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Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language

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RESOLVING RENVOI: THE BEWITCHMENT OF OUR INTELLIGENCE BY MEANS OF LANGUAGE

*Kermit Roosevelt III**

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INTRODUCTION

The task of a court confronted with a choice-of-law problem, conventionally conceived, is to determine which of several different jurisdictions' laws applies to the case before it.¹ The question of what law applies is a question the court answers by consulting the law of its own state; that is, it is a question of forum choice-of-law doctrine. If the forum's choice-of-law rules direct the application of forum law, the court proceeds to apply the forum's substantive, or internal law: the tort, contract, or other law that determines the parties' substantive rights.

The forum's choice-of-law rules might also direct the application of another state's law. At this point a question arises. Should the court, when instructed by forum law to apply the law of another state, apply that state's internal law, or should it apply the state's entire law, including its choice-of-law rules? The latter might seem the obvious choice—applying a state's law, after all, presumably means reaching the same results that the courts of that state would reach—but it opens the door to an alarming possibility. Suppose that State *A*'s law directs the application of State *B*'s law, and the State *A* court understands this to mean the entirety of State *B* law. If State *B*'s choice-of-law rules point back to State *A* law, it is natural again to understand this as a reference to the entirety of State *A* law, and an unending series of references back and forth arises.²

1 Though renvoi arises in the international context, this Article will focus on the domestic, interstate version, both to keep things as simple as possible and because I will argue that the constitutional provisions governing interstate relations significantly constrain states in the choice-of-law venture. For international conflicts, the constitutional constraints are obviously lesser, but the conceptual points I make retain significance.

2 Other descriptions of the repetition thus created abound. Renvoi has been called: a "*circulus inextricabilis*," JOHN PAWLEY BATE, NOTES ON THE DOCTRINE OF RENVOI IN PRIVATE INTERNATIONAL LAW 49 (1904), an "endless circle," Lindell T. Bates, *Remission and Transmission in American Conflict of Laws*, 16 CORNELL L.Q. 311, 313 (1931), and a "game of battledore and shuttlecock [or] international lawn-ten-

The doctrine that a reference to the law of another state is a reference to the entirety of that state's law is the doctrine of renvoi, and the question of whether it should be followed—whether, in choice-of-law terminology, the renvoi should be “accepted” or “rejected”—stands out even among the notorious esoterica of conflict of laws as unusually exotic and difficult.³ For nearly two hundred years it has troubled the courts,⁴ driving judges to distraction and scholars to treatises on deductive logic.⁵ Though “[j]uristic speculation has been almost infinite,”⁶ scholarship has not settled the matter; much of it, “upon analysis, is seen to consist of nothing but dogmatic statement[s] of the result desired to be reached.”⁷

In more recent years, the controversy has abated, as scholars seem to have accepted the claim, put forward by proponents of modern policy-oriented approaches to choice of law, that these newer approaches offered a decisive answer.⁸ But the claim is untrue, and the problem persists.⁹ The solutions advanced by the policy-oriented approaches are essentially the same as those offered by the territorialists,

nis,” Ernest G. Lorenzen, *The Renvoi Theory and the Application of Foreign Law*, 10 COLUM. L. REV. 190, 198 n.33 (1910).

3 See, e.g., Joseph M. Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws*, 14 S. CAL. L. REV. 221, 249 (1941) (calling the doctrine “famous, insidious, and baffling”). The matter of pronunciation presents an additional difficulty: “rohn-vwa”? “ren-voy”? “ron-voy”? The first is correct given the word’s French origin; those wishing to Anglicize (and after all, no one calls the capital “Pah-ree”) use one of the latter two. See Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 980 (1991) (“[P]roper pronunciation is something like ‘ron-vwa,’ though some crude American scholars (myself included) say ‘ron-voy.’”).

4 See Ernst Otto Schreiber, Jr., *The Doctrine of the Renvoi in Anglo-American Law*, 31 HARV. L. REV. 523, 523 (1917) (describing early renvoi cases).

5 For an example of the former, see *In re Tallmadge*, 181 N.Y.S. 336, 348 (Sur. Ct. 1919) (deploring the “fundamental unsoundness” of the renvoi doctrine); for the latter, see, for example, J.C. Hicks, *The Liar Paradox in Legal Reasoning*, 29 CAMBRIDGE L.J. 275, 278–80, 284–89 (1971) (discussing renvoi in terms of the theories of Bertrand Russell and Alfred North Whitehead). I will have a bit to say about the logical structure of the problem, though I do not, in the end, think that approaching it from the perspective of formal logic is useful.

6 Note, *A Distinction in the Renvoi Doctrine*, 35 HARV. L. REV. 454, 454 (1922).

7 Cormack, *supra* note 3, at 249.

8 See *infra* Part II.B.

9 See *infra* Part II.B. Kramer, *supra* note 3, at 1003–13, deserves credit for the most penetrating and comprehensive statement of this point. My account of why the modern approaches do not solve the renvoi problem is similar to Kramer’s, but it adopts a slightly different perspective and relies in part on constitutional considerations.

and they suffer from the same defects.¹⁰ Consequently, the dispute over renvoi should be a live one.

At least, it should be a live one according to the conventional understanding of the nature of the choice-of-law process. My goal in this Article is not to take a side in the dispute—not to argue that renvoi should be accepted or rejected. It is instead to shed some light on what kind of a problem renvoi is, why it occurs, and what the problem might tell us about choice of law more generally.

In his 1938 assessment of the problem, Erwin Griswold lamented that “we are apparently on a merry-go-round” and asked “[h]ow is it possible to get off?”¹¹ I want to ask a different question: how did we get on in the first place? And my conclusion, to end the suspense, is that certain conventional ways of talking about choice of law have given us an unfortunate picture of what a choice-of-law analysis involves.¹² One of the unfortunate things about this picture is that it is false in perhaps the only sense such a picture can be false, which is that its vision of what courts are doing is unconstitutional. But more to the point, the picture is unhelpful. It generates unnecessary difficulties; it produces problems such as renvoi. Moving beyond that picture, and conceptualizing conflicts in a different way, would help the field a great deal, and this Article is one in a series of attempts to demonstrate that the persistent problems of the conventional understanding are not inevitable.¹³

Part I of the Article sets out the renvoi problem as it is conventionally understood. Part II examines the attempts to solve it within particular choice-of-law systems: the territorial approach and the more modern, policy-oriented approaches. It suggests that these attempts

10 Kramer's approach, though I do not agree with it in all particulars, is not subject to the same criticisms. See *infra* Part II.B.

11 Erwin N. Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1167 (1938).

12 See LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 115 (G.E.M. Anscombe trans., 1953) (“A picture held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably.”).

13 For my earlier attempt, see Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448 (1999). The broad purpose of that article was to suggest that it would be more useful to talk in terms of conflicts, rather than choices, between laws, because the rhetoric of choice overstates the extent to which one state may disregard another state's determination that a transaction falls within the scope of its law. This Article addresses what is in some ways the converse of that problem: the extent to which one state may disregard another's determination that its law does *not* reach a transaction. It focuses more broadly on the conventional understanding of choice of law as a matter of “determining what law applies” in the context of renvoi; it also amplifies and refines some of the points of the earlier article. And, I admit, it corrects a couple of mistakes.

are actually much more similar than has previously been recognized and that they fall prey to similar difficulties. It also examines the current situation, in which methodological pluralism obtains, and demonstrates that this exacerbates the problem of renvoi. Part III sets out a different approach to choice of law, building on a model developed by Larry Kramer. Within this model, I show, the problem of renvoi appears quite different; indeed, it does not exist. In place of the interminable circle of references back and forth, there are several narrow and distinct questions, none of which is insoluble or paradoxical.

Part IV uses the model developed in Part III as an analytic tool to examine the territorial and modern approaches to choice of law and to gain a different perspective on the nature of renvoi within those systems. And Part V offers the inevitable summation, arguing that renvoi, like many other apparently intractable problems in choice of law, is not a difficulty inherent to the venture. Still less is it a logical puzzle to be tackled by appeals to Russell and Whitehead. Instead, it is the artifact of a particular conception of the choice-of-law process, imposed upon on us by the conventional vocabulary—specifically, the supposition that one state's law can determine whether another state's law applies, and more generally, the idea that a court's task in performing a choice-of-law analysis is to decide which state's law applies.

I. THE PROBLEM

Choice-of-law rules, at least on occasion, will direct the application of some law other than the law of the forum. That, after all, is the point of choice of law. When they do, the forum court must decide what it means to apply the law of another state. And this, as already noted, is the occasion at which the problem of the renvoi arises. One of the earliest discussions of the problem phrased the issue as follows: "Broadly stated, the doctrine of the *renvoi* is that, when by its rules of the conflict of laws a court must apply the law of some other legal unit, it must apply not only the internal law of that unit, but also its rules of the conflict of laws."¹⁴ Modern formulations are similar.¹⁵ The problem, of course, is that each state's choice-of-law rules might

14 Note, *supra* note 6, at 454.

15 See, e.g., Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1196 (2000) ("[W]hen court X decides that Y state law applies, should court X apply Y substantive law, or should it apply Y choice-of-law rules . . . ?"). The important aspect of this formulation, as will become clear, is that it sees the application of State Y law as a question to be determined by the State X court, under State X law.

point to the law of the other state, setting up a series of references back and forth, with no obvious end in sight.

At the outset, there is something to be said about what kind of a problem *renvoi* is. One answer is that it is a problem of self-referentiality, conceptually linked to the welter of related paradoxes arising from the simple proposition: "This sentence is false."¹⁶ If we suppose that the question in a particular legal case is whether the plaintiff should prevail, *renvoi* could be modeled as a situation in which State *A*'s law provides that the plaintiff should prevail if she would prevail under the law of State *B*, while State *B*'s law provides that the plaintiff should prevail if she would under the law of State *A*.¹⁷ More precisely, the *renvoi* problem can be compared to the circle created by the following two propositions:

P1: The following sentence is true.

P2: The preceding sentence is true.

These sentences do not create a paradox, as they would if one asserted the falsity of the other. What they create is an indeterminacy about their truth-values, a situation in which it seems equally plausible to characterize them as both true, or both false. If P1 is true, for example, then P2 must be true. And if P2 is true, then P1 must be true. So this supposition simply leads to the conclusion that both are true. What if P1 is false? Then P2 must be false, in which case P1 must be false. Neither supposition leads to a contradiction.

Likewise, we could suppose either that State *A* law provides that the plaintiff prevails or that she does not; either supposition fits equally well. If State *A* law so provides, then *B* law does as well; if *A* law does not, neither does *B* law. The problem in this situation arises from the fact that there is no way to put content—the substance of *A* or *B* law, the truth-values of P1 or P2—into the circle, which means that a court would be unable to reach a decision: *A* and *B* law, as defined, do not resolve the case. One way of expressing this conclusion would be to say that when it is impossible to decide whether a proposition is true or false, it is quite likely that the proposition has

16 See generally, e.g., GEORG HENRIK VON WRIGHT, *PHILOSOPHICAL LOGIC* 25–33 (1984) (discussing "the paradox of the liar"); Thomas A. Cowan, *Renvoi Does Not Involve a Logical Fallacy*, 87 U. PA. L. REV. 34, 41–46 (1938) (comparing *renvoi* to standard paradoxes of self-referentiality).

17 As I will suggest later, the *renvoi* problem appears in this form if one adopts the local law theory. See *infra* notes 79–82 and accompanying text.

not been defined sufficiently to make it useful.¹⁸ From this perspective, renvoi appears as an incomplete definition.¹⁹

It is also possible, however, to model renvoi in a way that produces paradox. Paradox arises when the truth-values of the propositions change as the cycle progresses. In the one-proposition version ("This sentence is false") the supposition that the sentence is true implies that it is false, in which case it is true, and so on. The two-proposition version is this:

P1: The following sentence is true.

P2: The preceding sentence is false.

Here, if we suppose that P1 is true, we can conclude that P2 is true, which implies that P1 is false. And if P1 is false, then P2 must be false, and hence P1 must be true. Renvoi resembles this model if we suppose, as does the conventional approach to choice of law, that the question to be answered is "What state's law applies?" Now name our propositions "State A law" and "State B law" and define them as follows:

State A law: State B law applies.

State B law: State A law applies.

Now State A law tells us that State B law applies, but State B law tells us that State A law applies. The shifting answers to the question match the fluctuating truth-values of P1 and P2; here renvoi appears as a paradox. The two states' laws, with their mutual cross-reference, in fact contradict each other. This depiction of renvoi is probably closer to the conventional understanding than the incomplete definition, and it captures something important about the problem: the extent to which it relies on the supposition that State A law has something to say about whether State B law applies to a transaction. I

18 Such an assertion is recognizable from the philosophical perspective. It resembles the logical positivist claim that the meaning of a proposition is its method of verification, which carries as a corollary the implication that propositions that cannot be verified are meaningless. See, e.g., Moritz Schlick, *Positivism and Realism* (David Rhynin trans.), in *LOGICAL POSITIVISM* 82, 86–88 (A.J. Ayer ed., 1959). It also holds a place in the legal canon. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809, 826 (1935) ("All concepts that cannot be defined in terms of the elements of actual experience are meaningless.").

19 Erwin Griswold, in one of the leading articles, directs readers to a book by Lewis and Langford. Griswold, *supra* note 11, at 1167 n.8 (citing CLARENCE IRVING LEWIS & COOPER HAROLD LANGFORD, *SYMBOLIC LOGIC* 438–85 (1932)). Those authors discuss the paradox created by two sentences, each of which asserts the falsity of the other, and term the situation thus created a "vicious regression" resulting from the fact that "we have pretended to define p_1 and p_2 in terms of each other and have therefore not assigned to them any meanings at all." CLARENCE IRVING LEWIS & COOPER HAROLD LANGFORD, *SYMBOLIC LOGIC* 440 (1932).

will have occasion to discuss both versions, but the paradox will be the primary focus.

So what kind of a problem is *renvoi*? From a logical perspective, it is a problem of self-referentiality, which we could call a paradox or an incomplete definition. Another answer, which does more to explain the literature, is that it is a tempting problem. It is severe, for it seems to prevent resolution of a case, but it is easily stated, for everyone understands the idea of an endless cycle. It is, by the standards of legal scholarship, sexy;²⁰ it allows ready allusion to famous philosophical riddles, which possess—or seem to—more intellectual gravitas than the latest iteration of the Uniform Commercial Code. And it appears the sort of thing that only someone very smart could figure out; there is about it a whiff of Excalibur. It is, in short, exactly the type of problem that problem-solving types like to solve.

The tempting nature of the problem is a partial explanation for the academic furor that arose over *renvoi* in the first half of the twentieth century. But *renvoi* was debated with such intensity in the law reviews not simply because it is the sort of thing that strikes legal scholars as nifty; it is also, legitimately, a serious issue in the conflict of laws. When a carefully constructed system throws up a paradox, it is at least a warning that something may be amiss in the theory.²¹ It was not without reason that the problem for many years “occupied the first rank in the theoretical discussions relating to the Conflict of Laws.”²²

Nor is *renvoi*'s significance merely theoretical; the *renvoi* situation does arise in actual cases. The easiest way to create a *renvoi* is through a difference in two states' choice-of-law rules. If, for instance, State *A* holds that the law to be applied to a tort is the law of the place of injury, while State *B* holds that the appropriate law is the law of the

20 Which, I admit, is not saying much.

21 In a logical system, the derivation of a paradox is catastrophic: because any result can be logically derived from a paradox, all the conclusions generated by the system become suspect. For a succinct example of the ways in which self-referentiality can compromise the deductive soundness of a system, consider the following two propositions:

P1: Both P1 and P2 are false.

P2: God exists.

P1 cannot be true, for then it would assert its own falsity, engendering paradox. So P1 must be false. But then one of the two propositions must be true, and the only remaining candidate is P2. Voila! This “proof” of the existence of God is generally attributed to Buridan. See JOHN BURIDAN ON SELF-REFERENCE 91–93 (G. E. Hughes ed., 1982).

22 Lorenzen, *supra* note 2, at 192; see also, e.g., 1 ERNST RABEL, THE CONFLICT OF LAWS 70 (1945) (characterizing *renvoi* as “the most famous dispute in conflicts law”).

place of the act causing injury, a tort with an act in *A* and an injury in *B* will bounce back and forth between the two states. As Ernest Lorenzen, perhaps renvoi's fiercest critic, notes, "[t]he problem is a general one It arises whenever the rules of Private International Law of the countries in question differ."²³

In fact, Lorenzen understates the prevalence of renvoi, which can arise, even when choice-of-law rules are identical, as a consequence of differences in internal law or characterization.²⁴ Suppose, for example, that two states both follow the territorial choice-of-law rule for contracts, according to which the validity of a contract is determined by the law of the place of its formation. Both additionally agree that a contract is formed in the place where the last act necessary to formation occurs. They agree even that acceptance is the crucial last act. Nonetheless, renvoi occurs if they disagree on what constitutes acceptance. If, for instance, State *A* follows the mailbox rule, under which a contract is formed when acceptance is placed in the mail, and State *B* adheres to the minority approach under which acceptance is effective only when received, the two states' laws will disagree about where the contract was formed. And if acceptance was mailed in State *B* and received in State *A*, the disagreement will take the form of renvoi: each state's law will conclude that the contract was formed in the other state and should be governed by that state's law.²⁵

Even substantive uniformity is not enough. Courts in states that follow the same choice-of-law rules, whose internal law is in perfect accord, may still reach different conclusions about the appropriate law to apply if they characterize a cause of action differently. If one state's courts see the case as presenting a tort issue, and the other state's courts as a contract action, they may again each conclude that

²³ Lorenzen, *supra* note 2, at 191.

²⁴ See Rhoda S. Barish, Comment, *Renvoi and the Modern Approaches to Choice-of-Law*, 30 AM. U. L. REV. 1049, 1064 (1981) (describing characterization renvoi).

²⁵ What if the rules are reversed, so that State *B* follows the mailbox rule and State *A* does not? Now each state's law will see a contract formed within its borders and subject to its law. Instead of the apparent mutual disclaimer of legislative jurisdiction in the text, there are overlapping assertions of jurisdiction—what conflicts literature calls a "*cumul*" or "*conflit positif*" instead of a "*lacune*" or "*conflit négatif*." FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 138 (1993). Juenger elsewhere seems to suggest that the importation of the *cumul* and *lacune* into American conflicts law was the responsibility of Brainerd Currie and that the territorial approach avoided such problems. See Friedrich K. Juenger, *How Do You Rate a Century?*, 37 WILLAMETTE L. REV. 89, 105 (2001) ("Unlike Beale's territorialism . . . in Currie's scheme of things, several states may be simultaneously interested, or for that matter disinterested, in applying their policies to a particular case."). As the foregoing demonstrates, similar results can occur within the territorial system.

the other state's law applies.²⁶ Likewise, disagreement over the classification of an issue as substantive or procedural can have the same effects, since courts will follow local procedure even when applying foreign substantive law.²⁷ To eliminate the possibility of renvoi, in short, requires complete uniformity in choice-of-law methodology, internal law, and characterization techniques—at which point, obviously, there is very little need for choice of law. Renvoi, then, is aptly termed one of the “pervasive problems”²⁸ in choice of law; it will be with us as long as courts consult choice-of-law rules to determine which law applies.

One of the things this Article aspires to do, of course, is to undermine this conventional understanding of the choice-of-law project. When we encounter paradox, it is worthwhile to pause and think about whether what we have run into is a real difficulty or one of our own creation. I will eventually suggest that renvoi is the latter. In order to understand the significance of that conclusion, however, it is necessary first to consider how renvoi looks from the perspective of the territorial and the more modern approaches to choice of law and to examine their attempts to solve the problem.

II. RENVOI WITHIN SYSTEMS

A. *The Territorial Approach*

What is usually called the territorial (and sometimes the traditional or vested rights) approach to choice of law was not as monolithic as the label might suggest. Its preeminent exponents differed in

26 Or, as mentioned in the previous note, each might conclude that its own law applied. For a classic example of the power of characterization, see *Levy v. Daniels' U-Drive Auto Renting Co.*, 143 A. 163, 164–65 (Conn. 1928) (recharacterizing a tort claim as contractual in nature). For discussions of characterization more generally, see, for example, A. H. ROBERTSON, *CHARACTERIZATION IN THE CONFLICT OF LAWS* (1940). The scholarship on characterization has been, if possible, less successful than that on conflicts generally; a leading casebook calls it “large but uninformative.” DAVID P. CURRIE ET AL., *CONFLICT OF LAWS* 43 (6th ed. 2001). I believe that characterization is another area where the traditional choice-of-law vocabulary has led us astray and that the problem is better understood as essentially an election of remedies situation. Explaining and defending this assertion will require another article.

27 See generally RUSSELL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 59–94 (4th ed. 2001) (discussing categories of “substance” and “procedure,” as well as renvoi).

