

## Restating the Restatement of Conflicts: Approaching the Legitimacy Question in Choice-of-Law Theory

Justin Zaremby<sup>1</sup>

### ABSTRACT

Since the so-called conflicts revolution, choice-of-law theory continues to reject the vested rights approach of the First Restatement of Conflicts without fully criticizing the failures of the governmental interest theory in the Second Restatement of Conflicts. At the same time, neither approach adequately examines the question of what constitutes a legitimate resolution to a conflict between states. This Article suggests that the choice between the rights language of the First Restatement and the governmental interest language of the Second Restatement is actually a debate between legal formalism and legal realism. Both choices lead to a legitimacy deficit for theorists and judges who attempt to resolve conflicts. This Article applies liberal and republican political theory to the debate between vested rights and governmental interest, suggesting an approach to resolving conflicts that is grounded in the legitimate exercise of judicial discretion.

### INTRODUCTION

In George Bernard Shaw's *Man and Superman*, the protagonist, the forlorn revolutionary John Tanner, wrote, "Revolutions have never lightened the burden of tyranny: they have only shifted it to another shoulder."<sup>2</sup> The message, presented at the turn of the century in Shaw's mournful drama, might well be applied to modern choice-of-law theory. After a century of focus on the theory of *lex loci delicti* promulgated by Joseph Story and Professor Joseph Beale, and reaching its codification in the First Restatement of Conflicts,<sup>3</sup> the conflicts "revolution" rejected this theory forcefully.<sup>4</sup> While traditional choice-of-law theory established location as the most important factor for determining applicable law, the choice-of-law revolutionaries, following Brainerd Currie

---

1. B.A. 2003, Yale College; Ph.D. (in Political Science) 2007, Yale University; J.D. 2010, Yale Law School. The author is an independent scholar. Many thanks to Professor Lea Brilmayer, Judge José A. Cabranes, and Professor Josh Chafetz for their thoughtful comments.

2. GEORGE BERNARD SHAW, *Preface to the Revolutionist's Handbook*, in *MAN AND SUPERMAN* 214 (Dan H. Laurence ed., Penguin Books 1957) (1903).

3. RESTATEMENT OF CONFLICT OF LAWS (1934).

4. See Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983).

and his successors, sought to ground choice-of-law decisions in the policy interests of states. The First Restatement, characterized as “a Prussian-like system of detailed, mechanical and rigid rules,”<sup>5</sup> was replaced by the Second Restatement, which one scholar described as “hopelessly underdeterminative.”<sup>6</sup>

Approaches to choice of law, at the extremes, vary between the vested rights theory of Joseph Beale and the governmental interest theory of Brainerd Currie. Both are motivated by a shared desire to find the objective standards by which judges apply law, but they do so in vastly different ways. The vested rights approach was deeply formalistic, reflecting Beale’s own approach to the study of law. The interests approach of Currie and his followers—the revolutionaries who currently reign in the field—offers a realist response to Beale’s formalism. Because vested rights theory grows out of the formalist tradition of law, seeking a scientific approach to discovering the true doctrines underlying our common law, and the governmental interest approach grows out of the realist rejection of formalism and its faith in the science of law, defenders of either side speak past each other instead of moving toward any common understanding. Given the opposite poles that these two camps inhabit, adherents to either view lose track of the central question of the debate: How can a judge make a legitimate choice-of-law decision? This article attempts to refocus the debate without ignoring insights gained from both fields. It attempts to find a middle ground between the rights and interest theorists, which grounds judicial legitimacy in the centrality of democracy to the American political and legal system.

In moving away from the rights theory of Beale, the interest theorists have wholly embraced governmental interest as the guiding principle in the face of more traditional territoriality. However, through their wholesale rejection of rights, the interest revolutionaries have thrown the proverbial baby out with the bath water. The choice-of-law revolution has not solved all of the problems created by vested rights, but instead has created a system that is as entrenched as its predecessor and just as blind to criticism. Moreover, by rejecting rights, they have created a system of choice-of-law that puts undue weight on the desire of legislatures to determine choice-of-law rules, instead of the desires of individual citizens. This article seeks to revitalize the importance of rights for choice-of-law theory and proposes a system whereby judges balance governmental interest with individual interest in order to overcome what I suggest is a democratic deficit in the modern choice-of-law revolution. Rather than requiring a judge to choose between rights and interests on the basis of the formalist/realist debate, it suggests that judges instead balance two different

---

5. Symeon C. Symeonides, *The First Conflict Restatement Through the Eyes of Old: As Bad as Its Reputation?*, 32 S. ILL. U. L.J. 39, 75 (2007).

6. Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2449 (1999).

political theories. A liberal, rights-based approach to choice of law asks the judge to protect the rights of an individual from encroachment by a state and its laws. A republican approach reframes governmental interest as an expression of the general will of the state that the judge, as a functionary of the state, should uphold; the judge in that position is forced to interpret a general will that may conflict with the individual will of citizens. These two approaches to understanding the liberty interest for the citizen—one a negative liberty interest and one positive—are not easily reconcilable, but reflect the sorts of questions that judges confront, including issues of both vestedness and governmental interest. This Article ultimately suggests a middle ground between the *ancien régime* and the current structure of the choice-of-law revolutionaries where judges balance the democratic interests of individuals with the republican interests of their states.

In proposing this paradigm, this Article does not attempt to establish a foolproof solution to the choice-of-law dilemma. Neither judges nor individual actors will be able to look at what follows to assure themselves of a clear solution to a given conflicts problem. Solutions, after all, remain the purview of legislators who write statutes and judges who enforce them (when available). Instead, it points out the flaws of regnant theories and offers advice on what sort of questions would make those theories more vibrant. Most importantly, this Article signals the need for choice-of-law theorists to seriously examine the role of judicial discretion in resolving conflicts, a subject lacking in the current literature. Choice-of-law theory, in both its formalist and realist modes, tends to merge both descriptive and normative claims. Judges are *described* as acting in a given way, whether looking at vested rights or governmental interest, while they are also *told* to act in a particular way. This Article attempts neither description nor prescription. After all, before telling judges how they should act, the more pressing question that theorists should ask is how one judge can make a *legitimate* decision when choosing between the laws of two sovereign states. This Article suggests the sort of questions that choice-of-law theory, in order to gain legitimacy among practitioners in a democratic system, should consider. Ideally, the model presented here will help choice-of-law theorists move beyond the current issues in the literature to more fruitful questions about the place of both the vested rights and governmental interest traditions.

