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Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism

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My Wife Is Not My Wife. In the discipline of linguistics, received wisdom holds this semantically irregular word string lacks meaning as an English sentence.[1] Not so in the discipline of law. Particularly not so in the field of conflict of laws. Such formulations are in fact raw material for the machinery that spins and refines conflict of laws doctrine. In the world of conflicts, "my wife is not my wife" is a perfectly appropriate utterance because — after all — a life partner may well be a lawful spouse under the laws of one jurisdiction, but not under the laws of another.[2] Contemporary legal scholars have made use of the concept

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[1] *See* ANDREW RADFORD, TRANSFORMATIONAL SYNTAX 10 (1981) (noting that Radford denominates following as semantically ill-formed: "I killed John, but he didn't die" and "All my friends are linguists, but I have no friends."); *see also id.* at 31 (including "My wife is not my wife" in exercise for discussing pragmatic, syntactic, and semantic ill-formedness); *cf.* RUTH M. KEMPSON, SEMANTIC THEORY 114 (1977) (explaining that sentence "John ran home and yet he didn't run home" has "an interpretation, but this interpretation is contradictory").

[2] *See, e.g.*, Adams v. Howerton, 673 F.2d 1036, 1040 (9th Cir. 1982) (reasoning that "even though two persons contract marriage valid under state law and are recognized as spouses by that state, they are not necessarily spouses" under federal laws governing immigration); *In re* May's Estate, 114 N.E.2d 46 (N.Y. 1953) (evaluating whether two individuals who celebrated marriage valid under Rhode Island law are spouses for purposes of New York probate proceeding); Lanham v. Lanham, 117 N.W. 787, 788 (Wis. 1908) (evaluating whether two individuals who celebrated marriage valid under laws of Michigan are spouses for purposes of Wisconsin probate laws).

G.F.W. Hegel explored this notion in philosophical depth. He challenged the law of the excluded middle, which holds that something cannot simultaneously be both what it is and what it is not at the same time: "there is nothing that is at once 'A' and is 'not A.'" HEGEL'S SCIENCE OF LOGIC 438-39 (A.V. Miller trans., George Allen & Unwin 1969). Scholars have interpreted Hegel as arguing for a dynamic continuum, in which this can exist "as a series of minute degrees between opposite ends." Harold Kent Straughn, *G.W.F. Hegel's Contribution to Stage Theory and The Life Spiral, available at*

under the name "fuzzy logic."[3] Having made this observation about conflict of laws, I submit that nonchalance and unquestioning acceptance on the part of conflicts scholars and other lawyers may not be the best reaction. Duplicity, abstraction, and intricate structures of complicated analysis so characterize choice of law decisions as to render the subject impenetrable — if not nonsensical — to many and alienate even those inclined to study and understand the discipline. In other contexts, the type of hairsplitting that occurs in conflicts has considerably damaged the reputation of lawyers, the efficacy of the rule of law,[4] and efficiency in the litigation process.[5] For conflict of laws in particular, this tendency to complicate rather than simplify injects uncertainty and inefficiency into decisionmaking, which may disadvantage the discipline in important tasks that await, such as sorting principles of legal order in cyberspace and ordering relations among (and within) supranational institutions like the United Nations, the European Union, and the World Trade Organization.

Yet the news is not all bad. Responding to the abstraction and complexity of conflicts doctrine, lawmakers and scholars continue to experiment with cures.[6] One avenue of study evaluates whether a

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http://www.lifespirals.com/The Mind Spiral/Kant Hegel/kant hegel.html#Hegel (last visited July 28, 2003). So, for example, at various points in time, a chrysalis is either a caterpillar, a butterfly, both, or something in between. *Id.* As Hegel himself explained, "Something moves, not because at one moment it is here and at another there, but because at one and the same moment it is here and not here, because in this 'here', it at once is and is not." HEGEL'S SCIENCE OF LOGIC, *supra*.

[3] Edward S. Adams & Daniel A. Farber, *Beyond the Formalism Debate: Expert Reasoning, Fuzzy Logic, and Complex Statutes*, 52 VAND. L. REV. 1243, 1245 (1999) (describing fuzzy logic as recognizing that "something may be partially in one set while partially in another" and analyzing role fuzzy logic plays in understanding legal decisionmaking).

[4] *See, e.g.*, William Glaberson, *Legal Gamesmanship May Take Toll*, N.Y. TIMES, Sept. 24, 1998, at A4 (suggesting that public perception of law suffered in response to "legal hairsplitting" by President Clinton in "contortionist language" used in his grand jury testimony in Lewinsky investigation); Steven Pinker, *Listening Between the Lines*, N.Y. TIMES, Oct. 3, 1998, at A1 (analyzing President Clinton's artful semantic arguments and observing that "law requires language to do something for which it is badly designed: leave nothing to the imagination.").

[5] *See generally* Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150, 152 (1995) (modeling how legal complexity affects decisionmaking); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 265 (1974) (arguing that clear legal rules facilitate settlements and diminish need for costly litigation).

[6] *See, e.g.*, Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 MICH. L. REV. 2134, 2136-49 (1991) (making out case for choice of law code and action by National Conference of Commissioners on Uniform State Laws); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1153 (2000) (arguing that in order to maximize economic values of predictability and individual choice, conflict rules

jurisprudential approach proliferates or reduces complexity in conflicts doctrine. In an effort to fill that gap, I concentrate here on exploring how one particular jurisprudence influences conflicts doctrine. The jurisprudence I focus on is formalism, an approach to resolving disputes in which the adjudicator adheres to norms without evaluating the goals that the norms are meant to achieve.[7] Recent praise for formalism suggests that it may provide tools for coping with the special challenges of eliminating clashes among competing sovereignties and of structuring legal relations in uncharted areas. Ironically, conflict of laws doctrine's most outrageous complications are themselves yoked to (or caused by) formalism. My challenge now is to determine whether scholars, practitioners, and adjudicators can channel the formalist method in such a way as to harness its beneficial qualities. If successful, this effort will provide a model for evaluating larger debates in the literature concerning the merits of formalism, and offer insights on formalism's contribution to the law outside of the specific context of conflict of laws.

In the pages that follow, I document how conflicts doctrine is particularly prone to generate fine distinctions and analytical complexity. I then review current debates about the merits and demerits of formalism as an adjudicatory approach. With this background, I explore how these complexities are bound to, and perhaps caused by, the formalist strands of conflicts doctrine. Turning to the question of whether formalism holds any promise for reducing complexity, I reach the ironic conclusion that formalism itself is filled with baffling (and yes — complicating) paradoxes, but that ultimately these paradoxes may enable formalism to improve the efficacy of conflicts doctrine and to wrestle effectively with the challenges of the twenty-first century.

I. MULTIPLE MEANING, CHARACTERIZATION, AND HAIRSPLITTING IN CONFLICT OF LAWS CASES

I sort the rhetorical qualities emphasized here into three interconnected categories: multiple meaning, characterization, and hairsplitting. Multiple meaning occurs where one word possesses

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should derive from state legislatures rather than courts); 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, 263, 297 (2001) (arguing for national uniform code rather than Third Restatement).

[7] Larry Alexander, *"With Me, It's All er Nuthin": Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 531 n.2 (1999); *see* Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 607 (1999) (identifying several forms of formalism, including "apurposive rule-following").

several, sometimes contradictory, meanings. A related phenomenon is characterization — where one set of facts or issues implicating a particular legal category is reframed to invoke a contrasting legal category. Both multiple meaning and characterization are subsets of a larger inclination in conflict of laws cases, a marvel I call "hairsplitting." In this section, I describe examples of these three categories, recognizing significant overlap among them.

A. Multiple Meaning

As the "my wife is not my wife" example illustrates, multiple meanings often occur in the law of competing sovereigns or across different sections of one jurisdiction's law. In disputes over whether the law should recognize two individuals as spouses, a conflict of laws usually arises because two or more jurisdictions provide differing statutory schemes defining "spouse."[8] Similarly, multiple meaning can arise because dueling judicial interpretations from multiple sovereigns project different consequences on the same legal term. In *Sampson v. Channell*,[9] for example, the court determined that a burden of proof rule could be substantive for the purposes of a federal/state law conflict, yet procedural for the purposes of a state/state conflict presented in the same case.[10] In another classic example, "foreign" law takes on the identity of nonforeign or local law when enforced by another jurisdiction (in other words, foreign law is not foreign law).[11]

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[8] *See, e.g., In re* May's Estate, 114 N.E.2d 46 (N.Y. 1953) (evaluating whether two individuals who celebrated marriage valid under Rhode Island law are spouses for purposes of New York probate proceeding); Lanham v. Lanham, 117 N.W. 787, 788 (Wis. 1908) (evaluating whether two individuals who celebrated marriage valid under laws of Michigan are spouses for purposes of Wisconsin probate laws).

[9] 110 F.2d 754 (1st Cir. 1940).

[10] *Id.* at 759 (holding rule as substantive under *Erie* principles and explaining that Massachusetts Supreme Judicial Court would have held rule as procedural only, even in face of conflicting Maine rule).

[11] DAVID F. CAVERS, THE CHOICE OF LAW: SELECTED ESSAYS, 1933-1983, 46-47 (1985). As explained by Walter Wheeler Cook, a "forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar... in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected." WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF CONFLICTS OF LAWS 20-21 (1942). David Cavers reacted to this distinction as follows:

> 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 problem when, at the age of four, he

Conflicting interpretations of a single concept not only bedevils conflicts analysis itself, but also can disrupt citizens' lives. One can imagine the problems arising under bigamy laws, probate laws, and the like, for individuals who possess the status of spouse in one jurisdiction, yet are disqualified from that status in another. Estate tax litigation provides another (particularly expensive) context for dual meaning. Take for instance the estate of Campbell Soup founder, John Dorrance. After amassing a considerable fortune, Dorrance maintained two active households, one in Pennsylvania and another in New Jersey. Following Dorrance's death, authorities from both states sought to tax the estate. As it turned out, Dorrance manufactured such a complex web of separate contacts with both states that the tax authorities from each managed to convince courts in their respective jurisdictions that Dorrance died domiciled there. Accordingly, even in the face of the principle that an individual can be domiciled in only one place, the courts held Dorrance domiciled in two jurisdictions and his estate was exposed to double taxation.[12] As aberrational as it appears, this plight apparently recurs in estate matters with some regularity.[13]

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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."

CAVERS, *supra*, at 46-47.

[12] *In re* Dorrance's Estate, 166 A. 177 (N.J. Prerog. Ct. 1933) (holding Dorrance was domiciled in New Jersey); *In re* Dorrance's Estate, 163 A. 303 (Pa. 1932) (holding Dorrance was domiciled in Pennsylvania).

[13] Another prominent example comes from the Howard Hughes estate. *See generally* Kathleen Leslie Roin, Note, *Due Process Limits on State Estate Taxation: An Analogy to the State Corporate Income Tax*, 94 YALE L.J. 1229, 1230-31 (1985).

with some regularity.

Dorrance is instructive for a number of reasons. First, multiple meaning did not emerge in *Dorrance* because of preexisting variations in how New Jersey and Pennsylvania defined domicile. In fact, both courts applied relatively uniform, well-settled domicile law in reaching their decisions. The differences arose instead from dueling interpretations of Dorrance's life. In other words, multiple meaning emerged because courts reached conflicting conclusions based on a uniform set of facts analyzed in light of uniform legal standards.[14]

The other lesson of *Dorrance* arises from an important characteristic of American law: our system of jurisdictional concurrency, a federalist system where many competing sovereigns possess authority to govern a given set of individual affairs. This jurisdictional concurrency creates both conflicts of lawmaking authority (with different legal rules vying for governing authority), and conflicts of judicial authority in which two or more courts may render rivalrous judgments. As it turns out, our system evinces remarkable tolerance for litigants prosecuting duplicate litigation in two or more jurisdictions. Not surprisingly, the litigation sometimes produces inconsistent judgments, which themselves create multiple meanings. The possibility of these conflicting rulings make necessary an intricate body of law — largely governed by full faith and credit principles — that negotiates and settles the power clashes reflected in the inconsistent judgments.[15]

Both of these lessons expose many sources of multiple meaning. Competing realities can result from varying interpretations of law, fact, and application of law to fact. This gives rise to a new layer of legal analysis — recognition of judgments law — which itself may constitute a new source of complication and conflict.

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[14] For an example of multiple meaning in a domicile case deriving from different legal standards, see *Rodriguez-Diaz v. Sierra-Martinez*, 853 F.2d 1027, 1030 (1st Cir. 1988) (conflict of laws puzzle emerged because differences in law of domicile under federal law, New York law, and Puerto Rico territorial law).

[15] *See, e.g.*, Thomas v. Washington Gas Light Co., 448 U.S. 261, 286 (1980) (plurality opinion) (allowing one administrative tribunal to grant worker's compensation award even in face of another jurisdiction's earlier award that purported to be exclusive); Durfee v. Duke, 375 U.S. 106, 116 (1963) (resolving inconsistent judgment regarding location and title to land); Treinies v. Sunshine Mining Co., 308 U.S. 66, 77-78 (1939) (holding that Washington was required to recognize Idaho judgment that had refused to give full faith and credit to prior Washington judgment, even though Idaho Supreme Court had earlier denied certiorari to Idaho judgment).

B. Characterization

As a form of multiple meaning, characterization allows one legal problem to present as two or more distinguishable legal issues. An informal component of all lawyering,[16] characterization within the conflicts field is remarkable because settled doctrine formally instructs the legal analyst to use the technique. Best known for this quality is the First Restatement of Conflict of Laws, which requires characterization as an initial step to the conflict resolution. The First Restatement actually says precious little about the phenomenon, although commentary to its sections, court decisions applying the approach, and legal scholarship all reckon explicitly with the role of characterization in First Restatement analysis.[17]

A common First Restatement context for characterization arises from disputes over contracts for transferring property, which courts conceptualize as presenting contract issues, property issues, or both.[18] Although more apparent in some contexts than others, this approach of sorting cases by doctrinal category is imbedded throughout the First Restatement. It obliges the conflicts analyst to choose which list of choice of law rules — e.g., property, probate, contract, tort, corporations — should govern a dispute's resolution.[19] Likewise, the analyst must characterize when resolving the question whether a legal issue is "substantive" or "procedural"— a distinction that the First Restatement makes significant by providing that forum law automatically governs

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[16] Laura E. Little, *Characterization and Legal Discourse*, 46 J. LEGAL EDUC. 372, 373 (1996) (discussing various contexts in which lawyers characterize, including "court papers, oral argument, negotiations, mediations, counseling sessions, lobbying, and media relations"). Commentators suggest that tax law is particularly prone to characterizations. *See* Saul Levmore, *Recharacterizations and the Nature of Theory in Corporate Tax Law*, 136 U. PA. L. REV. 1019, 1022-32 (1988).