28 *Id.* at 52. Renvoi has also been classed with “wrinkles in the theory,” LEA BRILMAYER & JACK GOLDSMITH, *CONFLICT OF LAWS: CASES AND MATERIALS* 119 (5th ed. 2002), and “problems old and new,” CURRIE ET AL., *supra* note 26, at 244.

significant particulars, including their stance towards renvoi.²⁹ My exemplar will be Joseph Beale, who, as the Reporter for the First Restatement and author of a three-volume treatise commenting on the Restatement, exerted an unparalleled influence on the development of American conflicts thought.

Beale's approach begins with the axiom³⁰ of territoriality, the principle that "the law of a state prevails throughout its boundaries and, generally speaking, not outside them."³¹ Beale believed it impos-

29 Joseph Beale, as will be seen, took a fairly strong position against renvoi as a matter of theory—though, as we shall also see, the logic of his position is less than obvious. Goodrich's hornbook, at least in its later editions, viewed it more pragmatically and more favorably. See HERBERT F. GOODRICH, *HANDBOOK OF THE CONFLICT OF LAWS* 19–20 (3d ed. 1949) ("On policy grounds . . . a better case for limited use of renvoi can be made."). Goodrich's move towards pragmatism, and the evolution of conflicts thinking more generally, is neatly encapsulated in the ways the various prefaces of his hornbook acknowledge Beale, shifting from unadulterated praise in the first edition to the remark that "no pioneer's work becomes the last word in the subject and that is a good thing too" in the third. *Id.* at v, ix. And Dicey, describing the English practice, argued that courts look to the entire law of foreign jurisdictions. See A.V. DICEY, *A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS* 79–81, 715–23 (2d ed. 1908); see also Perry Dane, *Vested Rights, 'Vestedness,' and Choice of Law*, 96 *YALE L.J.* 1191, 1199 n.34 (1987) (noting disagreement between Beale and Dicey).

30 "Axiom" is the appropriate word. Recent scholarship has suggested that formalism, as conventionally understood, was more a creation of its critics than an intellectual movement to which anyone actually subscribed. See, e.g., ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 57–112 (1998); Albert W. Alschuler, *Rediscovering Blackstone*, 145 *U. PA. L. REV.* 1, 1–2 (1996) (responding to this "myth"). A look at Beale's treatise, though, displays the extent to which he believed his basic principles to be both unquestionable and capable of generating fairly specific rules through a rational deductive process. See 1 JOSEPH H. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* § 1.14, at 12 (1935).

In the introduction, the general nature of law, of legal rights, and of jurisdiction will be considered; this will be followed by a detailed theoretical study of legal rights, in which an attempt will be made to establish the time and place in which legal rights come into existence, the legal effect of acts, and the limits of merely remedial action.

1 *id.*; see 1 *id.* § 3.4, at 25 ("[I]n great part [law] consists in a homogeneous, scientific, and all-embracing body of principle."). Indeed, his treatise sets out choice-of-law rules with the certitude of a logical demonstration. Given this understanding of law, the accusations of dogmatism to which he was subject are perhaps off the mark; no one calls a logician dogmatic for believing in his proof. Beale's failing was his belief that law resembled logic. See Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 *IOWA L. REV.* 1513, 1592 (2001) (noting that Beale "came as close as anyone to understanding the common law as composed of principles that transcended the actual principles upon which any particular common law jurisdiction premised its decisions").

31 1 BEALE, *supra* note 30, § 59.2, at 308.

sible, in fact, for the law of one state to operate as law within the borders of another state: "It is quite obvious that since the only law that can be applicable in a state is the law of that state, no law of a foreign state can have there the force of law."³² From this premise flows the conclusion that only the law of the state where an event occurred can attach legal consequences to that event, and choice of law becomes largely a matter of determining the place of occurrence. Much of Beale's treatise is therefore concerned with establishing "localizing" rules to determine where, for example, torts are committed or contracts formed.

Territoriality might seem to offer an easy answer to the renvoi problem. If foreign law can never apply within the forum state, then obviously the forum cannot apply foreign choice-of-law rules. But this answer, as should be immediately apparent, comes at the price of scuttling the whole choice-of-law venture; if the forum can never apply foreign law, how is it to adjudicate cases dealing with events that occurred in other states?

Beale's answer was that when a court, for example, awarded damages to a plaintiff for an out-of-state tort, it was not applying the law of the foreign state as *law* at all. Instead, "[t]he foreign law is a fact in the transaction."³³ That is, it is a fact that foreign law entitles the plaintiff to recover, and this fact allows him to invoke the remedial law of the forum. The forum applies its own law in order to vindicate rights that have vested under the law of another state.³⁴

The advantage of this description over one that allows the possibility of foreign law operating as law is not readily apparent and may be a matter more of rhetoric than theory.³⁵ Beale, however, apparently believed that it offered a reason to reject renvoi. "The vice in the decisions [accepting renvoi]," he wrote, "results from the assump-

32 1 *id.* § 5.4, at 53. For a contemporaneous discussion of territoriality, see Elliott E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 379 (1945) ("Legal rights are created by the operation of law on acts done in the territory within its jurisdiction, and only one law can apply to an act."). For a modern one, see, for example, LEA BRILMAYER, *CONFLICT OF LAWS* § 5.4.2, at 247-53 (2d ed. 1995).

33 1 BEALE, *supra* note 30, § 5.4, at 53.

34 1 *id.* § 8A.28, at 86. For a more detailed discussion of Beale's taxonomy of rights, see Roosevelt, *supra* note 13, at 2456.

35 See Cheatham, *supra* note 32, at 367 (suggesting that vested rights theorists disapproved of the comity-based conception on the grounds that speaking in terms of foreign law operating by permission of the forum would "arouse unduly the suspicion and vigilance of the judge against this foreign activity" and "give to the forum judge the impression that his discretion is far wider than that given to the judge in other fields of the law").

tion that the foreign law has legal force in a decision of the case; whereas . . . the only Conflict-of-Laws rule that can possibly be applied is the law of the forum and the foreign law is called in simply for furnishing a factual rule."³⁶

Why Beale thought the fact/law distinction solved the problem is obscure at best. The question, phrased in Beale's terminology, is whether a court determining whether rights have vested under foreign law should consult the entirety of foreign law or merely foreign internal law. Asserting that foreign law is "a fact in the transaction" hardly shows that the latter is the correct course. Indeed, the territorialist premise leads most naturally to the opposite conclusion. If the forum is supposed to enforce rights vested under foreign law, it should not be a matter of indifference that the foreign court, following its choice-of-law rules, would conclude that no rights exist under its law. As Erwin Griswold observed, "[i]t is not a little difficult to understand why the exponents of the 'vested rights' point of view in conflict of laws have also been leading opponents of the renvoi in any sense."³⁷

Nor is Beale's answer to renvoi created by interstate differences over the mailbox rule any more lucid. If different states' laws differ over where a contract was formed, he wrote, "[i]n a territorial system of law there can be little doubt that this conflict is resolved in favor of the law of the forum."³⁸ Little doubt, perhaps; little explanation, certainly. It is hard to avoid the conclusion that Beale was motivated in part by the fact that wholesale acceptance of renvoi seems to lead nowhere. As he put it, "we shall be inextricably involved in a circle and can never decide the case, since each party will constantly refuse to apply its own law and insist upon the law of the other party. This of course is an impossible condition."³⁹

Beale was not alone; the territorialists' reaction to renvoi in general consisted more of derision than analysis. Frederic Coudert called it "a resultant of legal casuistry and over-subtlety" as well as "a doctrine

36 1 BEALE, *supra* note 30, § 7.3, at 56.

37 Griswold, *supra* note 11, at 1187 & n.70; *see also* Note, *supra* note 6, at 455 (arguing that when the forum is merely enforcing a right created elsewhere, "a just adjudication can be made only by deciding as to that right as the foreign court would have decided").

38 1 BEALE, *supra* note 30, § 7.1, at 55. Beale's further explanation, in the section of his treatise devoted specifically to the question of what law determines the place of contracting, is disturbingly typical of his treatment of difficult issues: "There is, indeed, no alternative." 2 *id.* § 311.2, at 1046. Surprisingly, the Restatement finds one: it recommends consulting "the general law of Contracts," presumably meaning the general common law. RESTATEMENT OF CONFLICT OF LAWS § 311 cmt. d (1934).

39 1 BEALE, *supra* note 30, § 7.3, at 56.

over-complicated, unsound and revolutionary,"⁴⁰ and others have termed it "heretic," "puerile," "paradoxical," and "burlesque."⁴¹ Renvoi's unsoundness as a matter of logic was frequently asserted to be self-evident; as Lorenzen put it, the doctrine's "days ought to be few after its deceptive character is fully understood."⁴² It is not fanciful to hear a sense of betrayal in these words, and the reaction is understandable. A logical system (what Beale and Lorenzen frequently referred to as a "science"⁴³) that throws up a paradox has indeed betrayed its creators and demonstrated a fundamental untrustworthiness,⁴⁴ and banishment is the only appropriate response.⁴⁵

But banishing a problem requires more than a refusal to think about it. Renvoi is not a discrete axiom that can be excised from a logical system; it is a consequence of a particular understanding of the choice-of-law task. In contrast to the system-building logicians who en-

40 Frederic R. Coudert, *Some Considerations in the Law of Domicil*, 36 YALE L.J. 949, 953 (1927).

41 See JUENGER, *supra* note 25, at 78.

42 Ernest G. Lorenzen, *The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country"*, 27 YALE L.J. 509, 529 (1918); see also Ernest G. Lorenzen, *Renvoi in Divorce Proceedings Based upon Constructive Service*, 31 YALE L.J. 191, 192 (1921) ("A mere statement of the operation of the 'renvoi doctrine' should be sufficient to condemn it."); Schreiber, *supra* note 4, at 570 (noting the "insidious nature of the renvoi").

43 See, e.g., I BEALE, *supra* note 30, § 3.4, at 24–25 (stating that law "is not a mere collection of arbitrary rules, but a body of scientific principle"); Lorenzen, *supra* note 2, at 204 (discussing "the science of the Private International Law"). The proportion of vituperation to explanation prompted one scholar to comment that "the present writer doubts whether [renvoi] has been surpassed by any other topic in the law in the amount of material written upon it which, upon analysis, is seen to consist of nothing but dogmatic statement of the result desired to be reached." Cormack, *supra* note 3, at 249.

44 The untrustworthiness follows from the fact that a deductive system containing a contradiction can prove any proposition. See *supra* note 21 (proving the existence of God). In addition to the sense of betrayal, there may have been a bit of xenophobia at work as well; the characterizations of renvoi as insidious and over subtle might be summarized by calling it too French, and Cheshire explicitly argued that it was undesirable to attempt to follow continental conflicts law because European courts did not even adhere to stare decisis, making it difficult to ascertain their law. Griswold, *supra* note 11, at 1178–79.

45 The First Restatement, explaining that "the only Conflict of Laws used in the determination of the case is the Conflict of Laws of the forum," provided that "the foreign law to be applied is the law applicable to the matter in hand and not the Conflict of Laws of the foreign state." RESTATEMENT OF CONFLICT OF LAWS § 7 (1934). Section 8, with less explanation, provided two exceptions to this general rule: cases involving "title to land" and "the validity of a decree of divorce" were to be decided in accordance with the law of the situs or the parties' domicile "including the Conflict of Laws rules of that state." *Id.* § 8.

countered the paradoxes of set theory,⁴⁶ the territorialists responding to renvoi did not attempt to adjust their basic postulates.⁴⁷ Instead, they simply vilified the consequence, focusing their attention on symptoms rather than root causes.

Supposing that legal theories and thought should conform to the standards of logic or science is, of course, part of the error traditionally ascribed to the formalists, so there is some irony in faulting them for not adhering to those standards. But given that the territorial approach does aspire to a high degree of theoretical coherence—consider Beale's disdain for those who believed law was "a mere collection of arbitrary rules"⁴⁸—whether it can handle renvoi in a principled manner is an important test. The territorialists did not provide a good answer, but the question remains whether they could have.

Conceptually, the basic problem the territorialists encountered was that they lacked an explanation of why courts should disregard foreign choice-of-law rules after having decided to apply foreign law. (Or, in a slightly different phrasing, why foreign choice-of-law rules should be treated differently from foreign internal law.) The problem was especially acute for Beale's vested rights theory, for the idea that the forum's task is to enforce rights acquired under foreign law is hard to square with the practice of reaching results different from those the foreign court would reach; in such cases the forum is enforcing rights whose existence the foreign court would deny.⁴⁹

46 My reference to the system builders is intended primarily to include those engaged in the logicist project of deriving arithmetic from first-order logic, i.e., Gottlob Frege, and the team of Bertrand Russell and Alfred North Whitehead. Russell was responsible for the collapse of Frege's attempt, pointing out that a version of the liar paradox could be generated by one of Frege's axioms. See generally 5 W. T. JONES & ROBERT J. FOGELIN, *A HISTORY OF WESTERN PHILOSOPHY: THE TWENTIETH CENTURY TO QUINE AND DERRIDA* 175–80 (3d ed. 1997) (discussing Russell's attempt to overcome the paradox via the Theory of Types); RAY MONK, *BERTRAND RUSSELL: THE SPIRIT OF SOLITUDE* 142–44, 152–54 (1996) (describing Russell and Whitehead's project and Russell's interaction with Frege).

47 Dicey's treatise did eventually abandon its reliance on the idea of vested rights, which has some palliative effect. See John Swan, *Federalism and the Conflict of Laws: The Curious Position of the Supreme Court of Canada*, 46 S.C. L. REV. 923, 948–49 (1995). The correct response, I will suggest, is to give up on the idea that State A law can prescribe that State B law "applies." See *infra* Part V.

48 I BEALE, *supra* note 30, § 3.4, at 24–25.

49 This point was raised against the territorialists but "never adequately answered, and by Professor Beale not at all." David F. Cavers, Book Review, 56 HARV. L. REV. 1170, 1171 (1943) (reviewing WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942)); see, e.g., Cheatham, *supra* note 32, at 380.

When the renvoi element is rejected and *F* employs the *X* internal law to determine the rights of the parties, it cannot be said that *F* is enforcing an *X*

The territorialists tended to rely on the observation that once renvoi is accepted, there is no logical stopping point; the rest is mostly bluster.⁵⁰ The territorialist rejection of renvoi is consequently unconvincing, for contumely is not argument.⁵¹ Arguments exist, however. Within the conventional understanding of the choice-of-law venture, there are three basic conceptual moves to make in response to the problem of renvoi, three arguments to bolster the forum's authority and justify its disregard for foreign choice-of-law rules and the results that would be reached by foreign courts. These moves were available to the territorialists, and some of them were used. They remain available to modern theorists, and again, some have been invoked. In the end, however, none succeeds.

My purpose in assessing these resources is twofold. First, I intend to show that the problem of renvoi has not been resolved. Second, I want to highlight the point that there are conceptual similarities in the way that different systems have tried to deal with the problem. Succeeding generations of conflicts theory have made, or could make, the same small number of moves to deal with renvoi, none of which is ultimately successful. And eventually I want to suggest that the reason the different systems have such similar responses is that the problem comes from something they have in common: the supposition that forum law can determine the scope of foreign law. That suggestion, of course, is for a later section.

1. The Inherent Distinctiveness of Choice of Law

The initial reason a territorialist might give for ignoring the foreign state's choice-of-law rules is that the distinction between foreign internal law and foreign choice of law inheres in the vested rights approach. The aim is to enforce the rights that vest under foreign inter-

created right, for the only legal right the party could have enforced in an *X* court was based on the internal law of the other state, *Y*.

Id.; Griswold, *supra* note 11, at 1187 (“[A] reference to a foreign law means that the local court should reach the conclusion which the foreign court would reach on the same facts.”).

50 Lorenzen asserted that courts could not accept renvoi because “upon strict principles of logic it can lead to no solution of the problem. . . . There would appear to be no escape in legal theory from this circle or endless chain of references.” Lorenzen, *supra* note 2, at 197–98. Beale characteristically invoked impossibility: “[W]e shall be inextricably involved in a circle and can never decide the case, since each party will constantly refuse to apply its own law and insist upon the law of the other party. This of course is an impossible condition.” 1 BEALE, *supra* note 30, § 7.3, at 56.

51 Or as Tom Stoppard put it, “[a] gibe is not a rebuttal.” TOM STOPPARD, *ARCADIA* 37 (1993).

nal law, and therefore it is internal law that should be consulted. Choice-of-law rules, a territorialist might say, are directed to courts and not parties; they have nothing to do with substantive rights.⁵²

This move has some superficial appeal, but it is in fact unfaithful to the methodology it invokes. For a territorialist, the choice-of-law calculus identifies the jurisdiction with authority to regulate a particular transaction. (It is for that reason that territorialism is called a jurisdiction-selecting approach.) The jurisdiction thus identified is the only one whose laws attach legal consequences to the transaction.⁵³ The foreign state's conclusion that its law does not apply then is, according to the internal logic of the vested rights approach, tantamount to a conclusion that no rights have vested under its law. That is, the territorial approach takes choice-of-law rules as deeply relevant to the question of what rights the parties possess. It is no answer then to say that territorialism is concerned with vested rights and not choice-of-law rules, for choice-of-law rules determine where and whether rights vest.

2. The Appeal to Objectivity

If foreign choice-of-law rules cannot be simply ignored as irrelevant to the forum's analysis, the next plausible tack is to assert that the foreign state's choice-of-law rules can be rejected because they are, in some sense, incorrect.⁵⁴ I call this move the appeal to objectivity be-

52 Interestingly, the assertion of inherent distinctiveness is essentially the tack taken by the most sustained attempts to resolve the renvoi problem by application of formal logic. See Cowan, *supra* note 16, at 44–45 (invoking Russell and Whitehead's Theory of Types as justification for ignoring foreign choice-of-law rules); Hicks, *supra* note 5, at 278–80, 284–89 (same). As the text demonstrates, the same move can be made without invoking Russell and Whitehead, which suggests that tacking on a philosophical pedigree adds little. Moreover, focusing on the logical aspect of the problem detaches it from the context of choice of law and obscures the extent to which legal analysis can tell us something about which solutions are plausible and which are not.

53 See I BEALE, *supra* note 30, § 4.12, at 46 (“By its very nature law must apply to everything and must exclusively apply to everything within the boundary of its jurisdiction.”).

54 A slightly more subtle way of making the argument might characterize renvoi as a conflict between choice-of-law rules, requiring resolution in the same way as a conflict between internal laws. The rejection of renvoi, then, would be seen as a determination that forum choice-of-law rules should prevail if they conflict with foreign rules, not because the foreign rules are objectively wrong but simply because a choice must be made. See Herma Hill Kay, “*The Entrails of a Goat*”: Reflections on Reading Lea Brilmayer's *Hague Lectures*, 48 MERCER L. REV. 891, 914 (1997) (stating that “the situation poses a conflict of conflict of laws rules”). This approach does not avoid the problems I identify; rather, it highlights them, because it asserts so clearly that

cause it asserts, in defiance of the contemporary methodological pluralism, that there is some objective standard (usually resembling forum law) against which foreign choice-of-law rules can be measured. In fact, the move defies more than the state of modern conflicts law, for it runs against one of the most basic principles of contemporary jurisprudence: the principle that state courts are authoritative in the exposition of their own law.

That principle, however, is of relatively recent vintage, and the territorialists had available a very effective argument for the appeal to objectivity. It is not clear to me whether they actually made the argument. Larry Kramer, who does present it, attributes it to Beale, but this is perhaps overgenerous; Beale's analysis of *renvoi*, as discussed earlier, turns on the law/fact distinction.⁵⁵ The stronger argument relies not on that distinction, but on the status of conflicts as part of the general common law.

Beale's treatise recognizes several different kinds of law. "Theoretical law," for instance, he defines as "the body of principles worked out by the light of reason and by general usage, without special reference to the actual law in any particular state."⁵⁶ By contrast, "[p]ositive law" is "the law as actually administered in a particular country."⁵⁷ Last, in some ways intermediate between the positive and the theoretical law is what Beale refers to as the "general common law," an unwritten body of law "which is accepted by all so-called common-law jurisdictions but is the particular and peculiar law of none."⁵⁸ The doctrines of the common law, Beale writes, "are authoritative in each state whose law is based upon it; and the decisions of courts of all such states are important evidences of the law."⁵⁹

For Beale, then, the general common law, which included conflict of laws, existed independent of any particular state or lawmaking authority. It was common to, and authoritative in, every common law jurisdiction whose courts struggled to discern it, but it had no single source, and hence no single authoritative interpreter. And thus a forum court could—indeed, might well be required to by the binding precedents of the forum's higher courts—conclude that foreign courts had erred in their articulation or application of choice-of-law

whether foreign law applies is a question to be answered by reference to forum law. This assertion is what I identify as the fundamental source of the *renvoi* problem. See *infra* Part V.

55 See Kramer, *supra* note 3, at 984–89.

56 1 BEALE, *supra* note 30, § 1.12, at 9.

57 1 *id.*

58 1 *id.* § 4.1, at 27.

