of course, still use the traditional First Restatement approach), most choice-of-law methods currently practiced apply some version of interest analysis, center of gravity, or (as with the Second Restatement) both of these.[259]

Like all choice-of-law methods, interest analysis and center-of-gravity approaches have been subject to criticism as well as praise. Most of the criticism has, however, been somewhat theoretical and generalized. Some have argued, for example, that interest analysis construes state interests too narrowly,[260] or that center-of-gravity analysis tends to focus on the sheer quantity rather than the quality and meaningfulness of contacts.[261] The Second Restatement, which combines elements of both, has been described as cumbersome and lacking in adequate guidance for judges.[262]

Yet while these criticisms may be justified, they are not always of central relevance to courts and parties who care primarily about getting a particular case resolved.[263] Much literature has explored the factors that determine whether parties are relatively more or less satisfied with the experience of litigation. Parties, for example, tend to have more respect for the law when it coincides with "the degree to which legal rules correspond with everyday notions of what the law should be"[264] and when they believe themselves to

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259. *See* Symeonides, *Silver Anniversary*, *supra* note 227, at 1249–50 (describing Second Restatement as a "compromise among [the] conflicting philosophies" of traditional and modern approaches).

260. *See, e.g.*, Alfred Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 479–81 (1960).

261. *See, e.g.*, Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 537–38 (1983).

262. *See* Symeonides, *Survey*, *supra* note 7, at 1249–50.

263. *See also* Sterk, *supra* note 6, at 992–93 (arguing that while "most of the premises and principles that underlie any given choice of law theory are . . . unimportant to courts," courts nonetheless recognize that "procedural requirements perform an essential function in any legal system" and consider "the harm to the system that would result if procedures were entirely ignored").

264. John M. Darley, et al., *Must Torts Be Wrongs? An Empirical Perspective*, 49 WAKE FOREST L. REV. 1, 9 (2014); *see also* Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1427

have been treated fairly in court.[265] While most of the existing analysis concerns substantive rules of law (such as those of tort), it seems reasonable to expect that litigants would have similar intuitions about the choice-of-law rule to be applied.[266] And here, modern conflicts methodologies have distinct strengths. Modern choice-of-law methods were, to begin with, developed with an eye to avoiding formalism and arbitrariness—to obviate the need for judicial manipulation by pointing to a law that seemed more intuitively fair to courts (and presumably to litigants as well).[267] As a result, conflicts analysis under modern methods is likely, in a large majority of cases, to point to a state with ties to the facts that are obvious even to a lay observer. Because of this, the chosen law in most cases will not come as an unfair surprise—or even as a surprise at all—to the parties to the dispute.

Of course, there will always be cases in which judges misunderstand conflicts principles, show undue bias toward forum law or the law they substantively prefer, or otherwise resolve conflicts in potentially unfair ways.[268] Likewise, there will be line-drawing problems in difficult cases where contacts are fairly evenly distributed among two or more jurisdictions. Nonetheless, in contrast to the First Restatement, modern methods are almost certainly less likely to produce truly discordant results.

A second reason to think that current choice-of-law doctrine is working at least serviceably in little conflicts is the increasing consensus among courts about what to do with certain kinds of cases. As Symeon C. Symeonides has demonstrated, the large majority of courts—regardless of what choice-of-law method they are nominally using—follow certain consistent patterns. For example, if both parties are from the same state, most courts apply the law of their common domicile to loss allocation issues (i.e., questions about who can

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(2005) (suggesting based on experimental evidence that "cases perceived to have been wrongly decided, and laws perceived to be poorly conceived or downright foolish, can lead to lowered respect for law generally and greater willingness to flout it").

265. *See* Patrick E. Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 MARQ. L. REV. 295, 296 (1995) ("Procedures must not only be accurate and efficient: they must also be perceived by the litigants as fair.").

266. Litigants, indeed, often blur differences between substance and procedure, and "[a]lthough some litigants make conceptual distinctions between process and outcome, they do not necessarily do so." Ellen Berrey, et al., *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 LAW & SOC'Y REV. 1, 30 (2012).

267. *See supra* Section II.C.

268. *See* Sterk, *supra* note 6, at 1030 (arguing that judges often resolve conflicts according not to choice-of-law theory, but based on "concerns about the facts and substantive law issues involved in the individual case").

recover from whom under what circumstances).[269] By contrast, if parties are from different states and the conduct and injury occurred in one of those states, courts tend to favor the law of the place of conduct.[270] In addition, most states broadly enforce choice-of-law provisions under Section 187 of the Second Restatement (at least where controversial issues such as noncompete or arbitration clauses are not involved), vastly simplifying the choice-of-law analysis in a large percentage of conflicts cases.[271] This consensus shows some underlying agreement by courts about the proper disposition of many conflicts, transcending the hodgepodge of methodologies they apply.

None of this is to suggest, of course, that universal consensus exists on all conflicts patterns; there are many scenarios on which courts and states continue to differ.[272] Nor should one be completely sanguine about the performance of current conflicts doctrine in little conflicts cases or to suggest that there are not many ways in which it could be improved. It seems reasonable to suggest, however, that with regard to little conflicts, widespread scholarly pessimism about choice-of-law's direction may be overstated. Further, to the extent current doctrine suffers from the defects of which it has been accused,[273] the effects of those shortcomings are less pronounced in little conflicts.

Moreover, the questions that courts are already getting right may suggest avenues for improving courts' resolution of little conflicts still further. For example, widely used practices (such as applying the law of the common domicile in loss-allocation cases) could, be adopted more explicitly and self-consciously by courts[274] or codified by legislatures. Likewise, although courts sometimes take into account party expectations in their choice-of-law

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269. *See* Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (and a Proposal for Tort Conflicts)*, 75 IND. L.J. 437, 459 (2000) (describing application of the law of the common domicile in this situation as "well-entrenched in American case law and academic doctrine").

270. *See id.* at 456–57 (noting that both doctrine and case law supports this practice).

271. *See* Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 371 (2003) (noting that Section 187 is widely applied).

272. *See, e.g.*, Peter Hay, Patrick Borchers, & Symeon C. Symeonides, CONFLICT OF LAWS, 1033 (5th ed. 2010) (noting that, in "true conflict" cases, "the solutions . . . are neither easy nor beyond question" because "[e]ither state may apply its own law, depending . . . on many . . . variable factors").

273. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (AM. LAW INST. 1971); Hill, *supra* note 260, at 479–81.

274. That is, in deciding to adopt such a principle, the court could rely not merely on the principle's suitability on the facts of a particular case, but also on the fact that the principle has gained widespread judicial acceptance.

decisions (as a Second Restatement factor,[275] for example, or as part of California's comparative impairment analysis[276]), they could do so more routinely and give such expectations greater weight. Finally, courts could try to correct situations in which current rules might promote forum-shopping and litigant (or judicial) manipulation to such a degree that it has the potential to undermine litigants' sense of what is fair.