[17] *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 358 cmt. b (2002) (discussing process of characterizing whether contract issue is one of obligation or performance); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 333 cmt. a (discussing process of characterizing difference between capacity to make contract to transfer property and capacity to transfer property); COOK, *supra* note 11, at 211-38 (1942) (discussing characterization process); A. H. ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS (1940) (devoting entire volume to characterization process).

[18] *See, e.g.*, Thompson v. Kyle, 23 So. 12 (Fla. 1897) (changing characterization of case mid-stream, by treating dispute over real estate contract first as contract matter and then as property matter); Burr v. Beckler, 106 N.E. 206, 209 (Ill. 1914) (reasoning that case should be decided on contract principles governing capacity of married woman to contract, rather than property principles of state where land was located).

[19] *See, e.g., In re* Barrie's Estate, 35 N.W.2d 658, 660 (Iowa 1949) (presenting issue of whether probate dispute as real property should be governed by property rules or probate rules).

procedural questions.[20] The First Restatement[21] treats some substance/procedure characterizations as routine and others as more challenging.[22]

Yet characterization is not unique to the First Restatement. Indeed, the Second Restatement preserves the structural sorting process, whereby the conflicts analyst must first choose the doctrinal category implicated in the choice of law problem and then resolve the problem from a list of conflicts rules within the category. Likewise, contemporary courts in jurisdictions applying hybrid choice of law methodologies, rather than pure Second Restatement approaches, also retain the characterization process.[23]

Even Professor Brainerd Currie's governmental interest analysis, which seeks to ascertain the policies behind laws, has strong strains of characterization. Although governmental interest analysis appears open-ended in its focus on governmental policies, the analysis ultimately turns on characterizing which one of five rigid categories the case presents — "false conflict," "apparent conflict," "true conflict,"

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[20] RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 585 (stating that "[a]ll matters of procedure are governed by the law of the forum"); *see, e.g.*, Grant v. McAullife, 264 P.2d 944, 948-49 (Cal. 1954) (holding that survival of cause of action after wrongful death is procedural question governed by forum law). *See generally* Levy v. Steiger, 124 N.E. 477, 477 (Mass. 1919) ("It is elementary that the law of the place where the injury was received determines whether a right of action exists, and that the law of the place where the action was brought regulates the remedy and its incidents, such as pleading, evidence and practice.").

[21] For example, courts at one time raised no question over the characterization of statute of limitations questions as procedural. *See* Lumbermens Mut. Cas. Co. v. August, 530 So.2d 293, 295 (Fla. 1988) (noting erosion of once-firm characterization of statutes of limitations as procedural); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 603 (designating forum law as law governing statute of limitations issue). Another example was statutes of fraud, which were automatically characterized as procedural if they used the word "voidable" and substantive if they used the word "void." *See* Marie v. Garrison, 13 Abb. N. Cas. 210, 257 (N.Y. Super. Ct. 1883); EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 125 n.5 (3d ed. 2000) (explaining that this method of characterizing statutes of limitations derives from English law).

[22] *See, e.g., Levy*, 124 N.E. at 477 (stating that question of whether burden of proof rules are substantive or procedural is sometimes difficult to decide); *see also* LEA BRILMAYER, CONFLICT OF LAWS 236-53 (4th ed. 1995) (listing questions of privilege, parol evidence, pleading, setoff, right to jury trial, survival of causes of action, and remedies as common contexts for controversy over substantive/procedural characterization). For a particularly artful, yet complicated, characterization of burden of proof as procedural for the purpose of a conflict of state laws, but substantive for the purpose of a conflict between state and federal law, see *Sampson v. Channell*, 110 F.2d 754, 762 (1st Cir. 1940).

[23] Nationwide Mut. Ins. Co. v. West, 2002 PA Super. 282 (2002)(holding that in evaluating insurance coverage for tort, court must apply law of state having most significant relationship to contract and not to underlying tort).

"unprovided for" case, or "disinterested forum."[24] Once a court chooses this label, the result mechanistically follows.[25] In addition, courts applying the methodology tend to ritualize their reasoning, characterizing laws into categories such as plaintiff-protecting or defendant-protecting laws, conduct-regulating rules, loss-distribution rules, and the like.[26]

C. *Hairsplitting*

Hairsplitting: a broad mode of problem resolution characterized by filigreed analysis, intricate dissection, and crystalline thought patterns — all creating fine distinctions allegedly in the service of fairness and accuracy. I use "hairsplitting" as a generic term, embracing multiple meaning, characterization, as well as other forms of complexity endemic to conflicts problems.[27] *Haumschild v. Continental Casualty Co.*[28] is an example of the overlap between hairsplitting and other techniques. In *Haumschild*, a woman brought a negligence suit against her former husband and his insurer for injuries resulting from a California accident. To resolve the conflict of laws in the suit, the court cut the case into pieces — a process known as *dépeçage* — characterizing first the liability questions as a negligence issue governed by the law of the place of the accident (California) then characterizing the interspousal immunity questions as governed by the law of the marital domicile (Wisconsin).[29] The court thus spliced the "characterization" thread finely —

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[24] *See generally* BRILMAYER, *supra* note 22, at 236-53 (reviewing various categories of cases in governmental interest analysis).

[25] Brainerd Currie declined to produce a "restatement" of his approach, but did distill his methodology to a series of mechanical rules proscribing the consequence of the label deemed most appropriate for the dispute. *See* Brainerd Currie, *Comments on* Babcock v. Jackson, 63 COLUM. L. REV. 1233, 1242-43 (1963) (laying out governmental interest analysis rubric).

[26] *See, e.g.*, Coram Healthcare Corp. v. Aetna U.S. Healthcare Inc., 94 F. Supp. 2d 589, 594 (E.D. Pa. 1999) (engaging in Pennsylvania's hybrid version of governmental interest analysis, court characterized Pennsylvania's parol evidence rule as "defendant-protecting" and another state's decision to admit parol evidence to prove fraud as manifesting "an interest in protecting its citizens from the harmful consequences of an ill-gotten agreement"); Schultz v. Boy Scouts of America, Inc., 480 N.E.2d 679, 686 (N.Y. 1985) (pursuing New York's version of governmental interest analysis, court weighed whether charitable immunity is loss-distributing or conduct-regulating rule).

[27] Of course, hairsplitting is in no way confined to conflicts. *See, e.g.*, 28 U.S.C. § 1391(a)(1)-(b)(1) (2000) (presenting circumstance where corporation can be resident of state for purpose of one statutory provision and then resident of another state for another provision).

[28] 95 N.W.2d 814 (Wis. 1959).

[29] *Id.* at 815, 816, 820.

categorizing the case's various legal issues rather than categorizing the entire dispute. Although common in estatement cases such as *Haumschild*,[30] *dépeçage* is also popular in more contemporary American methodologies,[31] a trend not pursued in all countries.[32]

Another classic hairsplitting problem in conflicts, provoking even more eye-rolling and head-scratching than *dépeçage*, is *renvoi*. When the choice of law process points a forum court to another jurisdiction's law, the question that arises is: how much of that other jurisdiction's laws should apply? Does the reference to the other law include that jurisdiction's choice of law principles, or, alternatively, does it include only the jurisdiction's "internal law" principles? If the reference includes both internal law and conflicts principles, the foreign conflicts principles may point the inquiring court back to the forum's law or to a third jurisdiction's law. This question — whether a forum should consult the choice of law rules of other jurisdictions — is called *"renvoi."* Traditionally, American courts avoided the *renvoi* issue by looking only at the internal law of other jurisdictions, but not the mandate of other jurisdictions' choice of law rules. A significant number of other countries, however, have embraced *renvoi*, allowing a forum court to consider foreign choice of law rules. If, however, the foreign rules send the court back to its own law, these countries "stop" the *renvoi* process, which otherwise could lead to endless circularity. The courts then apply their own internal law (without reference to their own conflict of laws principles).[33]

American preferences, however, are changing, with *renvoi* becoming a darling of courts applying modern methodologies. Not only does the Second Restatement of Conflicts of Law advocate the *renvoi* process in two broad circumstances,[34] but courts applying governmental interest

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[30] *See, e.g.*, Thompson v. Kyle, 23 So. 12, 18 (Fla. 1897) (applying vested rights approach to conflict of laws, court analyzed portion of case as contract issue and portion as property issue).

[31] *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 141, 188 (1971) (directing court to ascertain law most significantly related to particular issue of contract or tort); Peter Hay, *From Rule-Orientation to "Approach" in German Conflicts Law — The Effect of the 1986 and 1999 Codifications*, 47 AM. J. COMP. L. 633, 633, 648 (1999) (observing that *dépeçage* "has happened wholesale in the United States" in methodologies developed after Restatement (First)).

[32] *See* Hay, *supra* note 31, at 648 (concluding that although *dépeçage* is important element of American conflicts law, it is "the exception in German law").

[33] SCOLES ET AL., *supra* note 21, at 134-36 (comparing American reluctance to allow forum to consider foreign choice of law principles with approaches of Austria, France, Germany, and Japan).

[34] *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 8(2) (advocating *renvoi*, "when

analysis are finding greater use for the multi-layered inquiry *renvoi* invites. In particular, modern courts frequently look to foreign jurisdictions' choice of law approaches to identify and to evaluate the policies underlying internal laws. For example, a forum court may confront the question of whether to apply its own statute of limitations or that of a foreign jurisdiction. Upon learning that the foreign jurisdiction would not apply its own statute of limitations were it adjudicating the particular controversy, the forum court may conclude that the foreign jurisdiction has no interest in its statute of limitations governing the parties' dispute.[35] The forum thus uses this foreign conflicts principle as a way of evaluating whether to apply its own statute of limitations. Despite the dizzying complications generated from this reasoning, courts have routinely invoked the technique while negotiating the difficult task of identifying policies behind laws.[36]

Similar examples of debilitating complexity pack the modern cases. Indeed, the statute of limitations context alone presents several other troublesome puzzles that dog courts and litigants. Once choice of law doctrine jettisoned the ritualized characterization of statutes of limitations as procedural, the trend toward complexity flourished. A court confronting a multi-jurisdictional statute of limitations dispute

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the objective of the particular choice-of-law rule is that the forum reach the same result on the very facts involved as would court of another state . . . subject to considerations of practicability and feasibility."); *id.* § 8(3) (advocating *renvoi* when forum state "has no substantial relationship to the particular issue or the parties" and all other interested states would apply same law).

[35] Sutherland v. Kennington Truck Serv., Ltd., 562 N.W.2d 466, 472-73 (Mich. 1997) (pursuing similar analysis in evaluating scope of Ontario's interest in applying statute of limitations in accident case adjudicated in Michigan).

[36] *See, e.g.*, Kubasko v. Pfizer, Inc., 2000 WL 1211219, at *4 (Del. Super. Ct. June 30, 2000) (holding that Delaware has greater interest than Connecticut in having its law applied since Delaware would apply Connecticut law if adjudicating case); Stutsman v. Kaiser Foundation Health Plan, 546 A.2d 367, 374 (D.C. 1988) (finding that District of Columbia had less interest than Virginia in resolution of case because District of Columbia law mandates application of Virginia law to facts of case); Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co., 590 N.W.2d 670, 675 (Minn. 2000) (declining to apply North Dakota law because North Dakota had previously determined that Minnesota had deeper interest in application of Minnesota law in similar situation); Phillips v. Gen. Motor Corp., 995 P.2d 1002, 1011 (Mont. 2000) (making choice of law decision, court considered that North Carolina and Michigan courts would not apply their own product liability law if adjudicating case); Braxton v. Anco Elec., Inc., 409 S.E.2d 914, 917 (N.C. 1991) (deciding choice of law question, court declined to apply Virginia law because under facts of case, Virginia would not have applied its own law); Miller v. White, 702 A.2d 392, 396 (Vt. 1997) (answering choice of law question, court declined to apply Quebec law because Quebec would not apply its own law under facts of case); *see also* SCOLES ET AL., *supra* note 21, at 137 (observing how modern decisions consider foreign conflicts of law for purpose of identifying governmental interest).

must wrestle with no less than three sub-issues: (1) what law governs the chunk of time set forth in the text of limitation statutes; (2) what law governs the point at which the statute of limitation begins to run (a question of when the plaintiff's cause of action arose); and (3) what law governs issues relating to tolling the limitations period. With distinctions this fine, the margin for error increases. Courts easily fall prey to the tendency to confuse the choice of law question of where the cause of action arises with the question of when the statute of limitations starts running.[37] Note also that courts sometimes confuse all three issues.[38]

II. SOURCES OF COMPLEXITY IN CONFLICT OF LAW DOCTRINE

Good sense points to simplicity in law. To govern effectively, law should be easily accessible and easily ascertained. Straightforward, uncomplicated legal principles are more likely to appeal to the minds and intuitions of the governed, to resonate within them, and to garner the respect and emotional attachment that ensure that citizens will actually honor and obey the law. Simplicity in the law promotes an effective system of "government by consent; a government that provides both the governed and the governors with a peaceful process for resolving conflicts" about law.[39] In a particularly nuanced approach to this question, Joseph Raz argues that what really matters is "local coherence" in law, meaning "coherence of doctrine in specific fields."[40] Local coherence is most important for "efficient operation of bureaucratic institutions" and "ordinary rule of law considerations," such as ensuring the law is "predictable" and "widely known."[41] In service of simplicity, philosophy teaches us the virtues of Ockham's Razor, which would suggest that those grappling with conflict of laws

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[37] *See, e.g.*, Lumbermans Mut. Cas. Co. v. August, 530 So.2d 293, 295 (Fla. 1988) (focusing on events occurring in one jurisdiction in course of determining that cause of action arose in another jurisdiction, in developing statute of limitations analysis).

[38] *See* Duke v. Housen, 589 P.2d 334, 340-58 (Wyo. 1979); LEA BRILMAYER, *supra* note 22 (suggesting different levels of confusion reflected in *Duke*).