59 1 *id.* § 1.12, at 10.

rules. Making choice of law part of the general common law essentially imposes uniformity on the forum and foreign courts, while simultaneously granting them interpretive independence with regard to the content of the uniform law. This move goes some way towards eliminating the problem of the renvoi.⁶⁰

This approach, of course, relies on Beale's understanding of the general common law as controlling in common law jurisdictions but lacking a single supreme interpreter. It was, we could say, authoritative law without an author.⁶¹ Beale did not dispute that state courts are the authoritative expositors of their own law; he relied on the point that the general common law is no state's *own* law. The decisions of state courts applying common law produced the positive law of the state, and lower state courts were bound by the decisions of higher state courts as to the content of that law. But they were bound by virtue of their inferior status, not because state supreme courts had any power to make the common law of the state. Indeed, Beale rejected the proposition that courts make law, both explicitly and at length.⁶² It was for this reason that courts of other jurisdictions, not subject to the state hierarchy, were entitled to interpretive independence.

It is not clear to me, I have said, that the territorialists ever made the argument for objectivity based on the general common law. Neither, however, is it necessary to decide whether they did; what is important is to see that the argument is ultimately unavailing. An initial problem with this resolution of the renvoi problem is that it is somewhat too powerful. Choice-of-law rules are part of the general common law, but so too is the large portion of tort and contract law that has not been codified. Beale's theory of the general common law did not distinguish between choice of law and internal law, and it sug-

60 The problem is not eliminated entirely, and not to the extent it might seem at first blush, because renvoi can arise even with uniform choice-of-law rules. See *supra* Part I. In addition, the "uniformity" produced by the appeal to objectivity is illusory in practice because the foreign courts will almost certainly continue to apply their own interpretations of the general common law and disregard those of the forum.

61 The best modern analog is probably something like the Restatements. We could imagine a situation in which the courts of several states announced that they would follow a Restatement while differing over what the relevant Restatement section meant. In applying Massachusetts law, a New York court would nowadays follow the Massachusetts decisions construing the Restatement; under the analog to Beale's approach, it would instead follow those of New York.

62 1 BEALE, *supra* note 30, § 3.4, at 24 ("Courts are sworn to enforce the law, not to make it."); 1 *id.* § 4.6, at 39 (stating that the possibility of "a difference of opinion between the state court and the federal court sitting in the state as to the law of the state . . . is quite incompatible with the court making the law").

gested that the forum court should follow its own interpretation of substantive general law as well. That is, if the tort law of the forum differs from that of the foreign state, the forum should apply its own law, since that represents the forum's best understanding of the general common law that prevails in the foreign state and the forum alike. The appeal to general law, in short, tends to obliterate the whole idea of choice of law.

The elimination of choice of law is not a fatal defect. Indeed, it may not be a defect at all; this Article will end with a prescription that could be construed as calling for much the same thing.⁶³ The more serious problem with the appeal to general law is not that it accomplishes too much, but rather that from the modern perspective it accomplishes nothing at all.

The regime under which a forum will apply its own understanding of general law rather than the understanding of the geographically appropriate state court is familiar to students of legal history. It is the regime of *Swift v. Tyson*,⁶⁴ which the positivists, Oliver Wendell Holmes notably among them, attacked, and which the Supreme Court rejected in *Erie Railroad Co. v. Tompkins*.⁶⁵ And that is the second and more devastating objection to the appeal to general law: we have it on good authority that there is no such thing.

To reduce *Erie* to the proposition that the general law does not exist is, of course, to engage in caricature. What *Erie* stands for is a complicated and contested question.⁶⁶ Some of its language might

63 Not, I hasten to add, by imposing the uniformity of a general law upon every state. See *infra* Part V.

64 41 U.S. (16 Pet.) 1 (1842).

65 304 U.S. 64 (1938). Beale relied on *Swift* at a number of points, for example, 1 BEALE, *supra* note 30, § 3.3, at 22 & n.1, § 3.5, at 26, § 4.6, at 39 & n.1, and, looking at the cases on which Beale constructed his system, one might think he had a rare knack for picking losers. In addition to *Swift*, he favored *Pennoyer v. Neff*, 95 U.S. 714 (1877), see 1 BEALE, *supra* note 30, § 42.2, at 276 (citing *Pennoyer*), which hung on until 1945 when the Supreme Court decided *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). A more accurate statement would be that Beale had the misfortune that his great work was one of the last flowerings of legal classicism, a worldview soon to be swept aside. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 9–31 (1992) (describing classical legal thought); WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937* (1998) (same).

66 For a sampling of the literature, see EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000); Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79 (1993); Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459 (1997);

suggest that its relevance for state courts, my chief focus, is marginal at best. To the extent that *Erie* relies on the idea that making general common law is beyond the power of the federal government entirely, and a fortiori beyond the power of federal courts, it might seem not to apply to state courts at all.⁶⁷ But it also seems to hold (though the constitutional source for this proposition is unclear) that state high court decisions are of equal dignity with state statutes.⁶⁸ If that is so, the Full Faith and Credit Clause would presumably bar state courts from refusing to follow the high courts of other states when applying those states' law.⁶⁹ Nor, of course, do states have the power to make law for other states. Thus, at the least, *Erie* establishes that state courts' authority with respect to the interpretation of their own law cannot be circumvented by the suggestion that conflicts is in some sense not state law.

John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Henry J. Friendly, *In Praise of Erie? and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 283 (1992); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 426–38 (1995); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682 (1974); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989).

67 See *Erie*, 304 U.S. at 78 (“Congress has no power to declare substantive rules of common law applicable in a State. . . . And no clause in the Constitution purports to confer such a power upon the federal courts.”).

68 See *id.* at 79.

‘The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State. . . . [T]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.’

Id. (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533–35 (1928) (Holmes, J., dissenting)).

69 See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 731 (1988) (stating that construction that “contradict[s] law of the other State that is clearly established and that has been brought to the court’s attention” violates full faith and credit). *Erie* is often cited for the proposition that state courts are authoritative with respect to their own law. That is a misconception; *Erie* did not establish this proposition but simply increased the significance of what was already accepted by expanding the range of issues governed by state (rather than general) law. For a discussion of the early treatment by the Supreme Court of state court interpretations of state law, see Barton H. Thompson, Jr., *The History of the Judicial Impairment “Doctrine” and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373, 1388 & n.70 (1992).

3. The Local Law Theory

So foreign choice-of-law rules cannot be ignored, and they cannot be overridden on the grounds that they are part of a general law that the foreign courts have misunderstood. One more means exists to bring the matter back within the authority of the forum: to assert that the law being applied is, in some sense, "really" forum law.

This move occupies a prominent place in the literature; it is what is known as the "local law theory." It was presented most completely by a critic of the territorialists, Walter Wheeler Cook, and it begins with a point already noted: that a true adherent of the vested rights approach would consult foreign choice-of-law rules in order to determine whether rights had vested under foreign law.⁷⁰ But rather than adhering to the vested rights theory and urging acceptance of renvoi, Cook argued that the widespread failure to do so implied that courts, whatever they said, were doing something other than enforcing vested rights.⁷¹ In fact, Cook argued, courts were applying "the rule of decision which the given foreign state or country would apply, not to this very group of facts now before the court of the forum, but to a *similar but purely domestic group of facts involving for the foreign court no foreign element.*"⁷² In consequence, Cook concluded, "[t]he forum thus enforces not a foreign right but a right created by its own law."⁷³

⁷⁰ Courts applying Beale's approach, Cook argued, "are logically compelled . . . to study the decision of [foreign] courts . . . upon the conflict of laws." WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 19 (1942).

⁷¹ As Cheatham put it, citing Cook:

When the renvoi element is rejected and *F* employs the *X* internal law to determine the rights of the parties, it cannot be said that *F* is enforcing an *X*-created right, for the only legal right the party could have enforced in an *X* court was based on the internal law of the other state, *Y*.

Cheatham, *supra* note 32, at 380; *see also, e.g.*, Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 *RECUEIL DES COURS* 19, 31-34 (1989) (describing Cook's argument).

⁷² COOK, *supra* note 70, at 21.

⁷³ *Id.* Although the local law theory is generally associated with Cook, it was prominent in the literature before his work. *See, e.g.*, Lorenzen, *supra* note 2, at 206.

It follows that whenever the question as to the creation of rights under the law of a foreign country arises before the tribunals of another State the existence or nonexistence of such rights depends, properly speaking, not upon the will of the foreign law-giver, but upon the *lex fori*, which must be deemed to have adopted the foreign internal or territorial law for the purpose.

Id.; Schreiber, *supra* note 4, at 531 ("The truth is that the [forum] court is enforcing its own law throughout, and is not in any sense enforcing [foreign] law."). Beale of course maintained a similar position as a matter of metaphysics; because he believed that foreign law could be given effect only as a fact, the law the forum applied as law must be local law. Under his approach, "the foreign law cannot and does not operate

Is this a distinction without a difference? Some have concluded that the local law theory amounts to little more than hand waving. Hessel Yntema called it “empty luggage,”⁷⁴ and David Cavers offered an anecdotal analogy that is no less devastating for its humor.

Theories that explain how it is that a foreign rule isn't foreign law when it is used in deciding a case in another country might seem more useful if I could forget the way in which my son resolved a like problem when, at the age of four, he encountered tuna fish salad. “Isn't that chicken?” he inquired after the first bite. Told that no, indeed, it was fish, he restored his world to order and concluded the matter by remarking to himself, “Fish made of chicken.”⁷⁵

The theory continues to have its adherents, however; one does not have to look far to find those who maintain that “[i]n reality, a state can only create and apply its own law.”⁷⁶ In a less ambitious form, the theory is hard to deny; that a forum will sometimes apply a “rule of assimilation” and shape its law to mirror the substance of foreign internal law is an important insight.⁷⁷ And, most relevant for the purposes of this Article, the local law theory does have the ability to resolve the renvoi problem. Unfortunately, the solution comes at a price that no choice-of-law theory can accept.

To see these points, the first step is the realization that the assertion that the forum is enforcing local law, by itself, does nothing. The question remains whether local law is to be shaped to resemble the entirety of foreign law or foreign internal law alone. The two possible

in the forum but . . . a foreign-created right or obligation is enforced.” Cheatham, *supra* note 32, at 365–66. Cook was concerned with pointing out the inconsistency between Beale's theory and the territorialist practice of rejecting the renvoi and thus enforcing “rights” whose existence the foreign court would deny, an inconsistency that Beale's fact/law distinction does not resolve.

74 Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 316 (1953); see also, e.g., Juenger, *supra* note 25, at 101 (stating that “[i]t may well be doubted whether anything is gained” by the local law theory).

75 David F. Cavers, *The Two “Local Law” Theories*, 63 HARV. L. REV. 822, 823 (1950).

76 Stanley E. Cox, *Razing Conflicts Facades to Build Better Jurisdiction Theory: The Foundation—There Is No Law but Forum Law*, 28 VAL. U. L. REV. 1, 3 (1993); see also Harold G. Maier, *Baseball and Chicken Salad: A Realistic Look at Choice of Law*, 44 VAND. L. REV. 827, 843 (1991) (reviewing LEA BRILMAYER, *CONFLICT OF LAWS, FOUNDATIONS AND FUTURE DIRECTIONS* (1991)) (“If the decision is the law in the case, then in this sense forum law is *always* applied, even though the forum court may look to foreign rules or principles to find guides for its decision.”).

77 See Dane, *supra* note 29, at 1200; see generally *infra* Part III.B.3 (discussing assimilation).

answers to this question give rise to what Cavers famously called “the two ‘local law’ theories.”⁷⁸

The first, which Cavers associated with Judge Learned Hand, “requires . . . that a *right* be found to have been created in whatever state is selected by the forum’s choice-of-law rule.”⁷⁹ That is, under the first local law theory, local law mimics the entirety of foreign law. Under the second, which Cavers attributed to Cook, local law mimics only the foreign state’s internal law, and thus “it is a matter of no concern whether the foreign state has created a right in the plaintiff under its law.”⁸⁰

The difference between the two theories assumes significance when the foreign state’s entire law does not create a right—that is, when its choice-of-law rules do not select its own law. This circumstance, of course, is *renvoi*. Hand’s version of the local law theory does not solve the *renvoi* problem, for mimicking the entirety of foreign law will lead the forum to apply the foreign state’s choice-of-law rules, even if as a matter of “forum” law.⁸¹ Thus a State *A* court may well find itself in a situation in which State *A* law provides that the plaintiff shall have whatever rights she would have under State *B* law, and State *B* law gives her whatever rights she would have under State *A* law. That is, Hand’s version of the local law theory simply restates the problem of *renvoi* from the perspective that sees it as an incomplete definition.⁸²

For the local law theory to deal with *renvoi* then, it must be understood as directing local law to mimic only foreign internal law and thus not concerning itself with whether a foreign court would agree that the rights being enforced exist. This is Cook’s version of the theory, and while it does indeed allow a court to overcome *renvoi*, it comes with its own set of problems.

The first problem is that Cook’s version of the local law theory seems to be very little more than an alternate description of rejecting *renvoi*. It solves the problem, but it does so by fiat, with no explanation of why forum law should mimic foreign internal law but not foreign choice-of-law rules. Cook would likely not have been troubled by this. He offered the local law theory more as a description of what

78 See Cavers, *supra* note 75.

79 *Id.* at 824.

80 *Id.*

81 Beale’s vested rights approach is basically similar to the Hand formulation, and it is for basically the same reason that his admonition to reject *renvoi* is suspect. See *supra* notes 29–39 and accompanying text.

82 See *supra* note 19 and accompanying text (discussing *renvoi* as an incomplete definition).

courts were doing than as an explanation, and his purpose was to show that the vested rights theory did not fit the practice. But an approach so lacking in normative or explanatory force is unlikely to win many adherents.⁸³

In fact, there is a more substantial reason that the local law theory is unsatisfactory: it raises serious constitutional difficulties. The current Supreme Court has adopted quite a lenient reading of the constitutional strictures on choice-of-law rules, but it has repeatedly affirmed that such limits exist.⁸⁴ In particular, the Due Process Clause prohibits states from applying their own law unless they have certain minimum contacts with the litigated transaction.⁸⁵ There are certainly circumstances in which the forum will lack the required contacts, but the local law theory insists that it nonetheless apply its own law, in apparent defiance of due process requirements.

This objection might seem sophistic, the same sort of hand waving as critics deemed the local law theory itself—but worse, because the hand waving here is employed not to solve a problem but to create one. After all, the “local law” that is applied is not in substance forum internal law; it is the internal law of some other state. The state whose internal law is mimicked will almost certainly have sufficient contacts with the case for the application of its law to be constitutionally acceptable. If it does not, at any rate, the defect will lie in the choice-of-law rule that selected that state’s law, not the local law theory. And so, one might think, the due process problem is at most a technicality. Since the forum court could constitutionally apply the foreign law in its own right, there is certainly no injury from the application of forum law modeled on foreign law.⁸⁶

But the objection is somewhat more serious than that because Cook’s version of the local law theory—unlike Hand’s—does more than simply slap the label “local law” on foreign law. It changes the contours of foreign law in a very real sense—it identifies and enforces

83 As Cheatham put it:

The wisdom of substituting for the territoriality of the place of occurrence a conceptually necessary territoriality of the state of the forum cannot find adequate support in any supposedly necessary notion about the nature of law. Any analytical system, as Mr. Cook would have been the first to insist, is useful only in aiding us to see and express the real problem.

Cheatham, *supra* note 32, at 388.

84 For a critical evaluation of the Court’s constitutional choice-of-law jurisprudence, see Roosevelt, *supra* note 13, at 2503–18.

85 See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818–19 (1985) (discussing due process and full faith and credit restrictions).

86 See *id.* at 816 (noting that “there can be no injury” if the law applied by the forum does not conflict with any other law that may be applied).

rights that do not exist under the foreign law.⁸⁷ What it applies may be local law only in name, but it is not, in substance, foreign law.⁸⁸

The practical purpose of due process restrictions on choice of law is to protect litigants from unfair surprise, paradigmatically the imposition of liability that they had no reason to expect. From this perspective, the local law theory is troubling; it imposes liability that does not exist under the law of the state selected by forum choice-of-law rules. It will do so in every case in which the *renvoi* issue exists—which are the only cases in which it actually does any work.

Suppose, for instance, that New York and Pennsylvania both follow a territorialist approach, and a Pennsylvania defendant injures a Pennsylvania plaintiff in New York. Obviously, if the defendant is somehow sued in Hawaii, the application of Hawaii law will raise due process issues, at least in a formal sense. It will be a formal sense alone—and a mindless formalism, at that—if Hawaii uses the local law theory to supplement a territorialist approach and mimics New York law. There can be no due process objection to the application of New York law; that law clearly asserts an intent to regulate the defendant's conduct and he cannot claim unfair surprise in being subjected to the law that would be applied by the courts of the state where he acted.

In that case, however, no *renvoi* problem exists either, and the local law theory is idling. New York choice-of-law rules direct the application of New York law, so a Hawaii court could achieve the same result by applying New York law *qua* New York law, rather than mimicking New York internal law. The theory does do some work if we

87 This assertion might seem to beg the question—is it so clear that no rights exist under a state's law if its choice-of-law rules point elsewhere? I will argue that the answer is generally yes, but the argument will have to be deferred. See *infra* Part IV.A.4. At this point I will rest with the observation that Cavers thought so. See Cavers, *supra* note 75, at 825 (arguing that determining whether a right had been created under X law “would require a reference, not merely to the X substantive law, but to the X choice-of-law rules. Only if they . . . [pointed] to the X law as applicable to this very case could one say that a right had been created by X law.”). Cook agreed; that was why he saw the local law theory as a critique of Beale's vested rights account. See COOK, *supra* note 70, at 32 (arguing that a forum can claim to be enforcing a foreign right only if it has “acted *precisely* as the [foreign] officials would have acted had *the precise case* been presented to them”).

88 Again, this is a little question-begging, and again, I will have to postpone a fuller discussion of the issue. See *infra* notes 140–48 and accompanying text. For now, note that it is commonplace in our system that state courts are authoritative in the exposition of their own law, and thus if the State X high court would assert that the plaintiff has no rights under State X law, it is at least superficially plausible to take that as the end of the matter. As Griswold put it, “a reference to a foreign law means that the local court should reach the conclusion which the foreign court would reach on the same facts.” Griswold, *supra* note 11, at 1187.

imagine that Hawaii choice-of-law rules instead lead a Hawaii court to suppose that Pennsylvania law is appropriate.⁸⁹ Saying that the law applied is Hawaii law shaped to resemble Pennsylvania internal law explains why the Hawaii court can ignore Pennsylvania territorialist choice-of-law rules, so here we see the local law theory working to explain rejection of renvoi. But new problems are created: now the defendant has effectively been subjected to a law that, according to its authoritative expositors, the Pennsylvania courts, does not reach his conduct.

In this hypothetical case, the due process objection has more force. The conventional due process analysis would look to the connections between Pennsylvania and the litigated transaction and conclude that the parties' domicile creates a sufficient connection to make it legitimate for Pennsylvania to exercise legislative jurisdiction.⁹⁰ This makes sense as far as it goes. It makes sense as a test for when a *Pennsylvania* court should be permitted to apply Pennsylvania law. And it makes sense as a test for when a Hawaii court can apply Pennsylvania law if a Pennsylvania court would have applied Pennsylvania law. But in the imagined case, it makes no sense at all, because the test is designed to determine whether Pennsylvania may exercise legislative jurisdiction, and on the supposed facts, Pennsylvania has not attempted to do so. Pennsylvania law, as interpreted by Pennsylvania courts, is territorial in scope and attaches no legal consequences to the defendant's conduct.⁹¹

One way of phrasing the practical due process objection, then, is to say that it is indeed surprising to be subjected to a law that does not reach your conduct. Another, which I prefer, is to say that in such a case Hawaii is not applying Pennsylvania law in any meaningful sense.⁹² The defendant's claim of unfair surprise at the imposition of

89 The most plausible way in which this might occur would be if Hawaii were an interest analysis state and both parties were from Pennsylvania. To restrict the discussion to the territorial approach, we might suppose alternatively that Hawaii law for some reason finds the last act occurring in Pennsylvania.

90 *Phillips Petroleum Co.*, 472 U.S. at 818–19 (noting due process restrictions on the application of forum law); see generally BRILMAYER, *supra* note 32, § 3.2.2, at 137–43 (discussing due process analysis).

91 Territorialist courts were quite clear that their choice-of-law rule amounted to a restriction on the scope of state law. Construing a personal injury statute and applying a territorial vested rights approach, the Supreme Court of Alabama said that the statute must be applied "as if its operation had been expressly limited to this state, and as if its first line read as follows: 'When a personal injury is received in Alabama by a servant or employe,' etc." *Ala. G.S.R. Co. v. Carroll*, 11 So. 803, 807 (Ala. 1892).