In short, the virtues that courts should aim to serve in little conflicts cases are largely procedural ones: promoting predictability and the rule of law, honoring party expectations, discouraging manipulative litigant behavior, and deciding the appropriate law through a process that the parties are likely to regard as reasonable and fair. In determining what choice-of-law principles to adopt and how to apply those principles, courts should therefore determine which choice-of-law approaches enable them to best honor these values.

For the most part, however, little conflicts (essentially by definition) do not raise wider issues of, say, the proper allocation of state power or of the relationships between sovereigns. Generally, therefore, courts should be able to set these issues to the side when deciding little conflicts. As Part III discusses, however, courts have not always done so. The following section draws attention to two weaknesses in modern conflicts doctrine: first, the danger of unnecessarily viewing little conflicts as big ones; second, courts' failure to recognize and develop adequate tools for addressing big conflicts.

III. MODERN CONFLICTS DOCTRINE AND PROBLEMS OF "FIT"

As the preceding section has argued, modern conflicts doctrines rely on tools wrought for little conflicts, designed with the characteristic issues of little conflicts in mind. At the same time, much of the rhetoric surrounding conflicts practice—discussions of state interests, territoriality, and so forth—can create the misleading impression that what is going on in a typical conflicts case has to do not with procedural regularity but with broader questions of the division of state power.

This issue—the presence in conflicts doctrine of, on the one hand, devices suited primarily for little conflicts with, on the other, common terms suggesting that larger questions of state power are involved—creates two problems. First, the distracting presence of "big conflicts" terminology sometimes causes courts to overcomplicate little conflicts, seeing clashes in policy where none exist. Second, where courts encounter genuinely big

275. *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §6(2)(d) (AM. LAW INST. 1971) (citing "the protection of justified expectations" as a factor to be taken into account).

276. *See supra* note 101.

conflicts, they lack proper tools for recognizing and resolving them. The following section explores these problems.

A. Problem #1: Little Conflicts Embedded in Complex Cases

As the previous section has suggested, courts have generally not recognized a distinction between big and little conflicts and have no specialized techniques for dealing with the former. This rule, however, is subject to an important exception for what I have called Category D big conflicts—that is, scenarios in which the sheer scale of a conflicts problem turns what might otherwise be a small issue into a bigger one. Courts do have an important tool for managing such conflicts, which is quite simply to avoid them by denying aggregation of certain kinds of claims.

Some of the limitations on aggregation are external. For example, *Philips Petroleum Co. v. Shutts*[277] places constitutional limits on the degree to which a court can apply its law to class-action claims with a minimal relationship to a state, while Rule 23 imposes procedural limits on the degree to which claims of various class members can be governed by the law of diverse states.[278] Between these two principles and their own concerns about the justness of extending one jurisdiction's law broadly,[279] courts are extremely reluctant to certify classes that involve geographically dispersed members. Indeed, the choice-of-law problem has played perhaps the most significant role in the declining usefulness of the class action.[280]

Courts, then, can easily sidestep the difficult issues that might arise in Category D conflicts by ensuring that such scenarios do not come to pass in the first place. There are two situations, however, in which this strategy runs into difficulties. The first is the scenario in which courts overstate the significance of minor differences in law among states and deny aggregation on that basis, even in cases where aggregation might lead to greater fairness and efficiency. The second scenario involves circumstances in which aggregation is unavoidable—specifically, in multi-district litigation (MDL). The following section considers these issues.

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277. 472 U.S. 797, 821–23 (1985).

278. *See* FED. R. CIV. P. 23(a)(b)(3).

279. *See supra* Section I.B.1.

280. *See* Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 761 (2012) ("[C]hoice of law has presented a seemingly intractable problem for the nationwide, diversity-based, mass-tort class action."); Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2002 (2008) (explaining that "choice of law has emerged as such a critical issue in the modern class action setting.").

1. Little Conflicts in Class Actions

Some class actions involve differences among state law that constitute big conflicts because they engage significant issues of social policy on which we might reasonably expect states to want to forge their own legal course and where the uniform solution that might be imposed by a class action is undesirable. The previously discussed *In re Bridgestone/Firestone* case,[281] with its novel theory of damages, is arguably one such case; cases involving such controversial issues as the tobacco industry's liability for the addiction of smokers are another.[282] In other cases, however, the applicable state laws will present differences on the sorts of issues—which parol evidence rules to apply, for example[283]—that allow for the reasonable inference that the variance in different states' law does not reflect deliberate policy choices to the same extent. While certification should not be granted automatically in such cases, a strong case exists that courts should weigh such differences less heavily in determining whether certification is proper.

Further, courts should take care to differentiate between two types of choice-of-law problems that arise in class certification. On the one hand, some classes present choice-of-law issues that, because of variances in applicable conflicts doctrine, are simply intricate and complicated for courts to decide. For example, in *Zinser v. Accuflix Research Institute, Inc.*,[284] the Ninth Circuit affirmed the district court's denial of certification, noting that the applicable California choice-of-law principles required an extraordinarily difficult analysis:

> As required by California law, Zinser thus must apply California's three-part conflict test to each non-forum state with an interest in the application of its law. . . . Also, because Zinser seeks certification of three separate claims . . . this conflicts test must be applied to *each* claim upon which certification is sought.[285]

The *Zinser* court apparently found it self-evident that this complicated choice-of-law determination weighed against certification. However, as the following section will argue, complexity in choice-of-law determinations often masks the fundamental inconsequentiality of the state-law variance involved. While some complex choice-of-law determinations also involve

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281. *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1014 (7th Cir. 2002). *See supra* Section I.B.1 for a discussion of this case.

282. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 752 (5th Cir. 1996) (declining to certify such a class largely because of differences in applicable state laws).

283. *See* Farmers Ins. Exchange v. Leonard, 125 S.W.3d 55, 64–65 (Tex. App. 2003).

284. Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001).

285. *Id.* at 1188.

big conflicts, others do not, and courts should not take the complexity of choice-of-law analysis as a necessary indicator of the depth of substantive state-law differences.

Because the general desirability of class aggregation is both hotly debated[286] and largely beyond the scope of this Article, I will not discuss the class action scenario at length. Whatever one's opinions about aggregation in general, however, it is still important to recognize that consolidation of cases is less likely to raise concerns about fairness or the appropriate scope of state power in cases that involve only little conflicts.

Consider, for example, two hypothetical nationwide class actions against a manufacturer involving allegations that a certain car part is defective. In the first example, the law across all 50 states is virtually identical except that some states allow spouses to sue the manufacturer for loss of consortium and other states do not. In the second example, state law differs materially as to the substantive standard for what constitutes a design defect. It should be uncontroversial to suggest that the first example is likely more suitable (with appropriate subclasses) for class treatment than the second.

