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AMERICAN CONFLICTS LAW IN ITS HISTORICAL PERSPECTIVE

SHOULD THE RESTATEMENT BE "CONTINUED"? *

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"Transition," "crisis," or search for compromise—few will deny the existence of a rift in the theory and practice of American conflicts law. When some insist on "logical" solutions while others acquiesce in "justice" from case to case, when some reject as obsolete whole bodies of doctrine while others warn of innovation, we must be on our guard. Yet as early as twenty years ago, the American Law Institute tried by majority vote and fiat to cut through doubt and search by the publication of a "Restatement" in which dogmatic generalizations tended to by-pass the complexities of a growing law.

The number of references to this text in court decisions are an unreliable test of its soundness. Fair judgment would above all require a count of those decisions actually affected by the Restatement; for, in what at first glance appears to be the vast majority of the pertinent cases, reliance on the Restatement relates to situations in which the contact stressed in the "rule" invoked, such as the place of "contracting" (§ 332) or the place of the "last event" (§ 377), coincides with most or all other contacts. Moreover, it would be necessary to ascertain in how many of the remaining cases the court was either misguided by an all-too-broad proposition of the Restaters or compelled to escape such a proposition by resorting to "public policy" (§ 612), "procedure"

* See AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW CONTINUED 33 (Tentative Draft No. 1, 1953); *id.* at 37 (Tentative Draft No. 2, 1954).

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(§ 585), or such almost exclusionary "exceptions" as the place of performance provision (§ 358) in contracts law.

Responding to much criticism based on unfavorable answers to these questions in certain fields, the American Law Institute is now engaged in a wholesale revision of its venture. Whether cure and progress may be expected from a mere "continuation," or whether new techniques have to be devised can, I believe, best be judged from the distance and with the detachment of historical analysis. An introduction to such an analysis is attempted in this Article.¹

For this purpose the history of conflicts law can perhaps best be understood as a struggle between two tendencies, both of which continue to compete in the Restatement: one we may call unitarian, seeking to resolve or avoid conflict by the assumption of a superior legal order; the other we may call pluralistic, seeking to achieve this result by insisting on the exclusivity of each nation's (or state's) own law. The early interplay of these tendencies can be followed in Professor Yntema's masterful sketch on the "Historic Bases of Private International Law"²—from a prenatal stage in the Empires of Rome and England, in which denial of conflict was supported by the political reality of "one world" and mercantile internationalism in law and trade—through early pluralistic inroads into unitarian thinking, variously expressed by the later "statutists" and partly neutralized by canonist and other natural law teaching—to the vigorous nationalism of the newly born sovereignties with their stress on mere "comity" in international relations. What remains to be done in order to see the problem of American conflicts law as created by Story and restated by Beale in its historical setting, is to analyze the doctrinal sources and results of their compromise from the near-denial of conflicts law under the pluralistic Dutch doctrine of comity, through the super-law concept

1. On the history of American conflict of laws, see 3 BEALE, *CONFLICT OF LAWS* 1879 (1935); CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953); YNTEMA, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297 (1953); Rheinstein, *Das Kollisionsrecht im System des Verfassungsrechts der Vereinigten Staaten von Amerika*, 1 Festschrift für ERNST RABEL 539 (1954). For European literature see particularly GUTZWILLER, *Le Développement Historique du Droit Intern. Privé*, 29 REC. AC. DR. INT. 291 (France 1929); LAINÉ, *INTRODUCTION AU DROIT INTERNATIONAL PRIVÉ* (2 vol. 1888); NEUMEYER, *DIE GEMEINRECHTLICHE ENTWICKELUNG DES INTERNATIONALEN PRIVAT- UND STRAFRECHTS BIS BARTOLUS* (1916); SACK, *Conflicts of Laws in the History of English Law*, 3 LAW: A CENTURY OF PROGRESS, 1835-1935, 344 (N.Y. University 1937); GIHL, *DEN INTERNATIONELLA PRIVATRÄTTENS HISTORIA OCH ALLMÄNNA PRINCIPER* (1951); Socini, *Considerazioni sul Concetto Norte-Americano del Diritto Internazionale Privato*, 29 ANN. DI DIR. COMP. E DI STUDI LEGISL. 99 (1953). Cf. BATIFFOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT INTERNATIONAL PRIVÉ* 7 *et seq.* (1949); 1 PILLET, *TRAITÉ PRATIQUE DE DROIT INTERNATIONAL PRIVÉ* 22 *et seq.* (1923). For South America see, e.g., 1 ROMERO DEL PRADO, *MANUAL DE DERECHO INTERNACIONAL PRIVADO* 395 (1944).

2. Yntema, *supra* note 1.

of international jurisdiction, to the opinions of Justice Holmes and the hybrid Restatement of Conflict of Laws; and again from Judge Learned Hand's transitional "localism," through the new beginnings of Stone, Cook and Lorenzen, to the problems of our time.

FAILURE OF A COMPROMISE: "NO LAW" AND "SUPER-LAW"

No Law: "Comity of Nations"

American conflicts law begins with Joseph Story. When this great scholar and judge wrote his commentaries,³ American courts had not yet fully recognized the need for, and the existence of, such a law. International conflicts problems were largely held governed by international law,⁴ and interstate conflicts were minimized by the continued recognition of a general commercial law as well as by the existence of what then was an at least nearly uniform common law.⁵ It was with regard to the comparatively isolated legislative encroachments upon this law and certain topics of personal law exposed to particularistic tendencies⁶ that the choice of law first became a problem in this country. Marriage prohibitions, usury laws and insolvency statutes were among the earliest examples, and the code law of Louisiana produced the first American treatise on the conflict of laws.⁷

Neither Roman nor English law offered much assistance in the solution of these new problems, both sharing the imperial privilege to deny or avoid "conflicts" of law. Ancient Rome had achieved this by having the foreigner, incapable of having a law of his own,⁸ at first

3. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1st ed. 1834). See Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15 (1934); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945); Nadelmann, *Joseph Story's Sketch of American Law*, 3 AM. J. COMP. L. 3 (1954); Valladão, *The Influence of Joseph Story on Latin-American Rules of Conflict of Laws*, *id.* at 27.

4. Miller v. Hall, 1 Dall. 229, 232-33 (Pa. 1788) ("... mutual convenience, policy, the consent of nations, and the general principles of justice form a code which pervades all nations and must be everywhere acknowledged and pursued.") Cf. 1 CROSSKEY, *op. cit. supra* note 1 at 549.

5. Cf. Steinmetz v. Currie, 1 Dall. 270, 272 (Pa. 1788), relying on "general mercantile law" rather than the "local regulations of Pennsylvania," as if the case "had been determined in France, Spain or Holland, as well as in England." See also Miller v. Hall, 1 Dall. 229 (Pa. 1788); 1 SWIFT, A SYSTEM OF LAWS OF THE STATE OF CONNECTICUT 41 (1795). Concerning the uniform common law of the time, see 1 HOFFMAN, COURSE OF LEGAL STUDY 415 (2d ed. 1836); Story, *American Law*, 3 AM. J. COMP. L. 9, 11, 24 (1954).

6. "Marriage, divorce, wills, and succession" are enumerated as the most important topics on the title page of STORY, COMMENTARIES, *op. cit. supra* note 3.

7. LIVERMORE, DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS (New Orleans, 1828).

8. In ancient civilizations aliens seem to have been treated as lawless. See BATTEFOL, *op. cit. supra* note 1, at 7 *et seq.*

apply and later create Roman law;⁹ medieval Roman doctrine, though allocating legislative power to the several units of the declining empire,¹⁰ had continued to think in terms of the all-embracing sovereignties of Pope¹¹ and Emperor. English law, while partly following Roman doctrine,¹² had reached a similar result by the exclusion of foreign contacts: the jury was not to pass upon foreign facts,¹³ and the deed made¹⁴ or tort committed¹⁵ abroad could not be sued on in England. Although in the course of time mercantile needs had broken down these barriers and forced upon English courts jurisdiction over foreign facts,¹⁶ these courts had continued to forestall conflict by insisting on the application of English law.¹⁷ If resort to both Roman and common law sources thus failed American courts, they sought and found guidance in other legal systems.

Some of the American colonies had strong ethnical and cultural ties with the Netherlands. With regard to the treatment of international problems, these ties may have proved particularly effective in the early history of the United States which, like the Netherlands, had gained its independence from an empire; and British law itself had had early contact with Dutch legal scholarship. Whatever may have been the reason, this scholarship, primarily the writings of Ulric Huber and Johannes Voet with their rejection of the imperial heritage of a law "governing" by virtue of its own claim to authority¹⁸ and their stress

9. See, e.g., Meili, *Über das Historische Deblüt der Doktrin des Internationalen Privat- und Strafrechts*, 9 Z. INT. STR. PR. 1 (Germany 1899); Rabel, Book Review, 22 Z. INT. R. 331 (Germany 1912).