92 A more general way of putting this point, David Franklin has suggested, is that the supposed dichotomy between internal law and choice-of-law rules is false: it is

liability under Hawaii law goes beyond formalism, for the Hawaii court has created an obligation that simply does not exist under Pennsylvania law and would not be recognized by Pennsylvania courts.⁹³

From a more theoretical perspective, the due process issue is the permissible scope of state legislative jurisdiction.⁹⁴ From this perspective, the local law theory appears even worse, asserting a legislative jurisdiction that is entirely unbounded—a state’s law governs every transaction litigated in its courts. This consequence of the local law theory has not gone unremarked. “Under it,” Elliott Cheatham wrote, “the law of every state applies to every occurrence in the world and creates at the time of each occurrence rights and obligations which may later be enforced in the state creating them.”⁹⁵ Cook himself agreed. “Shall we, must we, say that there are as many ‘rights,’ all growing out of the one group of facts under consideration, as there are jurisdictions which will give the plaintiff relief?” he asked, and answered that “there seems to be no other statement to make.”⁹⁶

impossible to separate the two, and to apply State A internal law alone is not to apply State A law. The Supreme Court has come close to recognizing this point. *See infra* text accompanying notes 140–48.

93 What, then, if we suppose that the case is litigated in New York and New York choice-of-law rules point to Pennsylvania law? The due process objection to the local law theory that I have identified finds no traction now, for New York’s contacts with the case (unlike Hawaii’s) are sufficient to allow it to assert legislative jurisdiction—New York courts can apply New York law, shaped to resemble Pennsylvania internal law, if they choose. If New York purported truly to be applying Pennsylvania law, I will argue, there would be a full faith and credit problem, but that problem too is avoided by the local law theory. *See infra* text accompanying note 138. The reason that the due process objection fails, however, is mere fortuity—New York happens to have sufficient contacts with the transaction, but those contacts are not the reason it is applying its “local” law. In some other case, New York would find itself in the position of Hawaii, i.e., applying its own law despite the lack of any contacts.

94 *See, e.g.,* *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 314 n.2 (1970) (Harlan, J., dissenting) (“There must be at least some minimal contact between a State and the regulated subject before it can, consistently with the requirements of due process, exercise legislative jurisdiction.”).

95 Cheatham, *supra* note 32, at 386–87.

96 Cook, *supra* note 70, at 33. Cook understood assertions about the law to be no more than predictions of official behavior, *see id.* at 30, and he does not appear to have considered the due process implications of his approach. His general aim was to provide “a reasonably accurate, understandable, and workable description of judicial phenomena,” *id.* at 33, and he rightly concluded that the vested rights approach fit judicial practice poorly. *See id.* at 33–34. The local law theory might work somewhat better as a description, but the behavior it describes is unconstitutional. This makes the theory a less than satisfactory theoretical resolution of the renvoi problem, though it may well be the case that the unconstitutionality is more than an artifact of the theory. In fact, I will suggest just that: much of what judges do in response to the

The local law theory, then, does not solve the problem of renvoi within the territorial approach. If anything, it worsens the difficulty. Not only does it offer no good reason for mimicking foreign internal law rather than the entirety of foreign law, but its introduction of the idea of mimicking describes judicial practice from a perspective that reveals serious constitutional difficulties. As we shall see, however, the modern approaches are hardly more successful.

B. *Interest Analysis*

One of the greatest defects of the territorial approach is that the axiom of territorial scope may fit poorly with the purposes behind a state law. A court assessing those purposes might conclude that they would be better served if the law reached some events outside the state's borders or perhaps if it did not reach some within. Some reacted to this frustration by using the so-called "escape devices" to reach results that seemed more sensible in terms of hypothesized legislative purpose.⁹⁷ Brainerd Currie reacted by creating a whole new approach to choice of law.

Governmental interest analysis, as the name suggests, focuses attention on the interests of the jurisdictions whose laws are potentially applicable. A state is interested, on Currie's account, if application of its law would promote the purposes behind the law.⁹⁸ The forum

renvoi problem, and in conflicts generally, is best understood as violating the Constitution. See *infra* text accompanying notes 140–48; see also Roosevelt, *supra* note 13, at 2527–33 (arguing for stronger constitutional constraints on choice-of-law rules).

97 See generally, e.g., Ralph U. Whitten, *Curing the Deficiencies of the Conflicts Revolution: A Proposal for National Legislation on Choice of Law, Jurisdiction, and Judgments*, 37 WILLAMETTE L. REV. 259, 268 & n.27 (2001) (discussing escape devices).

98 See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 183–84 (1963). How one should go about determining whether application of a law would promote its purpose is not clear. It can certainly be done in some cases—most everyone would agree that the purpose of a speed limit, for instance, is served by its application to cases arising on the subject road and not others—but the typical conflicts case presents more difficult questions, such as whether and in what circumstances out-of-staters should be entitled to invoke local tort or contract law. The defenders of interest analysis tend to argue that the process in such cases is essentially identical to the ordinary work of statutory interpretation and thus that interest analysis stands on the same footing as the general project of determining whether statutes apply to marginal cases. See Kramer, *supra* note 3, at 1005–08. “[D]etermining whether a law applies in a multistate case requires interpreting it in a way that is not qualitatively different from other legal problems.” *Id.* at 1008.

The problem with this claim is that the tools available to guide such interpretation turn out to be almost exclusively assumptions unrelated to the particular law being interpreted. That is, while the purpose of a statute relating to “pedestrians” (for example) may well offer some guidance as to whether in-line skaters should be

should apply another state's law, Currie suggested, only if the other state is interested and the forum is not.⁹⁹ And in this case, he believed, "it seems clear that the problem of the renvoi would have no place at all in the analysis that has been suggested."¹⁰⁰ Because interest analysis had already determined that the foreign state had "a legitimate interest in the application of its law and policy to the case at bar . . . there can be no question of applying anything other than the internal law of the foreign state."¹⁰¹ Interest analysis, in short, eliminates the problem of renvoi entirely.

As Griswold wrote before rejecting a similarly optimistic conclusion, "[t]is a consummation devoutly to be wished."¹⁰² The problem

included, it will have substantially less resolving power on the question of whether skaters from other states count. On that question, the interest analyst must rely on background assumptions. In consequence, Currie's examples of his method look like statutory interpretation only to the extent that imposing a presumptive domiciliary restriction is interpretive. See, e.g., CURRIE, *supra*, at 85 ("What married women [is a Massachusetts disability contract intended to apply to]? Why, those with whose welfare Massachusetts is concerned, of course—i.e., Massachusetts married women."). Beale's approach, which uses a presumptive territorial restriction, is equally "interpretive." I find fault with this term to the extent that it suggests a qualitative difference between Currie and Beale; if Currie's "of course" counts as interpretation, then so does Beale's "by its very nature." See 1 BEALE, *supra* note 30, § 4.12, at 46. The only question, then, is whether Currie's presumption is more sensible than Beale's. For general discussions of the plausibility of characterizing interest analysis as statutory construction, see Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 467 (1985) [hereinafter Brilmayer, *Governmental Interest Analysis*] ("Currie's illustrative examples do not amount to the ordinary process of statutory interpretation."); Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980) [hereinafter Brilmayer, *Myth of Legislative Intent*]; Kay, *supra* note 71, at 117–33 (discussing Brilmayer's critique); Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics'*, 34 MERCER L. REV. 593, 620 (1983) (claiming that "the process of determining policies and interests is exactly the same" in "domestic interpretation and conflicts interpretation").

99 CURRIE, *supra* note 98, at 184. I omit here a discussion of Currie's suggestions for other kinds of cases, which are not relevant for my purposes. For a more general discussion of interest analysis, see, for example, Kay, *supra* note 71.

100 CURRIE, *supra* note 98, at 184.

101 *Id.*

102 Erwin N. Griswold, *In Reply to Mr. Cowan's Views on Renvoi*, 87 U. PA. L. REV. 257, 258 (1939). Griswold was responding to Cowan, *supra* note 16, who argued that a forum should apply foreign choice-of-law rules but should interpret a foreign selection of the forum's law as a selection of forum internal law alone. Anticipating (though reaching a different conclusion than) Hicks, *supra* note 5, Cowan argued that this was justifiable by analogy to Whitehead and Russell's Theory of Types and on the grounds that the business of lawyers was merely "to avoid contradiction, not necessarily to resolve it, the resolution of generalized forms of contradiction being the busi-

is that a court following Currie's interest analysis plainly faces the same question as the territorialists: having decided to apply the law of another state, is it to apply the entirety of that state's law, or only the internal law?

In answering this question, Currie, or at least his followers, ran together several quite distinct perspectives. Currie rejected choice-of-law rules entirely and hoped to see them superseded by interest analysis. That normative stance is of course one that a scholar may justifiably adopt. A state supreme court convinced of the wisdom of this position is likewise free to discard its own judicially-crafted choice-of-law rules and replace them with interest analysis. But a court applying foreign law is in quite a different position. It has neither the wide-ranging liberty of the scholar nor the narrow authority it wields with respect to the content of its own law. A state court cannot discard the rules of other states; it cannot impose interest analysis on them. Other states may choose to retain their traditional choice-of-law rules, as indeed many have. The refusal to apply foreign choice-of-law rules requires an additional justification—and an interest analyst, if making recommendations to a court, must provide one.

It does, admittedly, seem odd to examine a foreign state's internal law in order to determine whether that state's law should be applied and then to apply not that internal law but the entirety of foreign law.¹⁰³ But identifying an oddity is not the same thing as making an argument; interest analysis needs some explanation of why renvoi should be rejected. As did the territorial approach, interest analysis has resources for this task. Indeed, on closer inspection, they

ness of logic and not of law." Cowan, *supra* note 16, at 45. Griswold quite properly answered that "it seems difficult to escape the feeling that the result has been assumed rather than established." Griswold, *supra*, at 259. That is, while Cowan offered a method of dealing with the renvoi that did not lead to paradox, the method had nothing more than the avoidance of paradox to recommend it; it worked by fiat rather than analysis. Oddly, Cowan argued that while the *ipse dixit* nature of the solution made it inadequate as a matter of logic, "it is entirely legitimate for lawyers to postulate where it would be illegitimate for a logician to do the same thing." Cowan, *supra* note 16, at 45.

103 The problem, of course, is that applying a foreign choice-of-law rule may undo the supposed gains of interest analysis. Having, for instance, decided that the policies behind the forum's internal law are not implicated and that those behind the foreign state's are, an interest analyst might then find that the foreign state's choice-of-law rules directed the application of the (uninterested) forum's law, precisely what interest analysis was to avoid. What this suggests is that accepting the renvoi is not a happy solution for interest analysis, either. Here there is indeed an air of "abdication of sovereignty," as Lorenzen charged occurred with renvoi generally. See Lorenzen, *supra* note 2, at 205.

prove to be essentially the same moves. And, as we shall see, they fail for essentially the same reasons.

1. The Inherent Distinctiveness of Choice of Law

The oddity just mentioned appears to be what Currie was relying on in his suggestion that there was no question of applying anything but foreign internal law. Indeed, there is a superficial plausibility to the idea that, having determined that the purposes of foreign internal law would be served by its application, one should proceed to that application straightaway without further dalliance in the choice-of-law field. The proper focus for interest analysis, Currie evidently thought, is internal law and internal law alone; choice-of-law rules do not relate to state interests.¹⁰⁴ A deeper investigation, however, shows that this approach runs so counter to the fundamental presuppositions of interest analysis as to flirt with incoherence.

The great defect of the territorial approach, according to Currie, was that it resolved choice-of-law problems in a haphazard manner, without consideration of the policies underlying the competing laws.¹⁰⁵ In a significant number of cases, then, it sacrificed the interests of one or another state for no good reason.¹⁰⁶ But what are these interests, and who determines them?

Currie never gave an entirely clear answer to this question, and much of the debate over interest analysis centers on what it means to have an interest, and in particular whether state interests are “objective” or “subjective” (terms whose significance will be explained soon). But I believe the best reading of his approach—“best” both in terms of his likely intent and on the merits—takes them to be simply shorthand for the end result of a process of statutory construction.¹⁰⁷ That

104 See CURRIE, *supra* note 98, at 183–84. For a modern statement of this position, see Bruce Posnak, *Choice of Law—Interest Analysis: They Still Don’t Get It*, 40 WAYNE L. REV. 1121, 1140 (1994) (“[T]he interest analyst is saying that the only policies that count in determining whether a state has an ‘interest’ are the policies behind its competing law, not the policies behind its choice of law approach or some other policy.”). It is at this point, as the text discusses in more detail, that I believe the interest analysts unwittingly transformed the legitimate suggestion that all state courts should reject their own traditional choice-of-law rules into the illegitimate one that each state court should reject all other states’ traditional choice-of-law rules.

105 See CURRIE, *supra* note 98, at 89–98.

106 See *id.*

107 Currie suggested (somewhat facetiously) that the aim would be achieved if “we could buttonhole in the statehouse corridor the personification of the Massachusetts General Assembly” and get an answer as to which cases the statute was meant to cover. *Id.* at 81, 83–84. This line suggests an intent-focused method of statutory construction. But those who are skeptical about the existence of legislative intent or the possi-

is, the first step of interest analysis is simply a matter of determining the scope of a state law by interpreting that law to determine whether it is intended to apply to a given set of facts.¹⁰⁸

But if that is so, it should be immediately obvious that the forum cannot ignore foreign choice-of-law rules.¹⁰⁹ Those rules, after all, are

bility of personifying a multi-member body may of course substitute their preferred method; the application of interest analysis does not require any particular interpretive approach.

108 As the text notes, how faithful this statement is to Currie's understanding of interest analysis is not entirely clear. See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 290 n.35 (1990); Kramer, *supra* note 3, at 1005 n.91. The claim that interest analysis seeks constructive intent (i.e., the result the legislature would have approved had it considered the problem) provides the fulcrum for much of Brilmayer's early criticism. See, e.g., Brilmayer, *Myth of Legislative Intent*, *supra* note 98, at 393. The partisans of interest analysis scolded her harshly for the alleged misinterpretation. See, e.g., Kay, *supra* note 71, at 127 ("[Professor] Brilmayer seems impervious to constructive criticism."); Sedler, *supra* note 98, at 609 ("Professor Brilmayer simply has got it all wrong. . . . Interest analysis is in no sense based on legislative intent, either actual or constructive."). The vitriol of these responses is puzzling. Kay and Sedler both agree that the aim of interest analysis is to apply state laws in circumstances in which doing so promotes the policies or purposes behind them. See Kay, *supra* note 71, at 125 (stating that Currie was interested "only in how a statute or common law rule might be applied to accomplish its underlying domestic policies"); Sedler, *supra* note 98, at 610 (suggesting that interest analysts' "claim is that choice of law decisions should be made with reference to the policies embodied in rules of substantive law . . . and the interests of the involved states in having their laws applied to implement those policies in the particular case"). But each of these quotes would receive full credit as a definition of "constructive intent," which itself is just a method of statutory interpretation, and statutory interpretation is exactly what everyone agrees interest analysis claims to use. See, e.g., Scott Fruehwald, *Choice of Law in Federal Courts: A Reevaluation*, 37 BRANDEIS L.J. 21, 50 (1998) (urging courts to "attempt to establish the legislature's constructive intent by examining the law's purpose"); Kramer, *supra*, at 300 (describing this method of statutory construction as "black letter law" and "the most widely used and accepted approach to interpretation both in practice and in the academy"). One does not, at any rate, find many interest analysts arguing that their aim is to produce results the legislature would *not* have approved had it considered the question; nor did Currie suggest that this would be desirable. See CURRIE, *supra* note 98, at 606 (approvingly describing the Supreme Court's methodology in a conflicts case as "trying to decide as it believes Congress would have decided had it foreseen the problem").

109 Larry Kramer gives an excellent statement of this point in *Return of the Renvoi*. See Kramer, *supra* note 3, at 1005. Kay denies it, though apparently only on the grounds that state choice-of-law rules do not relate to state interests. See Kay, *supra* note 54, at 908-11. But the inquiry into the existence of an interest is simply an intermediate step in the determination of a law's scope, and given that legislatures can control scope, their power over interests is irrelevant—as, indeed, is the term itself. See Larry Kramer, *The Myth of the "Unprovided-for" Case*, 75 VA. L. REV. 1045, 1064 (1989) ("[T]he 'interest' terminology is merely conventional. The point of the in-

the ones that govern precisely the question of whether a state's internal law applies.¹¹⁰ Interest analysis is thus by its own terms committed to the consideration of foreign choice-of-law rules, odd though it may seem.¹¹¹ The assertion of a distinction inherent in the methodology casts aside provisions of foreign law specifically directed to the question interest analysis tries to answer; it makes interest analysis run roughshod over its own aspirations. Currie's conclusion cannot stand.¹¹²

quiry is to determine what rights the state may have conferred on a party . . ."). The most promising step to advance Currie's insights might well now be to abandon talk of interests. Kramer has done so; he phrases the analysis in terms of "prima facie applicability." See Kramer, *supra* note 3, at 1014 ("I prefer to say that the state's law is 'prima facie applicable' in order to avoid some of the baggage associated with the term interest . . ."). I would rather talk simply in terms of scope; as will become clear later, I think it would be an even greater advance to abandon talk of "applying" a state's law at all.

110 The point could be disputed, but not, I think, convincingly. In *Pfau v. Trent Aluminum Co.*, 263 A.2d 129, 137 (N.J. 1970), the court justified disregard of a territorial choice-of-law rule with the observation that "[I] *ex loci delicti* was born in an effort to achieve simplicity and uniformity, and does not relate to a state's interest in having its law applied to given issues in a tort case." *Id.* As a matter of intellectual history, this is far off; *lex loci delicti* was born from the conviction that state power was territorially bounded, and it quite definitely reflects a conviction that tort law does not reach out-of-state events. See *Ala. G.S.R. Co. v. Carroll*, 11 So. 803, 807 (Ala. 1892) (equating operation of a territorialist choice-of-law rule to explicit territorial restriction in the text of a statute).

111 One way of eliminating the oddity, of course, would be to consider foreign choice-of-law rules at the stage of determining whether the foreign state is interested. This solution is, I believe, essentially correct, and I discuss it in more detail *infra* Part II.B.4.

112 In saying this I do not mean to disparage Currie's contribution. His fundamental insight—that choice-of-law analysis can largely be assimilated to the process of determining the scope of state-created rights in purely domestic cases—is a tremendous conceptual advance. And even his brief and tentative discussion of *renvoi* contains two important observations: first that *renvoi* is "wholly artificial, being raised merely by the form of choice-of-law rules," and second that *renvoi* within interest analysis is similar to "the case in which neither state has an interest in the application of its law and policy." CURRIE, *supra* note 98, at 184. The first observation is accurate, though I disagree with Currie over the source of the *renvoi* problem and believe he failed to eliminate it. The second describes what in Currie's terminology is called an "unprovided-for" case. Again, Currie was correct to link this phenomenon to *renvoi*, but because he did not himself fully understand the implications of his method, he suggested that in such cases "the forum would apply its own law simply on the ground that that is the more convenient disposition." *Id.* at 184. The correct analysis is found in Kramer, *supra* note 109. The relationship between the unprovided-for case and *renvoi* is discussed *infra* Part IV.B.1.b.

2. The Appeal to Objectivity

We have seen already that after the failure of the attempt to deem foreign choice-of-law rules irrelevant, the next move is to characterize them as incorrect. The territorialists did not make this move as aggressively as they could have, but the interest analysts did. Indeed, in so doing they seriously overplayed their hand and came close to compromising the plausibility of interest analysis as a conflicts methodology altogether. Understanding how this happened requires a more detailed discussion of the nature of state interests.

In the preceding section, I adopted a perspective that takes state interests as "subjective." That is, whether a state is interested in a transaction is shorthand for whether the transaction falls within the scope of that state's law. Determining the scope of a state's law is a matter of interpreting it, and the legislature and the courts of that state are of course authoritative in the drafting and interpretation of their own law.

I have said that I find this understanding of interest analysis best on the merits, for reasons that will appear shortly. And to the extent that Currie addressed the issue explicitly, he seems to have endorsed it.¹¹³ But it is possible also to suppose that states are not authoritative with respect to the existence or nonexistence of their interests—that is, that state interests are "objective" and outside the control of the state courts and legislatures. If this is so, then a forum may safely substitute interest analysis for whatever a foreign state's choice-of-law rules provide. The forum is entitled to decide for itself whether a foreign state is interested, and having made that decision, it has resolved the question of whether that state's law should apply. The foreign state's choice-of-law rules may prescribe a different conclusion, but that is of no moment—to the extent that they suggest that the foreign state's law does not apply (i.e., that the foreign state is not interested), they are simply wrong.