The big vs. little conflict classification, then, can be used to help clarify whether aggregation is desirable, and it should be separated from the issue of complexity in choice-of-law analysis. Of course, complex choice-of-law problems remain difficult for courts to solve, even when they involve "little conflicts" issues. The following sections explore this problem as it arises in multi-district litigation.

2. Little Conflicts in MDL and Other Instances of Unavoidable Aggregation

Possibly an even more serious issue arises where aggregation is unavoidable—a scenario that has become common and troublesome with the ever-growing popularity of MDL. Perhaps ironically from a conflicts perspective, MDL is an increasingly appealing alternative to class actions or other forms of mass joinder that may now be unavailable precisely because of the choice-of-law issues they create.[287] Frequently, however, MDL cases cause conflicts headaches of their own.[288]

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286. *See, e.g.*, Laura J. Hines, *The Unruly Class Action*, 82 GEO. WASH. L. REV. 718, 724 (2014) (summarizing some of the current issues attending class certification).

287. *See* Bradt, *supra* note 15, at 763.

288. *Id.* at 822.

The governing MDL statute permits the Judicial Panel on Multidistrict Litigation[289] to transfer civil actions "pending in different districts . . . to any district for coordinated or consolidated pretrial proceedings."[290] Such pretrial proceedings may include decisions on motions to dismiss or summary judgment, which often raise choice-of-law issues. The Panel may initiate transfers either on its own initiative or upon a motion by party to any action in which consolidation may be appropriate.[291] Notably, the sole criterion for MDL consolidation is that the civil actions in question "involv[e] one or more common questions of fact."[292] Thus, the fact that given actions would be governed by different states' law in their home districts is not a barrier to MDL aggregation so long as the cases have facts in common. Meanwhile, MDL pretrial proceedings are subject to the general *Van Dusen*, rule which dictates that, when a case is properly filed in its original district and then transferred, the transferee court applies the same substantive law that the transferor court would have applied.[293] Finally, federal courts must follow the choice-of-law principles of the state in which they sit.[294] The consequence of these rules and their interaction is that MDL courts often find themselves struggling to apply a host of different conflicts methodologies to facts that almost always involve contacts with multiple states.[295]

Needless to say, this is a task that is virtually impossible to perform—or at least to perform honestly. It is routine in MDL cases for courts to be required to consult three or more choice-of-law methodologies and potentially consider the interests of a dozen or more states. Faced with this task of almost impossible complexity, courts are tempted to cut corners.

To illustrate the problems of MDL—and the difficulty of using existing conflicts constructs to solve them—consider a typical instance[296] of conflicts-blurring in an MDL case, *In re Air Crash Disaster at Sioux City, Iowa*.[297] As

289. The panel is composed of "seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit." 28 U.S.C. § 1407(d) (2012).

290. *Id.* § 1407(a).

291. *Id.* § 1407(c).

292. *Id.* § 1407(a).

293. *See* Van Dusen v. Barrack, 376 U.S. 612, 636 (1964).

294. *See* Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941).

295. *See* Kramer, *Complex Litigation*, *supra* note 1, at 561–63.

296. Professor Cox, for example, cites the case as an example of one that generally disregards conflicts principles in favor of a "sensible substantive solution." *See* Stanley E. Cox, *Substantive, Multilateral, and Unilateral Choice-of-Law Approaches*, 37 WILLAMETTE L. REV. 171, 180 n.16 (2001).

297. 734 F.Supp. 1425 (N.D. Ill. 1990).

is common in air disaster cases,[298] the number of jurisdictions whose contacts might potentially be taken into account was dizzying. A flight from Denver to Chicago, carrying passengers from thirty states and two foreign countries had crashed in Iowa.[299] Defendants potentially implicated in the crash included United Airlines, which was incorporated in Delaware and headquartered in Illinois but which had maintained the airplane in California and trained the flight crew in Colorado;[300] McDonnell Douglas, a Maryland corporation headquartered in Missouri, which had designed and manufactured the airplane in California;[301] and General Electric, mercifully both headquartered and incorporated in a single state (New York), which had designed and manufactured the engines in Ohio.[302] Further, cases asserting claims involving the issue in question (punitive damages) had been transferred from eight different states,[303] thus obliging the court under *Klaxon* and *Van Dusen* to apply each respective state's choice-of-law rules as to the cases transferred from that state.[304]

Despite these seemingly unresolvable complexities, the court ultimately concluded that a single state's law governed all claims against each defendant—Illinois for United Airlines (as its headquarters), California for McDonnell Douglas (as the place of conduct) and Ohio for General Electric (again, the place of conduct).[305] To reach this result, however, required numerous moves on the part of the court to simplify methodologies and blur distinctions. For example, despite the prominence of domicile in much modern choice-of-law analysis, the court found the plaintiffs' domicile to "play[] no role" in the analysis under any approach.[306] Likewise, rather than looking closely at the choice-of-law principles followed by each state, the court grouped them broadly into three approaches: comparative impairment, the Second Restatement, and a hybrid of the two.[307]

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298. *See generally* Kyle Brackin, *Salvaging the Wreckage: Multidistrict Litigation and Aviation*, 57 J. AIR L. & COM. 655 (1992).

299. *Sioux City*, 734 F. Supp. at 1426.

300. *Id.* at 1427.

301. *Id.*

302. *Id.*

303. *Id.* at 1429.

304. *Id.*

305. *Sioux City*, 734 F. Supp. at 1435–36.

306. *Id.* at 1430.

307. *Id.* at 1436. Some of this categorization was questionable, to say the least. The court grouped Georgia with other states following the Second Restatement, *id.* at 1434 n.15, despite an almost complete absence of evidence that Georgia would depart from the *lex loci delicti* approach it was following at the time (and continues to follow to this day). *See, e.g.*, Smith v. Graham Constr. Co., 761 S.E.2d 370, 372 (Ga. Ct. App. 2014) (noting that "Georgia adheres to the rule of

Courts are routinely faced with MDL conflicts scenarios that are equally complex, and simplifying decisions of this sort are commonplace.[308] Larry Kramer has observed skeptically that the applicability of the same law to each defendant under multiple choice-of-law approaches in cases like *Sioux City* is an "astonishing coincidence."[309] Nonetheless, as lacking in intellectual honesty as the court's reasoning may be, one must have some sympathy for the judge in this situation. The problematic nature of MDL choice-of-law does not stem merely from the sheer number of jurisdictions involved—although any court would have been overwhelmed had it attempted, say, to consider (as an honest Second Restatement analysis would likely require it to)[310] the law of the 32 jurisdictions where the passengers were domiciled. It also stems from the attenuated relationship between the choice-of-law principles applied by the transferee forum and the ultimate shape of the case.[311]

Yet although the facts in this case required an analysis intricate and lengthy enough to tempt a judge to cut corners, few broader policy concerns appeared to be at play. To begin with, many of the differences in state law were slight, and the precise contours of any state's doctrine were likely difficult for anyone but an experienced state judge to grasp. Take the example of United Airlines, for which the court considered the laws of Illinois, California, and Colorado as potentially applicable.[312] The court observed

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lex loci delicti, which requires application of the substantive law of the place where the tort occurred").