Part One of this Article surveys the historical debate between vested rights theorists and governmental interest theorists. In describing the literature in this field, this Article reflects not merely on how governmental interest theory has rejected vested rights, but acknowledges what the shift from the First to Second Restatement has sacrificed. The turn to policy justifications for applying domestic law, as opposed to territorial justifications, may have helped choice-of-law scholars escape from some of the more tiresome and poorly defended arguments of Beale and other vested rights theorists. At the same time, though, they have rejected one valuable facet of vested rights theory—its emphasis on

the rights of the individual citizen to have his domestic law applied to him. The revival of this individual focus, along with insights gained from a close reading of the governmental-interest theorists, reveals the need for another interpretive lens through which to understand choice of law.

Part Two suggests that the debate between liberal and republican political theory offers such a lens. On the national level, liberalism and republicanism reflect an American concern with protecting the rights of individuals, as well as furthering a common good for a given city or state. Applying the ideals of both political models to the field of conflicts allows scholars to embrace what is useful in vested-rights theory, while also enjoying the benefits of governmental-interest theory. After elaborating on the differences between liberalism and republicanism, this Part will show how the two theories offer a cogent way of understanding the strengths and weaknesses of the First and Second Restatements.

Finally, Part Three discusses how a balancing test between liberalism and republicanism may be used by judges.<sup>7</sup> This balancing test is applied to a well-known case used by conflicts theorists, the married women's contracts case. This Part suggests how the application of liberalism and republicanism reveals important facts for judges to consider in making their decisions, and how the approach may pose new questions to further develop the field of conflicts. By exploring the implications of such questions, this Part suggests how a new approach may help scholars explore the question of legitimacy in the field, and perhaps further a revolution that has lost its energy.

#### I. FRAMING THE DEBATE: VESTED RIGHTS AND GOVERNMENTAL INTERESTS IN THEIR CONTEXT

Beale's vested rights theory is grounded in formalism.<sup>8</sup> Various authors have explored the extent to which Beale believed himself to be discovering the true law that would apply at all times.<sup>9</sup> His reputation as a "generally unenlightened" thinker<sup>10</sup> is commonly shown through a poem written by Thurman Arnold that mentions his belief in the orderliness of the legal system

---

7. Balancing tests have been viewed by some as a natural choice for judges as they choose between different interests. See Frank M. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 41 (1988).

8. Beale's theory is elaborated most completely in JOSEPH H. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* (1935). The conventional divide between formalism and realism has come under recent and thoughtful attack as an inappropriate framework for understanding the role of the judiciary. See BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010). Given the centrality of the formalist/realist divide in the history of choice-of-law theory, however, I do not address this important contribution to legal theory here.

9. See, e.g., Julia Halloran McLaughlin, *Premarital Agreements and Choice of Law: "One, Two, Three, Baby, You and Me,"* 72 MO. L. REV. 793, 801 (2007); Symeonides, *supra* note 5.

10. Patrick J. Kelley, *Introduction: Did the First Restatement Adopt a Reform Agenda?*, 32 S. ILL. U. L.J. 1, 5 (2007).

when properly understood by scholars:

Beale, Beale, wonderful Beale,  
Not even in verse can we tell how we feel,  
When our efforts so strenuous,  
To over-throw,  
Your reasoning tenuous,  
Simply won't go.  
For the law is a system of wheels within wheels  
Invented by Sayres and Thayers and Beales.<sup>11</sup>

Beale was a favorite punching bag for realists because of his dedication to a purely conceptual approach to the law.<sup>12</sup>

The essence of Beale's formalism was his belief that the law was not created by judges, as understood by the realists, but instead that judges discovered principles of law. "The decision and judgment of the court," he wrote, "determining a particular controversy . . . can in no sense be regarded as in itself law, whether it can be the doom of an ancient monarch, the decision of a popular court, or the judgment of a modern tribunal."<sup>13</sup> Decisions have a temporal quality for Beale—they need not reveal timeless doctrines of law. Ideally, though, judges, guided by the academic and orderly study of law, could discover more timeless principles. Beale's approach to conflicts was an attempt to move past the whims of a given judge in a given jurisdiction to discover clear principles by which all judges could act.

Beale's vested rights theory is deceptively simple. For Beale, judges apply the *lex loci delicti* (for tort) or *lex loci contractus* (for contracts).<sup>14</sup> The rights of a given party to choice of law are determined by the state itself, on the basis of the location where the event in question takes place. The state where the event takes place has control over the laws that apply to the situation, and other states ideally accept the rules established by their sister state. Of course, other states have no obligation to do so. Beale wrote,

---

11. THURMAN ARNOLD, FAIR FIGHTS AND FOUL: A DISSIDENTING LAWYER'S LIFE 22 (1965), *quoted in* Symonides, *supra* note 5, at 7 n.82.

12. LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 47-48 (2001).

13. *Id.* at 47.

14. Arthur Nussbaum, *Conflict Theories of Contracts: Cases Versus Restatement*, 51 YALE L.J. 893, 894 (1942).

The law annexes to the event a certain consequence, namely, the creation of a legal right. . . . When a right has been created by law, this right itself becomes a fact . . . . [A] right may be changed by the law that created it, or by any other law having power over it. If no law having power to do so has changed a right, the existing right should everywhere be recognized; since to do so is merely to recognize the existence of a fact.<sup>15</sup>

The transformative power of rights and facts as revealed in Beale's treatise reflects the common criticism of Beale's theory that it has a metaphysical component. Rights come from laws and take on a reality so clear, according to Beale, that other states should naturally acknowledge these rights as having vested. He rejects the theory of comity that pervaded earlier choice-of-law theory, arguing that states, although not obligated to acknowledge foreign law, would do so by acknowledging rights that were as concrete for Beale as the doctrines of law themselves.<sup>16</sup>

Criticisms of Beale's theory abound in the literature, and this led to the conflicts revolution. The realist critique of Beale was promoted significantly by the realist Walter Wheeler Cook. In his book, *The Logical and Legal Bases of the Conflict of Laws*, Cook argued against the arbitrariness of Beale's language, as well as his faith in formalism and the timelessness of legal doctrine. According to Perry Dane,

Cook's critique of the conceptualist pretenses of traditional choice of law was of a piece with 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, and that it reached conclusions required neither by principle nor by policy.<sup>17</sup>

Cook turned away from Beale's faith in vested rights to a view that when states apply the law of other forums, they do not do so on the basis of any metaphysical rights, but instead based upon their local law.<sup>18</sup>

Brainerd Currie's approach to conflict of laws, which continued the "conflicts revolution," begins with an assumption not made by Beale's school. Where Beale argued that judges ignore foreign law, only looking to vested rights as a sort of residue of the law of others, Currie asserts that "[t]he central problem of conflict of laws may be defined . . . as that of determining the

---

15. 3 BEALE, *supra* note 8, at 1969.