[39] JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND 19-20 (1992). For a more detailed discussion about the values of clarity and candor in judicial decisionmaking, see Michael C. Dorf, *Courts, Reasons*, 19 Q.R.L. 483, 487-90 (2000) (discussing clarity); Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 84-85, 139-40 (1998) (discussing candor and clarity).

[40] *See* Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 308 (1992).

[41] *See id.* at 312-13.

matters should not multiply hypotheses or explanations unnecessarily.[42] Linguists likewise document a general principle of human discourse disfavoring superfluity and redundancy.[43] In light of this wisdom, why is conflict of laws so prone to fine distinctions, multiple meanings, and filigreed structures of analysis — all of which cause painful confusion? Why, moreover, are these tendencies not only tolerated, but sometimes even heralded as essential to fair, thoughtful, and accurate resolution of conflict of laws disputes? To this puzzle, I now turn.

A. Causes of Complexity: Federalism

Perhaps the most obvious explanation for conflict of laws doctrine's complexity rests in the multi-jurisdictional context in which it operates. By definition, in every conflict of laws case, more than one jurisdiction is making a claim for regulation, more than one "law" is implicated. The multi-jurisdictional context also contributes factual details that extend across state boundaries, litigants from different jurisdictions, competing regulatory environments, and multiple litigation pending in different court systems. Moreover, the presence of more than one source of law creates the perfect environment for dual meaning: after all, each jurisdiction provides an independent medium for generating and refining the terms used in governance. One can only expect that the same terms are sometimes attached to different meanings by diverse law-administering bodies.[44] Exacerbating these complications are

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[42] Ockham's razor is a "principle of parsimony," developed by the fourteenth-century philosopher, William of Ockham. Ernest A. Moody, *William of Ockham*, *in* 8 THE ENCYCLOPEDIA OF PHILOSOPHY 306, 307 (Paul Edwards ed., 1967). Ockham invoked the principle in such forms as, "Plurality is not to be assumed without necessity" and "[w]hat can be done with fewer [assumptions] is done in vain with more." The principle often appears in contemporary literature as the notion that "entities are not to be multiplied without necessity." R. George Wright, *The Illusion of Simplicity: An Explanation for Why the Law Can't Just Be Less Complex*, 27 FLA. ST. U. L. REV. 715, 716 n.3 (2000).

[43] *See* PAUL GRICE, STUDIES IN THE WAY OF WORDS 27-28 (1989). In his influential work, Grice developed maxims of communication behavior designed to explain the rational means for conducting cooperative exchanges between communicants. The maxims act as reference points for predicting and interpreting communication, or — in Gricean terminology — for making "implicatures." *Id.* at 28. On the subject of simplicity, he has two pertinent maxims: the maxim of quantity and the maxim of manner. The maxim of quantity provides that discourse is generally as informative as is required, *id.* at 29, but not more informative than is required. *Id.* at 27, 29. The maxim of manner states that a starting place for those communicating is to "be perspicuous," and specifically: (i) "[a]void obscurity," (ii) "[a]void ambiguity," and (iii) "[b]e brief." *Id.* at 27. Many of the complicating tendencies in conflict of laws opinions violate these principles.

[44] One could argue that this is a particularly stark example of the problem posed by postmodernism itself. If life contains no one reality and if truth and ethical judgment have

litigation doctrines tolerating duplicative litigation[45] and rendering preclusion principles less available.[46] Juggling each of these complexities, those solving conflicts problems inevitably lead themselves into a forest of distinctions and analytical decision trees.[47]

The source of all this complexity is, of course, the overlapping, concurrent jurisdictional authorities in our federalist system. Complications thus arise where, for example, federal law clashes with state law or municipal sovereignty runs up against state or federal authority. But the context of my focus here, state-to-state conflicts, provides an even more fertile medium for breeding tangled legal rules.

Because state sovereigns are coequal, no easy response or default solution to choice of law problems presents itself.[48] Indeed, elevating one state's law over another's is fundamentally at odds with the premise of equality that undergirds our federalist system. Moreover, under present jurisprudence, the United States Constitution provides no ready answer for resolving state law conflicts. The United States Supreme Court has declined to mandate any particular choice of law system, reading the Due Process and Full Faith and Credit Clauses to provide only minimal limitations on the process of choosing competing legal rules.[49] State and lower federal courts are thus left to their own devices to explain why one state rather than another is the superior lawmaker in a particular case.

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no objective validity, then surely no one clearly-correct resolution will emerge where two apparently legitimate, equal sovereigns make a claim for governing a controversy. From this observation, one might argue that complication arises from kicking up dust in the futile attempt to resolve the conflict between two valid competing perspectives.

[45] *Cf.* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (expressing presumption allowing same lawsuit to proceed in two separate fora).

[46] *See, e.g.*, Martin v. Wilks, 490 U.S. 755, 762-63 (1989) (articulating due process restrictions on collateral estoppel).

[47] *See* Raz, *supra* note 40, at 286 (observing that "[t]he more pluralistic the law, the less coherent it is").

[48] *Cf. id.* Professor Raz reasons that the law is usually less coherent where it derives from a plurality of distinct principles that are not completely ranked in a hierarchy. *Id.* Raz observes that coherence can result, however, from equal principles "through circular interdependency of a set of propositions such that giving up one principle requires the abandonment of all the others." *Id.* In a choice of law setting, this would occur where one state law ceded to another state law through a principle of unity under which one state law enjoyed no automatic priority over another state's law.

[49] *See, e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981) (plurality opinion) (stating that choice of particular state's law is consistent with Due Process and Full Faith and Credit Clauses if chosen state has significant contact or aggregation of contacts with case). For further discussion, see Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271, 271 (1996) (observing that Supreme Court intervenes in conflicts cases rarely and that Constitution in this area is "forgiving," thus permitting localism at expense of nonforum litigants).

B. Causes of Complexity: The Common Law System

And it is indeed courts that fashion the techniques and doctrines for resolving conflicts in lawmaking authority. Aside from a few areas of legislative activity,[50] conflict of laws is a common law discipline. Thus arises another source of complexity. As Harlan Fiske Stone explained, common law rules are "forged between the hammer and anvil of opposing counsel" and are "wrought to fit the very facts which call for [their] application."[51] For that reason, they are ad hoc, fact driven, often inharmonious.[52] Much of this results from the salutary impulse of the common law to reach the most fair and equitable judgment in a given case. After all, it is the common law's hallmark to enable courts to tailor the law to do justice in light of the particulars of a controversy.

Applied to the task of choosing which law should apply, this common law tradition creates special challenges. As Professor Stewart Sterk has pointed out, the law-centered approach to the choice of law process is in tension with mainstream views of the judicial decisionmaking process.[53] Sterk argues that, under prevailing legal thought, courts resolve choice of law questions by referring to the law's content, while they resolve lawsuits primarily by referring to facts.[54] The consequence is a deductive choice of law analysis embossed onto an inductive common law analysis.[55] This, according to Sterk, creates a state of chaos in the

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[50] Same sex marriage (e.g., 1 U.S.C. § 7 (2000)), statutes of limitation (e.g., Uniform Conflict of Laws–Limitations Act), and child custody decrees (e.g., 28 U.S.C. § 1738a (2000)) are examples. *See generally* LEA BRILMAYER & JACK GOLDSMITH, CONFLICT OF LAWS – CASES AND MATERIALS 333-38 (5th ed. 2002) (discussing statutory resolution of choice of law problems). For discussion of other exceptions to the common law character of conflicts rules, see Patrick J. Borchers, *Louisiana's Conflicts Codification: Some Empirical Observations Regarding Decisional Probability*, 60 LA. L. REV. 1061, 1067-70 (2000); James A. R. Nafziger, *Oregon's Project to Codify Choice of Law Rules*, 60 LA. L. REV. 1189, 1192-1202 (2000); Symeon C. Symeonides, *Revising Puerto Rico's Conflicts Law: A Preview*, 28 COLUM. J. TRANSNAT'L L. 413, 437-40 (1990).

[51] Harlan F. Stone, *Some Aspects of the Problem of Law Simplification*, 4 COLUM. L. REV. 319, 321 (1923).

[52] *See, e.g.*, RICHARD B. CAPPALLI, THE AMERICAN COMMON LAW METHOD 14-18 (1997) (describing common law method as including such qualities as constant movement, piecemeal growth, and constrained by facts); Stone, *supra* note 51, at 321-22 (describing weaknesses of common law system, including lack of "a foundation of scientific and philosophical generalization on which all systems of law must ultimately rest if they are to endure and do their appointed work").

[53] Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 993-94 (1994) (arguing that resolution of conflict of law cases is law-centered, while resolution of cases is fact-centered).

[54] *Id.* at 994-95.

[55] BENJAMIN CARDOZO, NATURE OF THE JUDICIAL PROCESS 46 (1921) (commenting on

discipline of conflict of laws.[56] The battling methodologies and incoherent hybrid conflicts approaches adopted by courts around the country create chaotic dissonance that translates into analytical complexity.

C. Causes of Complexity: Issues of Power Adjudicated by an Interested Party

As the primary actors in the business of choosing, refining, and applying conflict of laws doctrine, courts find themselves in a delicate, and consequently difficult, position. This delicacy arises because the adjudicating courts are, in fact, usually entities interested in the resolution of the conflict of laws issue. That is, the court's own law — forum law — is usually (if not almost always) one source of the competing laws scrutinized under conflict of laws analysis. As representatives of the sovereignty that creates forum law, forum judges therefore have a stake in the outcome. Their stake increases in the frequent cases where the law to be chosen is court-made, not statutory.

This is not to say that the judge's stake is personal rather than official. Yet even the judge's official stake may cause palpable effects in her decisionmaking — if only to prompt compensating steps to eliminate the appearance of partiality. Moreover, if role morality means anything for the interested judge, one would expect that she discerns the need for particularly deliberate, complete, and seemingly fair analysis — analysis that often gives birth to the type of crystalline structure, filled with the exceptions, nooks, and crannies that characterizes conflict of laws doctrine.

The adjudicator's special interest in the outcome exacerbates a trait common in communications dealing with power — a tendency to cloud meaning and avoid direct statements. Multiple motivations may underlie this tendency, including concern for the feelings of the entity losing the power struggle, an intent to avoid angering the loser or an interested third party, the desire to avoid the attention of the press or other onlookers, and an intent to hide the resolution's true effect so as to allow the winner to reinforce her power further.[57] Of related concern is the state's desire not to appear to be imposing negative effects on other

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"inductive process through which our case law has developed").

[56] Sterk, *supra* note 53, at 1030-31 (offering explanations for "existing regime of 'choice of law chaos'").

[57] *See* Little, *supra* note 39, at 134-36 (reviewing these motivations in context of U.S. Supreme Court opinions on topic of federal court jurisdiction).

states or groups in other states.[58] Whichever of these motivations are at play in a conflict of laws decision, the judge typically wishes to avoid the appearance of partiality and the embarrassment of blatantly evaluating, and possibly enhancing, her own authority. Possible manifestations of these motivations include lack of candor as well as greater use of linguistic devices that tend to obscure the true meaning of an utterance.[59] Hairsplitting, dual meaning, and complexity are close cousins to these linguistic and rhetorical qualities.

A related factor that may increase a court's desire to obscure the true dynamics in a conflict of laws decision derives from the deeply confrontational context in which the conflicts doctrine is developed and enforced. Conflict of laws is a doctrine largely confined to litigation, the ritualized battle within a court system. If one starts with the premise — admittedly more common in Eastern culture than Western — that law as a general matter and lawsuits in particular are evidence of a citizenry's failure to act decently of their own volition,[60] then the discipline of conflict of laws exists as a double-barreled symbol of contentiousness. In a lawsuit, the first unwelcome "barrel" or message emerges because humans require law — rather than merely mutual benevolence and the fabric of social structure — to resolve an issue that arose in their interactions. Conflict of laws adds yet another "barrel" because the potentially relevant laws are themselves not in accord. Thus, the mere existence of conflict of laws doctrine demonstrates not only that the innate goodness of humans is too weak to control their affairs, but also that the laws created to govern in place of human benevolence are themselves in competition. Making matters even worse are the clashes among conflict doctrines *themselves*. What else could result from such a state of affairs but confusion and disharmony!

The litigation context that necessitates conflict of laws doctrine creates yet another source of complexity: the doctrine is by definition abstract and removed from the world outside legal institutions. Conflict of laws, like much procedural law, enjoys freedom from many of the world's

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[58] *Cf.* Andrew Maravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 521 (1997) (outlining liberal/constructionist theory that state is less inclined to pursue preferences when doing so imposes negative externalities on dominant social groups in other states).

[59] *See* Little, *supra* note 39, at 96-108 (canvassing devices identified by linguists as obscuring meaning).

[60] T.R. REID, CONFUCIUS LIVES NEXT DOOR 110-11 (1999) (describing basic distrust in Far East culture of law as means of assuring civil society). This distrust of law apparently has support in the writings of Confucius, which emphasizes making lawsuits unnecessary rather than adjudicating lawsuits in some specific way. *Id.*

brute constraints. Because conflict of laws rules do not regulate primary, out-of-court activity, those who create the rules are less constrained by the details of daily life and the physical world than those who create rules governing such matters as real estate or contracts. Conflict of laws systems need not take account of unchangeables such as weather, physics, or medical fact. While allowing for potentially useful creativity, this untethered quality gives conflict of laws thinkers wide range in choosing starting assumptions and manufacturing complicated pathways for analytical solution.

Students of language have long documented the challenges of creating clear legal expression. St. Thomas Aquinas, for example, noted that while uniform definitions are within grasp for disciplines where phenomena are "determined and distinct," the enterprise is far more problematic for disciplines dominated by "human institutions."[61] The adversary system aggravates this problem for common law topics, allowing adversaries to turn the inadequacy of language into a tool of manipulation.[62] As Steven Pinker explains, lawmakers and lawyers may

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[61] ST. THOMAS ACQUINAS: THE TREATISE ON LAW 31 (R.J. Henle ed. & trans., 1993).