308. *See* Kramer, *Complex Litigation*, *supra* note 1, at 553.

309. *See id.*

310. For example, the section of the Second Restatement governing tort cases directs parties to consider "the domicil, residence, nationality, place of incorporation and place of business of *the parties*." *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (AM. LAW INST.1971) (emphasis added). While the court in Sioux City found that plaintiffs' domicile was irrelevant because the issue was one of punitive damages, this is not a view endorsed by the Second Restatement, which does not treat punitive damages separately from other wrongful death damages issues. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 178 cmt. a (AM. LAW INST. 1971) ("This law [relating to the measure of damages generally] also determines whether exemplary or punitive damages should be allowed.").

311. It has sometimes been argued to the contrary that choice-of-law principles a state adopts themselves reflect a policy decision about how broadly the state's law should apply in a multijurisdictional scenario. Andrew Bradt argues, for example, that such rules "are part of a state's substantive law, in the sense that they define the reach and strength of those laws in a multistate dispute." Bradt, *supra* note 15, at 801. I would respectfully disagree with this position for two central reasons. First, as discussed in Part II.B, the history of modern conflicts principles reflects that their architects were primarily interested in resolving individual cases fairly, not in delineating the overall scope of state law. Second, as previously discussed, the *content* of many conflicts principles gives scant attention to extraterritoriality concerns.

312. *In re* Air Crash Disaster at Sioux City, Iowa, 734 F. Supp. 1425, 1431 (N.D. Ill. 1990).

these differences: California permitted punitive damages in survival and personal injury actions, but only upon "clear and convincing evidence of oppression, fraud, or malice."[313] Colorado did not permit punitive damages in survival actions, required that in personal injury actions such damages be proven "beyond a reasonable doubt," and limited such damages to actual damages in the absence of "willful and wanton" behavior by the defendant.[314] Illinois permitted punitive damages only in personal injury actions on a showing of "fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with . . . gross negligence."[315]

Particularly as to the availability of punitive damages in personal injury cases, the differences among these three states seem perhaps real but hard to parse. Further, any differences that exist do not fit neatly into the framework of current conflicts doctrine. The court found itself at something of a loss as to how to apply either interest analysis or the Second Restatement to resolve the conflict. As characteristically practiced, interest analysis requires courts to identify relevant policies behind a particular legal rule, then determine whether those interests are triggered based on the facts of the case. The *Sioux City* court, however, engaged in something more like a free-form balancing of interests and contacts. The court determined that each state's laws "reflect a balance reached by each state between deterrence of wrongful conduct and protection of defendants from excessive financial liability"[316] and that all three states had "legitimate interests in controlling the activity of defendant United Airlines."[317] The court thus based its analysis on the "fit" between the purpose of each state's punitive damages law and the circumstances of the case."[318] This notion of "fit" led the court to apply Illinois law in this case, noting that future injuries were more "likely to occur at United's primary place of business, where United flights frequently arrive and depart."[319] The court further found that "Illinois is an appropriate forum to balance the deterrent function of punitive damages against the need to protect United Airlines" because Illinois "benefits from United's presence and Illinois risks the consequences of United's wrongful conduct."[320]

It is easy to fault the court for engaging in somewhat slipshod reasoning and failing to apply the relevant methodologies carefully. A deeper problem,

313. *Id.*
314. *Id.* at 1431–32 (citation omitted).
315. *Id.* at 1432.
316. *Id.*
317. *Id.*
318. *Sioux City*, 734 F. Supp. at 1432.
319. *Id.* at 1433.
320. *Id.*

however, is that it is difficult for courts to apply methods incorporating interest analysis to cases of such factual complexity.[321] On the one hand, interest analysis requires courts to make complicated and intricate determinations of the relationships among law, policy, and facts. On the other, interest analysis provides few tools for courts to weigh the actual, real-world significance of the conflicts involved. The following section argues that drawing the big/little conflicts distinction is one way to introduce this missing element.

3. Seeing Some Complex Cases Through the "Little Conflicts" Lens

One way in which decision-making in cases like *Sioux City* could be enhanced is by encouraging courts to focus on the scale of the conflict, not merely the scale of the case. In other words, an understanding of the little conflicts/big conflicts divide might aid courts in deciding how to treat such cases.

At least two important objections might be made to this proposal. First of all, there has been significant resistance to the notion of singling out any one class of cases for special conflicts treatment. Larry Kramer has argued, for example, that it is unfair to apply different conflicts principles in complex litigation because it alters parties' rights.[322] Andrew Bradt has likewise criticized the practice of direct filing in MDL cases because, among other reasons, it would "change the law that would otherwise apply to an individual plaintiff's case."[323] The point of separating big conflicts from little ones, however, is not to arbitrarily apply a different set of rules to one simply because they are more efficient or otherwise more desirable from a procedural standpoint. Rather, it is to recognize differences in the actual posture of the case that are material to a conflicts analysis. The interests of

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321. Other scholarship has noted this poor fit. Patrick Borchers, for example, has observed that interest analysis seems "frozen in time, still wrestling with the problems of a bygone era" and is ill-equipped to deal with complex litigation involving contacts with multiple jurisdictions. Borchers, *supra* note 66, at 726.

322. *See* Kramer, *Complex Litigation*, *supra* note 1, at 549. I do not mean to take this argument at face value, because important counterarguments can be made. One could reasonably argue that in cases that present inherent geographical complexities, it is difficult to say in advance what any conflicts analysis might yield, and thus hard to argue that parties have any particular expectation of a particular state's law. However, even if one dislikes the notion of separating the conflicts treatment of complex and simple litigation, distinguishing big from little conflicts presents a different issue.

323. *See* Bradt, *supra* note 15, at 765.

states, litigants, and the public as a whole are simply different when big conflicts are involved. Recognizing this need does not require subjecting big conflicts to a wholly distinct choice-of-law framework.[324] Further, the big/little distinction is meant to be a fluid one; a big conflict may reveal itself to be a little one upon further examination and vice versa.

A second objection might be that conflicts doctrine is already sufficiently complicated without adding a layer of new distinctions and approaches. While this is a reasonable concern, an understanding of the big/little conflicts divide does not necessarily require developing a radically different conflicts framework. The large majority of American states follow interest analysis, other methods influenced by interest analysis, or the Second Restatement.[325] These methods are all quite compatible with a consideration of the scale of the conflict. Indeed, in the case of the Second Restatement, looking at choice-of-law decisions from a big/little angle might help courts winnow and make sense of the Second Restatement's multiplicity of sometimes-vague factors.[326]

4. The "Little Conflicts" Approach in Cases Like *Sioux City*

If we accept that big conflicts and little conflicts raise different issues, what implications might this have in practice in, say, multidistrict litigation? To begin with, it is at first important to recognize that cases like *Sioux City*[327] present little conflicts despite their complexity.