16. With regard to the pre-Beale approach to conflicts and particularly Joseph Story's theory of comity, see generally JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (Boston, Little, Brown, & Co., 8th ed. 1883); Ernest G. Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15 (1934).

17. Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1197 (1987).

18. *Id.* at 1198.

appropriate rule of decision when the interests of two or more states are in conflict.”<sup>19</sup> Like Beale, Currie would like to discover a uniform standard for the “administration of private law,” but barring lasting treaties or “an all-powerful central government,” he needs to find a new standard.<sup>20</sup> His standard bearer, the judge, will see through the false conflicts created by the Beale school by approaching conflicts by examining governmental interests. By becoming aware of the conflicting interests of states, the judge will be able not merely to separate the real conflicts from the false conflicts, but, in fact, do a better job of applying the law of their forum.

The judge, for Currie, has the ability to move beyond the morass created by the territorialist school and, indeed, has a jurisprudential responsibility to do so. He notes that “despite the camouflage of discourse, the rules . . . operate to nullify state interests.”<sup>21</sup> Courts attempt to properly apply the law of their forum, but by ignoring the idea of state interest, they often do so in an incorrect manner. When judges realize that the rules may stop them from properly applying the law, they complicate the conflicts system with exceptions and public-policy doctrines, meant to avoid breaking the law without breaking the rules. The resulting complex system leads Currie to moan, “The rules so evolved have not worked and cannot be made to work. In our times, we have suffered particularly from the jurisprudential theory which has been compounded in order to explain and justify the assumption by the courts of so extraordinary a function.”<sup>22</sup>

As such, he offers a four-step method for determining whether to apply the law of the forum or foreign law. A judge will, by default, look to the law of the forum until such time as the application of foreign law is suggested. At that point, the judge will examine the laws of the foreign state and forum. Such examination will not merely read the letter of the law, but will also look to legislative intent.<sup>23</sup> If the foreign state has an “interest” in the matter at hand, but the forum does not, he will apply the foreign law. If the forum state also has an interest, though, he will apply the law of the forum.<sup>24</sup> The governmental interest analysis prioritizes the law of the forum, but attempts to give judges a standard by which to determine when foreign law should be considered. Scholars have built on the idea of governmental interest, creating more nuanced

---

19. BRAINERD CURRIE, *Notes on Methods and Objectives in Conflict of Laws*, 1959 DUKE L.J. 171, reprinted in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 177, 178 (1963).

20. *Id.* at 178-79.

21. *Id.* at 180.

22. *Id.*

23. Currie introduced this method in an article that theorized the governmental interests involved in laws in Massachusetts and Maine that restricted the rights of married women to contract. See generally BRAINERD CURRIE, *Married Women's Contracts: A Study in Conflicts-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958), reprinted in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 77 (1963). This will be the subject of Part 3.

24. CURRIE, *supra* note 19, at 184.

standards by which judges will analyze such interest and make their decision.<sup>25</sup>

The governmental interest approach is grounded in the political focus of legal realism.<sup>26</sup> Herma Hill Kay writes that Currie's method has deep sociological underpinnings. Ultimately, the policy suggested by a given law is "the balance struck between the conflicting interests of private individuals and groups seeking to influence the content of domestic law, either by pressure exerted on legislative bodies or by arguing cases in court."<sup>27</sup> Yet while Currie acknowledged his indebtedness to the legal realists, particularly Walter Wheeler Cook, he shared a bit of the formalist dream of discovering law that could guide jurisprudence more generally.<sup>28</sup>

Currie's approach has a number of strengths. First, it empowers judges to defend the interest of states; the traditional approach, by ignoring foreign law, could ensure the interest of either state would be ignored. By forcing judges to examine the interests underlying the laws of the forum and the laws of the foreign state, the judge approaches the conflict with far more nuance. Moreover, his theory avoids the metaphysical quality of vested-rights theory, looking to governmental interest as a driving factor in resolving conflicts. Governmental-interest theory reflects the real-world tensions that create conflicts and establishes the judge as a mediator—balancing the self-interest of states that, themselves, are driven by self-interested groups domestically. Currie's judge is a lofty arbiter who grounds his decisions in the legislative bodies that establish his jurisdictional responsibilities. On the one hand, the judge is a thoughtful servant of his state. On the other hand, should Currie's approach be adopted universally, the judge is a member of a community of

---

25. See, e.g., William Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963) (establishing standard of comparative impairment by which judges will determine which state will suffer more from *not* having their law applied).

26. As described by H.L.A. Hart, it is difficult to give one definition of legal realism because

this active group of jurists differed from as much as they resembled each other. All, certainly, [were] concerned to stress the legislative opportunities of the courts and to dissipate the myths of conventional thought which they believed [obscured] this. Some accompanied this with a tough-minded insistence that to understand law all that mattered was what courts did and the possibility of predicting this, not what paper rules said and not the reasons given by judges for their decisions. Some claimed that knowledge of the judge's character, habits of life, political, social, or economic views, even the state of his health was at least as important a basis for successful prediction of a decision as legal doctrine. Others cherished a vision of a down-to-earth, truly scientific jurisprudence, inspired by the belief that the only profitable, or even the only rational, study of law was investigations, using the methods of the natural sciences, into the course of judicial decision and its effects on men's behavior.

H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 977 (1977). A comprehensive sample of the works of legal realists of many stripes can be found in AMERICAN LEGAL REALISM (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993).

27. Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 50 (1989).

28. *Id.* at 39-40.

methodologically similar judges who strive for uniformity through a common method.

Unfortunately, governmental-interest analysis creates its own set of problems. How judges should interpret legislative intent is not clear. Studying legislative history may offer one approach, but it is not a foolproof method.<sup>29</sup> Given that, as Currie acknowledges, domestic law is grounded in conflict among self-interested political groups, the motivations behind laws may not always be transparent. Even if one assumes that a judge can determine governmental interest, such an approach may do more harm than good. As noted by Lea Brilmayer, the tendency to examine governmental interest motivates judges to resolve conflicts on the basis of substantive policies and factors.<sup>30</sup> However, the tendency to move toward substantive policies and away from territoriality may tilt the debate too far in one direction. The importance of territory and individual rights gets pushed aside in the name of defending particular policy interests.