[62] *See, e.g.*,William Glaberson, *Legal Gamesmanship May Take Toll*, N.Y. TIMES, Sept. 24, 1998, at A4 (describing verbal hairsplitting between Bill Clinton and Ken Starr's investigation team). This is not to say that lawyers do not covet language as a tool of the trade and relish the power it makes possible. In this way, the legal profession is much like Alice in Wonderland's Humpty Dumpty:

> "When *I* use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean — neither more, nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> Alice was too much puzzled to say anything, so after a minute Humpty Dumpty began again. They've a temper, some of them — particularly verbs, they're the proudest — adjectives you can do anything with, but not verbs — however, *I* can manage the whole lot of them! Impenetrability! That's what *I* say!
>
> "Would you tell me, please," said Alice, "what that means?"
>
> "Now you talk like a reasonable child," said Humpty Dumpty, looking very much pleased. "I meant by 'impenetrability' that we've had enough of that subject, and it would be just as well if you'd mention what you mean to do next, as I suppose you don't mean to stop here all the rest of you life."
>
> "That's a great deal to make one word mean," Alice said in a thoughtful tone.
>
> "When I make a word do a lot of work like that," said Humpty Dumpty, "I

do their best to co-opt language for all inclusive and precise description, but language is not equipped for "this unnatural job."[63] According to Pinker, even lawyers' "prolix definitions and legalese inevitably leave room for alternate interpretations that an adversary will find."[64]

Making matters particularly problematic in the conflict of laws context is the limited universe of professionals for which the decisions are written. Conflict of laws doctrine is law for lawyers and judges — individuals who make their living navigating court systems.[65] The necessity of providing coherent principles for lay people does not constrain or discipline those who create conflicts doctrine.

The adjudicatory process — with the necessary participation of an interested adjudicator and the adversarial context — thus creates a welcome medium for complexity. The obscurity of abstraction, the inclination to create professional jargon as well as the particularly specialized nature of choice of law doctrine adds further complexity. As shown below, tendencies in American legal culture generally, and conflicts doctrine more particularly, further exacerbate this complicating effect.

D. Causes of Complexity: American Legal Culture and Jurisprudential Orientation

American legal culture is no friend to the mission of simplifying choice of law doctrine. Specific theoretical orientations within conflicts doctrine may enhance or reduce legal culture's complicating effect. The role of jurisprudential orientation dominates the remainder of the study. Before analyzing the effect of theory, however, I must review legal culture's largely unfortunate contribution to complexity in conflicts doctrine.

1. Legal Culture

American legal culture tends to prefer explicit rules and specific authority for proposed action.[66] Before rendering legal advice, the

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always pay it extra."

LOUIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS 186 (Signet Classics 1960) (1871).

[63] Pinker, *supra* note 4, at A1.

[64] *Id.*

[65] *See, e.g.*, James Audley McLaughlin, *Conflict of Laws: The New Approach to Choice of Law: Justice in Search of Certainty, Part Two*, 94 W. VA. L. REV. 73, 108 (1991) (observing that conflicts is "lawyer-dependent" area of law).

[66] In her classic study of Japanese culture, *The Chrysanthemum and the Sword*, Ruth

American lawyer prefers to find a legal source that actually authorizes a transaction or course of action. This contrasts with, say, Italian legal culture, where lawyers presume that a course of action is lawful unless specifically prohibited in its civil code.[67] No surprise, then, that Italian law is subsumed in comparatively few volumes,[68] while American law fills entire libraries. One cause of this American inclination is the common law system of precedent, which exhorts the American lawyer to identify a source for law other than mere reasoning. Whatever its cause, however, dense complexity characterizes much of American law — often to a much greater extent than in the legal systems governing sovereign states elsewhere on the globe.

This legal culture is at its height in the field of conflict of laws. One sign of the discipline's attraction to rule-based complexity is the ridicule that surrounds two of the most freewheeling of choice of law approaches — Professor Leflar's Better Rule of Law approach[69] and the center of

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Benedict alludes to this preference for rules in suggesting that Americans tend — through the vehicle of guilt — to internalize notions of right or wrong. She contrasts this with cultures such as in Japan that are organized around shame as an enforcement mechanism. RUTH BENEDICT, THE CHRYSANTHEMUM AND THE SWORD 222-27 (1946). The inference from this observation is that the standards of good and evil in guilt cultures tend to be absolute, while the externally imposed standards in shame cultures are more easily changed. Alexander Stille, *Experts Can Help Rebuild a Country*, N.Y. TIMES, July 19, 2003, at B7.

[67] Guido Calabresi, *Two Functions of Formalism: In Memory of Guido Tedeschi*, 67 U. CHI. L. REV. 479, 481 (2000) ("The Italian's casual contempt for legal rules in practice baffles the, by contrast, extraordinarily law abiding American."). Calabresi points out the further irony for Americans is that Italians hold the theoretical system of law itself "in high respect." *Id.*

[68] The formal sources of Italian law include four main codes and complementary laws enacted by the legislature. Case law and legal scholarship are informal sources of the law. *See, e.g.*, Luigi Moccia, *The Italian Legal System in the Comparative Law Perspective: An Overview*, 27 INT'L J. LEGAL INFO. 230, 239-40 (1999) (reviewing sources of Italian law). The question whether Italian law will continue along this trend is, of course, uncertain in light of influences from legal practice in other countries and the development of European Union law. *See* Guido Alpa, *Foreign Law in International Legal Practice: An Italian Perspective*, 36 TEX. INT'L L.J. 495 (2001).

[69] *See, e.g.*, Fuerste v. Bemis, 156 N.W.2d 831, 834 (Iowa 1968) (noting criticism of Leflar's approach as one "plagued by excessive forum favoritism"); Tower v. Schwabe, 585 P.2d 662, 664 (Or. 1978) (refusing to apply "better rule of law" approach because such approach would result in application of forum law in each case); Hataway v. McKinley, 830 S.W.2d 53, 58-59 (Tenn. 1992) (dismissing "better rule of law" because it leads to forum favoritism); David F. Cavers, *The Value of Principled Preferences*, 49 TEX. L. REV. 211, 213 (1971) (stating that "better rule of law" is not principled but is rather escape from choice of law decision); Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 893 (2002) (enumerating "obvious problems" with "better rule of law" approach, including local bias and lack of meaningful criteria to identify better law); Michael J. Harrington, *A Review of State, Diversity Jurisdiction, and FTCA Decisions Concerning Choice of Law Rules in the United States*, 5 SPG AIR & SPACE LAW. 3, 4 (1991) (announcing that "better rule of law"

gravity approach.[70] Although reviled for structureless unpredictability, both approaches trade on intuition, candor, and common sense appeal, thereby avoiding the obfuscation and confusion arising from the analytical maze generated by most choice of law approaches. Further evidence of the inclination toward complexity in choice of law comes from the unusually strong influence of legal academics. Possibly reacting to conflict of laws' abstract quality, or unconsciously seeking to ensure that the discipline remains in the common law realm, courts have opened their decisionmaking to academic input on developing choice of law approaches. Indeed, Professors Currie, Baxter, and Leflar can all boast mainstream methodologies bearing their name and imprint that appear in various state court opinions throughout the United States.[71] The result imports academic culture into common law decisionmaking, a culture that values thorough investigation, full exposition of competing

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methodology is forum-favoring and highly subjective); Larry Kramer, *Return of the* Renvoi, 66 N.Y.U. L. REV. 979, 1019 (1991) (concluding that very notion of "'better' law" is contrary to premise of states existing as coequal sovereigns in federal system); David E. Seidelson, *Resolving Choice-of-Law Problems Through Interest Analysis in Personal Injury Actions: A Suggested Order of Priority Among Competing State Interests and Among Available Techniques for Weighing Those Interests*, 30 DUQ. L. REV. 869, 875-76 (1992) (cautioning that "better rule of law" approach invariably leads to application of forum law); Harold P. Southerland, *A Plea for the Proper Use of the Second Restatement of Conflict of Laws*, 27 VT. L. REV. 1, 12-13, 25 (2002) (emphasizing that "'better' law" approach is subjective and "robs a conflicts case of the very element that makes it a conflicts case and turns it into the equivalent of a domestic one"); William Tetley, *A Canadian Looks at American Conflict of Law Theory and Practice, Especially in the Light of the American Legal and Social Systems (Corrective vs. Distributive Justice)*, 38 COLUM. J. TRANSNAT'L L. 299, 315 (1999) (stating that "better rule of law" approach is highly subjective and produces arbitrary and unpredictable results); Russel J. Weintraub, *A Method for Solving Conflict Problems*, 21 U. PITT. L. REV. 573, 585-86 (1960) (describing "'better' rule" as amorphous standard).

[70] *See, e.g.*, BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 727-28 (1963) (critiquing center of gravity approach for providing "no standard for determining what 'contacts' are significant," for dealing in "broad generalities," and condoning "highly subjective fiat... too elusive for objective evaluation."); Albert A. Ehrenzweig, *The "Bastard" in the Conflict of Laws — A National Disgrace*, 29 U. CHI. L. REV. 498, 503 (1962) (expressing hope that Haag v. Barnes can be explained by reference to equities in facts, rather than attempt to generate principle for future interpretation).

[71] At least one scholar questions whether the influence is as significant as meets the eye, and describes courts' references to academic writing as "window dressing [rather] than as a dispositive factor in deciding choice of law cases." Sterk, *supra* note 53, at 962, 970 (arguing recent cases suggest that once courts become "satisfied that no party expectations will be frustrated," they are motivated less by scholarly purity than with trying to apply "forum law or what they regard as the 'better' law"); *see also* Patrick J. Borchers, *The Choice of Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 358 (1992) (noting Leflar's observation that in practice courts borrow from many "new" theories and reach results consistent with many proposals) (citing Robert A. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. 10, 11-21 (Spring, 1977)).

arguments, and — alas — seemingly endless documentation and footnotes.[72]

2. Jurisprudential Orientation

Related to the idea of legal culture is the more purely cognitive notion of jurisprudential orientation or philosophy. Judicial philosophies may in turn influence whether conflict of laws schemes are more or are less complicated. One common theme in recent conflict of laws scholarship concerns the role of corrective justice — the principle that law should provide a remedy commensurate with a wrong done — in choice of laws cases.[73] Some studies suggest that many modern conflicts decisions serve American law's preoccupation with awarding victims generous compensation.[74] Because this preoccupation with adequate recovery sometimes requires courts to augment existing conflicts doctrine with "pro-recovery," and/or "equity analysis,"[75] one might deduce that corrective justice philosophy would complicate resolution of the cases. Corrective justice thus might provide yet another explanation for the complications of conflicts doctrine.

Corrective justice is more a value by which to judge competing outcomes in litigation than a methodology or analytical technique for resolving cases. Such methodologies and techniques play a significant role in conflict of laws cases, and conflicts scholars have systematically studied many of them, including rights-based theories of adjudication,[76] legal realism,[77] economic theory,[78] and legal process.[79] Some of this

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[72] William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1372 (1997) (describing turgid quality of academic writing on conflicts topics).

[73] *See, e.g.*, Borchers, *supra* note 71, at 359 (empirically testing whether choice of law cases are, *inter alia*, "pro-recovery"); Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 398 (1980) (identifying three "biases" in applications of government interest analysis: "pro-resident, pro-forum-law, and pro-recovery"); Tetley, *supra* note 69, at 353-68 (exploring preference for corrective justice in conflicts decisions).

[74] *See* Borchers, *supra* note 71, at 380 (finding "strong pro-recovery bent" that "all new theories evince in application"); Tetley, *supra* note 69, at 353, 368 (noting that many decisions seem to make equity paramount concern, permitting recovery of damages by injured party even where other values and principles, which have traditionally been applied in conflict of laws, would dictate different outcome).

[75] Tetley, *supra* note 69, at 353, 372.

[76] *See, e.g.*, Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1289-91 (1989) (contrasting consequentialist reasoning with rights-based theory of adjudication); Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1242-71 (1987) (defending theory of "vestedness," related to traditional vested rights theory).

[77] *See, e.g.*, Michael S. Green, *Legal Realism, Lex Fori, and the Choice-of-Law Revolution*, 104 YALE L.J. 967, 973 (1995) (analyzing effect of legal realism on conflict of laws doctrine);

scholarship tangentially mentions the relation of jurisprudential method to complexity in conflict of laws doctrine.[80] The method I take up here, formalism, has received scant attention from conflicts scholars, but nonetheless holds particular relevance to complexity. Could formalism actually cause doctrinal complexity in conflict of laws? Or is it a potential cure? Both? I propose answers in the next section.

III. THREE PARADOXES OF FORMALISM: CAUSE OR CURE

Because complexity in choice of law doctrine has many sources, the cure for its deleterious effects may require effort on multiple fronts. Take for example the problems created by the common law process. Many American conflict of laws analysts have rejected the notion that we should avoid the pitfalls of the common law process through a code system such as exists in Europe.[81] Others, however, propose increased reliance on legislation, and argue that a legislative response holds more promise than the already-failed Restatement approach.[82]

Along a similar line, scholars have recognized our common law system of overlapping jurisdictions may be here to stay, but nonetheless have sought to improve conflict of laws rules by harnessing the

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Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2457-58 (1999) (describing legal realist response to vested rights theorists such as Joseph Beale).

[78] *See, e.g.*, Guzman, *supra* note 69, at 885 (adopting economic perspective on choice of law and evaluating conflicts doctrine in light of goal of maximizing global welfare); O'Hara & Ribstein, *supra* note 6, at 1151 (analyzing choice of law in light of economic values).

[79] *See* Reynolds, *supra* note 72, at 1399, 1406 (advocating that in formulating and applying conflict of laws doctrine, legal thinkers should remember lessons of Hart and Sacks and legal process school).

[80] For example, Kermit Roosevelt notes that Beale's vested right theories interacted with "a smoothness and complexity suspiciously reminiscent of celestial spheres, pholgiston, luminiferous ether, and other refined illusions." Roosevelt, *supra* note 77, at 2457-58.

[81] *See, e.g.*, Harlan F. Stone, *Some Aspects of the Problem of Law Simplification*, 4 COLO. L. REV. 319, 329 (1923) (arguing against European model of codification). Professor Stewart Sterk argues that legislation is not a promising avenue for promoting cooperation among states, particularly in light of the drafting challenges and the necessity for the legislation to have an open texture. Sterk, *supra* note 71, at 1011.