10. On the theory of the "statutists," see in general Yntema, *supra* note 1, at 303.

11. On the conflicts law of the canonists, see NEUMEYER, *op. cit. supra* note 1, at 113; Van Hove, *La territorialité et la personnalité des lois en droit canonique depuis Gratien (vers 1140) jusqu'à Jean Anderae (†1348)*, 3 TIJDSCHRIFT VOOR RECHTSGESCH. 277 (Netherlands 1922).

12. Cf. HENRY, *THE JUDGMENT OF THE COURT OF DEMERARA, ETC.* (1823); BURGE, *COMMENTARIES ON COLONIAL AND FOREIGN LAW* (1838).

13. See in general Sack, *supra* note 1, at 346.

14. Anonymous, *Yearbooks*, 2 Edw. II (1308), 17 Selden Soc'y 110.

15. *Pape v. The Merchants of Florence in London*, 9 Edw. I (Coram Rege Roll 64, 1281), 46 Selden Soc'y 34. See, in general, Sack, *supra* note 1, at 342; Rheinstein, *supra* note 1, at 583.

16. For an example illustrating the use of fictions for this purpose, see Anonymous, cited in *Ward's Case*, Latch 3, 82 Eng. Rep. 245 (K.B. 1625), where it was held that, while there would be no jurisdiction in a case involving an obligation created in Athlone, Ireland, the obligation could be sued on "entant Athlone poet estre alleedge destre diens Anglitterre" (if Athlone were alleged to be in England). In general see Rheinstein, *supra* note 1, at 584.

17. Cf. *Tucker v. Capps & Jones*, 2 Rolle 497, 81 Eng. Rep. 940 (K.B. 1624). In a suit on a contract made and to be performed in Virginia, Doderidge, J. would, in contrast to Whitlock, J. (who had affirmed admiralty jurisdiction because the "civil ley" was applicable), apparently, at the plaintiff's choice, have permitted application of the common law in a common law court.

18. On this "statutist" theory, see, e.g., Yntema, *supra* note 1, at 303.

upon mere comity as the basis of applying foreign law,¹⁹ was to gain great influence on the development of American conflicts law. Following earlier cases approving this approach,²⁰ Story relied primarily upon Huber's authority for which he found "undisputed preference on this subject over other continental jurists, as well in England as in America." Citing Huber, he states that "whatever force and obligation the laws of one country have in another, depends solely upon the laws, and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express and tacit consent."²¹ Rejecting Continental attempts at establishing principles entitled to general recognition, Story approved²² the statement in *Saul v. His Creditors*²³ that this problem "touched the comity of nations, and that, that comity is, and ever must be uncertain."

But this practice, while workable and proper enough in international relations, would soon have proved inadequate within the American Union. Louisiana courts, obligated to apply a legal system essentially different from that of other states, were in particular need of "certain principles."²⁴ It is understandable, therefore, that the Louisiana lawyer Livermore had declared the "modern" doctrine of courtesy "inconsistent with the very nature of a court of justice."²⁵ Although "comity" language nevertheless has remained with us until

19. See Lorenzen, *Huber's De Conflictu Legum*, in *SELECTED ARTICLES ON THE CONFLICT OF LAWS* 136 (1947); Davies, *The Influence of Huber's "De Conflictu Legum" on English Private International Law*, 18 *BRIT. Y.B. INT'L L.* 49 (Gr. Brit. 1937); Kuhn, *Doctrines of Private International Law in England and America Contrasted with those of Continental Europe*, 12 *COL. L. REV.* 44, 46 (1912). On Dutch influence, see, e.g., Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 *COL. L. REV.* 416, 428 (1931); VAN LAER, *MINUTES OF THE COURT OF ALBANY, RENSELAERSWYCK AND SCHENECTADY 1668-1673* (1926); MORRIS, *SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784*, pp. 42, 58 (1935).

20. Cf. the comprehensive quotation from Huber in *Emory v. Grenough*, 3 *Dall.* 368, 369-77n. (U.S. 1797). But cf. JAMES SULLIVAN, *THE HISTORY OF LAND TITLES IN MASSACHUSETTS* 352 *et seq.* (1801), objecting to the authority of Huber, "often resorted to in our courts," in matters of commercial contracts properly subject to federal regulation. On Huber's influence upon Lord Mansfield, see Rheinsteint, *supra* note 1, at 585.

21. STORY, *op. cit. supra* note 3, at 32, 34. See also Aumann, *The Influence of English and Civil Law Principles upon the American Legal System During the Critical Post-Revolutionary Period*, 12 *U. OF CIN. L. REV.* 289 (1938); Pound, *The Place of Judge Story in the Making of American Law*, 48 *AM. L. REV.* 676, 685, 687, 693, 694 (1914). Story's predominant reliance upon Continental sources has in part been explained by the availability to him of Livermore's collection of medieval treatises. Valladao, *supra* note 3, at 30.

22. STORY, *op. cit. supra* note 3, at 29.

23. *Saul v. His Creditors*, 5 *MART. (N.S.)* 569, 596 (La. 1827).

24. LIVERMORE, *op. cit. supra* note 7, at 15. Concerning the influence of Louisiana law on Story, see Valladao, *supra* note 3, at 30.

25. LIVERMORE, *op. cit. supra* note 7, at 171, 172.

the present day,²⁶ it was soon combined with theories better adapted to the needs of a country in which not only growing intercourse between member states demanded interstate law, but where the relations between states soon became less significant than relations between individuals whose very citizenship in the several states steadily lost meaning. Jurisdiction became the first vehicle of a new super-law of conflicts.

Super-Law

Judicial Jurisdiction

It has never been doubted that judgments recovered in the courts of one state are entitled to recognition in sister states, although the courts may at first have failed to utilize the Full Faith and Credit Clause for this purpose.²⁷ But where compulsion rather than comity was to apply, some test had to be provided for the applicability of this compulsion. This test was based on the concept of the foreign court's "jurisdiction,"—a concept which was thus started on its victorious career both in interstate and international relations.

This extension of the concept of jurisdiction beyond its application to the forum's domestic authority—an application well-known to the Roman and Canon law of the Middle Ages²⁸—would not have caused difficulties more serious than those of terminology had it remained confined to interstate conflicts under the constitutional doctrine of full faith and credit or due process. But to this day the jurisdictional approach has been applied in both interstate and international conflicts law,²⁹ and has thus necessarily had to be predicated upon a supernational standard which, since the eclipse of the law of nations in both fields, has lacked a positive legal foundation. Historical analysis confirms

26. For an excellent analysis of the comity theory in American law, see Cheatham, *supra* note 3, at 374. Regarding the current uses of the term, cf. NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 17 (1943). "The misleading word 'comity' has been responsible for much of the trouble." Cardozo, J., in *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 201 (1918).

27. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 *COL. L. REV.* 1, 7 (1945).

28. Cf. ALBERICI DE ROSATE, *Dictionarium Juris tam Civilis, quam Canonici* (1623) defining in reliance on Azo's Summa "jurisdiction" as the power to adjudicate. For an early use of the term in a conflicts setting, see the statute of Vercelli (1225) invalidating instruments prepared by notaries "de aliena jurisdictione." 2 NEUMEYER, *op. cit. supra* note 1, at 46. In classic Rome, "territorial" jurisdiction was said to be based on the magistrate's right to frighten ("terrere") those within his territory. WENGER, *INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE* 39 n.32 (trans. Fisk 1940).

29. See, e.g., *Boivin v. Talcott*, 102 F. Supp. 979 (N.D. Ohio 1951), where the Ohio court, denying recognition to a Quebec judgment against a nonresident motorist, found lack of "jurisdiction" in the rendering state in non-compliance with "due process."

this observation and, also, establishes the fact that this super-law of jurisdiction, far from being logically indispensable as the Restaters would lead us to believe, owes its present prevalence in the conflict of laws to one man—Joseph Story, the judge and scholar.