Some theorists have attempted to salvage something of the rights tradition in choice of law. For example, the theories of Lea Brilmayer reveal the importance of rights-speak in the literature and suggest the value that rights can offer beyond the metaphysics of Beale.<sup>31</sup> What is central to Brilmayer's point, beyond the invocation of the rejected rights tradition, is the sense that rights place value on the individual, as opposed to the state, as in the governmental interest tradition. Brilmayer's theory reminds choice-of-law theorists that the individual should have a say in the law that applies to him. Negative liberty from governmental incursion is missing from the top-down approach of the governmental-interest theory, in which the will of the state trumps the largely ignored will of the individual. Brilmayer asserts that what makes her approach different from the vested-rights approach of Beale is that

the rights are primarily negative rights rather than positive rights; not swords but shields. By and large, they are rights to be left alone. Their source is also different from the sources that Beale relied upon. They are founded on principles of political fairness that specify the preconditions for the exercise of legitimate state coercion.<sup>32</sup>

In short, Brilmayer's rights are purely negative rights.

Of course, striking a balance between vested rights and governmental

---

29. The study of legislative intent is not accepted by some governmental interest theorists. See *infra* note 46.

30. Lea Brilmayer, *The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules*, 252 RECUEIL DES COURS 9 (1995).

31. Another attempt to revive the language of vested rights can be found in the language of Perry Dane, whose work attempts to overcome the failings of Beale's theory but preserves the term "vested" by considering an idea of vestedness whereby through a set of forum-neutral criteria, judges will look to substantive criteria that would apply in any jurisdiction. See generally Dane, *supra* note 17.

32. Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1279-80 (1989) (footnote omitted).

interest is easier said than done. Part of the problem stems from the fact that both schools have different understandings of what makes for a legitimate choice-of-law standard. Vested-rights theory is grounded in the sanctity of territory—the location of the event is of prime importance—and that ensures that the forum law is prioritized. Governmental-interest theory grounds itself in substantive policies made by legislatures. The forum law only receives priority insofar as the interest of the state demands it. The judge is forced to make an all-or-nothing choice between these two methods. Such a choice is not only unnecessary but also a somewhat inaccurate description of how judges function.

An alternative model approaches legitimacy based not in choosing sides in the debate between territorialism and governmental interest, or formalism and realism, but instead grounding legitimacy in the proper role of the judge in a democratic society. In this model, the judge will be forced to balance the demand to uphold a liberal relationship between the state and the individual, where the rights of the individual are prioritized in resolving choice-of-law disputes. With a republican approach, the judge is forced to resolve the dispute with reference to the common good of the citizenry, as established by the state through its leadership and legislation. The key is that the judge's legitimate action is based upon an awareness of both the rights of citizens and of the needs of the state as a whole. He will factor both political factors and judicial precedent in applying the law and will not be forced to choose between formalism and realism. Instead, legitimacy will be based upon dialogue between the citizens and the states through arbitration by the judiciary. This approach attempts to synthesize the best of both vested-rights and governmental-interest theory.

Legitimacy will be based on the judge fulfilling two components of American democracy—its liberal and republican sides.<sup>33</sup> Why should judicial legitimacy be based upon both liberal and republican impulses? Some might instead argue that the judge's decision is defensible based simply upon his appointment to the bench—his reasoning need not reflect either liberal or republican values, but instead should have a purely legal basis. If a judge deals purely with domestic law, that would be the case. At that point, the judge could simply apply whatever interpretive lens he deems appropriate for the case. However, at stake in a case of conflicts is a fundamentally political question:

---

33. The desire of American politics to embrace both liberalism and republicanism has been frequently described by political theorists. See Michael J. Sandel, *Liberalism and Republicanism: Friends or Foes? A Reply to Richard Dagger*, 61 REV. OF POL. 209 (1999) (conceptualizing difference between liberalism and republicanism); Richard C. Sinopoli, *Liberalism, Republicanism & the Constitution*, 19 POLITY 331 (1987) (arguing founders' definition of republican virtue meant to incorporate liberal components). The argument that America is a fundamentally liberal polity was most-famously presented in LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955). The argument that America is a fundamentally republican polity is presented in GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787* (1969).

Which state's law should apply, the domestic or the foreign? In order to choose between two political sovereigns, each with its own set of laws and precedents, the judge would do well to have a solid set of reasons that can speak to both the domestic and foreign party.<sup>34</sup>

Basing his decision on a choice between formalism and realism would seem to be too academic a reason to make a choice-of-law determination. However, speaking in the language of liberalism and republicanism, the judge approaches the debate between two states by recognizing the fundamentally federalist issues involved. He will not choose one state over the other merely on the basis of legal theory, but instead will do so aware of the rights of citizens and the demands placed upon states to protect and provide for their citizens. In this role, the judge facilitates communication between proponents of both the liberal and republican impulses—both essential impulses in our political system. This approach welcomes back the language of rights without excluding the language of governmental interest. While democracy is, itself, a political construct, instead of a strictly legal one, the fact that rights are able to be discussed in both a political and legal setting makes the liberal/republican dichotomy appropriate to apply for those figures who enforce these rights—the judges.

## II. LIBERALISM AND “VESTEDNESS,” REPUBLICANISM AND GOVERNMENTAL INTERESTS

The liberal model prioritizes the individual and his desires. Historically, this vision of politics has its roots in the writings of John Locke and the notion that the legitimacy of the state and the law is based upon the consent of the governed.<sup>35</sup> A liberal model approaches politics as an exchange between the state and the individual.<sup>36</sup> In this vision, the state gains the loyalty of the

---

34. The idea that judges have a political role to fulfill was lyrically described by Judge Jack Weinstein in his 2008 Cardozo lecture:

We judges cling to the tiller—respect for the law and our colleagues on the bench, in the bar, and at the academies. We struggle to keep on course in the buffeting narrow sea between the hard rock of unfeeling abstraction and the treacherous whirlpool of unrestrained empathy and compassion. We steer with eyes on Lincoln's shining stars—“of,” “for,” and “by the people.”

Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 244 (2008).

35. JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT (1690).

36. There are many different forms of liberal thought that span the conventional political spectrum. On the left, the theories of John Rawls emphasize the centrality of the individual for deriving an understanding of justice. See JOHN RAWLS, A THEORY OF JUSTICE (1971). On the right, more libertarian theories emphasize the importance of the individual in liberal theory to maintain a sense of political legitimacy. See, e.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974). Many political philosophers have engaged with these and other strains of liberalism and a number of thoughtful surveys of the literature on liberalism exist. See generally WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION (1990); IAN

citizen in exchange for protection and an imposed order. The only way in which the state can fulfill this role is by having the affirmative vote of the citizen—either through his participation in the political process or his mere presence and enjoyment of the privileges that the state provides. One clear definition of liberalism, in its myriad forms, comes from Paul Kahn, who writes,

Liberal theorists believe in the primacy of autonomous individuals who share a capacity for rational deliberation but do not necessarily share a common set of interests. For most liberal theorists, the autonomous individual always has the capacity to redefine the relationship to his or her culture. Of course a liberal state need not support equally every individual's conception of the good, and liberal theorists disagree on the appropriate limits of state recognition and support of these diverse conceptions.<sup>37</sup>

Given this definition, it is not surprising that much of the literature on liberalism tends to focus on the rights of the individual in his relationship with the state. In order to ensure that people do not consent to a regime that will violate their dignity, the limitations on the state's action are thus the terms under which the citizen has consented, subject to whatever inalienable rights the citizen is believed to have. On a philosophical level, these rights have been variously described: rights to life, liberty, property, and "the pursuit of happiness," being among the most well known. The liberal state may thus take a wide sweep in its influence, so long as it does not interfere with the more metaphysical rights inherent in all people. Outside of the boundaries set by rights and consent, the individual has liberty to act.

The liberal model is a model of negative liberty. Isaiah Berlin famously explained the definition of negative liberty by saying, "I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others."<sup>38</sup> The essential freedom granted by a liberal state is a freedom from state interference, even with the acknowledgement that sometimes men must contract with the state in order to ensure their larger freedoms. Most importantly, though, the contract in liberalism may be construed as a relationship between two equals—the individual and the state—both receiving something from the other, and, as such, the goal of entering the liberal state is personal and directed toward the fulfillment of the individual. He remains the contractor and has the right to remove himself from state interference in order to assure his happiness and material well-being. For this

---

SHAPIRO, *THE MORAL FOUNDATIONS OF POLITICS* (2003).

37. PAUL W. KAHN, *PUTTING LIBERALISM IN ITS PLACE* 14 (2005) (footnote omitted).

38. ISAIAH BERLIN, *Two Concepts of Liberty*, in *THE PROPER STUDY OF MANKIND* 191, 194 (1997).

reason, the chosen form of voting in a liberal system is pure democracy—one person, one vote—such that the majority determines the appropriate direction for the state. The state is no more than the sum of its parts, and the citizens' aggregate will determines state actions.

Because of its emphasis on the rights of individuals, the vested-rights theory of Beale and later supporters can be reconceptualized as a liberal theory. The original notion as described by Beale and later successors, such as Perry Dane, focuses on the fact that in determining choice of law, judges should recognize that they do not acknowledge foreign law, but instead merely acknowledge the rights that inhere in citizens based upon their membership in foreign states. That is, they look to the inherent rights of the individual to determine what law should apply. The dominant-vestedness theory argues that the rights that attach to a citizen based upon membership in a state give him a right to certain laws—thus the judge, by the applying foreign law, is merely giving the individual what he deserves.

This vying for a particular law, the right *to* a law as opposed to protection *from* the state, gives the vestedness theories a tinge of positive liberty. However, although the individual rights vest him with the ability to pursue the law of his choice, the emphasis on the rights of the individual leads me to classify vestedness as a liberal theory. Indeed, this makes sense given that while much of vestedness theory offers a positive right to a given law, others have argued that in fact a negative right from forum state intervention attaches under this theory.<sup>39</sup> Brilmayer explains the value of “rights talk” as follows: “Rights impose limits on state authority, protecting individuals from being forced to sacrifice for the good of society as a whole. They reflect a notion of individual desert that stands above the instrumental advantage to be achieved by the application of some particular state’s substantive law.”<sup>40</sup>

The advantage of viewing vestedness as a liberal theory is two-fold. First it helps vestedness escape from some of the complaints levied against it by those who question the metaphysical nature of Beale’s original theory. Rights talk is not foreign in politics, and so it seems odd that it should seem so foreign in law. However, because Beale’s vestedness is grounded in his unilateralist approach to choice of law, it has an air of almost religious conviction. Perry Dane’s work, which emphasizes the dignity of individuals that judges can uphold through their choice of law, moves closer to an understanding that grounds choice of law in the rights of the individual in the face of a powerful state. That contrast between an individual protected from unjust interference with his rights and the judge as arbiter of the law matches the model of liberal politics. Most importantly, when vestedness is understood through a liberal lens, it gains legitimacy. Liberal theory makes vestedness less arbitrary because it grounds

---

39. See generally Brilmayer, *supra* note 30.

40. *Id.* at 1278.

territorialism in a theory that is generally recognized in modern politics. Rights understood in a liberal context seem more familiar than rights grounded in the formalism of the First Restatement.

While the liberal model offers a vision of negative liberty, the republican model embraces a vision of positive liberty. Republicanism, in a theoretical sense, does not make the well-being of the individual the highest goal of politics. While some republicans, like Jean-Jacques Rousseau, have argued that the individual does indeed contract with the state, the relationship is not based on the one-to-one exchange found in liberal theory.<sup>41</sup> Indeed, the liberal contracts with the state in order to ensure happiness that *can* be his on the basis of his natural gifts or material possessions. The state merely provides an orderly way for him to pursue his interest without the interference of other self-interested individuals. Republicanism, on the other hand, asserts that the individual is unable to achieve his highest form of freedom alone. Instead, the republican gives himself over to a state that is necessary for his happiness and well-being. He is most truly free when he has given up some of his natural rights to the state, in exchange for which the state can provide its citizens with a more perfect freedom.

Such an idea has its most prominent defender in Rousseau, who describes the idea of a general will in his *On the Social Contract*.<sup>42</sup> According to Rousseau, men enter into society in order to protect themselves from the inevitable warring that follows the discovery of wealth. The state and its institutions, drafted by a somewhat elusive figure known as the legislator, provide a realm in which man can free himself from concerns over material warfare and pursue higher callings, such as the arts. All the state asks is that the people submit to the general will of a state that will provide them with both protection and the means toward attaining individual fulfillment. The general will is a complex term whose exact content remains unclear. Rousseau is clear, though, that the general will is not akin to the majority will in a democracy. Where the liberal finds the will of the state in the sum of all votes, Rousseau's general will constitutes a higher set of commands that does not rely on the counting of individual preferences in society. He writes:

There is often a great deal of difference between the will of all and the general will. The latter considers only the general interest, whereas the former considers private interest and is merely the sum of private wills. But remove from these same wills the pluses and minuses that cancel each other out, and

---

41. Rousseau's republican theory is most famously elaborated in *ON THE SOCIAL CONTRACT* (1762).

42. Republican theory, like liberal theory, has many different forms and adherents. See generally PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (2000); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (2003); MICHAEL SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1998).

what remains as the sum of the differences is the general will.<sup>43</sup>

The idea behind the general will is that it provides something more than the aggregate of individual wills can achieve—the whole is greater than the sum of its parts.