Why doesn't *Sioux City*—which concerns significant issues of which punitive damages standard to apply—involve a big conflict? It is certainly true that opinions about punitive damages and the circumstances under which they should be awarded are varied and often passionately held—in contrast to legal rules about guest statutes or interspousal immunity. At the same time, *Sioux City* has the principal characteristic of a small conflict, which is that the decision will have few, if any, ramifications for anyone other than the parties to the action. In particular, cases like *Sioux City* do not serve as a useful mechanism for any potentially interested state to advance its policies on punitive damages. Air travel accidents are unpredictable in terms of location, circumstances, and causes, and each one is thus likely to involve a

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324. The Second Restatement, for example, is malleable enough to encompass virtually any conflicts approach. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. LAW INST. 1971).

325. *See* Symeonides, *Survey*, *supra* note 7, at 281, Table 2.

326. *See* Symeonides, *Silver Anniversary*, *supra* note 227, at 1249–50.

327. There are dozens of MDL cases presenting similar problems. *See* Kramer, *Complex Litigation*, *supra* note 1, at 584.

different set of contacts. Airlines can already locate their headquarters or manufacturing facilities to the extent reasonable in states with pro-defendant law. Other than that, there is little potential for cases like *Sioux City* to shape primary behavior and thus to provide an opportunity to implement state policies.

Suppose that, for example, State Y wishes strongly to impose severe punitive damages in order to deter airlines from engaging in grossly negligent conduct that may harm its citizens. State Y simply cannot do so effectively, because it is overwhelmingly likely that in the vast majority of airline conduct affecting State Y citizens, a different state's law will be applied.[328] The same is true for a hypothetical State Z that wishes to use a relatively lax punitive damages regime to encourage airlines to locate within its borders by insulating them from ruinous liability. Again, State Z cannot provide airlines with any meaningful protection given the variety of circumstances (and hence the many possible configurations of state contacts) under which their conduct may potentially be subject to punitive damages.

Even this analysis supposes that strong policy positions underpin the particulars of states' punitive damages schemes, an assumption that may be true in some cases but is unlikely to be universally so. Particularly when differences are subtle—such as making punitive damages available for "willful" conduct in one case and "malice" in another[329]—they are likely to have evolved to some extent by accident, as a function of tradition or a judge's unconsidered use of one term rather than another in an opinion. In some cases, the different terms may reflect no real difference in law; in others, they may indicate a modest but largely unintentional one. In any case, they are unlikely to reflect the sort of serious policy clash necessary to create a big conflict.

But isn't *Sioux City* a bit like a Category D conflict, in that it involves many people and is the result of aggregation? While MDL cases certainly involve more parties than most simple litigation, they generally do not affect enough people to have widespread impact simply due to the reach of the decision. A case that affects dozens or even hundreds of people differs significantly from one that affects millions, or one (such as *Phillips Petroleum*) involving a large percentage of people who might be concerned

328. Note that the court in *Sioux City* did not even consider the home states of the passengers as relevant contacts. *In re* Air Crash Disaster at Sioux City, Iowa, 734 F. Supp 1425, 1430 (N.D. Ill. 1990). Citizens of any given state are likely to board flights with a variety of destinations, relevant parts of which were manufactured in a variety of places by corporations with different states of citizenship.

329. *Id.* at 1431–32.

about a particular issue, such as the royalty rate to be applied to withheld oil and gas royalties.[330] Certainly, it is possible for MDL cases to create big conflicts by virtue of their widespread impact, but many if not most MDL cases will not.

That a case presents a little conflict does not, of course, mean it can be ignored. Many MDL cases in particular may involve dozens or hundreds of litigants and thus have genuine consequences for the rights of real people. At the same time, it may be helpful to recognize that such cases do not present a clash of state interests or policies, despite the fact that courts sometimes characterize them in those terms. Courts in such cases, therefore, generally need not confront the challenge of trying to balance the supposed interests of various states or choose the state that has the strongest stake in the dispute. Rather, courts should attend to the issues that matter to litigants: absence of bias and selection of applicable law through a rational, transparent process.

Excessive attention to substantive differences in state law may, in fact, impair courts' attention to the procedural consequences of their choice-of-law decision-making, which may in fact be of far greater significance. As one commentator writing about the aviation context has noted, the variance in choice-of-law methodologies applied by different courts "virtually assures forum shopping as well as wide disparity in the compensation awards of airplane crash victims."[331] Likewise, choice-of-law results that are highly unpredictable may impede settlement negotiations—in the case at hand or in subsequent ones—by increasing uncertainty.[332]

What does this mean in practice for complex cases that nonetheless present little conflicts? The answer will, of course, vary for different cases, and indeed a variety of choice-of-law methods may be suitable for tackling complex cases involving little conflicts. Because the problem of choice-of-law in mass torts is such a persistent one, many proposals have been advanced to create new choice-of-law rules and methods in order to improve results in such cases.[333] In some cases, such changes may be desirable. In other

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330. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 797 (1985).

331. *See* Brackin, *supra* note 298, at 672.

332. *See id.* at 656 (noting that choice-of-law problems create "overall unpredictability and [a] wide range of compensation available for victims").

333. Some scholars have advocated, for example, applying a single law to govern all issues in a single mass tort case. *See, e.g.*, Paul S. Bird, *Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse*, 96 YALE L.J. 1077 (1987); James A.R. Nafziger, *Choice of Law in Air Disaster Cases: Complex Litigation Rules and the Common Law*, 54 LA. L. REV. 1001 (1994). Others have argued for dépeçage, or issue-by-issue analysis. *See, e.g.*, Symeon C. Symeonides, *The ALI's Complex Litigation Project: Commencing the National Debate*, 54 LA. L. REV. 843, 860 (1994). Many commentators have urged the creation of a federal choice-of-law approach. *See*

circumstances, however, current approaches, if applied selectively and wisely, may be sufficiently flexible to allow courts to reach a fair result without great difficulty. Regardless of the method courts choose, though, the insight that some complex cases nonetheless present little conflicts can be helpful in guiding their analysis.