According to Story it is a "lawful"³⁰ or "legitimate"³¹ jurisdiction, "rightfully exercised,"³² which entitles the judgment of a foreign court to recognition in this country. This concept of jurisdiction Story apparently identifies with what he also refers to as "jurisdiction *inter gentes*, upon principles of public [international] law."³³ Thus, for laying down the "true doctrine,"³⁴ he relies on Vattel who, in connection with his discussion of the "rights of jurisdiction," remarks that "to undertake to examine the justice of a definitive [foreign] sentence is an attack on the jurisdiction of him [the sovereign] who has passed it."³⁵ And Story's precedents taken from the law of admiralty are, of course, equally predicated upon concepts of public international law.³⁶

Where, on the other hand, Story leaves the laws of nations and admiralty and enters upon what we call today the law of conflict of laws, he has to break new ground in evaluating a foreign judgment with reference to a jurisdiction whose lawfulness is measured by standards other than those of the rendering court. Most of the cases relied on by Story concern the forum's own "local" rather than the foreign court's "international" or "interstate" jurisdiction.³⁷ This is particularly true for the equity cases dealing with the forum's authority to interfere with foreign lands "without affecting the jurisdiction of the Courts" of the

30. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1st ed. 1834) 492.

31. *Id.* at 458.

32. *Id.* at 450, 453.

33. *Id.* at 445. See also *id.* at 468.

34. *Id.* at 450.

35. VATTEL, THE LAW OF NATIONS 165 (1758, transl. and ed. Chitty and Ingraham 1861).

36. See particularly Chief Justice Marshall's opinion in *Rose v. Himely*, 4 Cranch 241, 269, 270 (U.S. 1808) from which Story quotes extensively (*op. cit. supra* note 30, at 493) in explaining the concept of "lawful jurisdiction" of a foreign court. After declaring that in an admiralty case "upon principle . . . to a certain extent, the capacity of the court . . . may be considered by that tribunal which is to decide on the effect of the sentence," Marshall approved what he declared to be English practice under which recognition of foreign judgments "is uniformly qualified with the limitation that [the foreign court] has, in the given case, jurisdiction of the subject matter." In the cases cited by Chief Justice Marshall [*The Flad Oyen*, 1 Rob. Chr. 134 (High Ct. of Adm. 1799), *The Henrick and Maria*, 4 Rob. Chr. 43 (High Ct. of Adm. 1799), *The Comet*, 5 Rob. Chr. 285 (High Ct. of Adm. 1804), *The Helena*, 4 Rob. Chr. 3 (High Ct. of Adm. 1801)] foreign acts of condemnation and sale were examined under the law of nations.

37. LORENZEN AND STUMBERG, CASES AND MATERIALS ON THE CONFLICT OF LAWS 15 (6th ed. 1951). Nussbaum prefers for the same concepts the terms "direct" and "indirect" jurisdiction. NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 241 (1943).

foreign situs.³⁸ It may be significant, therefore, that for his proposition that "every exertion of authority [by a sovereign beyond its own territorial limits though in accordance with its own laws] . . . is a mere nullity, and incapable of binding . . . in any other tribunals,"³⁹ Story cites only his own opinion in *Picquet v. Swan*,⁴⁰ where the forum's jurisdiction over a nonresident citizen was denied for lack of proper service.

The non-admiralty precedent primarily relied upon by Story in this case, as well as in his text,⁴¹ is the well-known case of *Buchanan v. Rucker*.⁴² Even here Lord Ellenborough, while denying the Island of Tobago the power "to bind the rights of the whole world"⁴³ by a judgment based on service violating minimum standards of fair notice, was careful not to deny Tobago's jurisdiction under her own law.

It is true that, nevertheless, Story's concept of a jurisdiction independent from the laws of both the rendering court and the forum was probably not unknown to the courts of his time. As early as 1786, in *Kibbe v. Kibbe*,⁴⁴ one of the earliest cases reported in this country, involving a suit in Connecticut on a Massachusetts judgment, the defendant countered the plaintiff's reliance on the fact that the proceedings underlying that judgment "were conformable to the laws and customs" of Massachusetts, by claiming that these proceedings were "altogether

38. STORY, *op. cit. supra* note 30, at 456, 457, quoting with approval from *Cranstown v. Johnston*, 3 Ves. 170, 183, 30 Eng. Rep. 952, 959 (1796), where defendant was held liable to reconvey an estate in the West Indies which he had "unconscionably" acquired under the decree of a local court whose jurisdiction was not denied. All of the equity cases cited by Story, *op. cit. supra* note 30, at 455 *et seq.*, for his concept of (international) jurisdiction merely deal with the forum's authority to intercede as to foreign land. See, e.g., *White v. Hall*, 12 Ves. 321, 33 Eng. Rep. 122 (1806) (expressly recognizing the foreign court's "intrinsic" jurisdiction). Perhaps the earliest case raising the possibility that "jurisdictions might clash" is *Comes Arglasse v. Muschamp*, [1682] 1 Vern. 75, 134, overruling defendant's plea to the jurisdiction in a case involving land in Ireland, as "only a jest put upon the jurisdiction of this court by the common lawyers" who wish to deny equity's power to bind the conscience. See in general, Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620 (1954).

39. STORY, *op. cit. supra* note 30, at 450.

40. *Picquet v. Swan*, 5 Mason 35 (C.C. Mass. 1828).

41. STORY, *op. cit. supra* note 30, at 492.

42. 9 East 192 (1808).

43. Eight years later Lord Ellenborough, in *Cavan v. Stewart*, 1 Stark. 525, 528, 171 Eng. Rep. 551, 552 (1816) derived the invalidity of a Jamaica judgment against a defendant not properly notified, from "the first principles of justice," a phrase borrowed from Lord Chief Justice De Grey's opinion in *Fisher v. Lane*, 3 Wilson 297, 302 (1772) who seemed to identify these principles with the law of England. ("The twenty-seven colonies abroad cannot make a law contrary to the law of England, but they can make any law agreeable thereto, and to the principles of justice." *Fisher v. Lane*, *supra* at 303). See also *Turnbull v. Walker*, 67 L.T. 767 (Q.B. 1892) per Wright J.; *Pemberton v. Hughes* [1899] 1 Ch. 781; and in general Borm-Reid, *Recognition and Enforcement of Foreign Judgments*, 3 INT. COMP. L.Q. 49 (1954).

44. *Kibbe v. Kibbe*, Kirby 119 (Conn. 1786).

illegal, and not conformable to or warranted by the laws of this state [Connecticut?] or any other." ⁴⁵ And the court apparently adopted the defendant's argument by holding that Massachusetts "had no legal jurisdiction of the cause." ⁴⁶ That this approach was, however, far from generally accepted, ⁴⁷ appears from a case decided twenty-five years later in Massachusetts where the court, giving full faith and credit to a New Hampshire judgment, limited its inquiry to an examination of "the manner in which a particular jurisdiction is exercised, according to its own regulations and the laws of the state from whence an authenticated judgment is taken," ⁴⁸ and distinguished the *Kibbe* holding as a "violent expedient[s], to which recourse was had to avoid a construction at which courts of justice naturally revolt . . ." ⁴⁹ It was left to Story then to give authority to super-law standards of jurisdiction.

When adopting these standards for judging the "lawfulness" of foreign jurisdiction under a law other than that of the rendering court, Story might well have chosen another term for distinguishing from this "international" jurisdiction the "local" jurisdiction of the forum. His failure to do so and his use of the term "jurisdiction" with reference to both the forum and the foreign court would have been serious enough had this jurisdictional language remained limited to the law of recognition of foreign judgments. But Professor Beale and the Restatement have carried it far beyond this field into the law of choice of law by their discovery of "legislative jurisdiction."

Legislative Jurisdiction

Comity had threatened to "put the conflict of laws out of joint and . . . placed the whole subject on a basis where it nearly perished." ⁵⁰ In the choice of law, too, a new approach was needed. Unfortunately it was found in a false analogy to that "territorial theory" ⁵¹ under which a foreign judgment was held entitled to recognition if issuing from a court having "lawful jurisdiction" in an inter-

45. *Id.* at 125.

46. *Id.* at 126.

47. See also the following early cases relied on by Story: *Phelps v. Holker*, 1 Dall. 261 (Pa. 1788) (denying recognition without resort to jurisdictional language); *Jackson v. Jackson*, 1 Johns. 424 (N.Y. 1806) (refusing to recognize a Vermont divorce as obtained in *fraudem legis*).

48. *Bissell v. Briggs*, 9 Mass. 461, 476 (1813).

49. *Id.* at 472.

50. Meili, *Ein Specimen aus der holländischen Schule des internationalen Privatrechts* (Ulricus Huber 1636-1694), 8 Z. INT. PR. STR. R. 189, 190 (transl. Lorenzen, *op. cit. supra* note 19, at 158).