[82] *See, e.g.*, Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 MICH. L. REV. 2134, 2136-49 (1991) (making out case for choice of law code and action by National Conference of Commissioners on Uniform State Laws); O'Hara & Ribstein, *supra* note 6, at 1153 (arguing that in order to maximize economic values of predictability and individual choice, conflicts rules should derive from state legislatures rather than courts); 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, 297 (2001) (arguing for national uniform code rather than *Third Restatement*).

dynamics of interstate relations for the greater good.[83] Of these proposals, the legislative approach is particularly well suited to reducing complexity because it promises to provide an internally consistent and integrated analytical foundation for choice of law methodology. Legislative approaches based on uniform state law or federal models may eliminate *renvoi* issues and avoid problems with multiple meaning arising from the jurisdictional concurrency in our system.[84] Because conflict of laws rules would be both legislatively created and consistent across jurisdictions, one would expect fewer sensitive power concerns, such as the potential partiality of the adjudicator. Under the legislative scheme, the adjudicator would presumably play a reduced role in creating and refining choice of law methodology, and thus would be less inclined toward obfuscation than in a common law system.

With no intent to detract from these legislative and other efforts to refine the choice of law system in the United States, I focus the remainder of this study on formalism, which stands in the unusual position of both a cause *and* a potential cure of complexity in conflict of laws doctrine. I start with a brief look at the contours of formalism, then document its presence in conflict of laws cases — both old and new. This survey exposes three paradoxes of formalism, which I then evaluate

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[83] *See, e.g.*, William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 16-18 (1963) (proposing that courts resolve conflicts by reference to how impairment of one state's interest compares to impairment of another state's interest); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 312-13, 324-25, 340-43 (1990) (emphasizing how states' interest in comity and reciprocity behavior should inform choice of law doctrine); O'Hara & Ribstein, *supra* note 6, at 1153 (developing efficiency framework).

[84] No clear consensus emerges as to which of the two routes toward unification is best — federalization or uniform state codes. After 9/11, some suggested that policymakers should show greater concern for promoting a strong national government, rather than protecting the prerogatives of states to regulate. Linda Greenhouse, *Will the Court Reassert National Authority?*, N.Y. TIMES, Sept. 30, 2001, at A4 (asserting that "[i]n a time of globalization," protection of state sovereignty "may seem 'anachronistic and quaint,'" after Sept. 11, "it feels" downright "dangerous"). Others have pointed to the significant efficiency and other incentives toward the use of federal power to solve difficult legal problems. *See generally* Laura E. Little, *The Future of the Federal Judiciary*, 70 TEMP. L. REV. 1151 (1997) (discussing perception that "important" issues are dealt with on federal level); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 276-77 (1990) (discussing efficiency factors supporting use of federal rather than state power to regulate). In the face of these trends, however, the argument remains that uniform state codes can accommodate the competing concerns of allowing experimentation in different jurisdictions while unifying state governments under one general choice of law approach. *See* Mark D. Rosen, *Nonformalistic Law in Time and Space*, 66 U. CHI. L. REV. 622, 623 (1999) (arguing that nonuniform applications of single source of law "can help to preserve a single national (or state) culture without necessarily destroying local difference").

in light of the goal of reducing complexity.

A. The Contours of Formalism

Descriptions of formalism vary considerably according to the historical and legal context in which they were uttered. My research explored formalism materials with an eye for optimistic contributions to the litigation context of choice of law. That research strategy lead me to contemporary scholarship trumpeting the salutary effects of formalism for resolving grievances. I canvass this optimistic contemporary scholarship below.

1. A Disfavored Jurisprudence Returns

Until recently a term of unquestionable insult, formalism now has a number of contemporary proponents, who herald the approach's many alleged virtues, including restraint, efficiency, reduction in error, and consistency in decisionmaking.[85] Characteristically leaving no room for ambiguity on this matter, Justice Scalia celebrates the trend and announces that: "The rule of law is *about* form. . . . Long live formalism. It is what makes a government of laws and not men."[86]

Formalism has a checkered history — which includes unflattering epithets as well as optimistic portraits. As Richard Pildes argues, various contemporary modes of formalism bear little resemblance to each other and differ dramatically in "underlying assumptions about morals, society, and politics."[87] Several theorists sketch a picture that — from a twenty-first century perspective — is so unreasonable as to set up formalism as a straw man for ridicule or a foil for more meaningful legal methods. One definition, for example, posits that under formalism: "legal reasoning should determine all specific actions required by the law based only on objective facts, unambiguous rules, and logic."[88]

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[85] *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LIFE AND LAW 159 (1991) (arguing that formalism reduces factors that may be legitimately used to resolve disputes); Alexander, *supra* note 7, at 534 (arguing that formalism makes possible coordination and efficiency in decisionmaking); Pildes, *supra* note 7, at 613 (arguing that formalism reduces error in decisionmaking and ensures deference to "the greater expertise of rulemakers" as against rule appliers).

[86] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (1997); *see also* Mistretta v. United States, 488 U.S. 361, 426 (1989) (Scalia, J., dissenting) ("A government of laws means a government of rules.").

[87] Pildes, *supra* note 7, at 619.

[88] STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 3 (2d ed.

Similarly, others suggest that formalism posits that judges "can and should be tightly constrained by objectively determinable" legal meanings.[89] In a similar vein, one writer states that for the pure formalist: "The judge's job is to act as a highly skilled mechanic with significant responsibility for identifying the 'right' externally mandated rule. . . [and the juror's job is then] to discover the 'true' facts and to feed them into a ['giant syllogism machine']. The conclusion takes care of itself as a matter of logic."[90]

Another symptom of these definitional disagreements is the absence of a canonical, polar opposite for formalism. Scholars often contrast formalism with "functionalism." Other contrasting terms include "antiformalism," "nonformalism," and "pragmatic functionalism."[91] Whatever its proper name, the competing strategy to formalism tends to favor flexibility in decisionmaking, invoking purposes or background principles to answer difficult questions of interpretation.[92] The competing strategy often resolves disputes by referring to standards — a term that can be defined as abstract concepts that "refer to the ultimate policy or goal animating the law."[93]

I hasten to add, however, that formalism and its competing strategy are not realistically represented by opposing poles, but rather as

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[89] William N. Eskridge Jr., *The New Texualism*, 37 UCLA L. REV. 621, 646 (1990).

[90] Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 421 (1992). For a similar, albeit less rhetorically charged account of formalism, see Brian Leiter, *Postivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1145 (1999) (book review) (explaining that formalism is descriptive theory "according to which (1) the law is rationally determinate, and (2) judging is mechanical"). For yet another account, see Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 278 (1997) [hereinafter Leiter, *Rethinking Legal Realism*] (contrasting realism — described as notion that judges are primarily fact-responsive — with formalism — described as notion that judges are primarily rule-responsive).

[91] Rosen, *supra* note 84, at 623 (using term "nonformalistic"); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638 (1999) (using term "anti-formalism"); Thomas C. Grey, *The New Formalism* (1999) *available at* http://papers.com/paper.taf?abstract_id=200732 (last visited July 15, 2003) (unpublished manuscript on file with author) (using term "pragmatic formalism"); *see also* Leiter, *Rethinking Legal Realism*, *supra* note 90, at 277-78 (contrasting formalism with realism).

[92] Sunstein, *supra* note 91, at 639 (observing that anti-formalists are "concerned about avoiding the kinds of rigidity that can lead to injustices and mistakes. . . and might contend that courts legitimately invoke purposes, or background principles of various kinds" when interpreting laws).

[93] Rosen, *supra* note 84, at 623 (using term "nonformalistic law" synonymously with "standards" as it appears in literature analyzing rules/standards debate).

orientations along a continuum.[94] Professors Adams and Farber explain that the difference between formalism and anti-formalism is "a matter of degree."[95] They argue that both formalists and anti-formalists understand that all legal reasoning cannot be reduced to "crisp bright-line rules" and believe in the "usefulness of legal predictability, stability, and therefore, rules for making decisions."[96]

Frederick Schauer — whose contemporary advocacy for formalism is particularly upbeat — argues that rules serve the salutary purpose of reducing the universe of appropriate factors or considerations the decisionmaker may legitimately incorporate into resolution of a dispute.[97] Other proponents of formalism have extolled other virtues. These virtues include "coordination of behavior"[98] and "reduction of error costs" resulting because formalism seeks to ensure deference to the "greater expertise of rule makers as against rule appliers."[99]

Pre-realist functionalists such as Holmes, Pound, and Cardozo saw formalism as providing an account of law that was both incomplete and impossible to attain. Responding to formalism's perceived deficiencies, these thinkers embraced the policy-oriented approach of functionalism because they believed judges must hold ultimate fidelity to the public welfare — "serving the sum of the interests of individuals and social groups."[100] Through its emphasis on legal concepts as instruments for making practical judgments, functionalism has always reflected an intellectual connection with pragmatism.[101] Those endorsing

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[94] *See* Sunstein, *supra* note 91, at 638. Sunstein argues that the division between formalists and their competing strategies is "along a continuum":

> One pole is represented by those who aspire to textually driven, rule-bound, rule-announcing judgments; the other is represented by those who are quite willing to reject the text when it would produce an unreasonable outcome, or when it is inconsistent with the legislative history, or when it conflicts with policy judgments of certain kinds or substantive canons of construction.

Id. at 640; *see also* Adams & Farber, *supra* note 3, at 1312-13.

[95] Adams & Farber, *supra* note 3, at 1312-13.

[96] *Id.*

[97] SCHAUER, *supra* note 85, at 159.

[98] Pildes, *supra* note 7, at 613; *see also* Alexander, *supra* note 7, at 534 (describing coordination problem as "any cost that results from moral disagreement or from uncertainty about how others will resolve questions about what they are morally permitted, required or forbidden to do.").

[99] Pildes, *supra* note 7, at 613; *see* Alexander, *supra* note 7, at 534 (arguing that formalism promotes "authoritative settlement" of disputes, which "solves the problems of *coordination, expertise,* and *efficiency*").

[100] Grey, *supra* note 91, at 10-12 (summarizing works of Pound, Holmes, and Cardozo).

[101] *See, e.g.*, Paul N. Cox, *An Interpretation and (Partial) Defense of Legal Formalism*, 36 IND.

functionalism in contemporary writing today often justify their position by pointing to problems with formalism, emphasizing formalism's illusionary nature and its difficulties in developing ex ante rules that accommodate rapid changes in society, technology, and scholarly knowledge.[102]

2. Formalism as a Grievance-Resolving Process

Students of formalism note that the approach must be evaluated within law's many different contexts, including "the penal, the grievance-remedial, the administrative-regulatory, the public-benefit conferral, and the private-ordering."[103] My primary focus for this conflict of laws project is the "grievance-remedial" — that is, evaluating the benefits of formalism for adjudicators who resolve civil grievances that implicate the laws of more than one sovereignty. For that reason, I sidestep the tangential (but otherwise important) issue of formalism's role in developing rules for commercial relationships and other voluntary transactions.[104] One trend in the transactional setting relevant to the complexity issue is the movement toward strengthening the presumption favoring contractual choice of law clauses.[105] One would expect that strengthening this presumption would reduce doctrinal

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L. REV. 57, 59 (2003) (referring to "[r]ealism, post-realism, and pragmatic instrumentalism" as labels for "anti-formalist arguments"); Grey, *supra* note 91, at 12 (outlining link between functionalism and pragmatism).

[102] Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959, 984 (1997) (arguing that seductions of formalist reasoning should be rejected in favor of functionalism); Rosen, *supra* note 84, at 624-34 (describing conditions under which ex ante rulemaking is ill advised).

[103] Robert S. Summers, *How Law is Formal and Why it Matters*, 82 CORNELL L. REV. 1165, 1174 (1997).

[104] This issue becomes relevant in the context of contractual choice of clauses. For the purpose of evaluating how much party autonomy the law should tolerate for such clauses, important scholarship evaluates the role of formalism. *See, e.g.*, Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy*, 66 U. CHI. L. REV. 710, 776-77 (1999) (arguing that transactors prefer to let informal principles govern when relations proceed smoothly, but that they prefer court adjudication with formal principles when relations turn sour); William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971, 976-1002 (2001) (exploring formalism's implications for contract law). Obviously, conflicts rules have pertinence to contract negotiations as a general matter because they provide parties with something to bargain about — and around.

[105] *See, e.g.*, Richard K. Greenstein, *Is the Proposed U.C.C. Choice of Law Provision Unconstitutional*, 73 TEMP. L. REV. 1159 (2000) (discussing proposal to strengthen parties' ability to designate governing law); William J. Woodward, Jr., *Contractual Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697 (2001) (discussing proposals to strengthen party autonomy over contractual choice of law).

complexity for the simple reason that courts would be presented with fewer opportunities to interpret and to apply choice of law principles. This trend, of course, has few ramifications for the litigation settings that provide the focus of this study.

This litigation orientation also leads me to evaluate formalism as a process, a means by which a resolution is attained, not as an end product or consequence of a legal process that manifests as a set of formal rules.[106] Thus, I have no incentive to argue that formalism is a true or accurate description of law itself. Rather, I look to formalism as a means to improve the process by which law is made and lawsuits are decided. For example, some may say that from the point of view of consequences — an individual who is killed and an individual who is allowed to die are functionally equivalent. But, from the point of view of form, a vast difference usually exists between these two circumstances.[107] Formalism emphasizes this difference and heightens the importance of *how* results are achieved.[108]

By focusing on formalism as a process, I avoid two debates that have frequently haunted formalism, distracting from its beneficial qualities. First is the criticism — often identified with Karl Llewellyn — that formalism ignores law's importance as a functionalist instrument whose purpose is to foster beneficial development of social and economic order.[109] Described as a process of applying clear rules and making decisions based on limited facts, formalism does indeed seek to avoid integrating social and economic factors into the process of decisionmaking. Yet the formalist process may nonetheless make possible the social and economic ends the legal realists find so integral to the legal system. In this respect, I reject the idea that formalism and functionalism stand as mutually exclusive ends of a dichotomy. I am persuaded that formalism may actually help to implement and enforce

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[106] Leo Katz, *Form and Substance in Law and Morality*, 66 U. CHI. L. REV. 566, 569-73 (1999) (describing deontological and path-dependent attributes of formality); Pildes, *supra* note 7, at 609-12 (casting in favorable light this "anticonsequentialist version of formalism").

[107] As my colleague Richard Greenstein points out, the two can converge in a situation such as failing to feed an incompetent such as a baby.

[108] Katz, *supra* note 106, at 569-70 (defending label of formalism for emphasis on how certain consequence is achieved).