To begin with, courts should take care to conduct a searching inquiry to determine whether, among laws with minor differences, a conflict of any sort actually exists. As Larry Kramer has noted, "States tend to copy their laws from each other, and many use identical or virtually identical rules."[334] While state laws will inevitably involve minor differences—such as the "willful conduct" versus "malice" requirement mentioned above[335]—in most cases, courts should not allow those differences to obscure broader commonalities, and they should make the question of whether a meaningful conflict exists in the first place a primary focus of their choice-of-law analysis.[336] Existing techniques such as dépeçage—applying the laws of different jurisdictions to different issues in a claim—can also help to narrow the area of actual divergence between states.[337] Finally, courts can benefit from construing state interests less aggressively and instead looking for common ground among state policies—a strategy that even Brainerd Currie, in his later writings, came to advocate.[338]

Second, where a genuine and meaningful difference between state laws does genuinely exist, courts can de-emphasize the notion of state interests and instead rely on other factors. As discussed above, interest analysis is nearly impossible to perform in a multi-jurisdictional situation involving small differences in state law. Further, as this Article has also discussed previously, the state "interests" involved in little conflicts are essentially

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id. at 852. Such proposals, of course, have also attracted criticism. *See, e.g.*, Kramer, *Complex Litigation*, *supra* note 1.

334. *See* Kramer, *Complex Litigation*, supra note 1, at 583.

335. *See In re* Air Crash Disaster at Sioux City, Iowa, 734 F. Supp 1425, 1431–32 (N.D. Ill. 1990); *see also supra* text accompanying notes 310–13.

336. In his later writings, Currie embraced this possibility to some extent, noting that some apparent conflicts could be resolved through a "moderate and restrained interpretation" of the state interests involved. *See* Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757–58 (1963) [hereinafter Currie, *Disinterested*]. For a leading example of the way in which this approach can be applied, see Bernkrant v. Fowler, 360 P.2d 906, 910 (Cal. 1961), in which Justice Traynor suggested that a difference in applicability of the statute of frauds under California versus Nevada law was dwarfed by the states' common policies, including the policies held by both states "to protect the reasonable expectations of the parties" and "to enforce lawful contracts."

337. *See* Symeonides, *supra* note 11, at 1039.

338. *See generally* Currie, *Disinterested*, supra note 336.

fictional, and courts should feel free to ignore them where they are not helpful in reaching a reasonable result. Where courts use the Second Restatement, for example, they may wish to focus on Second Restatement factors that do not involve state interests, such as those that look to the parties' justified expectations and the maintenance of predictability and uniformity[339] and those that focus on the location of relevant events, such as the place of conduct.[340]

Finally, in certain complex cases presenting little conflicts, a reasonable resolution might be to apply the law of a jurisdiction that represents the median or typical law of the several jurisdictions that may be involved rather than one that is an outlier. Assume, for example, in a punitive damages case, that of five potentially applicable laws, one is unusually sparing and another unusually generous, while three represent a middle range. If we imagine that contacts are widely dispersed among the five jurisdictions so that there is no obvious center of gravity, it is likely to be more in keeping with parties' expectations and intuitive notions of fairness to apply the law of one of the jurisdictions in the middle.[341] Judges must of course take care that such a practice does not turn into a search for "national consensus law"[342] or a rigid prejudice against outlier jurisdictions when they do in fact bear the strongest relationship to the case. Nonetheless, approaches like the Second Restatement seem consistent with a preference for laws that represent the mainstream practice.

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339. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(d)(f) (AM. LAW INST. 1971).

340. *See id.* § 145(2)(b).

341. Arthur Taylor von Mehren argued, based on similar considerations, that true conflicts might be resolved by "apply[ing] both states' rules, compromising differences on the basis of the relative strength of each legal order's claim to regulate." *See* Arthur Taylor von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347, 366 (1974). For example, Mehren suggested that, in circumstances where the law of one jurisdiction imposes liability and the law of the other does not, the plaintiff might be permitted to recover "one-half of his actual damages." *Id.* Where a conflict involves the law of multiple jurisdictions, applying the "median" or "typical" state's law might achieve some of the advantages of Mehren's proposal without requiring judges to undertake the potentially problematic task of inventing a hybrid law.

342. *See* Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527, 563 (2002) (recounting Judge Jack Weinstein's adoption of national consensus law in the case of *In re "Agent Orange" Prod. Liab. Litig.* and describing it as a "brilliant but highly controversial theory"). *In re* "Agent Orange" Prod. Liab. Litig., 580 F.Supp 690, 703 (E.D.N.Y 1984).

B. Problem #2: Little-Conflicts Tools in Big-Conflicts Cases

As the preceding section has argued, courts sometimes misconstrue little conflicts, particularly those contained in complex litigation, as involving wider questions of policy, and in the process may ignore the issues of more immediate concern to the parties. Perhaps an even more serious problem of fit, however, comes from the poor adaptation of existing choice-of-law tools to resolving big conflicts. Where big conflicts are concerned, however, the problem tends to be nearly the opposite one: courts have generally not viewed big conflicts as presenting different issues from little ones, and rarely use any special techniques for dealing with such conflicts.

Big conflicts, whether they go recognized or unrecognized by courts, will always be difficult cases that often admit no perfect solution. By their nature, they tend to involve serious policy disagreements among states or other issues of widespread public significance, and may involve the sort of no-win situation described in *Kearney* in which one agenda must inevitably yield to another. This is not, however, a reason to ignore them. On the contrary, courts can improve results in big conflicts by explicitly recognizing their existence and expanding the conflicts toolbox to find ways to address them.

As previously noted, courts already possess a powerful tool for avoiding Category D conflicts, which is to deny aggregation. Courts' principal task in these cases is to ensure that they do not overreact and extend the Category D class too far, thus preventing aggregation in cases where it is in fact desirable. Where a case presents only minor variations in state law on a matter of slight policy importance, it likely remains a little conflict even when the court's decision may affect many people. While not all such cases are suitable for certification, there may be some in which choice-of-law considerations should play a less substantial role in the certification analysis.[343]

In other sorts of big conflicts, however, the problem is just the opposite. Rather than magnifying the importance of big conflicts, as sometimes happens in Category D cases, courts in other scenarios tend to overlook them entirely. It is true that most conflicts analysis incorporates a process of determining whether two jurisdictions' law differs materially, and that most courts pay some heed to the presence or absence of state interests in that situation in determining whether a "true" conflict exists. But courts often fail to distinguish between cases that present a true conflict as an analytic construct and cases that involve a conflict in the more everyday sense—that is, an actual clash between meaningful policies of two jurisdictions.

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343. As previously mentioned, the issue of the proper level of class certification is a sufficiently complex and multifactorial one that a detailed discussion of it is beyond the scope of this Article.

For this reason, an important way courts could improve their handling of big conflicts is simply by developing mechanisms to identify them when they exist. Courts might examine conflicts, that is, for the big-conflict characteristics described in Part I.B: engagement of important policy concerns, particularly combined with far-reaching effects for many people, whether in the form of settling a certain legal question for good (Category B cases) or creating continuing uncertainty about the legal effects of conduct (Category C cases).

Once courts have recognized a particular case's big-conflict dimension, of course, they still need to consider what distinctive approaches might be worth employing in such a case. Although there is room for a great deal of further analysis on how to handle big conflicts, this Article makes two preliminary proposals. First, courts should be more concerned with real-world interests and effects when deciding cases that involve big conflicts. Second, courts should consider issues of territoriality and extraterritoriality that big conflicts may raise. Although Category B, C, and D conflicts raise distinctive issues, to some extent these proposals can be productively applied to each category.