51. For an enumeration of some of the meanings of the term "territoriality," see NUSSBAUM, *op. cit. supra* note 26, at 40 n.29.

national sense.⁵² Beginnings of this approach may be found in Story's treatment of interstate loan contracts. As stated elsewhere, early American courts showed a solicitude for money lenders (strange to modern ways of thinking and certainly to present law)⁵³ which led them to apply "liberal" foreign laws over the usury laws of the forum.⁵⁴ If this practice was to be founded in deductive reasoning, it could not be based on the doctrine of comity alone. To exclude the applicability of the law of the forum, the legislating state had to be given a "power" not explainable by that theory. And Story effected this exclusion by reasoning "that no country can give to its own laws an extra-territorial authority, so as to bind other nations. If it undertakes to legislate in regard to acts or contracts performed elsewhere, it can claim for its own laws no other validity than the comity of other nations may choose to allow towards them."⁵⁵ While including a reference to comity, this statement assumes a supernational assignment of exclusive legislative authority to the state in which the contract is performed. Significantly, Story's main authorities for this assumption were the writings of those very continental jurists who, following in the footsteps of the statistists, had "endeavoured to collect principles, which ought to regulate this subject among all nations," and whose efforts he had rejected as adapted to "a common empire" rather than to an independent nation.⁵⁶

The extension of jurisdictional thinking into the field of choice of law may have been facilitated in Anglo-American law by the fact that in English law the separation of legislative and judicial powers has been slower and perhaps less total than in countries governed by the civil law,⁵⁷ and that, in this country at least, this extension may have filled, from a functional viewpoint, a gap created by a peculiarity of the judicial process. Owing to a medieval concept of physical power, the court is given authority over any defendant "served with process"

52. Cf. *Schibsy v. Westenholz*, L.R. 6 Q.B. 155 (1870). See in general COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 83 *et seq.* (1942).

53. Cf. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COL. L. REV. 1072 (1953).

54. This practice, equally early, raised the question what use there was "for any legislature to pass a law for the protection of the weak and necessitous." *Depau v. Humphreys*, 8 Mart. (N.S.) 1, 30 (La. 1829).

55. STORY, *op. cit. supra* note 30, at 253.

56. STORY, *op. cit. supra* note 30, at 27.

57. Cf. *Bissell v. Briggs*, 9 Mass. 461, 467 (1813), where the court, inquiring into the (judicial) jurisdiction of a foreign court, relied upon an apparently unreported case in which a New Hampshire court's duty to give full faith and credit to an administrator's legislative license to sell land in that state, was denied because "it was not within the jurisdiction of the legislature of Massachusetts to license the sale of lands in New Hampshire." See also, in general, *Calder v. Bull*, 3 Dall. 385 (U.S. 1798).

within its territory.⁵⁸ If such purely accidental "jurisdiction" is to create a claim to recognition even in a sister state with closer contacts with the case, it may have seemed necessary in certain situations to assume a compulsion of the judgment court to apply the law of that state.

But it remained for Professor Beale fully to merge judgment recognition and choice of law under an all-embracing concept of jurisdiction.⁵⁹ Without accepting the statist's stress on the interpretation of the law to be applied, Beale thus built upon their assumption of a supernational unitarian order without taking account of the fact that at their time that assumption had a real or at least ideological basis in the common Roman law long since defunct. What to Story had been but an isolated solution of specific situations, thus became the dogma of "legislative jurisdiction," which has decisively affected the history of choice of law in this country. What could have become a discipline subject to considerations and pressures of social policy like all other branches of the law, came to be determined by an axiomatic rule directly traceable to medieval sources: ". . . no statute has force to affect any person, thing, or act . . . outside the territory of the state that passed it."⁶⁰

This "rule" presupposes a complete system of a super-law determining the location of persons, things, and acts which has never existed and will never exist, as well as a simplicity of choice of law principles (such as *lex delicti* or *lex contractus*) which, if it has ever prevailed, has long yielded to progressing diversification and refinement.⁶¹ Moreover, the concept of legislative jurisdiction is based on an analogy between foreign judgments and laws which has long ceased to apply. To recognize a foreign judgment meant to give deference to an act of another sovereign, to an expression of his will and opinion. It is true that

58. See Ehrenzweig and Mills, *Personal Service Outside the State*, 41 CALIF. L. REV. 383 (1953); and in general Blume, *Place of Trial of Civil Cases*, 48 MICH. L. REV. 1, 9 (1949); MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 85 (1952).

59. Cf. 1 BEALE, *A SELECTION OF CASES ON THE CONFLICT OF LAWS* 85 (1900); Beale, *The Progress of the Law, 1919-1920, The Conflict of Laws*, 34 HARV. L. REV. 50 (1920); 1 BEALE, *CONFLICT OF LAWS* 308 (1935). For a bibliography about this "teacher and writer, unrivalled since Story's time," see Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 365 (1945).

60. 1 BEALE, *CONFLICT OF LAWS* 312 (1935). The exception omitted in this quotation, i.e., that concerning the state's power over its citizens abroad, is not here pertinent. See also Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241 (1923).

61. In addition a law of conflicts of conflict of laws has been an essential part of our law of conflicts ever since Kahn's [1 ABH. ZUM INTERN. PRIVATRECHT 48 (Germany 1928)] and Bartin's investigations [*De l'impossibilité d'arriver à la suppression définitive des conflits de lois*, 24 J. DR. INT. PR. 225, 466, 720 (France 1897)].

the same observation applied to some extent to legislative acts prompted by a desire to remedy individual evils. When and in so far as older statutes served this purpose, their similarity to judicial acts may, therefore, have justified to some extent a concept of legislative "jurisdiction." But no such similarity exists between judgments and modern statutes phrased in general and abstract terms. If we choose, nevertheless, to apply such statutes of a foreign sovereign, we do so although the latter has ordinarily been unaware, and may even have disapproved, of such application. And, on the other hand, we neither violate international comity nor foreign legislative jurisdiction if we refuse to apply such statutes.

Notwithstanding inherent theoretical difficulties,⁶² a jurisdictional approach to the recognition of foreign legislation might have remained manageable if Story's successors had limited it, as Story in effect did, to certain types of statutes as to which deference to another sovereign perhaps justified the jurisdictional analogy. This, however, Story's successors⁶³ did not do, and, indeed, could not do. The "original sin" of the compromise inevitably created new problems.

62. As to repeated and recent attempts of the Supreme Court to overcome these difficulties in certain selected fields of choice of law, see, e.g., Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533 (1926); Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581 (1953); Rheinwein, *Das Kollisionsrecht im System des Verfassungsrechts der Vereinigten Staaten von Amerika*, 1 FESTSCHRIFT FÜR ERNST RABEL 539 (1954).

63. Story's work has several counterparts in Europe. Friedrich Carl von Savigny, the founder of the Historical School of legal philosophy, rejected both Wächter's [*Ueber die Collision der Privatrechtsgesetze verschiedener Staaten*, 24 ARCHIV FÜR DIE ZIVILISTISCHE PRAXIS 230 (Germany 1841)] resort to the *lex fori* and Story's comity theory. Though admitting the national source of all conflicts law, Savigny insisted on the demands of a supernational "community of law," based on a common Christian culture, mutual interest, and the postulate of "uniformity of decision," i.e., the need for identical decisions of each case wherever brought. (This principle, never totally forgotten, seems to have gained renewed attention. See PAGENSTECHER, *DER GRUNDSATZ DES ENTSCHEIDUNGSEINKLANGS IM INTERNATIONALEN PRIVATRECHT* (1951)). Savigny assumed that, by analyzing the "legal nature" of the foreign elements of a case, the law best applicable to it could be ascertained. His stress in this connection on the "seat" of an obligation, though often ridiculed ("obligations do not sit at all or, if they do, they sit on two stools," BRINZ, *LEHRBUCH DER PANDEKTEN* 102 (2nd ed. 1873)), has remained highly influential. His approach, though sharing Story's inconsistent combination of unitarian and pluralistic elements, greatly influenced such French writers as Bartin and Despagne, such English writers as Phillimore and Westlake, and the Italians Fiore and Dena. See SAVIGNY, *PRIVATE INTERNATIONAL LAW, A TREATISE ON THE CONFLICT OF LAWS AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME* (Guthrie trans. 1869); GUTZWILLER, *DER EINFLUSS SAVIGNYS AUF DIE ENTWICKLUNG DES INTERNATIONALEN PRIVATRECHTS* (1923); MARIDAKIS, *DIE INTERNATIONALEN PRIVATRECHTLICHE LEHRE SAVIGNYS IM LICHT SEINER RECHTSENTSTEHUNGSTHEORIE*, FESTSCHRIFT HANS LEWALD 309 (1953); and in general, Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 309 (1953).