Of course, for Rousseau, the people need some motivation to discover the general will and to join themselves under its power. For this reason, the power of the legislator in Rousseau is tremendous.<sup>44</sup> He provides the law for the state—in a tradition including figures like Solon in Athens. After establishing the institutions that will reveal and further the general will, he fades into the distance, perhaps a bit too knowledgeable about the founding to remain. The republican system involves an inherent amount of trust on the part of the citizens, who enter the system believing that the general will can provide for them in ways that their individual will (or a liberal will) cannot. It involves submission to the legislator and, more frankly, to a state that is far more paternalistic than the liberal state described above.

Scholars have debated how the general will reveals itself in politics. As more than merely a majority vote, the general will embodies structural, functional, and perhaps cultural elements of society. It cannot be overturned and has a timeless quality to it—timeless within the context of the already founded society. Indeed, it is for this reason that the legislator is unable to remain after the founding. He remembers a time before the general will was accepted and was instrumental in its establishment. His presence is a reminder of the very temporal quality of the general will, as well as the fact that the general will may not be as eternal as the people need to believe it to be. The general will is both coercive and liberating. It is coercive insofar as citizens must obey it, regardless of the desires of the majority. However, because citizens cannot fully escape from the chaos of the state of nature, the general will is also the source of their truest freedom.<sup>45</sup>

---

43. JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* (1762), reprinted in *THE BASIC POLITICAL WRITINGS* 141, 155-56 (Donald A. Cress ed. & trans., Hackett 1987).

44. *Id.* at 162.

45. The possibility of this truest freedom being coercive has led to a general concern about the tyrannical nature of the general will. Isaiah Berlin explained that positive freedom grows out of the sense that an individual, in pursuing a higher end, pursues freedom for a higher “self” rather than his lower “self.” As such

[t]his renders it easy for me to conceive of myself as coercing others for their own sake, in their, not my, interest. I am then claiming that I know what they truly need better than they know it themselves. What, at most, this entails is that they would not resist me if they were rational and as wise as I and understood their interests as I do. But I may go on to claim a good deal more than this. I may declare that they are actually aiming at what in their benighted state they consciously resist, because there exists within them an occult entity—their latent rational will, or their “true” purpose—and that this entity, although it is belied by all that they overtly feel and do and say, is their “real” self, of which the poor empirical self in space and time may know nothing or little; and that this inner spirit is the only self that deserves to have its wishes taken into account.

The state-interest doctrine in choice-of-law theory is better understood as republican. The followers of Brainerd Currie ask judges to apply the law of the state that would be most affected by the choice-of-law decision. Instead of turning to the location of the last act, or another standard of territoriality, they turn to the will of the state, expressed through an unclear combination of legislative history, close analysis of statutes, and perhaps a bit of guesswork.<sup>46</sup> In so doing, the judge does not concern himself with the actions of the parties, but instead with the actions of the state leaders. That is, the individuals are less important than their elected representatives. In this role, the judge responds not to the actions of individuals, but to the lawmakers in whom the parties have placed their trust—trust that their state will protect their citizens through its laws.

One criticism of this approach would be that governmental interest may not be aligned with the republican ideal of a common good. Is it an overstatement to say that governmental interest, as understood by its adherents, evokes a sense of the general will? The literature defining policy is not completely clear on what governmental interest entails. According to Currie, governmental interest is “the product of (a) governmental policy and (b) the concurrent existence of an appropriate relationship between the state having the policy and the transaction, the parties, or the litigation.”<sup>47</sup> The problem with this definition is that it merely asserts that judges need to examine those policies that relate to pending litigation. The definition requires more to be at all useful.

As will be discussed later in this article, the original definition of governmental interest is sufficiently vague to demand clarification. Governmental interest is pursued, in part, because judges are often forced to read between the lines of legislation to determine what policy goal should be upheld while adjudicating a conflict. Because of this, governmental-interest can, in the judge’s mind, be read as representing a common will that grows out of statutory law. Herma Hill Kay, who supports the governmental interest theory, in fact notes in an analysis of Currie that “[t]o understand what Currie meant the court to do, we must refer once again to his instrumental view of the nature of law. Currie saw the state as a governmental unit charged with the responsibility of providing for the welfare of its inhabitants.”<sup>48</sup> Even though state interest theorists avoid an exact definition of how to measure state interest, only offering the boundaries wherein such an interest can be found,

---

Berlin, *supra* note 38, at 204-05.

46. Among state interest theorists, the use of legislative history in determining state interests remains a source of contention. See Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980) (using question of legislative intent to criticize Currie’s approach); Kay, *supra* note 27, at 53 (arguing legislative intent not part of state interest analysis).

47. BRAINERD CURRIE, *The Verdict of Quiescent Years*, 28 U. CHI. L. REV. 258 (1961), reprinted in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 584, 621 (1963).

48. Kay, *supra* note 27, at 54.

this statement reveals that, in order for governmental interest to be a coherent and useful theory, the state itself must aim at some larger goal for its citizenry. The definition of this welfare will vary, and thus the content of the common good that drives the republican understanding of the governmental interest will vary. However, without a sense that the state aspires to some positive goal for its citizens, governmental interest theory would be incoherent.

As in the liberal model, one of the advantages of approaching governmental interest as a republican model is that it again moves away from the stark dichotomy between a rule-based formalism in choice of law and a more chaotic realist approach based purely on politics. In a republican model, the judge is obligated to view himself as a part of the institution of the state, and thus he is responsible for examining the laws of the states in question. When the judge examines his state's interests, he must consider politics as well as the more abstract needs of the state. However, this does not preclude the judge from seeking larger rules by which to determine what should drive his decisions. If the liberal model allows judges to concern themselves with the rights of citizens that are borne out of membership in a given state, a republican model allows judges to focus on the rights of the community as a whole in deciding which laws to apply.

Why not simply drop the language of liberalism and republicanism and focus instead on the language of positive and negative rights? After all, by using the language of rights, judges may still be able to develop a similar set of factors, based upon individuals' rights to be free of coercion by foreign law and the rights of states to impose their vision of the general will. The problem with a pure rights approach is that it does nothing to solve the legitimacy problem in the First and Second Restatements, respectively. This presentation of liberal and republican models, while perhaps oversimplifying some of the nuances of both theories, reminds the judge and the choice-of-law theorist that decisions are not being made in a vacuum, but instead within a political system where the sovereignty of states, not merely individual contracts and conflicts, are at stake.