[109] *See* LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 17-18 (1986) (citing Llewellyn as noting connection between law and social policy and observing that both law and social sciences analyze same acts of human beings); KARL N. LLEWELLYN, THE BRAMBLE BUSH 23 (1960) (urging usefulness of social sciences for law students).

the "rule" of law.[110]

The second criticism derives from those who see formalism as inextricably tied to the belief that law is the product of neutral principles, and that judges are capable of purely impartial, nondiscretionary adjudication.[111] I accept the contention associated with both critical legal studies theorists as well as legal realists such as Llewellyn, that judicial reasoning, including formalist judicial reasoning, is infused with result-oriented abduction.[112] Particularly in controversial cases, adjudication presents ample temptations for judges to avoid the full force of explicit rules. Yet I see this flexibility not as a condemnation of formalism, but as a potential reason to advocate for rule-based decisionmaking.[113]

Roberto Unger offered a particularly helpful sketch of formalism when he described the approach as "a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary."[114] Unger's description is consistent with the process-focused view that formalism does not necessarily promote the unqualified embrace of particular rules, but instead exhibits a preference for rule following without a searching evaluation of the goals underlying the rules.[115] His description also captures the aspirational potential of formalism, the notion that formalism can provide goals for optimum decisionmaking.

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[110] *See, e.g.*, Thomas W. Merrill, *Toward a Principled Interpretation of the Commerce Clause*, 22 HARV. J.L. & PUB. POL'Y 31, 31 (1998) (arguing that "there are good functionalist reasons to be a formalist"); Summers, *supra* note 103, at 1170 n.6 (treating "form as an indispensable means to policy and other values"). *But cf.* Cox, *supra* note 101, at 68 (arguing that "formalism, understood as autonomy claim, is non- or anti-instrumental").

[111] *See supra* notes 85-87 and accompanying text describing formalism as casting judges as neutral, mechanical decisionmakers.

[112] DENIS J. BRION, PRAGMATISM AND JUDICIAL CHOICE 215-16 (2003) (reasoning that Llewellyn's legal realism and Critical Legal Studies critique "comes down to the same point — that the reality of the judicial function is that the reasoning process is fraught with abduction"). Brion defines abduction as a reasoning process that "proceeds from the Result to the General Rule that is necessitated by that Result to the Particular Case." Contrasting abduction to inductive and deductive thinking modes, Brion explains that "[i]n a reversal of the process of deduction, under abduction the Result determines the Rule." *Id.* at 215.

[113] In pursuing this process-based analysis, I decline to enter perennial debates about appropriate views of the relationship between law and politics. *See, e.g.*, Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 950-52 (1988) (focusing on refuting arguments of Critical Legal Studies theorists).

[114] Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 564 (1983).

[115] *See* Alexander, *supra* note 7, at 531 n.2 (articulating this definition of formalism).

Contrary to Unger, however, I doubt whether one need believe in the possibility that some sort of formalism can and will carry the day in order to hold formalism out honestly as a desirable, if not fully achievable, adjudicatory approach. Having said this, I note possible hazards of formalist reasoning — such as its potential for creating an untrue impression of law as an entirely apolitical process.[116] These hazards I will take up later in this paper. First, however, I will endeavor to take formalism on its own terms, exploring its presence in conflict of laws decisions. I will then take a more critical approach of formalism as I evaluate formalism's promise in the effort to improve American conflict of laws jurisprudence.

B. Formalism's Long Established Place in Choice of Law Doctrine

Conflict of laws doctrine has long provided a haven for formalism. Indeed, what is most interesting and important for this study is evidence of formalism, not only in the First Restatement of Conflict of Laws,[117] but also in more modern approaches and in contemporary scholarship.

The formalism of the First Restatement is explicit in the text of its provisions. Nearly all of the sections contain rules that are mandatory (meaning that they direct the conflict of laws analyst to apply a certain law) and are regulative (meaning that they govern behavior that antedated the rule and exist without reference to the rule).[118] For example, the First Restatement's general rule for torts instructs the analyst that preexisting behavior (a wrong) must be judged by the law of the place of the wrong: "The law of the place of wrong determines whether a person has sustained a legal injury."[119]

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[116] *See, e.g.*, ROY L. BROOKS, STRUCTURES OF JUDICIAL DECISION-MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY 57 (Carolina 2002). Professor Brooks observes that:

> In treating judicial decisionmaking like mathematics, legal formalism creates the appearance that it is an apolitical process. We are thus led to believe that any disagreement we might have with the results of the process is solely a function of our inability to do the math correctly. The problem lies with us and not with the judge or her judicial method.

Id. at 57.

[117] This quality of the *Restatement (First)* is also a frequent source of criticism. *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 735-49 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (condemning rule-bound quasi-scientific system of *Restatement (First)*).

[118] SCHAUER, *supra* note 85, at 3-7 (defining mandatory and regulative rules).

[119] RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378. The *Restatement (First) of Conflict of Laws* further admonishes that "[t]he place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place." *Id.* § 377.

Most significant to their formalist orientation, however, is the lack of compromise in the First Restatement rules: the mandatory regulations give analysts no express invitation to find an exception or a reason to avoid applying the rule even if they believe the rule would produce an absurd, unjust, or unintended result in a given case.[120] Instead, the First Restatement rules declare the jurisdiction where parties' rights vest in particular contexts, with the understanding that this jurisdiction shall — without compromise — provide the governing legal principles. In this regard, the First Restatement evinces several qualities often crucial to formalism: definiteness, completeness, and structural rigidity.[121]

In application, of course, the First Restatement allows room for seemingly endless exceptions, escape valves, and other tomfoolery to enable the decisionmaker to avoid applying a particular rule in a given case. Albeit a consequence of the First Restatement's approach, this flexibility is not expressly authorized. Many of these unintended consequences are the rhetorical qualities that give rise to so much complexity in the First Restatement: characterization, substance/procedure distinctions, *dépeçage*, *renvoi*, and the like. Of even more interest, however, is the observation that many of these techniques themselves have formalist qualities. That is, the techniques each tend to inflate the importance of preexisting categories, a characteristic associated with formalistic analysis.[122]

Following the First Restatement's high-water mark, scholars and courts began to react to its deficiencies. Most notable is the criticism of Walter Wheeler Cook, who observed that the outcome of litigation often results from the tacit process of assigning disputes to legal categories, rather than any explicit application of conflicts rules. Recognizing the discipline's ritualistic adherence to specific words, Cook urged courts to consider context and clarity when they invoke conflict of laws concepts, such as domicile and procedure.[123] Cook even acknowledged the

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[120] SCHAUER, *supra* note 85, at 3-7 (describing formalism as system in which decisionmakers are not free to question whether results are absurd).

[121] Summers, *supra* note 103, at 1179-80 (listing prescriptive content, minimum generality, minimum completeness, minimum definiteness, structural form, expressional form, encapsulatory form, and organizational form as qualities of formalism).

[122] Frederick Schauer, *Formalism*, 97 YALE. L.J. 509, 542 (1988).

[123] COOK, *supra* note 11, at 215-37; *see* Dane, *supra* note 76, at 1197. Professor Dane states that

> Cook's critique of the conceptualist pretenses of traditional choice of law was a piece of functionalist 'realist' analyses of other fields of law. Cook tried to show that much of choice of law learning was arbitrary or driven by faulty logic and word fetishes.... More generally he urged attention to concern for clarity,

problem of multiple meaning, arguing that conflict of laws analysts must remember that "a word is 'the skin of a living thought' and that 'words are flexible,' and should be defined so as best to meet our needs."[124] Cook warned against "[t]he tendency to assume that a word which appears in two or more legal rules. . . has the same scope" in each of the rules, arguing that this tendency "has all of the tenacity of original sin and must be constantly guarded against."[125]

Apparently taking heed of Cook's concerns, courts eventually began to experiment with new approaches. Punctuating these experiments were antiformalist backlashes, often followed by efforts to inject formal rules and analytical structure *back* into choice of law adjudication. New York courts were among the most adventurous, providing a forum for one of the first "modern" choice of law approaches, which sought to identify the jurisdiction forming the center of gravity in the choice of laws dispute. Unabashedly open-ended, this center of gravity approach instructed courts to search a case's facts for contacts within battling jurisdictions and to ascertain which jurisdiction possessed the most meaningful mass of contacts. The approach designates *that* jurisdiction as the center of gravity from which the governing law should emanate, but remains silent on how courts should evaluate the contacts that ultimately point to the pivotal jurisdiction.[126]

While decidedly nonformalist in orientation, the center of gravity approach sets the stage for an evolution back toward more constrained analysis and rigid rules. In a series of cases, New York courts first established a regular process for evaluating contacts using functionalist standards.[127] Having created these constraints, New York courts then progressed toward enunciating Restatement-like rules for governing recurring conflicts questions.[128] These rules continue to attract

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> policy, and contextuality, and was skeptical of the ability of even the best abstract rules to meet the needs and challenges of choice of law.

Dane, *supra* note 76, at 1197.

[124] COOK, *supra* note 11, at 159 (quoting Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.) and Int'l Stevedoring Co. v. Haverty, 272 U.S. 50, 52 (1926) (Holmes, J.).

[125] *Id.*

[126] The classic center of gravity cases are *Haag v. Barnes*, 175 N.E.2d 441 (N.Y. 1961) and *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954).

[127] *See, e.g.*, Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1973) (evaluating contacts by reference to policies and interests that states had in application of laws); Tooker v. Lopez, 249 N.E.2d 394 (N.Y. 1969) (evaluating contacts by reference to policies and interests that states had in application of laws).

[128] *See* Neumeier v. Kuehner, 286 N.E.2d 454, 457-58 (N.Y. 1972) (articulating specific rules for governing situations involving guest statutes in conflicts settings); *see, e.g.*, Cooney

admiration and attention from courts and commentators today.[129]

New York's innovations also fueled the development of governmental interest analysis, which arguably evinces a functionalist orientation through its emphasis on the policies underlying competing legal rules. Yet, as refined by Brainerd Currie, governmental interest analysis does not cede analytical control to competing laws' policies. Instead, Currie developed a set of rigid categories that predesignated the ultimate result in a case. Consistent with the formalist orientation of restricting judicial discretion, Currie spurned the notion that courts should weigh state interests or incorporate into analysis concern with systemic factors such as national uniformity.[130]

Further evidence of a trend toward formalism appears in the work of courts and commentators applying governmental interest analysis. Several analysts using the methodology have created shortcuts for handling certain types of policies, ritualizing analysis by cubby-holing the policies. In this way, they reduce the range of relevant contacts to be considered in applying the methodology. So, for example, a court applying governmental interest analysis may decide that policymakers created a law to regulate conduct in a particular context. By thus identifying the policy as conduct-regulating, the court automatically designates the jurisdiction where conduct occurred as the more important jurisdiction in the dispute. Thus, the analysis unfolds mechanically once the court identifies which — from a menu of predetermined labels — best describes the policies underlying laws.[131]

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v. Osgood Mach., Inc., 612 N.E.2d 277, 281, 283 (N.Y. 1993) (following *Neumeier*); Dorsey v. Yantambwe, 715 N.Y.S.2d 566, 569-70 (App. Div. 2000) (following *Neumeier*); Monroe v. NuMed Inc., 680 N.Y.S.2d 707, 708 (App. Div. 1998) (following *Neumeier*).

[129] Symeon C. Symeonides, *Choice of Law in the American Courts in 2002: Sixteenth Annual Survey*, 51 AM. J. COMP. L. 1, 15 (2003) (describing current analysis of *Neumeier* rules); *see, e.g.*, Gould Elecs., Inc. v. United States, 220 F.3d 169 (3d Cir. 2000).

[130] *See, e.g.*, Currie, *supra* note 25, at 1242-43 (laying out instructions for courts in evaluating governmental policies behind conflicting laws).

[131] Courts pursue this type of analysis in applying various versions of governmental interest analysis. *See, e.g.*, Caruolo v. John Crane, Inc., 226 F.3d 46, 59 (2d Cir. 2000) (applying New York law, court concluded that prejudgment interest provisions are loss-distributing laws, not conduct regulating laws); Coram Healthcare Corp. v. Aetna U.S. Healthcare, Inc., 94 F. Supp. 2d 589, 594 (E.D. Pa. 1999) (characterizing Pennsylvania's parol evidence rule as "defendant-protecting" and another state's decision to admit parol evidence to prove fraud as manifesting "an interest in protecting its citizens from the harmful consequences of an ill-gotten agreement"); Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 686 (N.Y. 1985) (concluding that charitable immunity is loss distribution law, not conduct-regulating law). Scholars also use these types of categories to structure their analysis. *See, e.g.*, John T. Cross, *The Conduct Regulating Exception in Modern United States Choice-of-Law*, 36 CREIGHTON L. REV. 425, 426-42 (2003) (arguing that "conduct-regulating

This evolution thus illustrates one more context in which formalism emits a magnetic attraction for those who develop, refine, and apply choice of law doctrine.

Even the Second Restatement of Conflict of Laws — notorious for its unstructured and indeterminate design[132] — reflects this tendency. Although developed in reaction to the shortfalls of the First Restatement and more modern approaches, many Second Restatement sections use rule-like formality to designate the jurisdiction that presumptively provides the law governing a given dispute.[133] So, for example, in a fraud case, Second Restatement section 148(1) states that when "the plaintiff has suffered pecuniary harm" by relying on false representations, and when "the plaintiff's action in reliance took place in the state where the false representations were made and received," that state should provide the law governing the parties' rights unless another state can be shown to have a more significant relationship with the occurrence and the parties. In applying section 148(1), courts have given significant weight to the predesignated, presumptive jurisdiction.[134] In

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exception" exists under classical and modern choice of law analysis); Symeon C. Symeonides, *Choice of Law in the American Courts in 2000: As the Century Turns*, AALS NEWSLETTER, Dec. 31, 2000, at 16-27 (dividing cases into loss-distribution conflicts and conduct-regulating conflicts).

[132] *See, e.g.*, William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1388 (1997) (describing criticism of *Restatement (Second)* as lacking system and therefore inviting "open-ended and indeterminate" decisionmaking).