Pasquale Stanislao Mancini, in 1851, gave his famous speech on "Nationality as the Basis of the Law of Nations" in which, following a principle first adopted in the French Civil Code, he gave the decisive impulse to that movement which has since, in civil law countries, led to the far-reaching displacement of the domicile principle still prevalent in Anglo-American law. Moreover, distinguishing between

Vested Rights

Once foreign law was to be given recognition on jurisdictional grounds, it seemed hardly feasible to exclude from this recognition a common law which, increasingly, had come to differ from state to state. The Restaters avoided this discrimination under their theory of "vested" rights and obligations⁶⁴ which they borrowed from a time-honored concept developed by the same law of nations, that had given to Story the concept of jurisdiction.⁶⁵ They were assisted in the creation of this theory by a shift in the concept of conflicts law itself.

As we have seen, the comity element of Story's teaching is concerned with relations between sovereigns, and thus truly a concept of international law. But, as Story knew, the law of conflicts is "chiefly seen and felt in its application to the common business of private persons, and rarely rises to the dignity of national . . . controversies."⁶⁶ This realization later induced Lord Blackburn to deny the law of France the power "to bind the whole world" by a judgment which, lacking "jurisdiction," failed validly to impose an (ubiquitous) "obligation" on the defendant.⁶⁷ Though circular in character—whether or not such an obligation exists must, like "jurisdiction," again be determined by superlaw concepts—Blackburn's terminology

the rules created in the interest of private persons and those for the protection of public order, Mancini accepted an international obligation to recognize only the former. Largely pluralistic in its result (stressing the public policy exception), this theory is unitarian in its character. Mancini has been followed in Belgium by Laurent and in France by André Weiss, and has had considerable impact on European legislation (e.g., the Saxon Code of 1863). He collaborated in the drafting of the "Preliminary Provisions" of the Italian Code of 1865 which have been in part continued in the conflicts provisions of the new Code of 1939. On Story's counterparts in Latin-America, Augusto Teixeira de Freitas (Brazil) and Bello (Chile), see VALLADÃO, *O DESENVOLVIMENTO DO DIREITO INTERNACIONAL PRIVADO NAS LEGISLAÇÕES DOS ESTADOS AMERICANOS*, *ADAMEMIA INTERAMERICANA DE DERECHO COMPARADO E INTERNACIONAL, CURSOS MONOGRAFICOS* 109, 139, 161 (1948). See also Nadelmann, *De L'Organisation et de la Jurisdiction des Cours de Justice, aux Etats Unis d'Amerique par M. Joseph Story*, 30 B.U.L. REV. 382 (1950), for translations and discussions of two early articles by Story in foreign legal periodicals, explaining the American system to Continental scholars.

64. The phrase "foreign created rights" appears in 3 BEALE, *CASES ON THE CONFLICT OF LAWS* 501 (1902), and in 1 BEALE, *CONFLICT OF LAWS* 106 (1916) but was eliminated by him in the Restatement. Concerning the continuing identification of the Restatement with the theory of vested rights, see Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 385 (1945); Cavers, *The Two "Local Law" Theories*, 65 HARV. L. REV. 822, 823 (1950). Beale's theory of vested rights has been traced through DICEY, *DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS* (1st ed. 1896) and HOLLAND, *ELEMENTS OF JURISPRUDENCE* (1st ed. 1890) directly to HUBER, *PRAELECTIONES*. See Yntema, *Dicey: An American Commentary*, 4 INT. L.Q. 1 (1951); Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 308 (1953).

65. See STORY, *op. cit. supra* note 3, at 494, citing *Rose v. Himely*, 4 Cranch 240, 269, 270 (U.S. 1808), involving public international law.

66. STORY, *op. cit. supra* note 3, at 9.

67. *Schibsy v. Westenholz*, L.R. 6 Q.B. 155 (1870).

justified perhaps the use of the term "private international law." This expression, first adopted by Story⁶⁸ and later abandoned in this country, has, as "international private law," become common usage abroad,⁶⁹ and has prepared the ground for the theory of "vested rights."

According to the Restatement, "a problem of jurisdiction" concerns the "extent to which a state may create interests which will be recognized in other states,"⁷⁰ and such interests, whether based upon statute or common law rules, "may, in certain cases, depend upon the law in force of some other state or states."⁷¹ These (unitarian) statements, which assume an "extraterritorial" effect of foreign laws through the creation of ubiquitous interests, are, like the concept of an international jurisdiction, irreconcilable with the Restatement's (pluralistic) proposition that "the only law in force in the sovereign state is its own law."⁷²

At first glance, the vested rights theory,⁷³ like that of vested "obligations," appears but as another formulation of the jurisdiction test to the effect that if, and only if, a right was "vested" in the plaintiff by a foreign court "having jurisdiction," the foreign judgment is entitled to recognition.⁷⁴ Once the test of recognition is thus shifted from the source of the law (jurisdiction) to its product (obligation and

68. STORY, *op. cit. supra* note 3, at 9, 25. PILLET AND NIBOYET, *DRIT INTERNATIONAL PRIVÉ* 30 (1924), trace the term back to Story.

69. Cf. FOELIX, *DRIT INTERNATIONAL PRIVÉ* (1843); SCHAEFNER, *ENTWICKLUNG DES INTERNATIONALEN PRIVATRECHTS* (1841).

70. RESTATEMENT, *CONFLICT OF LAWS* § 1, comment *a* (1934).

71. *Id.* § 1.

72. Professor Cheatham sees in this pronouncement an essential difference between the vested rights theory of the Restatement and the theory of the statistes who assumed validity in the forum of the foreign law as such (see note 10 *supra*). Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 365 (1945). Both theories have in common, however, the assumption of a supernatural legal order.

73. NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 28 (1943). For a list of opponents of this theory, see *id.* at 31, 65. It is not limited to this country. In Germany, Zitelmann and Frankenstein may be mentioned as representing a movement which is trying to derive conflicts law from international law. In France, Antoine Pillet advocated a theory of vested rights somewhat related to, though not identical with, the theory of the statistes. And Niboyet only recently succeeded in having a vested rights doctrine incorporated in the Draft of the new Civil Code. Cf. Nadelmann and von Mehren, *Codification of French Conflicts Law*, 1 AM. J. COMP. L. 404, 420 (1952) (Art. 21 of the Draft). See also Niboyet, *Territoriality and Universal Recognition of Rules of Conflict of Laws*, 65 HARV. L. REV. 582 (1952). In Italy, Anzilotti's original "material reception" theory, though purportedly based on local law, would incorporate therein the entire foreign law. In Great Britain, Dicey is the great protagonist of the vested rights approach which is fully shared by Schmitthoff, while Cheshire and Graveson incline to a critical view. See particularly Yntema, *Dicey: An American Commentary*, 4 INT. L.Q. 1 (1951); *id.*, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 307 (1953).

74. Cf. Chief Justice Marshall in *Rose v. Himely*, 4 Cranch 240, 268 (U.S. 1808), examining the jurisdiction ("power") of the first forum to determine "whether its sentence has changed the right of property."

right), Story's jurisdictional discrimination between statute and common law has disappeared. But so has, at the same time, the last excuse for the analogous treatment of foreign judgments and foreign law for the purposes of recognition.⁷⁵ The compromise has failed. A new beginning must first overcome the strong support which the inconsistencies appearing in Story's and the Restaters' formulations have found in the opinions of three great American jurists.

Holmes, Hand and Goodrich

Justice Holmes' conceptualistic views in the law of conflicts contrast strangely with his iconoclastic realism in other fields of the law. Again and again we find Justice Holmes basing his opinions in conflicts cases on the tacit or express assumption of that "transcendental body of law outside of any particular state," whose existence he denied so vigorously elsewhere;⁷⁶ *i.e.*, a body of law which endows each state with the "power" to create obligations⁷⁷ and rights entitled to recognition and enforcement by other states. And instead of functional rationalizations of his assumptions of the kind so well known and dear to us from Holmes' constitutional opinions, we find metaphysical platitudes such as the statement that the determination of the exchange rate as of the date of breach rather than the date of judgment flows "from fundamental theory,"⁷⁸ or that the constitutionality of non-forfeiture

75. In a series of articles, Professor Briggs (while admitting the theoretical untenability of a theory which claims full power for each forum to devise its own choice of law rule and yet attributes to foreign states an independent "jurisdiction" for the creation of rights and obligations) has attempted to defend "jurisdictional thinking" in view of "the actual function and operation" of American conflicts law. Briggs, *Utility of the Jurisdictional Principle in a Policy Centered Conflict of Laws*, 6 VAND. L. REV. 667, 707 (1953). See also Briggs, *The Jurisdictional-Choice-of-Law in Conflict Rules*, 61 HARV. L. REV. 1165 (1948); Briggs, *The Dual Relationship of the Rules of Conflict of Laws in the Succession Field*, 15 MISS. L.J. 77 (1943). It is submitted, however, that once the power terminology has been found wanting in its theoretical foundation, it has lost its sole claim to usefulness. Such factual basis as may be stated for the forum's habits of recognition can and must be developed without the aid or hindrance of an obsolete terminology.