This is the appeal to objectivity for interest analysis. It may be possible to give a more sympathetic exposition of the move, but I do

113 In addition to suggesting that the existence of an interest could be ascertained by asking the personification of the state legislature, *see supra* note 107, Currie observed that an interest analyst's conclusions with respect to state policies and interests, based as they were on assessment of the purpose of a state's law, "are tentative and subject to modification on the advice of those who know better"—namely, state courts and legislatures. CURRIE, *supra* note 98, at 592 (emphasis omitted). He did, moreover, suggest that explicit legislative statements as to scope were authoritative and desirable. *Id.* at 171–72. *But see* Lea Brilmayer, *The Other State's Interests*, 24 CORNELL INT'L L.J. 233, 241 (1991) (asserting that Currie "almost certainly" had an objective conception of interests).

not find those of its proponents any more plausible. Peter Westen argued, for example, that "if the forum decides that a foreign state is interested in a case by looking to that state's conflicts law, it subordinates its own choice of law to that of a foreign state, however archaic the latter may be."¹¹⁴ But the whole venture of choice of law, as Griswold had earlier observed in response to just this claim, consists in "telling a court when it should cast aside its own rule in favor of one that is preferred abroad."¹¹⁵ Herma Hill Kay's suggestion that "[t]he mere fact that [a foreign state] might mistakenly fail to recognize her own legitimate interests need not prevent [the forum] from recognizing her interests on her behalf"¹¹⁶ is similarly puzzling; unless they run afoul of constitutional restrictions, states *cannot* be "mistaken" about the scope of their law.¹¹⁷

John David Egnal has described this approach as "megalomaniacal and a serious breach of the forum's obligation under the full faith and credit clause."¹¹⁸ Those are strong words, but the description is apt. The problem, the same one we have seen attending the assertion of inherent distinctiveness, is that an approach that seeks to determine whether foreign law is intended to apply can hardly justify contradicting those provisions of foreign law that address applicability. If foreign choice-of-law rules can be wrong, then state interests must be objective, and in that case interest analysis again runs headlong into itself; it is defying provisions of state law (the choice-of-law rules) that are plainly intended to apply. On this account, interest analysis loses

114 Peter Kay Westen, Comment, *False Conflicts*, 55 CAL. L. REV. 74, 85 (1967).

115 Griswold, *supra* note 11, at 1178.

116 Herma Hill Kay, *Comments on Reich v. Purcell*, 15 UCLA L. REV. 551, 589 n.31 (1968).

117 *See id.* Kay's point in that comment was the standard interest analysis claim that choice-of-law rules—especially the traditional ones prevalent in 1968—do not reflect state policy. *See Kay, supra* note 54, at 913 (arguing that territorial choice-of-law rules "provide no . . . information" as to whether a state "would choose to assert its domestic interest" and that consequently "my willingness in 1968 to permit California to recognize Ohio's domestic interests on her behalf still seems justified"). As a current prescription, she urges that "a court following interest analysis should still disregard the other state's traditional choice of law rule as irrelevant to its initial inquiry into the policies and interests underlying that state's domestic law." *Id.* at 914. The problem with both of these positions is that courts following territorial rules did quite clearly understand them as limitations on the scope of state law. *See Ala. G.S.R. Co. v. Carroll*, 11 So. 803, 807 (Ala. 1892). A restriction on scope may not be identical to the absence of an interest, but it is dispositive with respect to the question of whether a law may be applied to a transaction. If a transaction does not fall within the law's scope, any talk of interests is irrelevant.

118 John David Egnal, *The "Essential" Role of Modern Renvoi in the Governmental Interest Analysis Approach to Choice of Law*, 54 TEMP. L.Q. 237, 265 n.145 (1981).

all plausibility as an attempt to vindicate state policies, at least where such "policies" are understood as those the state has asserted, rather than the product of a priori theorizing. As Brilmayer put it, "Currie was as metaphysical as Beale."¹¹⁹

The interest analysts, of course, took pains to avoid reliance on metaphysics and tended to describe their approach as enlightened rather than correct.¹²⁰ But this is simply a more polite version of the appeal to objectivity, and it cures none of the defects. Other states may well have adopted unenlightened rules to determine when their law applies, but interest analysis is committed to respecting the judgment of "those who know better."¹²¹

Indeed, Egnal is quite right to suggest that the assertion of objectivity or superior enlightenment presents serious constitutional diffi-

119 Lea Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 555, 563 (1984). Brilmayer has suggested to the contrary that a state's choice-of-law rules should be respected to the same extent as its internal law. BRILMAYER, *supra* note 32, § 2.5.4, at 105–09. The 1995 treatise recapitulates some of the high points of decades of earlier attacks on interest analysis. See, e.g., Brilmayer, *Governmental Interest Analysis*, *supra* note 98; Brilmayer, *Myth of Legislative Intent*, *supra* note 98. For a sampling of responses, see, for example, Kay, *supra* note 71, at 50–58; Bruce Posnak, *Choice of Law: Interest Analysis and Its "New Critics"*, 36 AM. J. COMP. L. 681 (1988); Posnak, *supra* note 104; Sedler, *supra* note 98; Robert A. Sedler, *Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer's "Foundational Attack"*, 46 OHIO ST. L.J. 483 (1985). To the extent that interest analysts asserted the propriety, or even the possibility, of ignoring foreign choice-of-law rules, I believe Brilmayer's condemnation is correct. But as Larry Kramer has argued, there is no reason for interest analysis to put that particular millstone around its neck. See Kramer, *supra* note 3, at 1005 (suggesting that adherence to "Currie's basic insight" should lead interest analysts to respect foreign choice-of-law rules). It is not my purpose here to take a side in the dispute over interest analysis, something that the diversity of views as to the content of that approach would make difficult in any event. See Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577, 615 (1980) (describing modern choice-of-law theory as "stagnant pools of doctrine, each jealously guarded by its adherents"); Phaedon John Kozyris, *Conflicts Theory for Dummies: Après le Deluge, Where Are We on Producers Liability?*, 60 LA. L. REV. 1161, 1169 n.23 (2000) ("Indeed, interest analysis is becoming as diverse as Marxism or Christianity." (citations omitted)).

120 See, e.g., Posnak, *supra* note 104, at 1134–36 (discussing treatment of foreign choice-of-law rules under interest analysis as designed to avoid "irrational" results).

121 CURRIE, *supra* note 98, at 592 (emphasis omitted); see BRILMAYER, *supra* note 32, § 2.5.4, at 106 ("If [the forum] respects 'stupid' substantive preferences by other states, why not 'stupid' choice of law preferences? The fact is that an authoritative organ of the state has decreed that what the state 'wants' is to have its law applied in certain cases but not in others."). But see Posnak, *supra* note 104, at 1141 (stating that "the interest analyst is saying that the only policies that count in determining whether a state has an 'interest' are the policies behind its competing law, not the policies behind its choice of law approach or some other policy").

culties. If a sister state law, for instance, is explicitly territorial in scope¹²² (e.g., a wrongful death statute that applies only to deaths "caused within this state") it is a violation of the Full Faith and Credit Clause for the forum to apply it to those caused beyond the state's borders, even if the decedent is a state domiciliary with whose welfare the state is (of course) concerned. The interest analysts who suggested that the forum may recognize the other state's interests despite its mistakes¹²³ or that the forum should "apply the law of the other state, even though that law doesn't want to be applied"¹²⁴ would surely balk at the suggestion that the forum should allow recovery even though the foreign law does not allow it.¹²⁵ But—if a choice-of-law rule is equivalent to an explicit restriction within a statute—that is precisely what they suggest via the appeal to objectivity.¹²⁶

At this point it is appropriate to address that "if" in more detail. That choice-of-law rules are akin to explicit restrictions on statutory scope is one of the central claims of this Article, the premise that powers most of its conclusions. It is not a novel claim; John Westlake made it over a hundred years ago,¹²⁷ and it plays a similar central role

122 Since at this point I am discussing *renvoi* within interest analysis, the introduction of a territorial statute may seem not to play fair. But there is no bar to a state's defining its interests in territorial terms—unless, of course, interests are objective, an alternative the text offers reasons to reject. Indeed, if the question of whether a state is interested is the question of whether its law is intended to apply, such a territorial restriction should be considered the clearest possible definition of the state's interest.

123 See Kay, *supra* note 116, at 589 n.31.

124 DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 106 (1965).

125 Posnak does suggest that the forum should ignore an express statement of legislative intent that a state law reach a particular transaction, arguing that "[i]f the forum were bound to apply this foreign law or even bound merely to attribute an 'interest' to the foreign state, it could lead to a result that is irrational in terms of the policies of the competing laws and the facts of the case." Posnak, *supra* note 104, at 1135. The assertion that applying a state law to a transaction explicitly placed within its scope by the legislature could be irrational in terms of that law's policy is a stark example of how the appeal to objectivity rejects the policymaking authority of state legislatures. Posnak would give somewhat more, though not conclusive, weight to an express statement that a state law does not reach a particular transaction on the grounds that such a limitation "is analogous to a declaration against interest." *Id.* at 1135 n.72.

126 They might have been on firmer ground had they attempted to justify the rejection of foreign choice-of-law rules as a form of *dépeçage*—the application of parts of multiple states' laws. But *dépeçage* makes sense only when the portion of each states' law that is applied can be severed from the remainder without doing violence to its coherence, and ignoring a choice-of-law rule makes no more sense than severing a territorial restriction internal to a statute.

127 See NORMAN BENTWICH, *WESTLAKE'S TREATISE ON PRIVATE INTERNATIONAL LAW* 38 (7th ed. 1925) (concluding "that a rule referring to a foreign law should be under-

in both Brilmayer's critique of interest analysis¹²⁸ and Kramer's investigation of renvoi.¹²⁹ In each of these contexts it has been disputed.¹³⁰

The arguments offered in support, though persuasive to me, are perhaps the sort of things that convince only those who have already had similar thoughts. Kramer asserts that a choice-of-law rule is a rule of interpretation and further that rules of interpretation are "part of a state's positive law."¹³¹ Brilmayer challenges interest analysis on its own terms, arguing that choice-of-law rules are expressions of policy, even if "unenlightened" from the perspective of interest analysis, and must be heeded for that reason.¹³² Neither of these arguments is a 100% knockdown. Interest analysts might simply deny the premises and respond that choice-of-law rules are not rules of interpretation and that territorial rules do not reflect any policy judgment—indeed, they have.¹³³ My purpose in these paragraphs is to ask whether a stronger case can be made.

From the territorialist perspective, as I have demonstrated, the equivalence of territorial choice-of-law rules and statutory restrictions is implied by the theoretical apparatus and was explicitly recognized by courts.¹³⁴ But interest analysis rejects this perspective; its most vocal proponents maintain that a foreign state's choice-of-law rules cannot be considered dispositive on the question of whether that state's

stood as referring to the whole of that law, necessarily including the limits which it sets to its own application, without a regard to which it would not be really that law which was applied"). The first edition of the treatise was published in 1858. *Id.* at ii. Bate dates Westlake's acceptance of renvoi to his 1900 contribution to the discussions of the Institute on International Law. See BATE, *supra* note 2, at 57.

128 See BRILMAYER, *supra* note 32, § 2.5.4, at 105–09.

129 See Kramer, *supra* note 3, at 1011 ("A state's approach to choice of law by *definition* establishes the state's rules of interpretation for questions of extraterritorial scope.").

130 See Lorenzen, *supra* note 2, at 203 (dismissing Westlake's claim as "an absurdity"); Posnak, *supra* note 104, at 1123 n.6, 1131–51 (criticizing Kramer and Brilmayer).

131 Kramer, *supra* note 3, at 1008–10.

132 See BRILMAYER & GOLDSMITH, *supra* note 28, at 106–07.

133 See *supra* note 119.

134 As the Supreme Court of Alabama put it, construing a personal injury statute and applying a territorial approach, the statute must be applied "as if its operation had been expressly limited to this state, and as if its first line read as follows: 'When a personal injury is received in Alabama by a servant or employe,' etc." Ala. G.S.R. Co. v. Carroll, 11 So. 803, 807 (Ala. 1892).

law reaches a transaction.¹³⁵ Similar pronouncements have been made by courts.¹³⁶

It is possible to argue, as I have above, that disregarding foreign choice-of-law rules in fact runs counter to the central aspiration of interest analysis and that therefore interest analysis is committed by its own principles to respect them (which I take to be essentially Brilmayer's point). It is also possible to show, as I will below, that respecting foreign choice-of-law rules need not lead to renvoi, and the practice could for that reason be recommended on grounds of practical utility. But neither of these argumentative tacks is decisive, and so my aim here is to suggest that there is a constitutional argument for deference to foreign choice-of-law rules.

The starting point is the observation that state courts and legislatures are authoritative with respect to the scope of their own law. This point is well established and need not detain us long. The Supreme Court has long recognized that state court constructions of state law are generally binding on federal courts.¹³⁷ State courts plainly have no greater power than federal courts in the interpretation of sister state law, and the principle applies equally in the interstate context: state courts of last resort are authoritative with respect to the meaning of their law.¹³⁸

135 See, e.g., Posnak, *supra* note 104, at 1134 ("The forum court owes little deference to a foreign legislature.").

136 See, e.g., Pfau v. Trent Aluminum Co., 263 A.2d 129, 137 (N.J. 1970) (suggesting that territorial choice-of-law rules can be ignored by courts following policy-oriented approaches).

137 See, e.g., Forsyth v. City of Hammond, 166 U.S. 506, 518-19 (1897) (holding "the construction by the courts of a state of its constitution and statutes is, as a general rule, binding on the Federal courts"). For a more modern statement of the proposition, see *Alabama v. Shelton*, 535 U.S. 654, 674 (2002). The exceptions fall into two basic classes. First, state court applications of state law can be reviewed where the consequence is the denial of a federal right. Thus a state court determination that no contract exists can defeat a litigant's claim under the Contracts Clause, and a determination that a litigant has defaulted a federal claim under state procedure can justify refusal to hear that claim. In such cases, federal courts assert some power to second guess the state law ruling. See, e.g., Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80, 83 n.11 (2002) (discussing "antecedent state ground"); Kermit Roosevelt III, *Light From Dead Stars: The Adequate and Independent State Ground Reconsidered*, 103 COLUM. L. REV. 1888, 1889 n.1 (2003) (same). Second, some interpretations of state law may be so unexpected as to violate the Due Process Clause. See *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (holding that state court interpretation of state law departed so far from precedent as to constitute a due process violation). In both these circumstances, the presence of a federal right makes the difference.

138 The principle is somewhat less developed in the interstate context, but it does exist; indeed, it has a clear textual basis in the Full Faith and Credit Clause. See, e.g.,

But the foregoing gets us only to the stage of raising the fundamental question. Certainly state courts are authoritative as to the meaning of their own law, and certainly whether a state's law applies to a particular set of facts is a question of its meaning.¹³⁹ But do choice-of-law rules answer that question? Do they delimit the substantive scope of state law?

Again, it is useful to look to the interaction of state and federal courts, where the questions of respective authority have been addressed in more detail. The Supreme Court has, it turns out, stated explicitly that a federal court applying state law must heed the limits set by that state's choice-of-law rules. *Klaxon v. Stentor Electric Manufacturing Co.* holds that federal courts exercising diversity jurisdiction cannot second guess state courts as to the scope of their law; subject only to constitutional constraints, a state "is free to determine whether a given matter should be governed by the law of the forum."¹⁴⁰ A federal court lacks the power to disregard the limitations that a state, through its choice-of-law rules, has placed on the scope of its law.¹⁴¹ To put the point slightly differently, *Klaxon* recognizes that to apply state law means to apply the entirety of state law; the idea that internal law may be separated out and "applied" by itself is simply false. Thus, it would seem, the Court has recognized that state choice-of-law rules amount to restrictions on the scope of state law and bind other forums.¹⁴²

Sun Oil Co. v. Wortman, 486 U.S. 717, 730–31 (1988) (noting that clear and willful misinterpretation of sister state law violates the Full Faith and Credit Clause). It would seem at any rate to follow more or less immediately from the rationale for state interpretive supremacy vis-à-vis federal courts, which is that "[t]he exclusive authority to enact [state] laws carries with it final authority to say what they mean." *Jones v. Prairie Oil & Gas Co.*, 273 U.S. 195, 200 (1927).

139 See, e.g., *Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co.*, 291 U.S. 352, 358 (1934) ("As to the meaning of the statute . . . the Supreme Court of Mississippi speaks with ultimate authority. We assume in accordance with its ruling that the statute was intended to apply to such a bond as the one in controversy here . . .").

140 313 U.S. 487, 497 (1941).

141 *Klaxon*, of course, deals with federal courts exercising diversity jurisdiction, but the principle that a federal court applying state law must observe the limits placed on that law by the state's choice-of-law rules has been recognized in the context of pendent jurisdiction as well. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966), directs federal courts to follow *Erie* in deciding state law claims under pendent jurisdiction, and lower courts have understood the directive to include *Klaxon* as progeny of *Erie*. See, e.g., *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1179 n.8 (3d Cir. 1992) (stating *Klaxon* requires application of a forum state's choice of law principles in diversity cases and with respect to pendent state claims).

142 I thus read *Klaxon* to be constitutionally grounded in a certain sense. It recognizes that state choice-of-law rules relate to the substantive scope of state law and thus

Matters are not quite that simple, however, for the quoted sentence continues "or some other."¹⁴³ *Klaxon* thus requires federal courts to adhere to state choice-of-law rules not merely on the question of whether local law applies, but also with respect to the application of foreign law. This second step is, or should be, puzzling. It grants to state courts the power denied those of the federal government—the power to ignore a state's determination, as expressed in its choice-of-law rules, whether its law applies. But state courts, we have seen, have no greater power than federal courts to ignore authoritative constructions of sister state law.

The explanation is presumably that the *Klaxon* Court saw that imposing similar requirements on the states would lead directly to the infinite regress of *renvoi*. If each state must, when applying the law of another state, apply that state's choice-of-law rules, the Constitution seems to have turned out to be a suicide pact after all: it has prescribed the very *circulus inextricabilis* the territorialists invoked as reason enough to reject the *renvoi*.

Impossibility of compliance is sufficient excuse to ignore a constitutional demand. The Supreme Court has said as much in considering the limits the Full Faith and Credit Clause sets on choice-of-law rules. There it pointed out that a straightforward application of the constitutional text would seem to require that "the statute of each state must be enforced in the courts of the other, but cannot be in its

that federal courts purporting to apply state law must respect the limits set out by choice-of-law rules. A federal court disregarding state choice-of-law rules would no more be applying the law of that state than would a federal court applying one section of a state statute while ignoring another. Whatever constitutional bar exists to the latter practice also forbids the former. This is not to say that the Constitution requires federal courts to apply any particular state's law in diversity actions (the main *Klaxon* question), or even to apply state law at all (the *Erie* question); it is only to say that "applying" state law means applying state choice-of-law rules to the extent they specify the scope of state law.

The scholarship focusing on *Klaxon* is sparser than that discussing *Erie*, which of course is not saying much. See MAURICE ROSENBERG ET AL., *ELEMENTS OF CIVIL PROCEDURE* 390 (4th ed. 1985) (noting that the volume of *Erie* scholarship is enough to "sink it without a trace"). A valuable recent contribution is Borchers, *supra* note 66. Borchers argues that *Erie*, and by extension *Klaxon*, are not constitutionally grounded; federal courts exercising diversity jurisdiction need not apply state law. See *id.* at 118–19. This Article takes no position on that broader question; it asserts only that *Klaxon* was correct in recognizing that a federal court that ignores the scope of state law as set out in that state's choice-of-law rules is not applying that state's law in any meaningful sense.

143 *Klaxon*, 313 U.S. at 497.

own"¹⁴⁴—an obviously absurd result. Unable to read the text literally, the Court has responded by draining it of meaning.¹⁴⁵

But we should not give up so easily. The Court was mistaken, I have argued, in thinking that no plausible method exists to implement a meaningful full faith and credit requirement.¹⁴⁶ And it was mistaken to suppose that recognizing choice-of-law rules as authoritative restrictions on the scope of state law would generate paradox. In fact, consistent application of *Klaxon's* basic principle resolves the difficulty; giving each state authority with respect to the scope of its own law simultaneously denies it authority with respect to other states' laws. (Thus, it should be clear, I am not arguing that applying a state's law means respecting the prescriptions of its choice-of-law rules as to whether some *other* state's law applies—indeed, I am arguing that on that issue, the other state's choice-of-law rules have final say.) What *Klaxon* should have said, then, is simply that all courts, in applying a state's law, are bound by the restrictions on scope embodied in that state's choice-of-law rules.¹⁴⁷

Of course, *Klaxon* did not say that, and an argument that relies on the first half of a sentence while disregarding the second is somewhat less than indisputable as a reading of the doctrine. I do not, and could not, claim that the current Supreme Court sees things this way or is likely to in the near future. What I have tried to suggest is that the logic behind *Klaxon* does lead, more or less inexorably, to the conclusion that states cannot ignore sister state choice-of-law rules. That state courts are supreme in the exposition of their own law is one of the most fundamental postulates of our post-*Erie* jurisprudence. From that principle it follows that each state is authoritative as to the scope of its own law—and consequently not authoritative with respect to the scope of foreign law. Thus, foreign choice-of-law rules must be heeded, at least to the extent that they relate to the scope of foreign

144 *Ala. Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 547 (1935).

145 See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 295 (1992) (characterizing the Court's approach as supposing that "the phrase cannot be taken literally, and therefore, it need not be taken seriously at all").