[133] *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS: WRONGS § 146 (1971) (designating law of state where injury occurred as presumptively applying in personal injury action); *id.* § 147 (designating law of state where injury occurred as presumptively applying in action for injury to tangible things); *id.* § 149 (designating law of state where publication occurred as presumptively applying in action for defamation); *id.* § 152 (designating law of state where invasion occurred as presumptively applying in right of privacy action); *id.* § 155 (designating that law of state where proceeding occurred presumptively determines rights and liabilities of parties in action for malicious prosecution and abuse of process); *id.* § 175 (designating that law of state where injury occurs presumptively determines rights and liabilities of parties in action for wrongful death); *id.* § 185 (designating that law of state under whose workmen's compensation statute employee has received award for injury determines rights of recovery person who has paid award has against third persons); RESTATEMENT (SECOND) OF CONFLICT OF LAWS: CONTRACTS § 189 (designating law of state where land is situated as presumptively determining validity of contract and rights created thereby in contracts for transfer of interests in land); *id.* § 190 (designating law of state where land is situated as presumptively determining contractual duties of parties to deed of transfer of interest in land); *id.* § 195 (designating law of state where contract requires payment be made as presumptively determining validity of contract for repayment of money); *id.* § 196 (designating law of state where contract requires services be rendered as presumptively determining validity of contract for rendition of services).

[134] *Coram Healthcare Corp.*, 94 F. Supp. 2d at 594 (applying Pennsylvania law, court noted that "[i]n fraud cases the Restatement places particular importance on the 'state

many cases, courts work to fit the facts into the presumptive jurisdiction. Empirical work suggests that when courts are unable to make this fit, they retreat to the more general sections of the Second Restatement, which express principles sufficiently sweeping to bolster a wide range of results.[135]

Courts applying the Second Restatement show a tendency to highlight predetermined categories in other ways as well. Take for example the section governing contractual choice of law clauses, section 187, which distinguishes between default and mandatory rules. Mandatory rules are those that the parties cannot defeat by terms in their contract. Parties possess freedom, however, to use their contract to override legal principles characterized as default rules. Much turns on this characterization, since the Second Restatement section 187 significantly restrains courts from evaluating whether the parties' chosen law should govern mandatory rules, yet grants parties free reign to contract for particular laws governing default rules. In charting the grey area in the mandatory/default divide, both the official comments as well as case law applying section 187 rely on maxims and bright-line analysis, rather than reasoning based on the goals or purposes behind the mandatory/default distinction.[136]

A context closely linked to choice of law — recognition of judgments — also demonstrates a modern inclination toward formalism. The currently prevailing rules designed to protect judgments are calcified in a lock-step analysis.[137] In fact, the Full Faith and Credit jurisprudence

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where the false representations were made and received' if the 'plaintiff's action in reliance took place in the same state'").

[135] Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1241-46 (1997) (reporting that courts frequently rely on general sections of *Restatement (Second)*). Professor Borcher's work arguably undercuts my assertion here that courts are attracted to the predetermined jurisdictions designated in the more narrow *Restatement (Second)* section. Borcher in fact suggests that courts most frequently look only to the general sections. *Id.* The frequency of citations to general sections, however, may reflect simply their generality, rather than any disposition against the more specific sections that are relevant to a more limited range of cases.

[136] *See, e.g.*, Nedlloyd Lines, B.V. v. Superior Court, 834 P.2d 1148, 1151-52, nn.3-4 (Cal. 1992) (discussing mandatory/default distinction); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1) cmt. c, illus. 4 & 5 (providing illustrations of mandatory/default based on quantitative formula).

[137] Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998) (explaining that "the full faith and credit obligation is exacting. A final judgment in one state if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land."); *see, e.g.*, SCOLES, *supra* note 21, at 1160-63 (explaining full faith and credit formula requiring court to give judgment same force and effect that it would receive in court that rendered it).

has changed little over the years,[138] suffering only a few modifications made necessary by the exigencies of modern life.[139] Distinct Second Restatement sections complement and reinforce the formal constitutional framework for Full Faith and Credit jurisprudence.[140]

We thus see the attractiveness of formalism to courts confronted with thorny issues of jurisdictional conflict.[141] Even scholars grappling with cures for deficiencies in conflicts doctrine have answered formalism's siren call.[142] The question remains, however, whether formalism is up to the task of simplifying choice of law doctrine, or whether it simply contributes to the problem. As I demonstrate below, three paradoxes of formalism provide insight into this question.

C. *Three Paradoxes of Formalism*

Innovation often breeds the unexpected. And the unexpected sometimes runs counter to the innovator's intention. Examples include superhighways that induce their own congestion as suburbanites use them to move farther from the city,[143] and increased football injuries that follow after safer football helmets enable a more aggressive game.[144] So it goes with choice of law doctrine. As the history outlined above

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[138] Evidence of this is clear in law school casebooks, which are remarkably uniform in the cases they include for covering full faith and credit. *Compare* DAVID H. VERNON, ET AL., CONFLICT OF LAWS: CASES, MATERIALS, AND PROBLEMS 717-776 (2d ed. 2002) (including cases demonstrating "Iron Law of Full Faith and Credit" and its exceptions), *with* LEA BRILMAYER, CONFLICT OF LAWS: CASES AND MATERIALS (2d ed. 1995) (including most of same cases to illustrate parameters of full faith and credit principle).

[139] *See, e.g.*, *Baker*, 522 U.S. at 237-39 (distinguishing prevention of consent injunction against testimony against former employer from prevention of testimony in subsequent cases); Thomas v. Wash. Gas Light Co., 448 U.S. 261, 286 (1980) (plurality opinion) (creating special rules for worker's compensation awards).

[140] *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS: JUDGMENTS § 97 (1971) (describing res judicata rules); *id.* § 121 (describing effect of reversal of prior judgment).

[141] The reason for this attraction may result in part from the inevitably conceptual nature of all law. *See* Cox, *supra* note 101, at 62 (observing that "a substantial degree of conceptualism is inescapable in law, and a substantial degree of conceptualistic argument is evident in law").

[142] *See* Kramer, *supra* note 83, at 319-38 (proposing discrete canons representing interstate compromises states will likely make on issues of comparative impairment, substance/procedure, contracts, obsolete laws, and reliance).

[143] *See* HELEN LEAVITT, SUPERHIGHWAY — SUPERHOAX 2 (1970) (arguing that highways cause congestion); *cf.* Laura E. Little, *The Future of the Federal Judiciary*, 70 TEMP. L. REV. 1151, 1154-56 (1997) (describing "inverse" of superhighway paradox as metaphor for decreasing cases in federal court because quality reduces when case volume increases).

[144] Edward Rothstein, *The Unforeseen Disruption of Moving Ahead*, N.Y. TIMES, Dec. 22, 2001, at A19 (discussing football helmets and unanticipated consequences).

illustrates, attempts to reduce choice of law to a rigid set of rules in the First Restatement bore complexity and attempts to introduce flexibility with the Second Restatement bore rigidity.

This dialectic between rigidity and flexibility holds important lessons for conflict of laws. One can understand the dialectic process as a series of three paradoxes, all of which shed light on the problem of complexity in choice of law doctrine. These paradoxes are fueled in substantial part by formalism's role as both a cause and a potential remedy for the complexity problem.

The first paradox appears in the exceptions and escape valves created in the face of systems of simple, yet rigid, rules such as those contained in the First Restatement. From these responses, a second paradox emerges: once decisionmakers erect the superstructure of exceptions and escape valves, they have more opportunity to obscure meaning and to avoid candid discussion of the factors influencing their judgment. Although the tradition of formalism seeks to restrain discretion, this dialectic actually increases discretion. The result, of course, may further complicate the system of rules.

At some point, system breakdown inspires innovation — which may take the form of more loosely constructed systems such as the center of gravity approach or the Second Restatement. As we have observed, however, both of these responses created the opportunity for another dialectic. The loose-ended center of gravity approach yielded to the more constrained and structured governmental interest analysis and the Second Restatement incorporated both presumptions and clearly defined, predesignated categories by which to sort forms of law.

This synthesis leading back toward formalism evidences the final paradox I study here. Rules, it seems, have a potent emotional appeal in a difficult, highly abstract context such as conflict of laws. Each time the discipline returns to a rule-structured regime, it encounters trouble with complexity, apparent hypocrisy, and other enemies to the effective rule of law. Yet good can arise out of these malevolent forces — as the process of adjudication by express rules stands as a goal to which decisionmakers can aspire. It is this third and final paradox — virtue emerging from hypocrisy and complication — that recasts formalism as a positive influence in the battle against incoherence in choice of law doctrine.

1. The First Paradox: The Bulging Balloon

Experience with the First Restatement makes the best case for purging formalism from conflict of laws doctrine. Perhaps the most formalist of

all choice of law approaches, the First Restatement is also arguably the most fertile source of complexity in the history of American conflicts law. Like a balloon containing a fixed amount of air looking for a way to expand, First Restatement rules may suppress discretion in one area of decisionmaking, but not without causing a "bulge" to appear elsewhere. The bulge in the First Restatement balloon then manifests itself as judicial discretion in the form of multiple meaning, hairsplitting, and other complications.[145]

The source of the bulge can be traced in part to the general human inclination to "game" a set of rules. As recently observed:

> One of the curiosities of life on earth is the obsession to lay down grids of rigid constraints — the rules of chess or baseball, the form of a sonnet, or the Internal Revenue Code — and then try to stretch them to the limit. Those who excel at pushing the envelope — chess masters, Olympic athletes, Washington tax lawyers, everyone it seems but contemporary poets — are generously rewarded with riches and sometimes even public esteem.[146]

Correspondingly, judges presumably indulge this same inclination in stretching the limits of the First Restatement.

Causes unique to the conflict of laws context, outlined above,[147] also help to explain the bulge. One particularly influential cause may be the dissonance created when the strongly deductive, law-centered nature of the First Restatement clashes with the inductive process of common law decisionmaking.[148] One would expect this dissonance to create doctrinal complications in controversial cases or where rules' limitations frustrate the judge's impulse to satisfy his sense of fairness.

2. The Second Paradox: Complications Shield Discretion

A hallmark of formalism is its distrust of decisionmakers. Formalism's proponents point out that a system of rules allocates power away from decisionmakers,[149] by instructing them to adjudicate based on only a

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[145] *See supra* notes 8-38 and accompanying text (discussing various complications in choice of law doctrine).

[146] George Johnson, *e=mc²*, *Except When It Doesn't*, N.Y. TIMES BOOK REVIEW, Feb. 9, 2003, § 7, at 9 (reviewing JODO MAGUEIJO, FASTER THAN THE SPEED OF LIGHT (2003)).

[147] *See supra* notes 43-77 (discussing various complications in choice of law doctrine).

[148] *See supra* notes 52-55 (discussing clash identified by Professor Stewart Sterk).

[149] The theory is that formalism seeks to take away from the judge power to use discretion, even where the judge would make a different judgment if she retained power to do so. Schauer, *supra* note 122, at 543.

limited number of predetermined factors. The judge is "operating in a world in which rules have allocated the determination of other factors to someone else or to some other person or institution."[150] As such, the jurisprudence is designed to reduce the decisionmaker's discretion. The reduction in this discretion and the existence of preexisting rules, the argument goes, will give fair notice of the law to the governed, permit optimum uniformity in its application, and increase the likelihood that citizens will comprehend and be able to administer legal rules.[151]

Yet the dynamic of the first paradox creates the opportunity for precisely the opposite outcome. Once the decisionmaker responds to the urge to make an end run around the rules, he has greater reason to avoid candor in his decisionmaking. The resulting complications themselves also create opportunities for greater obfuscation. Moreover, within the context of conflict of laws, several factors militate against clarity. First is the fancy footwork needed to adjudicate sensitive power issues between coequal sovereigns.[152] Next is the incentive to avoid clarity and simplicity because the judge's own power may hang in the balance.[153] Reinforcing these tendencies is the abstraction of conflict of laws issues, which are suited largely for highly trained legal professionals only. Rather than fulfilling formalism's promise of articulating straightforward legal principles, the self-interested judge who makes challenging and "technical" conflict of laws decisions is not likely to feel compelled to make her decision accessible to the parties or other untrained citizens.[154] The probable result is greater incoherence, less predictability, and more uneven application of preexisting legal categories — all inimical to both formalism and the rule of law. Making matters worse, formal rules such as those contained in the First Restatement are framed in general terms and operate with less dependency on factual context than many other potential choice of law approaches. As such, the rule-centered structure of the First Restatement may reinforce the abstract, complicating tendency of any conflict of laws decision.[155]

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[150] SCHAUER, *supra* note 85, at 231 .

[151] Summers, *supra* note 103, at 1222-23.

[152] *See supra* notes 47-48 (discussing complication in choice of law, which derives from our federalist system).

[153] *See supra* notes 56-57 and accompanying text (discussing complication in choice of law, which derives from our federalist system).

[154] *See supra* notes 57-70 and accompanying text (discussing abstract and academic nature of choice of law doctrine).

[155] ARTHUR L. STINCHCOMBE, WHEN FORMALITY WORKS 179 (2001) (describing formality as "government by abstraction"); Cox, *supra* note 101, at 61 (describing jurisprudential

At this point in the analysis, one might conclude that I have made out a case for banishing formalism from choice of law methodology altogether. After all, the approach seems to have significantly undermined the goals of clarity, uniformity, and coherence, which motivated all right-minded thinkers who care about the law. In the hands of conflict of laws technicians, the enterprise of formalism seems transformed into a charade — a discretion-exercising, complication-saturated free-for-all! Yet the dialectic takes another turn and the story continues as we try to understand the tendency of choice of law practitioners, adjudicators, and theorists to return to formalism even in the face of the mischief it has wrought.

3. The Third Paradox: Virtue Arises From Hypocrisy

As I described earlier, the apparent chaos of the First Restatement inspired innovations ultimately (and ironically) meandered back toward systems of well-defined categories and predesignated rules.[156] Whither comes this inclination toward formalism? I find its source in both emotion and cognition. The emotional appeal stems from the mental freedom that formalism provides for adjudicators, and the cognitive foundation rests on arguments favoring rule-based decisionmaking within the particular context of choice of law. This cognitive and emotional attractiveness is tied to formalism's most surprising ally: pretense. *Yes, pretense.* While the goal of formalism is, I believe, ultimately elusive, the delusion of believing it possible may actually improve decisionmaking. That is, the aspiration toward rule-based decisionmaking may push the adjudicator closer to simplicity, candor,

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trend whereby "abstract formalist concepts" were displaced by "context dependent sensitivity to social practice").