76. *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*, 276 U.S. 518, 532 (1928) (dissenting opinion concerning the *Swift v. Tyson* doctrine). It is this denial which only recently has made the Justice the object of bitter attacks. But see FRIEDMANN, *LEGAL THEORY* 454 (3d ed. 1953) for a detached re-appraisal.

77. The Justice preferred the Latin term "obligatio" to the English word "obligation," perhaps because of the broader scope (comprising both torts and contracts) and more clearly defined meaning of the Roman concept. *Slater v. Mexican Nat. R.R.*, 194 U.S. 120, 126 (1904). "Obligatio est juris vinculum quo necessitate astringimur alicujus solvendae rei. . . ." INSTR. 3, 13. Cf. *Mulhall v. Fallon*, 176 Mass. 266, 57 N.E. 386 (1900); *Slater v. Mexican Nat. R.R.*, 194 U.S. 120 (1904); *Western Union Telegraph Co. v. Brown*, 234 U.S. 542 (1913); *Zimmermann v. Sutherland*, 274 U.S. 253 (1927); *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 216 (1930) (dissent). But see again, Frankfurter, J., in *Levinson v. Deupree*, 345 U.S. 648, 652 (1953).

78. *Hicks v. Guinness*, 269 U.S. 71, 80 (1925).

statutes of the *lex contractus* is based on "the first principles of legal thinking."⁷⁹ Several reasons have been suggested for this attitude so strangely out of place in the searching mind of this great judge. Lack of knowledge in the field, traumatic predilection for the power concept due to early experience as a soldier,⁸⁰ as well as adherence to a rigidity "innate in the common law,"⁸¹ have been blamed for this deviation. It would, however, seem more likely that Justice Holmes was prompted by an ideology similar to that of Joseph Story and Joseph Beale, *i.e.*, the earnest, though frustrated, desire to promote and stabilize interstate and international relations.⁸²

While Holmes and the Restaters chose to fight for the restoration of the past, that other great American conflicts scholar, Judge Learned Hand, trying to follow both Holmes and new trends, has offered us another compromise. To him an obligation arising from a foreign tort is not, as it was to Holmes,⁸³ one existing under the foreign law. For "no court can enforce any law but that of its own sovereign";⁸⁴ and, if the forum looks to the law of the foreign sovereign, it is merely to impose "an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs."⁸⁵ But while Judge Hand's "local law" theory⁸⁶ thus purports to reject the assumption

79. *Mutual Life Insurance Co. v. Liebeng*, 259 U.S. 209, 214 (1922). Professor Rheinstein suspects that Justice Holmes used this phrase with a "suppressed smile." Rheinstein, *supra* note 62, at 553. Cf. note 82 *infra*.

80. Reiblich, *The Conflicts of Laws Philosophy of Mr. Justice Holmes*, 28 GEO. L.J. 1, 21, 22 (1939). For a list of the Justice's early opinions as a state judge, see Note, 44 HARV. L. REV. 717, 801 (1931).

81. NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 18, n.39 (1943).

82. This assumption is supported by the fact that Holmes, apparently when not speaking from the bench, took a considerably different view. In response to Sir Frederic Pollock's commendation of Pillet [*sur un point peu aperçu de la doctrine de Dicey*, 50 REV. DE DR. INT. 345 (France, 3d Ser. 1923)], Holmes calls it "a humbug" if "the virtuous Pillet" thinks that private international law means more than the law actually applied in each case "because the Court speaking for the Sovereign damn chose to. . . ." 2 HOLMES-POLLOCK LETTERS 137, 138 (Howe ed. 1941).

83. Cf. *Holmes, J., in Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517 (1926) (enforcing an obligation "arising from German law alone").

84. *Guinness v. Miller*, 291 Fed. 768, 770 (S.D.N.Y. 1923), *aff'd*, 299 Fed. 538 (2d Cir. 1924) *aff'd with modifications sub nom. Hicks v. Guinness*, 269 U.S. 71 (1925), where Justice Holmes referred to a "liability already fixed by law." See also *Hand, J., in Irving Trust Co. v. Maryland Casualty Co.*, 83 F.2d 168 (2d Cir. 1936).

85. *Guinness v. Miller*, *supra* note 84. See also *The James McGee*, 300 Fed. 93, 96 (S.D.N.Y. 1924); *Direction der Discontogesellschaft v. United States Steel Corp.*, 300 Fed. 741, 744 (S.D.N.Y. 1924), *aff'd*, 267 U.S. 22 (1925); *Siegmann v. Meyer*, 100 F.2d 367 (2d Cir. 1938); *Scheer v. Rockne Motors Corp.*, 68 F.2d 942, 944 (2d Cir. 1934).

86. C. Donley, *The Modern Influence in the Conflict of Laws*, 36 W. VA. L.Q. 217 (1930); de Sloovere, *The Local Law Theory and its Implications in the Conflict of Laws*, 41 HARV. L. REV. 421 (1928); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928); NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 36 (1943).

of a transcendental rule of choice, it is still one of "divided allegiance" ⁸⁷ in repeating as an axiom the assumption of a "foreign" tort or contract, the place of which is determined by an implied supernational standard.⁸⁸ Where suit was brought against the New York owner of a car involved in an Ontario accident, Ontario law, by imputing the driver's liability to the defendant, would have "to reach beyond its borders," claiming "extra-territorial effect."⁸⁹ And "people cannot by agreement substitute the law of another place. . . . Some law must impose the obligation, and the parties have nothing whatever to do with that. . . ." ⁹⁰ This conception of conflicts law, as one based on what Judge Hand himself calls a territorial "legislative jurisdiction," ⁹¹ is far removed still from Walter Wheeler Cook's definitive break with compromise.⁹² And so is the teaching of one of our foremost conflicts judges and writers, Judge Goodrich. Formerly a faithful follower of the Restatement, he has recently disavowed it at least in part and anticipates further changes. For: "To the extent one abandons the categorical imperative he slips away from the dogmas of Joseph H. Beale. . . ." ⁹³ Those who believe that these dogmas should be completely abandoned might prefer an even more determined "yielding place to new." ⁹⁴

We have seen that unitarian compromise characterizes the theories of Holmes and the Restaters who purport to improve on Story's by deriving perfect pluralism from a perfect unitarian order; and of Learned Hand who hopes to escape inconsistency by a new pluralistic definition of an ubiquitous obligation. Unitarian salvation is occasionally even expected from a new international order ⁹⁵ beyond pres-

87. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1211 (1946).

88. See also *New England Mut. Life Ins. Co. v. Spence*, 104 F.2d 665, 668 (2d Cir. 1939) where a preconceived notion of the place of assignment caused what the dissent characterized as a "tortuous" course of reasoning.

89. *Scheer v. Rockne Motors Corp.*, 68 F.2d 942, 943, 944 (2d Cir. 1934).

90. *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115, 117 (2d Cir. 1931), approved by Judge Hand as late as 1946 in *Great Lakes Transit Corp. v. Marceau*, 154 F.2d 623, 627 (2d Cir. 1946). See also *Louis Dreyfus v. Paterson Steamships Ltd.*, 43 F.2d 824 (2d Cir. 1930); and in general Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COL. L. REV. 1072, 1073 (1953).

91. *Siegmann v. Meyer*, 100 F.2d 367, 368 (2d Cir. 1938).

92. Cf. Cavers, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822, 832 (1950), suggesting that Judge Hand's theory should be distinguished from Cook's "local law theory" as the "homologous right theory," thus indicating an obvious affinity to the theory of "vested" rights.

93. GOODRICH, *CONFLICT OF LAWS*, p. v (3d ed. 1949).

94. GOODRICH, *Yielding Place to New: Rest v. Motion in the Conflict of Laws*, 50 COL. L. REV. 881 (1950).

95. See, e.g., Nussbaum, *Rise and Decline of the Law of Nations Doctrine in the Conflict of Laws*, 42 COL. L. REV. 189 (1942); Riesenfeld, Book Review, 3 U. OF CHI. L. REV. 153 (1935); Sohn, *New Bases for Solution of Conflict of Laws Problems*, 55 HARV. L. REV. 978 (1942); Cowles, *Judicial Review in Conflict of Laws*, 21 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET 51 (1951); Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COL. L. REV. 561 (1952).

ent efforts to revitalize international treaty solutions,⁹⁶ or, more realistically, in a comparative approach pooling the experiences of all countries.⁹⁷ On the other hand, there are those who have admitted defeat and, forswearing both international and national schemes, have sought refuge in a general appeal to justice,⁹⁸ or in special rules for the equitable adjustment of conflicts cases.⁹⁹ But in all this turmoil judicial wisdom and imaginative scholarship have been groping slowly and vigorously for a new beginning.