146 See Roosevelt, *supra* note 13, at 2503–10, 2528–29 (offering a full faith and credit methodology).

147 The Supreme Court of Montana seems to have reached essentially this conclusion. In *Phillips v. General Motors Corp.*, 995 P.2d 1002 (Mont. 2000), it noted that North Carolina "adheres to the traditional place of injury rule" and that therefore "the scope of North Carolina product liability law does not include causes of action for products purchased in North Carolina by North Carolina residents which cause injury outside of North Carolina." *Id.* at 1011.

law.¹⁴⁸ The only way to escape this line of reasoning, I believe, is to argue that choice-of-law rules are not in fact about the scope of state law; they are something like procedural rules with no direct link to substantive law. But that is precisely the move that *Klaxon* rejects, albeit incompletely.

This is an important conclusion, and one to which I will return repeatedly. Its significance for this section, however, is simply that it demonstrates that the appeal to objectivity is no sounder for interest analysis than it was for the territorial approach.

3. The Local Law Theory

The local law theory was little pursued by interest analysts, either because they believed the appeal to objectivity sufficient or because of the obvious tension with the aspirations of the methodology. But it could be seen as implicit in Westen's suggestion that states should disregard foreign choice-of-law rules to avoid subordinating their own rules.¹⁴⁹ If one is willing to supplant foreign choice-of-law rules with those of the forum, why not take the next step and place the entire matter within the authority of forum law? Indeed, if one concedes that foreign law, for unenlightened reasons, does not apply to the case at hand, why should not forum law come to the rescue? David Cavers identified *renvoi* as a problem for interest analysis and considered and rejected the first two moves.¹⁵⁰ Then he commented: "For me, the question seems to be easy of solution Why ought the forum not adhere to its own self-restricting interpretation and apply the law of the other state, even though that law doesn't want to be applied?"¹⁵¹

As stated, this sounds much like the appeal to objectivity, i.e., a determination that forum choice-of-law rules should trump those of the foreign state. But Cavers had a somewhat different idea in mind. "If the forum is satisfied that its domestic rule should not be applied and that the X rule provides an appropriate norm, given its purposes and the connection of the event or transaction with State X," he continued, "then why should the forum refrain from using the X rule?"¹⁵²

148 Choice-of-law rules may perform another function: they may resolve conflicts between rights created by the laws of different states by specifying which right shall prevail. I call these rules "rules of priority" in distinction to "rules of scope." See *infra* Part III.A.

149 See Westen, *supra* note 114.

150 CAVERS, *supra* note 124, at 106 (noting that the forum could "deny that X knows its own interest or that its conventional choice-of-law rule identifies that interest").

151 *Id.*

152 *Id.*

Although Cavers does not explicitly state that the “X rule” should be applied as forum law, the logic of his suggestion is that of Cook’s version of the local law theory: the X rule should be applied because the forum has deemed it substantively appropriate, without reference to the question of whether any rights actually exist under X law.¹⁵³

As a general approach to choice of law, the local law theory fits oddly with interest analysis. When interest analysis directs the application of foreign law, it does so because the foreign state is interested and the forum is not. It is hard to see, as a general matter, why in such cases foreign law should be assimilated to forum law rather than being applied directly. Cavers seems to suggest local law simply as a specific patch to solve the renvoi problem, but even in this guise it is inadequate. In fact, it manages to combine the defects of both the moves already rejected.

First, the methodological contradiction that accompanied the assertion of inherent distinctiveness remains. Even if the local law theory is invoked only in the face of renvoi, there is no explanation for why the existence of renvoi makes it appropriate to disregard foreign choice-of-law rules. Second, the constitutional difficulties associated with the appeal to objectivity persist—though perhaps to a lesser degree.¹⁵⁴ The local law theory does not allow interest analysis to overcome the renvoi.

4. A Solution?

What the preceding sections demonstrate is that the analytical moves by which the territorialists vainly sought to overcome the renvoi are no more effective in the hands of the interest analysts. None of the three standard gambits offers a convincing reason to reject the

153 See *supra* notes 70–74. The other approach it resembles is what Perry Dane has called the use of rules of assimilation: the process of shaping forum law to resemble foreign law. Assimilation likewise works by adopting some of the substance of foreign law without regard to whether or how the adopted law would be applied by a foreign court. As Currie put it, foreign law is sought not as a rule of decision but “for the collateral purpose of ascertaining some datum that will be relevant in the application of the rule of decision which is unquestionably provided by the law of the forum.” CURRIE, *supra* note 98, at 69; see also *id.* at 178 (noting the central problem of conflicts of laws is determining the appropriate rule of decision); Herma Hill Kay, *Conflict of Laws: Foreign Law as Datum*, 53 CAL. L. REV. 47 (1965) (critically assessing Currie’s datum argument).

154 The due process problem of applying forum law despite a lack of contacts between the forum and the litigation may be reduced because if foreign choice-of-law rules select forum law, the required contacts will be lacking only if the foreign rule is unconstitutional, which will be a rare case. The problem does arise, however, in cases in which the foreign choice of law rules select the law of a third state.

renvoi or any method of terminating the regress if the renvoi is accepted. Interest analysis, however, has one more device that must be considered.

The reason Currie believed interest analysis eliminated the problem of renvoi, I have said, is likely the prima facie oddity of analyzing a foreign state's internal law in order to determine whether it is interested and then applying not that internal law but the entirety of foreign law. Currie concluded that if internal law alone was consulted to ascertain state interests, "there can be no question of applying anything other than the internal law of the foreign state."¹⁵⁵

The conclusion makes a good deal of sense; the premise, however, is flawed. Currie might as well have asked why interests were determined by examining internal law rather than the entire law, and though he did not, others did. Choice-of-law rules, Arthur von Mehren suggested, might very well be relevant to the question of whether a foreign state is interested, and in consequence he urged that "the question posed by the renvoi approach be asked at the very beginning, before the forum formulates its choice-of-law rule for the case."¹⁵⁶ One ought, in other words, to consider foreign choice-of-law rules not *after* foreign law has been selected but in the course of deciding whether it *should* be selected.

Von Mehren was one of the early proponents of this position, but he was by no means alone. Paul Freund made a similar suggestion in 1946,¹⁵⁷ and as what von Mehren called the "functional approach" to choice of law¹⁵⁸ grew in popularity, others followed. Some interest analysts—notably those who sought to avoid renvoi via the appeal to objectivity—protested on the grounds that consulting the foreign state's choice-of-law rules amounted to subordinating local policies.¹⁵⁹ But the suggestion won broad approval; Egnal lists Cavers, Weintraub, and Leflar among its adherents.¹⁶⁰

155 CURRIE, *supra* note 98, at 184.

156 Arthur Taylor von Mehren, *The Renvoi and Its Relation to Various Approaches to the Choice-of-Law Problem*, in *XXTH CENTURY COMPARATIVE AND CONFLICTS LAW* 380, 390 (Kurt H. Nadelmann et al. eds., 1961).

157 See Paul Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1217 (1946) ("A second means of harmonizing by looking more closely at the competing laws may be found by examining not merely the policy but the conflict of laws delimitation of each law.").

158 ARTHUR TAYLOR VON MEHREN & DONALD THEODORE TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS* 76 (1965).

159 See *supra* notes 54–69.

160 Egnal, *supra* note 118, at 255; see also Posnak, *supra* note 104, at 1135–36 (suggesting that "the question of whether the foreign state would apply its own law should be relevant if the foreign state follows some form of the 'new learning'").

Because this approach is quite similar to one I will consider later, I postpone a full discussion. As put forth by von Mehren, it is not a complete solution because it considers foreign choice-of-law rules only as useful guides to the construction of interests, not definitive statements.¹⁶¹ Additionally, it deems them useful only if they reflect an enlightened or “functional” approach; almost no one suggested that a territorial choice-of-law rule should be heeded.¹⁶² Last, it seems to take the foreign conclusion as to whether or not foreign law applies as a bivalent variable—either the law applies or it does not—rather than distinguishing between the questions of whether foreign rights exist and whether they should prevail over conflicting forum rights. This distinction is the linchpin of what I will call the two-step model, and I develop it further in Part III. Before the more general discussion, however, there is one more modern choice-of-law approach to consider.

C. *The Second Restatement*

The scholars of the American Legal Institute began work on the Second Restatement of Conflict of Laws in 1953, by which point the academic revolt against Beale’s pieties was well underway. Ferment in the courts and law reviews made it difficult for the drafters to agree on which approaches should win a place in the Restatement, and the project was not completed until 1971.¹⁶³

Despite its lengthy preparation, the Restatement strikes many readers as half-baked. Its central command is to apply the law of the state with “the most significant relationship,”¹⁶⁴ but identifying that state is no easy task. Section six, the centerpiece of the Restatement, offers seven relevant factors but no explanation of how to weigh them

161 See Kramer, *supra* note 3, at 1004–05.

162 “In a fully developed system of functional choice-of-law rules,” von Mehren wrote, “much vital information would be stated in a jurisdiction’s choice-of-law rules. In such a system, these rules would be relatively particularized and nuanced; they should state fairly precisely whether the jurisdiction wishes to regulate a given issue at all, and, if so, under what conditions.” von Mehren, *supra* note 156, at 393. Systems that are less well developed or less functional, apparently, could be ignored. Interest analysts do, occasionally, even give weight to territorial choice-of-law rules, but they tend to do so opportunistically, in order to avoid an otherwise difficult choice, rather than for any consistent theoretical reason. See generally Kramer, *supra* note 3, at 1002 (stating that the “prevailing view among interest analysts is that it is preferable to ignore foreign rules”).

163 See Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 *BUFF. L. REV.* 329, 331 & n.8 (1997).

164 See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 145(1) (1971) (addressing the issue in tort cases); *id.* § 188(1) (addressing the issue in contract cases).

or decide cases in which the factors point to different states, a silence that in the words of Joseph Singer “mystifies rather than clarifies.”¹⁶⁵

Because the Second Restatement contains a *mélange* of different approaches rather than a distinct conceptual perspective, it is difficult to evaluate its success in handling *renvoi*. Like the First Restatement, the Second instructs courts generally to reject the *renvoi* and apply the internal law of the selected state;¹⁶⁶ like the First, it offers no detailed explanation of why foreign choice-of-law rules should not be applied.¹⁶⁷ If explanation is sought, the same three moves discussed above are available.

Unsurprisingly, they fail for the same reasons: nothing in the most significant relationship test explains why choice-of-law rules can be distinguished from internal law, or gives the forum authority to override foreign choice of rules, or suggests that foreign internal law should be assimilated into forum law.

None of the moves has been much invoked by scholars, perhaps because the Second Restatement is too indeterminate to lend itself to theorizing. And indeed, the value of the Second Restatement for this Article is not that it offers a distinctive approach to *renvoi*, but rather that it presents a pure example of a certain type of approach to conflicts—one that, like the others, has saddled itself with unnecessary difficulties. The *renvoi* problem, I will show, is indeed an artifact—not of any particular approach to conflicts, as Currie thought, but of

165 Joseph Singer, *Real Conflicts*, 69 B.U. L. Rev. 1, 77 (1989). For other examples of academic criticism, see, for example, Laycock, *supra* note 145, at 253 (“Trying to be all things to all people, [the Second Restatement] produced mush.”); Shaman, *supra* note 163, at 357–64. “Because the second *Restatement* tries to be so much and do so much, it is rife with inconsistency, incongruence, and incoherence.” *Id.* at 361.

166 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8(1). Subsection 8(2) makes an exception for cases in which “the objective of the particular choice-of-law rule is that the forum reach the same result on the very facts involved as would the courts of another state.” *Id.* § 8(2).

167 Comment d to subsection 8(1) describes *renvoi* as a problem of characterization (determining whether “law” should be taken to mean internal law or entire law) and admits that “no . . . obvious answer exists.” *Id.* § 8(1) cmt. d. Comment h to subsection 8(2) explains that the exception will apply “when the other state clearly has the dominant interest in the issue to be decided and its interest would be furthered by having the issue decided in the way that its courts would have done.” *Id.* § 8(2) cmt. h. The Restatement does, however, suggest evaluating state interests in a manner akin to that discussed in the preceding subsection; that is, it suggests that the question of whether a foreign state would apply its own law is relevant to (though not dispositive of) the question of whether that state should be deemed to have an interest. See *id.* § 8(2) cmt. k; *id.* § 145 cmt. h. Like von Mehren’s approach, these recommendations indicate some progress towards what I call the two-step model and represent an encouraging advance.

the picture that inspires the various approaches, the picture according to which the task of a court facing a choice-of-law problem is to follow its choice-of-law rules in order to determine which state's law applies. Understanding where this picture goes wrong, and how its error has been embedded in the various approaches, requires the deployment of a different perspective on conflicts. Explaining that perspective is the task of the next Part.

III. REVISING RENVOI

A. *The Two-Step Model*

The preceding Part has demonstrated that none of the leading approaches to conflicts offers a satisfactory resolution of the renvoi problem. The importance of this failure would be reduced if states could at least agree on a choice-of-law methodology. Renvoi would still arise, as discussed earlier, as a consequence of differences in characterization or substantive law, but it would do so less frequently. Its continuing significance depends in part on the fact that no agreement has materialized, and none seems likely in the foreseeable future. The most recent of Dean Symeonides' invaluable surveys of American conflicts law shows that no choice-of-law approach predominates.¹⁶⁸ The Second Restatement enjoys plurality status, but that tends if anything to reduce agreement, for the Second Restatement's application can vary so much from court to court as to virtually amount to distinct approaches. Methodological pluralism, in short, is the order of the day.

That makes things harder. The interest analysts who appealed to objectivity were at their most plausible when they asserted that territorial choice-of-law rules were not well thought-out restrictions on the scope of state law, but simply relics of the past, fated for obsolescence as soon as their authors grasped the new learning.¹⁶⁹ Given the dog-

168 Symeon C. Symeonides, *Choice of Law in the American Courts in 2002: Sixteenth Annual Survey*, 51 AM. J. COMP. L. 1, 4-5, 4 n.17 (2003) (citing Symeon C. Symeonides, *Choice of Law in the American Courts in 2000: As the Century Turns*, 49 AM. J. COMP. L. 1 (2001)).

169 See, e.g., David E. Seidelson, *The Americanization of Renvoi*, 7 DUQ. L. REV. 201, 211 (1968) (suggesting that courts should disregard only those *lex loci* decisions that are vestiges of a less-sophisticated period). From one perspective, this makes sense as a sort of constructive intent: it is at least plausible that a court or legislature aware of different approaches would decide to adopt the modern learning. From another, it does not: it is precisely the older cases that reflect the strongest commitment to territorial scope, and constructive intent is not usually invoked to override explicit statements to the contrary. The Supreme Court, for instance, has made clear that lower courts should not follow a "constructive intent" to overturn live precedents. See Rodri-

ged persistence of the First Restatement, the assertion rings increasingly false—territorialist states mean what they say, and their choice-of-law rules cannot be disregarded as misguided or quaint.

Von Mehren's suggestion that courts could draw important information from the choice-of-law rules of states that had adopted a "functional" approach was offered in 1961 and bore at least a tincture of the optimistic belief that all or most states would soon welcome the new learning.¹⁷⁰ Twenty years later, the Cramton, Currie, and Kay casebook, with a mixture of wistfulness and irony, labeled von Mehren's hoped-for day the "millennium"—the time when all choice-of-law systems would be rational.¹⁷¹ The latest version of the casebook drops that reference;¹⁷² the chronological millennium has come and gone with no cleansing apocalypse. The heresy of territorialism persists—and that, as far as *renvoi* is concerned, looks like the real end of the world.

But the lack of consensus need not thwart us. Conflicts scholarship has made progress, though one might not think so from reading the law reviews.¹⁷³ The first significant step is the legal realists' claim that choice-of-law questions should not be treated as esoterica but rather understood as conventional legal questions. This insight promised release from the whirlpool of theory,¹⁷⁴ if one could only figure out what it meant to treat a conflicts question as an ordinary legal one. The realists did not; after making the suggestion, they tended to fall back on vague admonitions to use "the same methods actually used in deciding cases involving purely domestic torts, contracts, property, etc."¹⁷⁵ Brainerd Currie did; he recognized that conflicts is, in part,

quez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

170 See von Mehren, *supra* note 156, at 392–94.

171 See ROGER C. CRAMTON ET AL., *CONFLICT OF LAWS* 401 (3d ed. 1981).

172 See CURRIE ET AL., *supra* note 26, at 248–49.

173 See, e.g., JUENGER, *supra* note 25, at 146 (stating that "the ferment in the United States has not produced anything truly novel" and "the conflicts experiment conducted in the vast laboratory of the American federal system has been a gigantic failure").

174 It is a truism in conflicts that the same approaches recur. See JUENGER, *supra* note 25, at 45–46 ("[T]here are only three basic choice-of-law methods . . . [t]hat have coexisted since the Middle Ages."); Patrick J. Borchers, *Professor Brilmayer and the Holy Grail*, 1991 Wis. L. REV. 465, 466 ("American conflicts scholars have a remarkable talent for reinventing the wheel and claiming it as their own design.").

175 COOK, *supra* note 70, at 43.

simply a matter of determining the scope of state-created rights and that, to this extent, it is the same task courts perform routinely in wholly domestic cases.¹⁷⁶

Given that insight, choice-of-law analysis can be described as a relatively simple two-step process.¹⁷⁷ First, a court must determine which of the potentially relevant laws grant rights to the parties.¹⁷⁸ Doing so is a matter of consulting what I have called “rules of scope.” Sometimes this step of the analysis will reveal that only one law does so, in which case the court has discovered what Currie called a false conflict and can enforce the rights created by that law without further ado. And sometimes it will reveal that more than one state’s law grants rights, and that the rights created by the different states’ laws conflict. This would be what Currie calls a true conflict, a case in which, for instance, the plaintiff is entitled to recover according to State A law, but the defendant is protected from liability according to State B law. In such a case, the court must resort to a different sort of rule, what I will call a “rule of priority,”¹⁷⁹ which tells it which of the conflicting rights will prevail.

So far, so good, I hope. This description of the conflicts problem should at least seem plausible. What I claim for it, however, is more than plausibility, though less than any sort of objective accuracy. My claim is that this model will allow us to do conflicts analysis without the sorts of problems that plague the conventional understanding—in particular, without the problem of renvoi. Now it is time to prove that claim.

176 See CURRIE, *supra* note 98, at 183–84.

177 The model is developed most fully in Kramer, *supra* note 108, at 291–318. Perry Dane offered a similar, less-fully articulated account in Dane, *supra* note 29, at 1250–51.

178 Here I switch from speaking about whether a law applies to whether the law grants rights. This is commonplace in the domestic case; if we say that a statute applies to a particular set of facts, what we mean is that it creates rights. I have argued that this latter description is more useful for the conflicts context, see Roosevelt, *supra* note 13, at 2482–85, and I will show later why this is especially true as far as renvoi is concerned. See *infra* Part III.B. Currie did not free himself from the rhetoric of “applying law,” which is the cause of most of his subsequent errors. See *infra* notes 207–11 and accompanying text. Kramer has not abandoned the rhetoric entirely, though he does understand that the basic issue is the scope of the laws, which is to say, the rights of the litigants. See Kramer, *supra* note 108, at 284 (describing “an inapplicable law” as “a law that does not give plaintiff a right to relief”).

179 In an earlier article I called these rules “conflicts rules,” in part to suggest that these rules were the proper focus of the field misleadingly named “choice of law.” See Roosevelt, *supra* note 13, at 2468. Further thought, inspired in part by David Franklin, has convinced me that “conflicts rules” is a confusing name, and I renounce it.

B. *Renvoi Within the Two-Step Model*

Within the two-step model, renvoi does not exist. The renvoi problem arises, recall, when the forum's choice-of-law rules instruct it to apply the law of another state, at which point it must decide whether to apply the entirety of the other state's law or its internal law alone. But a court working within the two-step model never decides to "apply" the law of either state; it simply ascertains the existence of rights under the various states' laws and then resolves any conflicts.

This might seem simply a rhetorical move. Talking in terms of identifying and enforcing rights rather than applying the law of a state, one might think, cannot eliminate any real problems. And that is true enough. What it can do, however, is to eliminate problems that are not real, but are simply artifacts of the conventional description. Within the two-step model, the insoluble question of renvoi is disassembled into two discrete problems, each of which can be solved.

1. Ascertaining the Scope of Foreign Law

The first renvoi-related problem is how to determine the scope of foreign law. More precisely, it is the question of whether foreign choice-of-law rules should be consulted in order to do so. This problem is relatively easy; the answer to the question is yes.¹⁸⁰ Since the aim of the two-step model is to enforce rights created by positive law, if the courts of a foreign state would find that no rights exist under foreign law, the forum cannot disregard that fact.¹⁸¹ State courts, after all, are authoritative with respect to their own law, and the scope of foreign law is not a question of forum law. No state, for instance, has the power to disregard an explicit restriction on the scope of another state's statute (as, for instance, a provision allowing recovery only for wrongful death "caused in this state"), and it has no more power to

180 At least, the problem is easy when considered explicitly from the proper perspective. I earlier took a different perspective on the issue. *See id.* at 2479 ("Choice of law rules are not rules of scope, and Currie was right not to defer to them."). The analysis I offered in support of that assertion does not now seem to me adequate. *Cf. McGrath v. Kristensen*, 340 U.S. 162, 178 (1950) (Jackson, J., concurring) ("The matter does not appear to me now as it appears to have appeared to me then.") (quoting *Andrews v. Styrap*, 26 L.T.R. (N.S.) 704, 706 (1872)).