1. State Interests in Their Real-World Dimension

Consideration of state interests can be just as helpful in big conflicts as it is distracting in little ones. This process, however, must be tempered by a real-world reality check; otherwise, a danger exists that the big conflicts category may become overinclusive. Thus, when courts consider the policies underlying legal rules, they should consider not only what purpose the rule might theoretically serve, but whether a jurisdiction is a*ctually* invested in the rule, and if so, to what extent. Where such genuine state interests are not present, courts can feel free to decide the case as a "little conflict," by whatever choice-of-law rule they would normally apply. But where such concerns are present, courts should take into account additional considerations.

Such inquiries might, in some cases, turn Category B true conflicts into what are essentially false conflicts. If only one state is meaningfully invested in its rule in a way that passes a real-world plausibility test, then courts should feel comfortable applying that state's law, even if the case might technically be classified as a true conflict. In other scenarios, states may meaningfully disagree, but one state's law may be significantly more important in its overall regulatory scheme or policy agenda; in such cases, the conflict might not be entirely obviated, but the court can nonetheless consider the disparity in interest in its decision-making.

There is some danger, of course, in permitting the courts of one state to decide whether another state is meaningfully invested in its policies or not. For this reason, courts should be liberal in permitting the foreign state an actual voice on this issue. Although one commentator has scoffed at the notion of states submitting amicus briefs in choice-of-law cases,[344] it seems not unreasonable that a state might do so in a scenario of critical policy importance (however absurd the idea might be in a garden-variety guest statute case). Courts could thus invite other states or jurisdictions to make their preferences known in situations where they have identified potentially important policy concerns—in the form of an amicus brief from the state's attorney general or, where a common-law rule is at issue, certification of the question to the state's supreme court. The issues addressed in these inquiries might concern the rule's purposes, importance to an overall statutory or regulatory scheme, or the degree to which the legislature considered whether extraterritorial application of the rule might be desirable or necessary to further its purposes.

This focus on states' real-world concerns could be helpful in expanding the scope of the state interests at stake beyond those that interest analysis takes into account. In his initial work, Currie initially saw state interests as a narrow focus on their citizens' welfare, deliberately excluding consideration of such state goals as "the policy of promoting a general legal order" or of "vindicating reasonable expectations."[345] In his later work, however, Currie advocated consideration of a broader swath of state policies and interests in resolving true conflicts.[346] As Currie later recognized, a state may in certain circumstances have a stronger interest in fostering interstate harmony or providing clear legal guidance in the future than in provincially insisting on application of its law to its citizens. Permitting such interests to be taken into account can help facilitate attainment of states' genuine policy goals; it can also be a way of resolving cases more easily, because a broader inquiry into state interests may reveal more areas of common ground than disagreement.

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344. *See* Gottesman, *Adrift*, *supra* note 68, at 531 ("Can anyone cite a case in which a state appeared as amicus curiae arguing the importance that its own law be applied?").

345. *See* Currie, *Methods*, *supra* note 76, at 181. Currie suggested that this exclusion was a practical one—that he ignored these possibilities not because of any "provincial lack of appreciation of the worth of these ideals," but because he wanted to focus on his primary purpose, which was to offer an alternative to what he saw as a deeply flawed choice-of-law system (i.e., the First Restatement). *See id.* (suggesting that, before such issues could be effectively addressed, it was necessary to "first clear away the apparatus which creates false problems and obscures the nature of the real ones").

346. *See generally* Currie, *Disinterested*, *supra* note 336 (discussing Currie's later idea that some conflicts could be avoided through a more moderate and restrained interpretation of state interests and the recognition that state policies frequently share common ground).

In order to take this wider range of interests into consideration, however, courts must be able to identify them. Soliciting input from the states themselves seems to be the best way for courts to accurately assess them. Of course, where such input is unavailable, courts may look to the other forms of evidence on which they conventionally rely in statutory interpretation.

If a state authoritatively disclaims a serious interest in application of its law, courts can discount that law's significance in deciding how to resolve the conflict. In other scenarios, however, state laws *will* actually reflect a genuine clash of deeply held policy perspectives. For example, if we assume that, in a case like *Kearney*, both Georgia and California are strongly committed to their respective policies on consumer policy, such a case presents both a true conflict and a big one. Neither state wants to lose, but it is likely that, at least to some degree, one will have to.

Such scenarios, of course, lead to inevitable friction, and it is likely impossible for courts to adopt an approach that leads to acceptable results in every situation. But recognizing that such a clash exists—and that it is possible that both jurisdictions have an equal stake in it—may help lead courts to find compromises that are as fair to both sides as is possible under the circumstances. This approach bears some resemblance to California's existing comparative impairment method for resolving true conflicts, and *Kearney*—with its difference-splitting result of applying the California rule only prospectively[347]—might stand as an example of a reasonable compromise. Indeed, the comparative impairment approach—in its broad outlines—has the potential to be a productive framework for thinking about big conflicts more generally. Nonetheless, comparative impairment decision-making could be enhanced by attention to (and fact-finding on where appropriate) the *actual* scope of the sovereign interests involved and the inherent trade-offs such conflicts create.

2. Drawing From International Comity and Extraterritoriality Doctrines

This Article's second proposal for resolving big conflicts is that courts should take seriously the problem of extraterritorial application of law as it arises in choice-of-law decision-making. In general, courts have rarely done so in the choice-of-law context, particularly where only sister-state legal rules are at issue but even in some conflicts involving foreign law.[348] This lack of attention to extraterritoriality in the choice-of-law decisions is surprising

347. *See supra* note 95 and accompanying text.

348. *See* Florey, *Divide*, *supra* note 9, at 204.

given that extensive case law and scholarship exists considering both the effect of *federal* law outside the United States and the permissible extraterritorial reach of state governmental authority more generally (such as, for example, the ability to impose state regulatory requirements on an out-of-state producer).[349] Courts' decisions in big-conflict cases can in some cases create similar effects—they can result in states' law being applied outside state and even U.S. borders, sometimes subverting actors' legitimate expectations or subjecting them to inconsistent expectations—and should, at least in some situations, be considered through similar lenses.

Considering the extent to which application of a given state's law raises extraterritoriality issues is useful for several reasons. First, in some cases, the question "Do the purposes of this legal rule require its extraterritorial application?" may be helpful in whittling down large conflicts to areas of genuine disagreement. Legislative history may indicate, for example, that legislators assumed or intended that a particular law would only apply to state citizens or those acting in-state. In situations where the intended geographic reach of a particular law is limited, the state may have no interest in applying its law outside its borders.