A NEW BEGINNING: THE LAW

Not a Super-Law: Stone, Cook and Lorenzen

When the Restatement of the Law of Conflict of Laws appeared in 1934, the Supreme Court was about to abandon that position so vocally expressed by Justice Holmes¹⁰⁰ which had lent support to the vested rights approach of the Restaters. True, the Court, in a series of cases from 1914 to 1930¹⁰¹ had, under the Due Process Clause, assumed the ubiquity of rights and obligations acquired under the *lex contractus* by virtue of what Justice Holmes had referred to as "the first principles of legal thinking."¹⁰² But as early as 1918, Justice Brandeis had maintained in a dissenting opinion that "there is no constitutional limitation by virtue of which a statute enacted by a State in the exercise of the police power is necessarily void if, in its operation, contracts made in another State may be affected."¹⁰³ And the

96. Cf. NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 46, 64 (1943).

97. The protagonist of this approach is Ernst Rabel, whose monumental work, *CONFLICT OF LAWS: A COMPARATIVE STUDY* (1945, 1947, 1950), is a unique source of information.

98. See Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933), who, after recommending a number of standards, characterizes the end product of the process of choice between forum and foreign law as the "search for a just decision in the principal case." But cf. Cavers, Book Review, 56 HARV. L. REV. 1170 (1943). See also Lorenzen, *Tort Liability and the Conflict of Laws*, 47 L.Q. REV. 483, 490 (1931); Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951). For a similar trend abroad, see Fränkel, *Der Irrgarten des internationalen Privatrechts*, 4 Z. AUSL. INT. PR. R. 239 (Germany 1930).

99. Hoff, *Adjustment of Conflicting Rights*, 38 VA. L. REV. 745, 747, 749, 751 (1952); Hoff, *Intensity Principle in the Conflict of Laws*, 39 VA. L. REV. 437 (1953). See also Kronstein, *Crisis of "Conflict of Laws"*, 37 GEO. L.J. 483 (1949).

100. See text at notes 76 *et seq. supra*.

101. *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918); *Mutual Life Ins. Co. v. Liebong*, 259 U.S. 209 (1922); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). See also *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936); *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389 (1924).

102. See note 79 *supra*.

103. *New York Life Ins. Co. v. Dodge*, 264 U.S. 357, 382 (1918).

same justice speaking for the majority of the Court twelve years later, held at least the *lex solutionis* entitled to the same recognition as the *lex contractus*.¹⁰⁴ Similar skepticism about the "vesting" power of the *lex contractus* had been expressed by other justices long before the Restatement.¹⁰⁵ It was Chief Justice Stone, however, who, both prior and subsequent to the publication of the Restatement, most consistently fought its underlying ideology, thus countering at the same time the Court's repeated attempts at establishing the vested rights theory not only through the alleged requirements of due process but also through the back door of full faith and credit.

In the first respect, speaking for the Court only five years after the publication of the Restatement, he found that at least two states, that of the contract and that of the tort, were "competent to legislate" as to workmen's compensation without denial of due process.¹⁰⁶ And in the same case Justice Stone rejected the full faith and credit clause as a means of introducing a constitutional system of choice of law¹⁰⁷—this in conspicuous contrast to his attitude concerning the recognition of foreign judgments, as to which he felt that the very "purpose of the full faith and credit clause" was to alter the "status of the several states as independent foreign sovereignties."¹⁰⁸ He also refused to recognize or to deny a state's "jurisdiction" to tax "by the choice of label, by definition previously agreed upon,"¹⁰⁹ and most eloquently expressed, in the following, now classic statement, his distaste for the rigidity of vested rights and obligations. Rejecting the majority's argument that full faith and credit had to be given to a sister state decree concerning a

104. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). The idea of legislative jurisdiction, though diluted, was, however, maintained in this case, as it was in *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936) (opinion also by Brandeis, J.).

105. Cf. Justice McKenna in *American Fire Ins. Co. v. King Lumber & Mfg. Co.*, 250 U.S. 2 (1919); and Chief Justice Taft in *National Union Fire Ins. Co. v. Wanberg*, 260 U.S. 71 (1922).

106. *Alaska Packers Ass'n v. Industrial Accident Comm'n of California*, 294 U.S. 532 (1935) (rationalizing this result in part by assuming a new classification under workmen's compensation). Cf. Beale, *Social Justice and Business Costs—A Study in the Legal History of Today*, 49 HARV. L. REV. 593, 603 (1936). See also *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939); and Justice Stone's concurring opinion in *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 163 (1932). For an analysis of his earlier opinion in *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927), equally "renouncing a geographical test in favor of a teleological one," see Freund, *supra* note 87, at 1214. Finally cf. *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201 (1941), *rehearing denied*, 314 U.S. 716 (1942).

107. *Alaska Packers Ass'n v. Industrial Accident Comm'n of California*, *supra* note 106.

108. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943). Cf. Cheatham, *Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt*, 44 COL. L. REV. 330 (1944).

109. *Senior v. Braden*, 295 U.S. 422, 433, 438 (1935) (dissenting opinion). See also *Milwaukee County v. M. E. White Co.*, 296 U.S. 268 (1935).

child's support because only the state of the father's domicile had "the power to impose" such a duty,¹¹⁰ Stone contrasted the (local) right of the several states to pass their own laws with their (interstate) "legislative jurisdiction."

"Between the prohibition of the due process clause, acting upon the courts of the state from which such proceedings may be taken, and the mandate of the full faith and credit clause, acting upon the state to which they may be taken, there is an area which federal authority has not occupied."¹¹¹

While doubt has since been cast on this statement, it alone would justify Professor Cheatham's conclusion that "since Story wrote his great treatise over one hundred years ago no member of the court has contributed more than the late Chief Justice to conflict of laws."¹¹²

Chief Justice Stone's rebellion against Justice Holmes' formalism in conflict of laws finds its counterpart in Cook's and Lorenzen's studies directed against the Restatement and other remnants of Story's jurisdictional compromise.¹¹³ While revolutionary at the time of their appearance, these studies have become the theoretical basis of virtually all current research in the field, including Stumberg's important text on the subject.¹¹⁴

Contrary to the Restatement, which Cook has shown to be fallacious in this respect,¹¹⁵ a state "can" affect "persons, things and acts" anywhere in the world subject only to positive rules of international or constitutional law not inherent "in the constitution of the legal universe," so that "by far the larger number of the rules for the solution of cases involving the conflict of laws do not relate to the 'power' or 'jurisdiction' of the particular court or state. . . ." ¹¹⁶

110. *Yarborough v. Yarborough*, 290 U.S. 202, 213 (1933) (dissenting opinion). Concerning the tenuous support of the Court's holding, see Ehrenzweig, *Interstate Recognition of Support Duties*, 42 CALIF. L. REV. 382, 385 (1954).

111. *Yarborough v. Yarborough*, 290 U.S. 202, 214 (1933). Stressing the same difference, the Chief Justice reached the opposite result in *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943).

112. Cheatham, *Stone on Conflict of Laws*, 46 COL. L. REV. 719, 733 (1946). See also, in general, Freund, *supra* note 87; Rheinstein *op. cit. supra* note 62.

113. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAW* (1942). For a list of authors following Cook's approach, see Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 366, 389 (1945). For a criticism, *id.* at 386. See also Cavers, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822 (1950). Lorenzen's writings are collected in *SELECTED ARTICLES ON THE CONFLICT OF LAWS* (1947). See particularly *Developments in the Conflict of Laws, 1902-1942*, at 203.

114. STUMBERG, *CONFLICT OF LAWS* (2d ed. 1951). See also CHESHIRE, *PRIVATE INTERNATIONAL LAW* (4th ed. 1952); NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* (1943); FALCONBRIDGE, *ESSAYS ON THE CONFLICT OF LAWS* (2d ed. 1954).

115. Cook, *op. cit. supra* note 113, at 51.

116. *Id.* at 41.

Thus Story's and Holmes' compromise, which combined a nationalist pluralistic assertion of sovereignty tempered only by comity between nations, with the internationalist, unitary notion of rights and obligations vested under a foreign legislative jurisdiction, could be considered obsolete were it not for the fact that the "local law theory" supplanting it appears to leave us without a guide.