181 I postpone a discussion of how this analysis works with regard to the various choice-of-law systems considered earlier. How to decide what a foreign choice-of-law rule means about the existence of foreign rights is slightly complicated and requires a bit more exposition. The general point is simply that foreign courts are authoritative with respect to foreign law, and choice-of-law rules are, at least in part, about the scope of state law. That is uncontroversial now, though it was not in the days of *Swift v. Tyson*.

disregard restrictions imposed by that state's court of last resort.¹⁸² Thus if, for example, Pennsylvania follows a territorialist approach, a New York court attempting to determine whether Pennsylvania law grants rights with respect to a transaction occurring in New York must conclude that no Pennsylvania rights exist.¹⁸³

The point may seem simple, but it has significant consequences. The renvoi problem occurs, essentially, when forum and foreign law differ as to their scopes—each state's choice-of-law rules assert that rights are created by the law of the other state and not its own. Heeding both states' laws produces the infinite regress of renvoi, but ignoring the foreign choice-of-law rules is impossible to justify. Recognizing that each state's law is authoritative as to its own scope (and not as to the scope of the other state's law) is the only workable solution. Perhaps not coincidentally, it is also mandated by fundamental postulates of our post-*Erie* jurisprudence.¹⁸⁴

2. The Problem of Mutual Deference

The second problem, and the closest analog to renvoi proper, arises when a forum, after determining that conflicting rights exist, looks to rules of priority to determine which rights shall prevail. If each state's rules of priority provide that the other state's rights should be given effect, the mutual deference creates a situation that resembles renvoi.

This issue, too, can be handled with no fear of paradox, for the resemblance is only superficial. The renvoi problem arises when forum choice of law directs the court to follow foreign choice-of-law rules and those foreign rules in turn direct adherence to forum choice of law. Mutual deference with respect to rules of priority creates no such circle, for a rule of priority instructs a court to privilege either local or foreign substantive rights. It does not refer to choice-

182 See *supra* text accompanying notes 84–96.

183 In ascertaining the existence of Pennsylvania rights, the New York court should also, of course, look to Pennsylvania law for a localizing rule, i.e., to determine where, according to Pennsylvania law, the transaction occurs. More generally, the New York court should ask whether a Pennsylvania court would decide that Pennsylvania law reaches the transaction.

184 I am not, it should be clear, arguing that foreign choice of law rules should be heeded to the extent that they assert that some other state's law applies. Indeed, I am arguing the opposite: whether a particular state's law creates rights is a question of that state's law and that state's law alone. A state's choice-of-law rules, then, are authoritative on the question of whether *that state's* law creates rights, and irrelevant to the question of whether some other state's law does. See *supra* text accompanying notes 140–48.

of-law rules, neither rules of scope nor rules of priority. The problem of mutual deference is not different in kind from the conflict created when each state's rule of priority provides that its own rights should prevail.

The solution is the same in both cases, and it follows quite simply from the recognition that while each state is authoritative with respect to the scope of its own law, the question of what happens when state laws conflict is not a question on which any state can claim the last word. Thus while one state's determination as to the scope of its law must—as a question of that state's law—be respected in foreign courts, its resolution of conflicts between its law and the laws of other states commands no such deference.¹⁸⁵ Instead, state courts must follow the direction of their legislature or court of last resort. That is, they must follow their own rules of priority and enforce either local or foreign rights as those rules dictate, regardless of contrary foreign rules of priority.¹⁸⁶

3. Understanding Assimilation

One puzzle remains. It is not an inherent part of the analysis under the two-step model, but because it resembles *renvoi*, it merits a brief discussion. It arises when the forum chooses to incorporate part of the law of another state, i.e., when it adopts what I have referred to as a rule of assimilation.

185 See Kramer, *supra* note 3, at 1029 (“No state’s rule has a privileged status from this multilateral perspective.”); Roosevelt, *supra* note 13, at 2533 (“The principle that the states are coequal sovereigns leads to no other conclusion.”).

186 I reached the same conclusion in Roosevelt, *supra* note 13, at 2533–34. Kramer suggests that in cases of mutual deference courts should reconsider the matter and feel free to enforce rights under their own law if that would make both states better off. See Kramer, *supra* note 3, at 1032–34. I am skeptical of such freedom. In the simple case, in which the forum’s rule of priority simply provides that local rights shall yield, I do not see how a court can claim the power to disregard this provision of its own law. Matters can be complicated; we could imagine a rule of priority stating that local rights shall yield, given a particular constellation of facts, unless the foreign rule of priority directs that foreign rights yield. (We are approaching a *renvoi*-type circle here, but there is no paradox yet. As long as the local rule of priority does not instruct the court to follow the foreign rule of priority, there is no danger of infinite regress—and a rule of priority that did so provide would be an example of legislative perversity.) I believe that such a rule would be constitutionally doubtful, however, because it would privilege local rights in a case featuring particular contacts, and again in a case in which those contacts were switched (what I have called a “mirror-image” case). This amounts to the sort of discrimination against foreign law that the Full Faith and Credit Clause prohibits. See generally Roosevelt, *supra* note 13, at 2528–29 (discussing full faith and credit and mirror image cases).

Assimilation occurs whenever a state decides to build upon the legal relations created by another. Suppose, for instance, that Connecticut refuses to recognize same-sex marriages solemnized in other states. Connecticut law might nonetheless provide that for certain incidents of marriage—for example, the right to make decisions about medical care for an incompetent spouse—it will look to domiciliary law, rather than Connecticut law, to determine who is a “spouse” entitled to make such decisions. In according such rights to one member of a Massachusetts same-sex couple, Connecticut is not enforcing Massachusetts rights. It is employing Massachusetts law in a definitional, rather than a substantive, capacity—to identify rights-bearers rather than to determine their rights. Consequently, as Currie recognized, there is no need to consider limitations Massachusetts might place on the scope of its rights, and in such cases foreign choice-of-law rules can be ignored.¹⁸⁷

IV. CONVENTIONALISM RECONSIDERED

A. *Conventional Approaches Within the Two-Step Model*

It is possible, then, to conceptualize the choice-of-law task in a manner that does not raise the problem of renvoi. That should go some ways towards demonstrating that the problem is an artifact of the conventional conflicts perspective, an assertion I will develop more fully later. But the point of this Article is not to devise an approach that avoids renvoi, and indeed the value of the two-step model is not that it is a distinctive approach to conflicts. The point is to identify the fundamental error within the conventional perspective, and to this end the two-step model is most useful as an analytical tool. I have not, after all, specified any of the rules of scope or rules of priority that are to be used. Specifying those rules produces a particular conflicts approach, and by using appropriate rules, any of the conventional approaches can be described within the two-step model. Given such specification, the model allows us to examine the conventional approaches in a more analytically tractable way. In particular, as we shall see, it allows us to describe these approaches in a manner in which the renvoi problem does not arise and hence to gain a deeper understanding of the nature of the problem. The first step towards that understanding is to depict the conventional approaches within the model.

187 For Currie's recognition of the difference between assimilation and choice of law, see CURRIE, *supra* note 98, at 69–73, 178.

1. The Territorial Approach

The territorial approach holds that a state's law governs all events, and only those events, that occur within the state.¹⁸⁸ That is, it holds that state laws are territorial in scope. Given this premise, and applying localizing rules to determine a single location for events extended across borders, there is no possibility for conflict between laws—one and only one law will attach legal consequences to a transaction. With such a powerful rule of scope, the territorial approach did not need rules of priority, and indeed it does not contain them. Territorialism, then, is easy to describe within the two-step model: it has a territorial rule of scope and no rules of priority.¹⁸⁹

2. Interest Analysis

Interest analysis uses the concept of an interest as a means of delimiting the scope of state law. If it would further a law's purposes to bring a transaction within its scope, the law is construed to extend to that transaction. Because this method of determining scope does not necessarily allocate legislative jurisdiction to a single state, interest analysis, as the territorial approach did not, confronts the possibility of conflict. If two states are both interested in a transaction, both laws are construed to attach legal consequences, and if the laws differ in substance, a conflict exists. Currie was thus forced to create a rule of priority, which he did via the principle that in case of a true conflict the forum should apply its own law.¹⁹⁰ Interest analysis can thus be

188 See I BEALE, *supra* note 30, § 4.12, at 46 ("By its very nature law must apply to everything and must exclusively apply to everything within the boundary of its jurisdiction.").

189 A reliance on rules of scope alone might seem inadequate to handle the situation in which territorialism encounters a different choice-of-law approach. Then, one might think, conflicts arise and cannot be ignored. In fact, conflicts can arise even between territorialist courts, for each court might, for reasons of characterization or substantive law, believe that its state wielded territorial authority. Territorialism resolves both these problems in essentially the same way, by allowing forum law to determine the scope of foreign law. If forum rules of scope are imposed on foreign law, no conflict can arise. This move is, of course, illegitimate, as I have suggested already and discuss further below. See *supra* text accompanying notes 140–48; *infra* text accompanying notes 199–200. For this reason, it might be more accurate to treat territorialism as including an implicit rule of priority favoring whatever law is deemed territorially appropriate. See Kramer, *supra* note 3, at 1039 ("By definition, the direction to apply [a state's] law means both that [that state] confers a right (the first step) and that it enforces this right notwithstanding the concurrent applicability of another state's law (the second step).").

190 Currie did not, of course, consider this rule of priority a solution; he thought that true conflicts were at bottom insoluble. See CURRIE, *supra* note 98, at 169 ("[The

redescribed within the two-step model as using state interests to determine scope and forum preference as a rule of priority.

3. The Second Restatement

The Second Restatement differs starkly from both the territorial approach and interest analysis in that it does not contain any means of limiting the class of states whose laws might potentially extend to a transaction. Any state is eligible to compete for the title of most significantly related. From the perspective of the two-step model, this means that the Second Restatement contains no rules of scope. Consequently, all the work is done by the diffuse and comprehensive rule of priority contained in section six. It is because of the absence of rules of scope that I have included the Second Restatement despite its failure to engage renvoi in a theoretical manner; the Restatement completes the picture by providing an example of a system that works solely via rules of priority.

4. Testing the Redescription

The following table summarizes the results of the preceding analysis:

	Territorialism	Interest Analysis	Second Restatement
Rule of Scope	Territoriality	Existence of Interest	None
Rule of Priority	None	Forum Preference	Most Significant Relationship

Describing the leading approaches to choice of law in terms of rules of scope and rules of priority accomplishes several goals. By viewing them within the same analytical framework, we are better positioned to see the similarities between what might otherwise seem radically different approaches and differences between ones that might seem similar. Currie's version of interest analysis and the territorial approach, for instance, are quite similar; each relies primarily on rules of scope and has at best a rudimentary conflicts rule. (Currie, notably, did not conceive of interest analysis as a method of resolving conflicts but rather a means to identify cases in which no conflict

resort to forum law] is not an ideal; it is simply the best that is available."). Modern theory has generally rejected Currie's forum preference and developed a number of more sophisticated approaches to true conflicts. Indeed, Currie himself later offered more refinement; he suggested that after detecting a true conflict, the forum should attempt a "moderate and restrained" interpretation of the two states' policies in an effort to eliminate the conflict. See Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963).

existed.)¹⁹¹ The Second Restatement, in sharp contrast, makes no attempt to segregate out cases in which the litigated transaction falls outside the scope of one state's law.¹⁹² All its energies are expended on resolving conflicts via its rule of priority.

Additionally, and more important for this Article, redescription allows us to identify and distinguish rules of scope and rules of priority within each approach. The distinction is vital because questions of scope and questions of priority are very different in terms of the issues over which a particular state may claim final authority. As already noted, the scope of a state's law is a matter very much within the authority of that state's courts and legislature. The priority given to its law in conflicts with the law of other states is not, and this difference is essential to understanding the *renvoi* problem.

The value of the redescription, however, depends crucially (if unsurprisingly) on its accuracy. The goal of this section is to demonstrate that the approaches considered, properly understood, do not produce the *renvoi* problem. If I have erred in my characterizations of the theories, then the demonstration is of little import. It is thus worth pausing to consider whether the two-step models set out above are indeed true to the approaches they represent.

The territorial approach presents the easiest case. There is little doubt that territorialists conceived of territorialism as a rule of scope. Beale was emphatic that territorial boundaries constitute limits to legislative jurisdiction,¹⁹³ and courts of the territorialist era issued equally

191 See CURRIE, *supra* note 98, at 107 (distinguishing between false conflicts, which "present *no real conflicts problem*" and true conflicts, which "*cannot be solved* by any science or method of conflict of laws" and should therefore be decided under forum law).

192 The Second Restatement, uncompromising in its ecumenicalism, includes interest analysis as a factor and territorialist principles in its presumptions. See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (1971); *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 844 (7th Cir. 1999) (noting that "the simple old rules can be glimpsed through modernity's fog, though spectrally thinned to presumptions"). Consequently, in some hands, it may resemble scope analysis.

193 See 1 BEALE, *supra* note 30, § 4.12, at 46.

[N]ot only must the law extend over the whole territory subject to it and apply to every act done there, but only one law can so apply. If two laws were present at the same time and in the same place upon the same subject we should also have a condition of anarchy. By its very nature law must apply to everything and must exclusively apply to everything within the boundary of its jurisdiction.

Id. Interestingly, or perhaps puzzlingly, Kramer disagrees, suggesting that the First Restatement contemplated overlapping legislative jurisdiction and that in fact territorialism should be understood as a rule of priority. See Kramer, *supra* note 3, at 1042 & n.197; see also Cheatham, *supra* note 32, at 383. I do not think Beale's treatise sup-

forceful pronouncements.¹⁹⁴

Confidence about the characterization of interest analysis is somewhat harder to come by. There are doubtless those who would deny that the determination that a state is interested is tantamount to a conclusion that a transaction falls within the scope of its relevant law. This Article is not an exercise in Currie hermeneutics, and I would be content to demonstrate that the model I have arrived at is a plausible method of operationalizing Currie's basic insights.

There are, I believe, adequate reasons to think so. First, the redescription given captures Currie's results. A court should never, Currie believed, apply the law of an uninterested state.¹⁹⁵ This is consistent with, indeed equivalent to, the conclusion that a lack of interest indicates that the transaction falls outside the scope of the state's law.¹⁹⁶ Conversely, Currie understood the existence of an interest as an indication that the state's law did attach legal consequences to the

ports this assertion; the section Kramer refers to argues that different states could impose sanctions, by statute, for a nucleus of acts and consequences crossing state lines. But his reasoning here appears to be that each state is regulating based on the acts or consequences within its borders—that is, he grants that states can, by statute, impose liability for what would be an incomplete tort at common law. This does not suggest that states can regulate acts outside their borders or that legislative jurisdiction can overlap. See I BEALE, *supra* note 30, § 65.2, at 315 (stating that with respect to a series of events crossing state lines, “either of these states has jurisdiction to make *that one* of the series of events which took place in that state the basis of a right” (emphasis added)). It is because such legislation would create causes of action unknown to the common law that Beale in this section sharply distinguished statutory from common law. The reasoning is not especially satisfying; one might wonder why under this theory the state in which the act is performed can do more than treat it as an attempt, and the state in which the consequence occurs do more than treat it as uncaused, a question Beale did not attempt to answer. The First Restatement, though less clearly, seems to be applying the same principle. See RESTATEMENT OF CONFLICT OF LAWS § 65 (1934) (extending legislative jurisdiction to states “in which any event in the series of act and consequences occurs”).

194 See, e.g., Ala. G.S.R. Co. v. Carroll, 11 So. 803, 807 (Ala. 1892).

195 The exceptions, in Currie's formulation of the theory, are the unprovided-for case and, in some circumstances, cases litigated in a disinterested forum. See CURRIE, *supra* note 98, at 152–56. As discussed more fully *infra* Part IV.B.1.b, I believe Kramer is correct in arguing that Currie erred in his analysis of the unprovided-for case and that such cases should be understood as ones in which neither state's law grants the plaintiff a right to recover. In such circumstances, the appropriate resolution is simply dismissal of the suit; the question of which law “applies” is a misleading distraction.

196 Currie's language suggests as much: in order to assess the results of interest analysis in his analysis of married women's contracts, he rephrased them in the language of explicit conflict-of-laws provisions setting out the scope of various state laws. See CURRIE, *supra* note 98, at 111–16.

transaction; it is for this reason that the presence of two interests backing substantively different rules of law produced a conflict. Second, not only does the redescription produce the same results reached by Currie, it fits with his writings. Currie repeatedly characterized his method as akin to conventional statutory construction.¹⁹⁷ If the choice-of-law methodology is essentially interpretation of the internal laws at issue, its result will be—as in the marginal domestic case—a conclusion as to the scope of the interpreted law.¹⁹⁸ The rule of priority I have selected, as already noted, represents Currie's earlier thinking and has not been followed by most of the jurisdictions purporting to apply interest analysis. Its content is not especially important for the analysis that follows, however, and its use may be justified on the grounds of simplicity.

As for the Second Restatement, the open texture that makes it difficult to be clearly correct or incorrect in application also poses some problems for characterization. The centerpiece section 6 directs courts to consider, *inter alia*, the policies of the forum and other interested states, a description that could be taken to suggest that uninterested states have (somehow) been excluded from the analysis at an earlier stage. But since the Restatement does not indicate how this exclusion is to be performed, it seems justified to treat it as essentially a priority-based approach.

B. Renvoi and the Conventional Approaches Reconsidered

All three of these choice-of-law systems suffer from a common defect. The defect is what I will call "scope imperialism." It consists in the substitution of forum rules of scope for foreign rules. Each of the systems described above has a particular rule of scope. (The lack of a rule, as in the Second Restatement, simply amounts to a permissive rule: no states are to be excluded as a matter of scope analysis.) A jurisdiction that adopts such a system adopts its associated rule of scope with respect to its own law. But courts applying the system apply the rule of scope not only to local law, but to foreign law as well. This produces a conflict (though not one that the conventional approach acknowledges), for some foreign states will have adopted different systems, with different rules of scope. States will thus disagree with others about the scope of their respective laws, and under the conventional approach, each state will use its own rules of scope to ascertain

197 *See id.* at 184–85, 364–65.

198 *Id.* at 184.

not only the limits of its own law, but the limits of the laws of other states as well.¹⁹⁹

Territorialism and interest analysis are imperialist in what could be termed both negative and positive senses. They will refuse to recognize the existence of foreign rights in cases in which foreign courts would, and they will “recognize” such rights when foreign courts would not. (Such cases will arise, for instance, when a territorialist court applies the law of a state that follows interest analysis on the grounds that a tort occurred within that state, despite the fact that courts of that state would find no interest. Similarly, most interest analysts would apply the law of a territorialist state to a tort claim if they found it interested, regardless of whether the tort occurred outside the state.) Because the Second Restatement places no limits on scope, its imperialism is positive only; it will find foreign rights that do not exist according to foreign courts. (A Second Restatement court, for instance, might find that a territorialist state had the most significant relationship to an issue in a tort claim arising out of state, and it would at least consider that state in making its most significant relationship determination.)

Scope imperialism should be familiar; it is the practice that underlies the appeal to objectivity. And as discussed at length in the context of that move, it is untenable. State courts and legislatures are authoritative with respect to the scope of their own law.²⁰⁰ The point of the redescription is to show that the choice-of-law rules of the conventional approaches do amount in part to rules of scope. Once this is granted, it follows that even under the conventional approaches, disregard of foreign choice-of-law rules is impermissible and must be renounced. But the renunciation is in fact a victory. Abandoning imperialist designs does not weaken the systems; instead, it allows us to see how renvoi should be resolved within them. And ultimately, it will give us a clearer picture of the nature of the problem.

199 A slightly different, and even more dramatic, form of imperialism arises with respect to characterization or differences in internal law. If a foreign state defines acceptance differently from the forum (recall the mailbox rule example discussed *supra* notes 25–28 and accompanying text), it may be that no contract has been formed within its borders as a matter of its internal law. A territorialist forum deciding that foreign law nonetheless “applies” on the basis of its own rules about the time and place of acceptance has privileged provisions of its substantive contract law over those of the foreign state.

200 See *supra* text accompanying notes 139–48.

1. Renvoi Within Systems

a. The Territorial Approach

Renvoi within the territorial approach occurs when each state's law provides that rights vest not within its territory but within the territory of the other state. Consider, for example, a tort suit in which the internal laws of the two states differ as to the elements of the cause of action, with each finding that the crucial last act necessary to the vesting of a right occurs in the other state. The courts of State *A* will thus rule that State *B* law applies, and vice versa.