### III. BALANCING ACTS AND MARRIED WOMEN

The central value of a liberal/republican approach is that it creates a theory of legitimacy for choice-of-law theory that is not based upon whether a judge is a formalist or a realist. Instead, it acknowledges that judges do not necessarily spend their time having the sort of academic debates found in the halls of law schools, but rather they act with regard to the inherent rights of the individual and the rights of the community as a whole. When approaching these matters from a liberal perspective, the judge prioritizes the rights of the individual, particularly his right to be protected from state encroachment. On the other hand, judges may choose to apply a republican approach that prioritizes a common good, invoking the necessity of the state's vision as well as the

judge's own role as a servant of the state itself. The republican model does not avoid the inherent difficulty of determining governmental interest, but acknowledges the need to pursue a general good over the particular good of an individual.

Given the current state of theory in choice of law, both the First Restatement and the Second Restatement, when used in isolation, seem to have a legitimacy deficit. The role of judges cannot be classified as either formalistic or realistic as the two Restatements demand. Indeed, the sources of law, as Judge Cardozo once noted, are not always obvious: "Where does the judge find the law which he embodies in his judgment?"<sup>49</sup> He continues:

There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained, his duty is to obey. The constitution overrides a statute, but a statute, if consistent with the constitution overrides the law of judges. In this sense, judge-made law is secondary and subordinate to the law that is made by legislators. It is true that the codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared.<sup>50</sup>

Conflicts of law are a prime example of when codes and constitutions may not be able to wholly assist the judge, given different jurisdictions and their differing priorities. Placed in that situation, the judge logically would seek a decision that is not merely defensible, but is in fact legitimate. Establishing legitimacy simply on the basis of a legal theory, as is done in the two Restatements, is problematic. However, by grounding that choice not merely in legal theory, but in the political theories of liberalism and republicanism, the judge has a better chance to make a legitimate choice.

A judge can legitimize his choice-of-law decision by trying to balance the liberal and republican approaches. On the liberal side, he will attempt to ensure that the decision allows individual rights to be preserved through judicial decision. In a choice between imposing foreign law on a citizen and preserving the citizen's right to be protected from a law to which the citizen has not pledged allegiance, the liberal decision will respect the citizen's negative right to avoid imposition by foreign law. On the republican side of the scale, the judge will focus his attentions not on protecting the rights of the individual against the state, but on the rights of the state to impose its law. In so doing, the judge looks toward the common good, as expressed through the state's interest. This balancing act respects the rights-based language of the First Restatement, while also respecting the state interest language of the Second

---

49. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 14 (1921).

50. *Id.*

Restatement.

To show how this balancing test works, it is useful to apply it to a classic case in conflicts-of-laws literature. In a well-known 1958 article in the *University of Chicago Law Review*, Brainerd Currie helped explain the importance of governmental-interest analysis by looking at the example of contracts made by married women in Massachusetts.<sup>51</sup> Currie used the case, which had already been introduced by earlier scholars,<sup>52</sup> to explain why turning to state interest was more valuable than merely looking at territoriality. Since the publication of his article, scholars have questioned the value of Currie's analysis.<sup>53</sup> While the liberal/republican balancing act may not completely solve the problems with Currie's analysis, it sheds light on a new approach to the field.

The married women's contract case is based upon the Massachusetts case of *Milliken v. Pratt*.<sup>54</sup> In that case, Mrs. Pratt, a resident of Massachusetts, guaranteed a contract between her husband and a partnership in Maine. In reliance on the contract, the partnership delivered goods to Mr. Pratt. When Mr. Pratt defaulted on his contract, the partnership sued in Massachusetts. According to the problem as described and modified by Currie, while Maine allowed married women to enter into contracts, Massachusetts did not allow married women to enter into contracts as if they were unmarried women.<sup>55</sup>

In Currie's hypothetical, he explains that a Massachusetts court, in determining whether to apply the Maine contracts law or its own, needs to determine which state has a stronger interest in the contract. Both Maine and Massachusetts, he claimed, have an interest in the sanctity of transactions.<sup>56</sup> However, Massachusetts, by upholding the ancient common-law rule forbidding married women from entering contracts as if they were unmarried, has expressed another set of concerns. "More specifically," he wrote, "it has subordinated the interests of creditors to the interests of this particular, favored class of debtors. It has felt the influence of pressure groups—banking and commercial interests, feminists, liberals, traditionalists, conservatives" and decided that women (and their husbands) should be protected from false contracting over the demands of creditors.<sup>57</sup> The court could choose to honor Maine's interest, but because Maine does not *seem* to have a special interest other than the preservation of the creditors' rights, the state with a special

---

51. CURRIE, *supra* note 23.

52. See David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924).

53. See LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 54-62 (1991).

54. 125 Mass. 374 (1878).

55. In the original case, Massachusetts changed its laws to allow married women to enter contracts between the time of breach and the court's decision. Currie changed this fact in his hypothetical in order to create a true conflict between the laws of Maine and Massachusetts. See CURRIE, *supra* note 23, at 80.

56. *Id.* at 85.

57. *Id.*

interest, Massachusetts, might have its will honored instead. After a detailed analysis of how judges may view foreign law and domestic law, the most important observation for Currie is that “nothing that we have said provides any basis for a suggestion that the place where the contract is made has anything whatever to do with the policy of the Massachusetts legislature.”<sup>58</sup> Governmental interest, not territory, matters.

One central criticism levied against Currie’s analysis stems from the matter-of-fact nature of his claims about governmental interest. Referring again to the discussion of how legislators of Massachusetts decided to make illegal married women’s contracts, Currie asks which married women should be protected from becoming bound to contracts: “*What* married women? Why, those with whose welfare Massachusetts is concerned, of course—*i.e.*, Massachusetts married women.”<sup>59</sup>

Brilmayer’s critique of Currie somewhat wryly turns this question around in order to show that it is not clear that the law of Massachusetts may not in fact be about protecting married women as citizens of the state, but instead may be concerned merely with invalidating particular types of transactions. She writes:

It is surely not a difficult matter to formulate the legislative policy in this case. Massachusetts, in common with all other states and many foreign countries, believes in freedom of contract, in the security of commercial transactions, in vindicating the reasonable expectations of promisees. It also believes, however, that certain sorts of contracts are likely to be a product of fraud or duress . . . [and as such] the legislature decides in favor of invalidating such transactions.