Not "No Law": Outlook

Whether or not the Supreme Court's current attempts at reviving "logical" theorems for the establishment of a constitutional scheme of choice of law¹¹⁷ will meet the failure of their predecessors,¹¹⁸ the local law theory, though having effectively fought its opponents, does not offer the final solution. This theory has "the defects of its qualities. Laying the emphasis on the freedom of the forum state to do what it wishes, it may engender the unfortunate attitude that the freedom should be widely used. While in the early stages or the off-type cases of any field of law it is essential that courts have freedom to achieve justice, in the developed stages and the ordinary cases the need is for doctrine which will point to the appropriate decision. So counterbalancing emphasis is needed on the wisdom of ordinarily employing the foreign law as guide in foreign transactions."¹¹⁹

Moreover, before declaring our unconditional adherence to any one of these theories, we should keep in mind that their differences may bear significantly on highly practical issues, and often perhaps in a manner not altogether desirable. True, we might well prefer the local

117. *Hughes v. Fetter*, 341 U.S. 609 (1951); *First Nat. Bank of Chicago v. United Air Lines*, 342 U.S. 396 (1952), impliedly assuming a constitutional compulsion to apply the law of the place of wrong as "creating" the cause of action. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), permitting application of the statute of limitations of the forum to such a "foreign cause of action," may or may not indicate a partial withdrawal from this position. Justice Jackson seemed to be the principal advocate of this approach on the Court. See Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COL. L. REV. 1 (1945); and the Justice's concurring opinion in *First Nat. Bank of Chicago v. United Air Lines*, *supra*.

118. See text at notes 76, 101 *et seq. supra*; and, in general, Cheatham, *A Federal Nation and Conflict of Laws*, 22 ROCKY MOUNT. L. REV. 109 (1950); Rhein-stein, *supra* note 62, at 577.

119. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 386 (1945). "... the remorseless logic of the dogma of sovereignty has driven the doctrine of conflicts law to the verge of a theoretic chaos where its acolytes, bemused by nationalistic positivism, are like to lose the vision of the grand objective in provincial worship of the *lex fori*." Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 312 (1953). Concerning a similar controversy in German conflicts law, see Kegel, *Begriffs- und Interessenjurisprudenz im Internationalen Privatrecht*, in Festschrift HANS LEWALD 259 (1953).

law theory because it supplies us with the most acceptable explanation for what has so aptly been called the "homeward trend" in the law of conflicts,¹²⁰ and because this theory most easily avoids pseudo-problems of inter-temporal conflicts law such as that concerning post-factual changes in the "applicable" foreign law¹²¹ or questions concerning the availability of "machinery" for the enforcement of "foreign" rights and obligations.¹²² But in other ways a dogmatic local law theory may give substance to old errors and induce new ones. Mere mention must suffice of such problems as those concerning characterization and renvoi under the *lex fori* or the *lex causae*, the treatment of foreign law as a "fact" for purposes of proof, review and judicial notice, and finally the "wide and unexplored" question of the relation between conflicts law and the interspatial interpretation of domestic and foreign legal rules.¹²³

Fortunately, American courts, though often speaking in legalistic terms, have in essence remained unaffected by sterile ideologies and have kept open the way to a more realistic approach. Above all, the exception of "public policy"¹²⁴ has been resorted to in order to reach the proper result where a rigid formula would have sacrificed common sense to "logic." But we should abandon the "unruly horse" of public policy wherever we can. "Once you get astride of it, you never know where it will carry you."¹²⁵ What at first appears as an exception based on public policy or other general considerations, at one point must become a new conflicts rule demanding formulation without regard to dogmatic conceptions such as vested rights, legislative jurisdiction, or local sovereignty.

We shall have to reconcile ourselves to the fact that the law of conflict of laws which has barely begun to crystallize in a few dozen general maxims, if it is to mature into a full-fledged new branch of the common law, will have to "be broken down to a very much larger number of narrower rules of more specific application, until they are similar to the rules in all other fields of law."¹²⁶

In a series of studies, I have tried to demonstrate the growth of new conflicts rules under the aegis not of the fancy of a super-law or

120. NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 37, 70 (1943).

121. *Cf. id.* at 69.

122. *Cf. Slater v. Mexican National R.R.*, 194 U.S. 120 (1904). See text at notes 64 *et seq. supra*.

123. *Cf. NUSSBAUM, op. cit. supra* note 120, at 71 *et seq.*

124. For a history and analysis of this concept, see particularly NUSSBAUM, *op. cit. supra* note 120, at 110; and LLOYD, *PUBLIC POLICY, A COMPARATIVE STUDY IN ENGLISH AND FRENCH LAW* (London 1953).

125. *Richardson v. Mellish*, 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (1824).

126. *Rheinstein*, Book Review, 28 IND. L.J. 443, 449 (1953). For a unique attempt at classifying the policies governing the progress of conflicts law, see Cheatham and Reese, *Choice of the Applicable Law*, 52 COL. L. REV. 959 (1952).

the anarchy of "local law," but of a body of common law which, while infinitely more complex than in other legal disciplines, is equally accessible to patient analysis. In these studies in widely scattered fields, I have tried to show that within the traditional doctrine of "*jurisdiction*" courts are approaching a new concept of competency similar to that of the civil law and yet superior to it owing to gradual refinement from case to case;¹²⁷ that the *lex loci delicti* in the conflicts law of *torts*, having long ceased to be the self-evident basis of vested rights, legislative jurisdiction or Justice Holmes' fairness test, has come to reflect new economic and special policies pressing for recognition;¹²⁸ that divergent policies in the conflicts law of *contracts*, too, foreshadow new classifications that may yet reach beyond the field of conflicts into domestic law;¹²⁹ and that the *custody* of children¹³⁰ and the enforcement of duties to *support*¹³¹ are no longer subject either to "logical" rules of jurisdiction or arbitrary tests of "welfare."

To assist courts in their groping for new generalizations much, much more has been done by others,¹³² and much, much more remains

127. Ehrenzweig and Mills, *supra* note 58. The "power" rationale of jurisdiction, after having yielded as to corporations to the "minimum contact" test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), seems to be about to lose its impact on the law of jurisdiction over individuals, unless we wish to find "power" where a state bases personal jurisdiction on the mere fact that the defendant was a resident of the state at the time the cause of action arose. Cf. *Allen v. Superior Court*, 41 Cal.2d 306, 259 P.2d 905 (1953).

128. *The Place of Acting in Intentional Multistate Torts: Law and Reason versus the Restatement*, 36 MINN. L. REV. 1 (1951); *Der Tatort im Amerikanischen Kollisionsrecht der Ausservertraglichen Schadenersatzansprüche*, Festschrift für ERNST RABEL 655 (Germany 1954). Contrary to the Restatement's exclusive reliance on the law of the place of harm, courts have never applied this law to torts primarily governed by admonitory policies.

129. *Adhesion Contracts in the Conflict of Laws*, 53 COL. L. REV. 1072 (1953). Contrary to widely accepted notions, party autonomy in choice of law has never been recognized by American courts with regard to contracts of mere adhesion.

130. *Interstate Recognition of Custody Decrees: Law and Reason versus the Restatement*, 51 MICH. L. REV. 345 (1953); *Recognition of Custody Decrees Rendered Abroad*, 2 AM. J. COMP. L. 167 (1953). According to Section 147 of the Restatement and the comment thereto, a custody decree rendered in the state having local and "therefore" interstate jurisdiction as the state of the child's domicile (§ 117) "cannot be reexamined either in the state where rendered or in another state," without proof of a change of circumstances. American courts, following a "policy" safeguarding the child's welfare, have, in hundreds of decisions, preferred to recognize foreign custody decrees without regard to the rendering court's "jurisdiction" and notwithstanding attempts to prove changes of circumstances, in those cases where a parent had tried to escape a foreign decree; and, on the other hand, have disregarded foreign decrees claiming "jurisdiction," with or without a proof of change of circumstances, in those cases where the decree had been obtained unfairly. This "clean hands" rule of "public policy" in the field of child custody seems to be pressing for formulation whether or not reconcilable with concepts of vested rights or jurisdiction.

131. *Interstate Recognition of Support Duties*, *supra* note 110.

132. Among most recent writings, see *A Symposium on Conflict of Laws*, 6 VAND. L. REV. 441-742 (1953) (including papers by Professors Carnahan, Cheatham, Cowen, Falconbridge, Leflar, Morris, Rabel, Reese, Stimson and Stumberg); and, e.g., Taintor, *Adoption in the Conflict of Laws*, 15 U. OF PITT. L. REV. 222 (1954); or Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. OF CHI. L. REV. 620 (1954).

to be done over many decades to come. To "continue" at this time what purports to be a systematic "restatement" of a body of law, thus seems premature. The work of the American Law Institute in this field should, I submit, either be postponed as a whole, or limited to those topics in which law can be truly "restated",—lest American conflicts law relapse into that sterile confusion of (pluralistic) "comity" and (unitarian) "jurisdiction" from which it has just barely begun to recover.