Courts, of course, should be careful in making such determinations. It would be misleading, for example, to apply a strict presumption against extraterritoriality to state law. The general practice has been to apply state law outside state borders routinely in certain conflicts scenarios (think, for example, of the guest statute cases in which courts apply the law of parties' common domicile even when an accident occurred in another jurisdiction).[350] Against this backdrop, state legislators have generally had no reason to raise extraterritoriality concerns explicitly. Further, many legal rules that create conflicts arise from common law, where courts may have even less reason to consider a given rule's proper territorial reach. Nonetheless, it is still worth inquiring into the intended geographical scope of a rule, because a court may wish to give substantial weight to such intent in the rare cases where it is present. Explicit discussion of extraterritoriality concerns in conflicts cases may ultimately have the further benefit of encouraging legislatures to consider the issue of legislation's territorial range and provide explicit guidance to courts more frequently.

A consideration of extraterritoriality also goes hand in hand with related due process issues, such as providing proper notice to people of the legal

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349. *See id.*

350. *See* Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1521 (2007) (noting that "[i]n practice, states exert regulatory control over each other all the time").

consequences of their conduct and avoiding scenarios in which conduct may be governed by multiple and perhaps conflicting legal rules. Because we generally assume that state law applies to within-state conduct, that is, it is seldom problematic or a subversion of expectations to decide a choice-of-law question in a way that conforms to this principle.[351] A choice-of-law decision that applies state law outside of state borders, however, may create unfair surprise and uncertainty. This is not to say that state law should never have extraterritorial effect as a result of conflicts decisions—indeed, such a result would utterly impede states' ability to meaningfully legislate. Where such application is unavoidable, however, courts should shape their decisions to minimize the frictions thereby created.

As noted, there is a wide body of court decisions and other literature considering extraterritoriality issues in other contexts. Although much of this doctrine may not be directly transferable to the realm of conflicts, it nonetheless forms a potential source of guidance. In particular (as I have argued elsewhere),[352] courts might benefit in certain choice-of-law cases by considering principles of comity developed in the international context, such as those articulated in the well-known *Timberlane Lumber* case[353] or in the discussion of prescriptive jurisdiction in the Restatement (Third) of Foreign Relations.[354] Although neither of these sources currently forms the actual standard for determining whether U.S. federal law should be applied extraterritorially,[355] many of their articulated factors nonetheless have the

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351. *See* Cipolla v. Shaposka, 267 A.2d 854, 856 (Pa. 1970) ("[I]t seems only fair to permit a defendant to rely on his home state law when he is acting within that state.").

352. *See* Florey, *State Courts*, *supra* note 27, at 1121.

353. *See* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 614 (9th Cir. 1976) (citing, as elements to be considered, "the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad").

354. The Third Restatement enumerates various bases on which nations may exercise prescriptive jurisdiction—that is, the extension of substantive law to people and actions—but also articulates "reasonableness" concerns that nations should consider in determining whether to exercise that jurisdiction. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403 (AM. LAW. INST. 1987).

355. In Hartford Fire Ins. v. California, 509 U.S. 764, 799 (1993), the Court suggested that there was no role for *Timberlane Lumber*-style comity considerations as long as it is possible for an actor in another jurisdiction to comply with both U.S. and foreign law. More recently, the Court has shifted focus from comity concerns to legislative intent in applying a presumption against the extraterritorial application of federal statutes. *See* Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 255 (2010). Nonetheless, even if neither doctrine is of live concern at the federal level,

potential to be useful in the choice-of-law context.[356] In addition to considerations already discussed, such as the relative importance of the regulated activity to various interested jurisdictions,[357] these two sources offer other considerations that may be of particular help in resolving big conflicts. Among the Restatement factors, for example, are the degree of conflict between regulations, the nature of the activity to be regulated, the likelihood of compliance with the law imposed, and the relative importance to the dispute of territorial versus non-territorial conduct.[358]

To some extent, some of these values find expression in existing conflicts law (and, indeed, both *Timberlane Lumber* and the Third Restatement have been characterized as sharing some considerations with interest analysis).[359] The "moderate and restrained" approach to resolving true conflicts,[360] for example, essentially takes into account the degree of conflict between two jurisdictions' laws by exhorting courts to assess the common ground as well as the differences between such laws. Moreover, *Timberlane Lumber* and the Third Restatement have come in for their own round of criticism for being overly vague or placing courts in an inappropriate role in delimiting the scope of national power.[361] Nonetheless, such sources of law have potential usefulness in helping courts resolve choice-of-law problems, where fuzzy multifactor tests are already the rule and where assigning courts a role in solving problems of territoriality may be somewhat less fraught.[362] At the very least, having an explicit source of guidance for identifying and resolving territoriality problems may help clarify courts' thinking on the issue.

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a strong case exists that they can nonetheless provide useful guidance. *See generally* Florey, *State Courts*, *supra* note 27.

356. Indeed, commentators have noted the influence of domestic choice-of-law doctrine in both of these frameworks. Some commonalities exist between the Restatement (Second) of Conflict of Laws and the Restatement (Third) of Foreign Relations. *See* Patrick J. Borchers, *Categorical Exceptions to Party Autonomy in Private International Law*, 82 TUL. L. REV. 1645, 1655 (2008). Likewise, *Timberlane Lumber* is often seen as specifying an interest analysis test. *See, e.g.*, Lawrence A. Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 CALIF. L. REV. 835, 877 (1987). Both analyses, however, allow for a much broader consideration of comity and extraterritoriality issues than does Currie-style interest analysis.

357. *See Timberlane Lumber Co.*, 549 F.2d at 614.

358. RESTATEMENT (THIRD) OF FOREIGN RELATIONS §403 (AM. LAW INST. 1987)

359. *See* Sullivan, *supra* note 356, at 877.

360. *See* Currie, *Disinterested*, *supra* note 336, at 757.

361. *See, e.g.*, Florey, *State Courts*, *supra* note 27, at 1130 (summarizing some such criticism).

362. For better or worse, courts occupy such a role to some extent already.

CONCLUSION

Current choice-of-law doctrine, developed in the mid-twentieth century, is best adapted to deciding the sorts of cases that were most common at that time: small-scale disputes between individuals with few large-scale policy implications. Although such little conflicts also exist today, certain cases also engage broader issues of territoriality, policy, and state power. The divide between little conflicts and big ones has created two parallel problems. On the one hand, courts have frequently assumed incorrectly that garden-variety conflicts decisions have something important to do with sovereigns' proper spheres of regulation and influence, thus needlessly complicating decisions that could be made more straightforwardly. At the same time, however, courts have also lacked guidance in identifying and analyzing situations that do in fact raise genuine extraterritoriality concerns. In such cases, courts could, among other techniques, give greater concern to real-world interests and borrow from doctrines of comity and territoriality in the international context. Identifying the characteristic features and concerns of big and little cases, then, can help courts resolve both more efficiently and fairly.