What are we to make of this difference of opinion? The conventional understanding takes the determination that the last act occurs in another state as a direction to apply that state's law, which leads into the renvoi problem. But having redescribed the territorial approach within the two-step model, we no longer confront a step at which we are instructed to "apply" some state's law. We are simply asking whether rights exist and then resolving any conflicts that arise. In the case posited, each state's courts will conclude that no rights exist under their own law, but that rights do exist under the law of the other state.

This is again a difference of opinion, but the two-step model has transformed it into one that can be resolved. Each state's courts are authoritative as to the scope of their own law and powerless as to the scope of other states' laws. Thus the State *A* determination that no rights exist under *A* law binds the State *B* court and vice versa. A territorialist court's conclusion that rights vest under foreign law is simple scope imperialism, and if the foreign court disagrees, its view must prevail. The hypothetical tort case falls within the scope of neither state's law.

In the conventional conflicts vocabulary, this amounts to a determination that neither state's law applies. So phrased, the conclusion is not novel. Over a century ago, John Westlake asserted that "a rule referring to a foreign law should be understood as referring to the whole of that law, necessarily including the limits which it sets to its own application, without a regard to which it would not be really that law which was applied" and described renvoi as a situation in which "neither . . . lawgiver has claimed authority."²⁰¹

201 BENTWICH, *supra* note 127, at 28, 38. The first edition of the treatise was published in 1858. *Id.* at ii. Bate dates Westlake's acceptance of renvoi to his 1900 contribution to the discussions of the Institute on International Law. See BATE, *supra* note 2, at 57.

Westlake's premise for this argument was the same one for which I have argued in this Article: that choice-of-law rules amount to substantive limits on the scope of a state's law.²⁰² His analysis differs from mine in that he remained within the conventional understanding, on which the task of a court engaged in choice of law is to determine which state's law applies. From this perspective, "no state's law" is not an answer but a gap in the theory, and just as Brainerd Currie would fifty-odd years later, Westlake filled the gap with forum law.²⁰³

From the conventional perspective, it may indeed make some sense to suppose that one cannot rest with the conclusion that a transaction falls outside the scope of both states' laws. The aim of the conventional choice-of-law analysis is to select a law according to which the case will be decided, and if no law is selected, scholars believed, the case cannot be decided. *Some* law must therefore be applied, and if no other presents itself, forum law is the only recourse.²⁰⁴

202 See BENTWICH, *supra* note 127, at 29, 38 (criticizing those who would ignore foreign choice-of-law rules as neglecting "the necessary . . . element of the authority claimed by the lawgiver" and describing such rules as "the limits which [the law] sets to its own application").

203 See *id.* at 29 (characterizing renvoi as a situation in which "the conflict of rules of private international law has had for its consequence that they lead to no result"); Lorenzen, *supra* note 2, at 202 (describing the conclusion of Westlake and von Bar that "the judge of the forum, being under an obligation to render a decision in the case, has no recourse except that of applying the *lex fori*"). Westlake's foreshadowing of Currie goes further; his argument was driven by the insight that there is no sharp distinction between choice of law and internal law, precisely the claim that Currie would later make the centerpiece of his interest analysis. See CURRIE, *supra* note 98, at 183–84 (describing resolution of multistate cases as similar to that of "marginal domestic situations"); Kramer, *supra* note 108, at 290–92 (pointing out similarities in analysis of conflicts cases and domestic cases). In his assertion that choice-of-law rules place limits on the scope of internal law, Westlake in fact anticipated a central theme of the analysis of Brilmayer and Kramer. The clairvoyance earned him a scolding from Lorenzen, who pronounced the "assertion that the legislator in adopting a rule of internal law in reality defined its operation in space by the corresponding rule of Private International Law . . . an absurdity." Lorenzen, *supra* note 2, at 203.

204 The idea that the choice-of-law analysis must end in the identification of a law that applies was apparently unquestioned in the territorialist era. As the preceding note indicates, Westlake, von Bar, and Lorenzen all believed that if the analysis did not so terminate, application of forum law was the only possible response. See also, e.g., Schreiber, *supra* note 4, at 530 ("There is here, therefore, a legal vacuum or gap, which must be bridged over, and which is bridged over by applying the law of the forum *as such*: otherwise no decision could be reached in the case."). Beale likewise warned that "[a] hiatus or vacuum in the law would mean anarchy." 1 BEALE, *supra* note 30, § 4.12, at 45. As the following section will discuss in more detail, this precise pattern of scholarship repeated itself many years later in the context of interest analysis.

Again, describing the case within the two-step model avoids these difficulties. That the tort does not fall within the scope of either state's law does not mean that the case cannot be decided. It simply means that the plaintiff has no rights to invoke, and his suit should be dismissed for failure to state a claim.

This result will surely seem unfortunate. The plaintiff has, after all, suffered a tort according to the internal law of each state, and it makes little sense that he cannot recover simply because the events constituting the tort straddle state lines. But what this apparent failure of the system suggests is simply that rigid territorialism is not a very sensible rule of scope.²⁰⁵ It does not suggest that states do, or even should, have the power to disregard sister state determinations that sister state law does not reach a particular transaction.

b. Interest Analysis

Renvoi within interest analysis is controversial; as we have already seen, Currie believed that his approach eliminated the problem. Indeed, conventional interest analysis would view renvoi as a false conflict, the easiest sort of case to resolve. Renvoi, within interest analysis, arises when each state court determines that its state is not interested but the other state is.²⁰⁶ Because conventional interest analysis tends to privilege the forum's assessment of sister state interests over the assessments of the courts of that state, it will conclude that only one state (the foreign state) is interested.

But if, as I have argued, the determination of interest is in fact a conclusion about the scope of state law, it is again a conclusion each

205 Beale seemed at least partially aware of the problem; he suggested that in cases where the elements of a tort occurred on different sides of a state line, each state legislature could assert jurisdiction on the basis of the occurrences within its border. See 1 BEALE, *supra* note 30, § 65.2, at 315 (stating that with respect to a series of events crossing state lines, "either of these states has jurisdiction to make that one of the series of events which took place in that state the basis of a right"). As a practical matter, this comes perilously close to recognizing overlapping legislative jurisdiction, and Cheatham (and later Kramer) both read Beale to have done so. See Cheatham, *supra* note 32, at 383; Kramer, *supra* note 3, at 1042 & n.197. As discussed *supra* note 193, I believe they miss a distinction Beale attempted to maintain between regulating a single act and regulating a series of acts and consequences. In their defense, I venture the observation that the distinction is sufficiently implausible that overlooking it might be the most charitable treatment.

206 The transjurisdictional tort used as an example in the previous section will not necessarily produce such a case. The easiest way to think about a renvoi between two states following interest analysis is simply to suppose that, for whatever reason, the State A court's analysis indicates that State A is not interested but State B is, while the B court's analysis indicates the reverse.

state has the authority to make with respect to its own law and no other. Thus, each state's assessment that it is not interested must be accepted by the other. Conversely, each state's assessment of the other's interest must be disregarded as scope imperialism. The correct conclusion is that neither state is interested; neither state's law grants the plaintiff rights.

Within the territorial system, such a case might be described as one that falls into the gap between jurisdictions. Within interest analysis, a name exists already: renvoi is simply a special instance of the unprovided-for case.²⁰⁷ Currie found the unprovided-for case troubling; like Westlake before him, he was unwilling to accept the conclusion that in some cases neither state's law would govern the transaction. And like Westlake, Currie suggested that in an unprovided-for case the forum should apply its own law, apparently on the theory that otherwise it would be impossible to reach a decision.²⁰⁸

Such perfect duplication of the preceding generation's theoretical moves gives support to those who argue that conflicts scholarship moves only in circles.²⁰⁹ The argument can be rebutted in this case, however, for Larry Kramer subsequently took up the question and argued that the correct resolution of a truly unprovided-for case is the dismissal described in the previous section.²¹⁰ This is, I think, an undeniable advance. It is frequently the case that no law gives the plain-

207 I say "special instance" because the unprovided-for case will arise whenever neither state is interested. Renvoi requires in addition that each state conclude the other is interested. As the text explains, however, this conclusion is beyond the power of state courts and can be disregarded. Renvoi thus should be analyzed like any other unprovided-for case.

208 This "solution" has an undeniable odor of ad-hocery, and critics of interest analysis seized on the unprovided-for case as indicative of serious problems with the theory. David Cavers commented that such mutual deference seemed to create "a gap in the law—a case fallen between the stools of two legal systems" and suggested that it would cause problems for interest analysis. See CAVERS, *supra* note 124, at 105–06. Other reactions were stronger. See, e.g., Aaron D. Twerski, Neumeier v. Kuehner: *Where Are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104, 107–08 (1973) (arguing that "interest analysis met its Waterloo with the advent of the unprovided-for case" and "[o]nly the almost mesmerizing effect of the brilliant Currie writing [prevented his discussion of such cases] from being subjected to the strongest ridicule"). From the conventional perspective, the reaction is understandable: if the point of choice of law is to identify the law that applies, the unprovided-for case looks like a failure. But as the text discusses, the two-step model resolves the problem; the only failure is the belief that some law must "apply."

209 See, e.g., Juenger, *supra* note 25, at 113 ("To be sure, as far as novelty is concerned, one can hardly expect it from any conflicts scholar considering that the three possible choice-of-law approaches have been known since the days of the statisticians").

210 See Kramer, *supra* note 109, at 1071.

tiff a right to recover, and the conclusion neither produces anarchy nor prevents decision. The inability of Beale, Westlake, and Currie to recognize this commonplace fact stems from their shared premise that the purpose of choice of law is to identify the law that applies to a transaction, and the concomitant belief that *some* law must apply.²¹¹ But if we consider the choice-of-law analysis as simply a process of first ascertaining the parties' rights and then resolving any conflicts between them—that is to say, if we employ the same methodology used to resolve domestic cases—the possibility that no law “applies” is untroubling, indeed, entirely banal.

c. The Second Restatement

Within the Second Restatement, *renvoi* occurs when each state's court believes that the other state has a more significant relationship. Because the Second Restatement works via rules of priority rather than rules of scope, the problem takes a somewhat different form within the two-step model. Each state's law, according to the courts of that state, brings the transaction within its scope, but each is willing to yield to the law of the other state.

This problem should also be familiar; it is the problem of mutual deference, which has been raised and resolved earlier. Foreign rules of scope must be heeded, I have said, but foreign rules of priority need not be. Which of two state laws should yield when they conflict is not a matter of setting the scope of state law, and hence not a question on which one state can bind the courts of another. It is forum rules of priority that bind the forum, and they must be followed. Consequently, each state should decide the case under the internal law of the other state, in obedience to its own rules of priority.²¹²

211 Conceptually, the problem here is that describing the choice-of-law question as “What law applies?” has led scholars to conflate two different senses in which *X* law might “apply.” In the first sense, we mean that the court will decide the case according to *X* law. In the second, we mean that the *X* law attaches legal consequences to the transaction—it gives one or the other party rights. The unprovided-for case (and the *renvoi*, as a special instance) arises when neither law attaches legal consequences. The correct conclusion here is simply that the plaintiff cannot recover. It is of no moment what law is “applied” in the first sense, just as it is of no moment whether a court “applies” one of two statutes neither of which gives a right to recover. The common mistake of Currie and Beale—and even of Westlake—is to think that a conclusion that no law “applies” in the second sense has some consequence for a court's ability to decide the case.

212 Kramer disagrees, as discussed *supra* note 186. I think that the conclusion follows from straightforward positivism—a state's rules of priority are binding on that state's courts—and also serves the constitutional purpose of preventing states from discriminating against foreign law. See Roosevelt, *supra* note 13, at 2533–34.

2. Renvoi Across Systems

Within the two-step model, the renvoi problem is no more difficult across systems than within them. For courts that follow interest analysis or the territorial approach, renvoi arises only when neither state's law grants rights. Again, each state's determination as to the scope of its law should be heeded, and its determination as to the scope of the other state's law should be disregarded. A renvoi between an interest analysis and a territorialist court is again simply a situation in which no law gives the plaintiff a right to recover.

When territorialism or interest analysis confronts the Second Restatement, the problem is again slightly more complex. In such a case, the law of the territorialist or interest analysis state does not, by its terms, include the transaction within its scope. The law of the Second Restatement state does, but it prescribes that rights created by its law should yield to contrary rights created by foreign law.

How is this problem to be resolved? Once again, the distinction between rules of scope and rules of priority shows the way—though this time by a slightly different path. Rules of scope, I have said, are about the existence or nonexistence of rights, while rules of priority deal with the question of which rights should be given precedence. A rule of priority directing that local rights should yield to foreign rights does not tell the court to “apply” foreign law, and if no foreign rights exist, the local rights should be given effect. Thus the case should be decided in accordance with the law of the Second Restatement state.

V. RESOLVING RENVOI

What this redescription has shown is that renvoi does not, or need not, exist either within or between any of the conventional approaches to choice of law. And it has shown something more. The reason that the renvoi problem arises is that the conventional approaches assume that the scope of foreign law can be determined by the forum's choice-of-law rules. That is, they assume that forum law can determine not merely whether forum law grants rights to the parties, but whether foreign law does as well. That they assume this is unsurprising; the idea is the basic starting point for conventional choice-of-law analysis. The whole point of a choice-of-law system, after all, is to determine when some other state's law applies. As Lorenzen put it:

The object of the science of the Private International Law of a particular country is to fix the limits of the application of the territorial law of such country, but its aim is not restricted to this. It includes

also the determination of the foreign law applicable in those cases in which the *lex fori* does not control.²¹³

But the idea that forum law can decide this second issue, as I have argued, is mistaken in two ways. First, it is an unconstitutional usurpation of authority, a denial of the basic proposition that a state's courts have the last word on the meaning of their own law.²¹⁴ And second, it is unhelpful; it produces the *renvoi* problem and others.²¹⁵ Conflicts will not advance until it frees itself from the vocabulary that presses this idea on us, what I have elsewhere called the rhetoric of choice.²¹⁶

There are, I have suggested, good reasons to do so. The rhetoric of choice—the suggestion that forum law can determine the scope of foreign law—overstates the forum's ability to disregard foreign determinations that foreign law *does* reach a transaction, hiding conflicts behind the veil of choice.²¹⁷ Additionally, as argued in this Article, it overstates the forum's ability to disregard foreign determinations that foreign law *does not* reach a transaction, the problem inherent in those decisions rejecting *renvoi*. But hiding the difficulties of conflicts does not make them go away; it simply causes them to reappear in different form.

There are also what might seem to be costs. Chief among them is the abandonment of the fundamental aspiration of the field of conflict of laws. If what I have said is correct, it demonstrates that choice-of-law rules cannot resolve the very question that called them into being. Thus, what I recommend is in a certain sense the death of choice of law.²¹⁸

This will surely strike some as shocking.²¹⁹ Overcoming a problem by calling for the elimination of the field of law designed to solve

213 Lorenzen, *supra* note 2, at 204.

214 See *supra* text accompanying notes 139–48.

215 At a higher level of generality, we could say that the problem lies in framing the choice-of-law question in terms of what law “applies” in the first place. For an explanation of the problems this formulation has caused for the analysis of *renvoi* and the unprovided-for case, see *supra* note 211.

216 See Roosevelt, *supra* note 13, at 2453.

217 See *id.* at 2465. The failure of modern choice-of-law theory to address existing conflicts is a theme of much of Joseph Singer's work, though his analysis differs from mine in significant respects. See, e.g., Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731 (1990); Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1 (1989).

218 Only a certain sense, because there remains the considerable task of crafting rules of scope and priority.

219 Though not, presumably, those who have already read the field its last rites. See, e.g., Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1407 (1996) (stating that “conflicts of law is dead—killed by a realism intended to save it”).

it is not the conventional understanding of a theoretical advance; it is more like prescribing the guillotine as a headache remedy. But it is hardly unprecedented. Currie wrote that "the system itself is at fault,"²²⁰ and others took him to be advocating a very similar abandonment of the venture.²²¹ In fact, the idea that conflicts should return from its self-imposed exile and rejoin the body of ordinary legal analysis is a staple of the literature.²²² The real question is not whether this reconciliation is desirable; it is why it has not yet occurred.

The most obvious reason is that the conventional understanding made good sense in Joseph Beale's day.²²³ Armed with the general common law, a court could confidently identify the last act necessary to the vesting of rights, and given territorialism's status as part of the nature of law, it could indeed decide which state's law applied to a transaction. Modern choice-of-law theory no longer sets out to identify a single state with authority to regulate, but it has retained much of Beale's vocabulary and conceptual framework, even while discarding his methodology. In particular, it has retained the central idea that forum law can determine whether foreign law "applies" or does not.

Forum law cannot do this. Indeed, though the determination might have seemed possible in Beale's day, the lesson of *Erie* is that it never was. Choice of law, understood as a body of forum law that can tell a court which foreign law to apply, is a phantasm. But it is a powerful one, and strong spirits leave hangovers in their wake. What con-

220 CURRIE, *supra* note 98, at 185. Currie made this observation, moreover, in response to the anticipated criticism that "it is no great trick to dispose of the characteristic problems of a system by destroying the system itself." *Id.*

221 Kegel remarked that "[s]ince the applicability of domestic substantive law is determined by its construction and interpretation, the body of law which we formerly knew as *Conflict of Laws disappears!* It fades into *substantive law* and, on issues involving constitutionality, into *constitutional law.*" Gerhard Kegel, *The Crisis in Conflict of Laws*, 112 RECUEIL DES COURS 91, 115 (1964).

222 Russell Weintraub, for example, has argued that "the conflict of laws should join the mainstream of legal reasoning." Russell J. Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases*, 46 OHIO ST. L.J. 493, 493 (1985). Walter Wheeler Cook, as already noted, urged rather vaguely that conflicts cases should be resolved by the ordinary tools of legal analysis. COOK, *supra* note 70, at 43. And Currie's basic insight, at least as Kramer and I understand him, is that choice-of-law analysis is not different in kind from the ordinary process of deciding whether a state's law applies to a marginal domestic case. See CURRIE, *supra* note 98, at 183-84; Kramer, *supra* note 3, at 1005.

223 It also makes some sense in the international context, where authoritative rules regarding the treatment of other countries' law are hard to find. It does not make sense in the modern United States, where such questions are governed by the Constitution.

flicts currently suffers from is just that—the aftereffects of an overindulgence in metaphysics. Implicit in the conventional vocabulary of choice of law is a mistaken conception of the nature of the task and of the authority of forum law. That is the picture that has held us captive; that is the ambition we must renounce.

CONCLUSION

Choice of law, as conventionally understood, has set itself an impossible task. The basic picture animating the venture—that a forum can consult its own law to determine whether a foreign state's law applies—ignores or defies the fundamental precept that state courts and legislatures are authoritative with respect to the scope of their own law. That error is embedded as deeply as can be—it is the starting point and basic postulate of all conventional choice-of-law theories. In the same way that a faulty axiom will produce paradoxes in a logical system, this error creates ripples on the surface of the theory, and *renvoi* is one of those.

Renvoi, as I have analyzed it, arises when each state contradicts the other as to the scope of their respective laws. The conventional understanding asserts that states do have authority to determine the scope of other states' laws, but that postulate leads naturally to the paradoxical infinite regress; if states have this power, each should be able to exercise it. Thus, if State *A* law asserts that State *B* law applies, and State *B* law that *A* law applies, the conventional understanding takes each assertion as legitimate and does not allow us to pick between them.

What I have argued is that a different approach, which takes *neither* assertion as legitimate, avoids the *renvoi* problem. If we suppose that the scope of State *A* law is a question of State *A* law alone, then "State *B* law provides that State *A* law applies" is simply not a well-formed proposition. Excising such statements from the choice-of-law vocabulary prevents the paradox from arising, and that excision is what the two-step model achieves.

There is, then, something to the idea that *renvoi* resembles a problem of logic. It should make us question our premises and revise the one that produces the contradiction. But the analysis of this Article has not proceeded as a matter of pure logic, and neither is its conclusion put forth simply as a means to avoid paradox. Instead, I have claimed as a constitutional matter that the power to set the scope of a state's law lies with that state and that state alone.²²⁴ *Renvoi* is a

224 See *supra* text accompanying notes 140–48.

logical problem that could only arise in a legal system other than our own, and once the constitutional allocation of power is understood, it disappears.²²⁵

Choice of law, or a certain vision of it, disappears as well. The conventional understanding of choice of law attributes to states a power that the Constitution denies them. But giving up on the idea that forum law can determine whether foreign law applies is no sacrifice. It is, instead, the only way in which conflicts can progress.

225 Thus the Constitution does not resolve the problem of renvoi in the international setting. The basic idea that nation-states are authoritative interpreters of their own law occupies a similar fundamental place in international law, however. As Chief Justice Marshall put it in *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159-60 (1825), "no Court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the Courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding." Understanding the nature of the problem in the manner developed in this Article should allow resolution on that basis.