[156] With different metaphors than I employ here to describe conflicts of law, Professor Carol Rose describes a similar dynamic in property law. She denominates property law's change in orientation as "crystal/mud circle":

> If things matter to us, we try to place clear bounds around them when we make up rules for our dealings with strangers so that we can invest in the things or trade them. The overloading of clear systems, however, may lead to forfeitures — dramatic losses that we can only see post hoc, and whose post hoc avoidance makes us (as judges) muddy the boundaries we have drawn. Then, at some point we may become so stymied by muddiness that as rulemakers we will start over with new boundaries, followed by new muddiness, and so on.

Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 604 (1988). Just as I discern a positive quality to the dynamic at work in conflicts doctrine, Professor Rose ultimately concludes that the crystal/mud cycle is not destructive. *Id.* at 609. Instead, she finds that the cycle provides a medium for debating different "social didactics." *Id.*

and impartiality than she might otherwise get. But the aspiration's force likely does not reach its true potential unless the adjudicator actually believes it to be possible to stick to the rules. Through this self-fulfilling prophecy, the rules act to constrain and to simplify only when the judge trusts in their ability to do so.[157]

Much of the debate about formalism's merits turns on disagreements over the approach's ability to constrain judicial discretion, preventing unwanted influence from tainting adjudication. Monitoring formalism's achievements in this regard is difficult because it depends on perceiving influences that judges are likely intent on hiding.[158] Yet even for those such as myself who are dubious that formalism has a chance of fully purging unwanted influences from decisionmaking, the aspiration of formalism nevertheless promises unique advantages. Indeed, the usual power of self-fulfilling prophesy may intensify for formalist decisionmaking because formalism seeks to banish from reasoning factors that cause internal conflict or discomfort for the adjudicator. Believing herself within a neutral zone for making decisions, the adjudicator may actually come closer to that ideal.

To empower a judge to avoid internal conflict, formalism compartmentalizes the decisionmaking process. By striving toward a formalist approach, the decisionmaker makes a "rational decision not to make decisions about every detail" of life and adjudicates based on limited factors often dictated from another source.[159] In the words of one scholar, the judge has decided to "Let Lex Decide" the principles applied to resolve disputes.[160] Although the judge will never achieve the goal of fully letting "Lex Decide," he can nevertheless benefit from the potentially liberating quality of rules. With formalist marching orders in hand, the judge may rid his mind of many disabling factors and focus solely on the proper resolution of the dispute in light of the limited factors within his "realm."

The resulting job environment may be conducive to a judge's satisfaction with her systemic role and with her ability to be the best

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[157] For an illuminating study of the how "[b]elief in law is . . . somewhat self-fulfilling," see Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 304 (1990).

[158] *Cf.* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (*FIN DE SIÉCLE*) 211-12 (1997) (analogizing jealousy in marriage with hidden influences in adjudication: "I think we critics should proudly affirm the analogy between our analysis of the ideological in adjudication and the Freudian tradition of hunting out sexual motives where people are most concerned to conceal them."). *But cf.* Sunstein, *supra* note 91, at 641 (offering qualified "yes" to question "whether a good defense of formalism must be empirical").

[159] SCHAUER, *supra* note 85, at 231.

[160] Alexander, *supra* note 7, at 537.

judge possible.[161] The rules therefore act in the same manner as encapsulation strategies advocated by management specialists to segregate groups within an organization and to reduce the dissonance resulting from the difficult task of choosing between the laws of competing sovereignties.[162] Theoretically, the result not only provides judges with the psychological space to cope with finding a just resolution of choice of law decisions, but also forestalls the development of emotions potentially deleterious to decisionmaking.[163] With all due regard for members of the judiciary, my concern here is not simply the psychiatric well being of the judge. Rather, my argument is that courts pursuing the formalist course in choice of law decisions may be less tempted to soften their language, to confuse their rhetoric, or to obfuscate their true reason for their decision out of discomfort with the sensitive power issues that hang in the balance and with their own institutional self-interest.[164]

Frederick Schauer anticipates potential problems with this analysis, acknowledging that, in the world of power, rules are "devices of arrogance" as well as "devices of modesty."[165] This observation is related to the paradox I noted earlier whereby formalism can enable judges to create complications in doctrine that shield true intent and cloud meaning. Schauer notes, however, an important reason to highlight the positive: formalism works with a light touch, since the jurisdiction-sorting force of rules is often "unnoticed" and "silent."[166] According to Schauer, "it is the very silence itself, the ability to take things off the agenda as well as put them on, that explains much of what is valuable about rules."[167]

This observation is an important consideration in choosing formalism over functionalism. Formalism may improve decisionmaking not

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[161] This systemic role includes most prominently the judicial duty to act as an impartial decisionmaker. For a description of this duty, its historical antecedents, and constitutional underpinnings, see Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 AM. U. L. REV. 699, 711-15 (1995).

[162] *See* Arthur G. Bedeian, *Workplace Envy*, 23 ORGANIZATIONAL DYNAMICS 49, 52-53 (1995) (describing encapsulation strategies in workplace).

[163] *See, e.g.*, Laura E. Little, *Envy and Jealousy: A Study of Separation of Powers and Judicial Review*, 52 HASTINGS L.J. 47, 117-20 (2000) (analyzing potential beneficial effects of formalism in reducing judicial envy and jealousy).

[164] Ironically, this is precisely the opposite of the dynamic I described in exploring formalism's obfuscating effect. For an explanation of this contradiction see *supra* notes 144-49 and accompanying text (describing formalism's second paradox).

[165] SCHAUER, *supra* note 85, at 232.

[166] *Id.* at 233.

[167] *Id.*

because it directly constrains discretion, but because it indirectly contributes to an environment that enables adjudication that is freer from dissonance and harmful emotions.[168] Moreover, the certainty of rule-based decisionmaking brings closure to a dispute, which in turn increases the judge's ability to move on to new cases and effectively adjudicate them.[169]

Complementing these observations about the emotional component of decisionmaking is a jurisprudential reason why formalism may be well suited to choice of law decisions. The choice between the laws of two sovereigns requires focus on state authority and conflicting governmental commands. The reasoning process is positivist in the sense that it conceives of law as the expression of state authority, rather than the product of such forces as historical, customary, or sociological behaviors.[170] As such, the choice of law inquiry focuses more on governmental authority rather than on the full range of human experience that may inform a fair and just resolution of a dispute between litigants. A broad span of human matters are indisputably relevant to a choice of law decision, particularly given the outcome determinative effect such a decision may carry. Nonetheless, the jurisdictional nature of the choice of law decision — together with its place on the threshold of the litigation process — militate toward restricting analysis to a limited set of formal rules. Should fairness and justice so require, the extensive proceedings that usually follow a choice of law decision provide ample opportunity for functionalist, multi-factored, or open-textured balancing analysis of the equities of each

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[168] *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 49 (1999) (suggesting that forbearance from "all-things-considered judgments" in constitutional adjudication may be possible only as by-product of character building experiences) (quoting JON ELSTER, SOUR GRAPES 43 (1983) ("Some mental . . . states . . . have the property that they can only come about as the by-product of actions undertaken for other ends. They can never, that is, be brought about intelligently or intentionally, because the very attempt to do so precludes the state one is trying to bring about.")).

[169] *Cf.* YANN MARTEL, LIFE OF PI 285 (Harcourt 2001). Pi mourned the lack of formality to the ending of his relationship with the tiger, Richard Parker:

> What a terrible thing it is to botch a farewell. I am a person who believes in form, in the harmony of order. Where we can, we must give things a meaningful shape. . . . It's important in life to conclude things properly. Only then can you let go. Otherwise you are left with words you should have said but never did, and your heart is heavy with remorse.

Id. at 285.

[170] *See* WILLIAM REYNOLDS, JUDICIAL PROCESS 49 (2003) (contrasting positivism with other jurisprudential approaches such as those that view law as existing independently of human endeavor or as product of historical, customary, or sociological behavior).

party's position.

While all these arguments present a persuasive case for giving formalism a role in conflict of laws analysis, they do not explain how judges can keep the first paradox from repeating itself. The factors that lead to complexity under the First Restatement, such as the influences of federalism[171] and the tension between inductive and deductive reasoning processes,[172] remain in place. Without some intervention, formalism's first paradox may usher back the hairsplitting, multiple meanings, and complications of earlier eras.

Cycles between complexity and simplicity may provide useful vehicles for education and debate.[173] But I seek here an escape from the tyranny of incoherence. To break the cycle, I look to innovations in the form of federal choice of law legislation or a uniform state choice of law code, which would undercut at least two important causes of complexity: the common law tradition[174] and the judicial concern with the appearance of partiality.[175] With the mandate of legislatively enshrined choice of law rules, courts need be less concerned with appearing self-protecting and less distracted by the rough and tumble of making conflict of law principles fit the particular case. Under such circumstances, the aspiration of formalism may be allowed to flourish, with its promise of principled rule following closer to the judicial grasp. The ultimate balance may call for a combination of formalist rule following and interstitial law making by courts.[176] Somewhere on this continuum,

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[171] *See supra* notes 43-48 and accompanying text (discussing complicating influences of federalism).

[172] *See supra* notes 50-53 and accompanying text (discussing clash between deductive-reasoning characterizing conflicts decisions and inductive-reasoning characterizing common law process).

[173] Rose, *supra* note 156, at 609 (arguing that cycle in property law between clarity and confusion offers important vehicle for social debate).

[174] *See supra* notes 49-55 and accompanying text (discussing complicating effect of common law system).

[175] *See supra* notes 54-60 and accompanying text (discussing judge's potential institutional interest in outcome of conflicts disputes).

[176] Some scholarship suggests that the optimum process for decisionmaking is a hybrid approach, with a structure of rules and opportunities to fill the gaps with common law, practical reasoning. *See* STINCHCOMBE, *supra* note 155, at 180 (arguing that filling gaps in civil law system through common law system of precedent "does better at producing a nearly everywhere gapless system of legal abstractions, and therefore better remedies governing the disputes," than earlier proposed formally rational systems). This approach appears consistent with the work of Professors Adams and Farber, who argue that many debates exaggerate the difference between formalism and anti-formalism. *See* Adams & Farber, *supra* note 3, at 1312-13. According to Professors Adams and Farber, both formalists and anti-formalists understand that all legal reasoning cannot be reduced to

however, there is hope that the virtues of formalism can rise from its failings.

CONCLUSION

Complications in much conflict of laws doctrine arise from courts' efforts to accommodate the complexity of American life — including the shifting contexts for legal rules and the differing regulatory structures of multiple sovereigns. The impulse to adapt law to these realities is not undesirable. Rather, it wisely recognizes that life does not sort into neat binary categories such as "black" and "white." The disputes that judges confront are characterized instead by ambiguities and multiple shades of gray,[177] and the doctrines must be sufficiently nuanced to accommodate these subtleties. What we should lose, however, is the incoherence and confusion that results when these subtleties calcify into a rigid web of inconsistent legal rules and convenient escape devices. Understanding the need for conflict of laws to operate in an abstract, multi-jurisdictional realm, we may be prepared to live with a challenging structure of conflict of laws principles. Yet we need these abstract rules to draw an accurate picture of the world with a sufficient degree of economy so as to be comprehensible.[178]

Viewed as a process to which courts should aspire, formalism holds promise for achieving that end. As for others who have studied formalism in other contexts, my conclusion, however, is necessarily tentative.[179] Too many factors encourage formalism to cycle through the paradoxes of complication evidenced in the history of conflict of laws. The force of this dialectic is strong and may very well repeat itself. For it to provide a permanent remedy, formalism is best yoked with legislative

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"crisp bright-line rules" and believe in the "usefulness of legal predictability, stability, and therefore, rules for making decisions." *Id.* at 1313.

[177] Adams & Farber, *supra* note 3, at 1245.

[178] STINCHCOMBE, *supra* note 155, at 21 (describing "a system of abstraction" as "cognitively adequate" if it, *inter alia*, "accurately portrays the world in a manner that... is cognitively economical (it does not have much noise and is not difficult to grasp)").

[179] *See* Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL INT'L L.J. 101, 176 (2001) (acknowledging that contrasts in "judicial approaches of Germany and France, coupled with grave injustice in substantive result in both countries, allow one to question whether causality linked specific methodologies to the substantive nature of case results"). Similarly nuanced is Gianmaria Ajani's conclusion about formalism in former Soviet-bloc countries. Gianmaria Ajani, *Formalism and Anti-formalism Under Socialist Law: The Case of General Clauses Within the Codification of Civil Law*, 2 GLOBAL JURIST ADVANCES, art. 2, at 10 (2003) (concluding that both formalism and anti-formalism coexist within old and new codes of Soviet Union, Poland, Hungary, and Czechoslovakia).

reform, whether in the form of federal legislation or a uniform choice of law code.

But such a unified response is best confined to routine conflict of laws matters. For nascent areas such as choice of law issues affecting cyberspace and new international organizations, we are not yet in a position to settle on immutable principles. In these areas, relying on legislation and formalist decisionmaking may yield the disabling paradoxes we witnessed with conflict of laws in earlier eras.[180] Because these contexts involve a broader slice of the world than traditional conflicts problems, complications arising from multiple competing sovereigns are both magnified and multiplied. For this reason, we are still in the process of exploring whether contexts such as cyberspace and international organizations call for unique legal rules independent of any sovereign, new choice of law doctrines, or tried-and-true choice of law principles borrowed from traditional contexts. In handling these new challenges, however, we are guided by an important lesson that survives from the old learning: formalism's apparent problems may not in fact be problems at all.

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[180] These areas are extremely fluid, changing as they struggle to accommodate dynamic areas of life. Accordingly, governing legal principles need to be flexible. Formalism, on the other hand, has the effect of preventing change. This is a frequent source of formalism's criticism. *See, e.g.*, Daniel Farber, *The Ages of American Formalism*, 90 NW. U. L. REV. 89, 92-93, 99-100 (1995) (describing Grant Gilmore's and Richard Posner's criticism that formalism seeks to hold "law captive in the past"). It is a criticism that is even acknowledged by its proponents. *See* Schauer, *supra* note 122, at 542 (acknowledging that formalism leads to "inflexibility in the face of a changing future"); *see also* Rosen, *supra* note 84, at 622 (arguing that "nonformalistic law might be appropriate or necessary in areas of the law where promulgators have a limited ability to lay down detailed rules in advance").