*Which* transactions? Why, those which Massachusetts has an interest in, of course—*i.e.*, Massachusetts transactions.<sup>60</sup>

Brilmayer’s point is to show the arbitrary nature of Currie’s reasoning. Indeed, Currie does not go far enough in explaining the source of governmental interest or the methodology that judges should use in deciding *what* the interest is, even though Currie explains that the states *with* an interest should have their law applied in the Massachusetts case.

The liberal/republican approach avoids this problem by encouraging judges to think more broadly than Currie’s analysis demands. Ideally, judges should not merely ask what governmental interest was at stake in the Massachusetts contract law. The balancing test, while not solving the conflict, at least offers a broader scope of analysis to judges and encourages them to carefully consider what rights—whether individual or state—are of primary importance in a given

---

58. *Id.* at 86.

59. CURRIE, *supra* note 23, at 85.

60. BRILMAYER, *supra* note 53, at 56.

conflict.

A Massachusetts judge looking at this issue from a liberal angle will have to acknowledge the different negative rights of the parties. Using the logic of the late 1870s, the judge will see a contract that was inappropriately made by a woman—a contract that unduly bound her husband to work with the Maine partnership. The right of the husband not to be bound by his wife's unlawful contracting would need to be protected. To protect a Massachusetts citizen from a contract that was legal in the foreign state but not domestically, the judge would find in favor of the husband and wife's choice to default on the contract. However, the party from Maine has its own right to be free of the married women's contract law in Massachusetts that has made the legal contract invalid. The liberal approach thus acknowledges the rights of both parties—one to be free from a foreign law that would negate the contract, and one to be free from the *expectations* of the foreign state that would expect the contract to hold.

The republican approach to the issue offers another set of issues. One approach would be to follow Currie's assumption and claim that the general will of the state of Massachusetts is to invalidate contracts made by married women. By enforcing such a contract, the judge might think, any number of ills could befall the state, from allowing women more rights to allowing women to make contracts without the permission of their husbands. A nineteenth-century jurist could easily find such possibilities distasteful. However, the more interesting republican analysis might be that it is in the best interest of the state to acknowledge contracts made with those in other states, even if the contract formation was, itself, inappropriate under local law. After all, if Massachusetts develops a reputation for allowing contracts to be broken, it may be difficult to engage in cross-border contracting in other circumstances.

The result of this analysis is that there are four possible factors that a judge can consider in deciding who will win the case. He can protect the rights of the Maine citizen to be free from Massachusetts law, or the right of a Massachusetts citizen to be free from the assumptions made by Maine in its willingness to acknowledge a married woman's contract.<sup>61</sup> He can further Massachusetts's goal of protecting its citizens from the contracting of women, or he can further the state's goal of being able to form valid contracts with states over a long period of time. The priority that the judge will give to these factors may vary over time and from judge to judge. However, three things should be clear.

---

61. One criticism that may immediately arise to this approach is whether it is somehow undemocratic for a judge in one state to interpret or attempt to declare the general will of the foreign state. After all, while it is not particularly difficult for a judge to interpret the law of his own state, interpreting foreign law is more problematic. While such interpretation may seem dangerously undemocratic, the possible need for a judge to interpret foreign law is endemic to a system that attempts to solve conflicts by turning not merely to the location of the injury, but to foreign law.

First, the liberal/republican analysis does not sacrifice concern for the location of the contracting or the citizenship of the parties in the name of pursuing governmental-interest theory. Instead, it creates the possibility of embracing both territory and policy as important factors in a judge's decisionmaking. Second, the analysis requires consideration of a larger range of factors. By framing the interest of the state in terms of positive liberty and the common good, instead of mere government interest, the judge presses himself to reveal many possible reasons for a given law. Finally, and perhaps more importantly, the analysis acknowledges the myriad issues that a judge, in order to fulfill his duties, must consider.

Legislators, after all, as Currie himself argued, leave an automatic lacuna in their legislation. According to Currie, "The important reason why lawgivers speak in such extravagantly general terms is that they ordinarily give no thought to the phenomena that would suggest the need for qualification."<sup>62</sup> Members of the legislature do not put their intention in a given bill, and certainly do not frequently consider the possibility that their law will come into conflict with another state's laws. The judge, then, is put in an awkward position as a civil servant. He must interpret the law, but sometimes needs to fill in the blanks through his own analysis.<sup>63</sup> The liberal/republican approach allows him to do so with as full a slate of factors to consider as possible. It will then remain for the judge to determine, on a case-by-case basis, whether to side with his liberal or republican impulses, and with that choice, which of the liberal or republican visions to uphold through his interpretation of the facts of the case.

The broader range of factors examined will help ensure that the judge can make his choice-of-law decision in a legitimate way, without having to choose between legal formalism or legal realism by subscribing to either the First or Second Restatements in beginning to approach the conflict. How the judge makes his ultimate decision, though, will reflect the way in which the judge makes his decisions, not just in the field of conflicts, but in other fields of law as well.<sup>64</sup> The question of conflicts becomes a broader question of jurisprudence under this approach. A larger debate on how judges function, as opposed to the ancient debate between the first two Restatements, may then become an appropriate next question as the field of conflicts advances.

Ultimately, the value of this approach is not to replace governmental-interest

---

62. CURRIE, *supra* note 23, at 82.

63. The question of how judges should regard their role of interpreters is obviously a loaded question, and not one wholly germane to this Article, but one that has been debated throughout the legal literature. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1998) (urging limited role for judges as interpreter).

64. The literature on the role of judges has remained an important one. See generally, Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (examining the "social tasks" that should be given to judges to complete); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (explaining dual role of judges as adjudicators and remedy providers in modern world).

2011] *APPROACHING THE LEGITIMACY QUESTION IN CHOICE-OF-LAW THEORY* 89

theory, or even to fully revive the territorialism of the First Restatement. Rather, at a time when the conflicts revolution seems to have stagnated, a new approach may raise questions that should be examined by theorists in the field. Applying the liberal/republican approach to conflicts decisions, as shown above, allows theorists to consider the effect of choice-of-law decisions on both the individual and the state as a whole. It promotes a closer analysis of the content of governmental interest as judges consider many more possible ways of defining the positive goals that the state attempts to further. In so doing, it also can promote reflection on the role of the judiciary in a field of law that has the potential to empower judges more than fields where statutes and precedent already have plenary control over decisionmaking. By welcoming the language of rights, both positive and negative, into choice-of-law theory, the ideas awakened by the first conflicts revolution of the Second Restatement may give way to a new set of questions and, perhaps, another conflicts revolution.