

DINING OUT IN THE ELEVENTH CIRCUIT: “A LA CARTE” AND “ALL-OR-NOTHING” APPROACHES TO CHOICE OF LAW

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INTRODUCTION

Whether you’re thinking of judicial opinions or you’re thinking of legal scholarship, it’s hard to deny the depth of disagreement that exists over how to select the law applicable to multistate cases. In some states, judges decide choice of law questions according to tried and true principles of their forefathers. In others, the judges seem ready to road test almost any eccentricity that law reviews see fit to publish. The divisions among scholars are even more pronounced. Choice of law theorists have been at each other’s throats for decades and the gap does not seem to be closing anytime soon. Rarely do the experts change their minds about the major issues in the field; and even more rarely do they change each other’s.

But stubbornness is not the issue here. To the contrary, we are more interested in those cases where a state somehow decides that change is necessary. For therein lies an interesting question of judicial process. Should a state’s courts adopt a change to choice of law as an integral package—a theoretical whole? Or should they make big changes bit by bit? Beneath this question’s innocent façade lurks a real Pandora’s Box.

Choice of law theories are all grounded on foundational premises about the nature and purpose of law and sovereignty. Differences among the various choice of law methodologies in their foundational premises virtually guarantee the incompatibility of different choice of law theories. It would therefore be reasonable to assume that adoption

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of a choice of law approach by a state's high court means acceptance of and commitment to that approach's foundational premises for all choice of law purposes. Adopting one theory therefore seems to entail rejection of the others.

But it doesn't always work that way. Judges sometimes pick individual parts of different choice of law theories and methodologies and employ them at the same time despite their apparent incompatibility. Should judges feel free to engage in "eclecticism,"¹ to "split the ticket," or to "cherry pick" the parts of a choice of law approach that they agree with and disregard the rest? Expert opinions on this issue—as on every other issue relating to the conflict of laws—are sharply divided.

We call cherry picking choice of law doctrine "a la carte decision-making." The phrase analogizes selection of the applicable law to selection of the courses of one's dinner off a menu at a restaurant. When ordering a la carte, the diner selects an appetizer, a soup or salad, a main dish, and a dessert independently of one another. No particular number of courses is required; the diner might skip the appetizer or the soup course, might ask for nothing more than a main dish, or might decide to order nothing more than a dessert. But there are restaurants where the menu is *table d'hôte*. These offer a choice between several multi-course, fixed meals. The diner who wishes for broiled salmon finds it pre-ordained that the salmon comes with leek soup, rice, creamed spinach, and dark chocolate mousse. In the choice of law context, the equivalent to the *table d'hôte* is what we call the "all-or-nothing" approach.

Of the three states situated in the Eleventh Circuit, both Alabama and Georgia follow the First Restatement of Conflict of Laws to choose the applicable law in a multistate case. Florida applies a mix of First and Second Restatement principles. Florida is the only one of the three that acknowledges following an a la carte approach.² The other two, Alabama and Georgia, describe themselves as committed to the all-or-nothing route. This variability makes the Eleventh Circuit an ideal environment to raise the question presented by this Article: should states consider themselves obliged to adopt a choice of law theory in its entirety—as a coherent and integral whole—or should they feel free to

¹ William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645 (1983).

² We say "acknowledges" because it can be argued that even Alabama and Georgia have a la carte elements in their choice of law processes. It has generally gone unnoticed that there are a la carte elements in virtually every state's choice of law processes, such as where the forum applies its own rules of procedure. See discussion *infra* Sections II.C.2. and III.B.1.

order off the menu a la carte?

In truth, we don't find the a la carte application of multiple choice of law methodologies per se problematic. Despite the facial appearance of internal inconsistency, good reasons for taking an a la carte approach do sometimes exist. And where they do, a judge ought to feel free to explore them, and not to feel "locked in" to the idiosyncratic contours of an academic's theoretical conclusions.

What matters is whether a state can and has provided sound reasoning for treating different sorts of cases differently. If a court provides no reason at all for the difference in treatment, then this failing should be corrected. Unfortunately, courts do not always provide explanations for a la carte decision-making and most existing legal scholarship has dropped the ball by not demanding that they do so. The goal of this article is to fill that void—to urge courts to recognize the issue and address it more directly.

We take the states of the Eleventh Circuit (which in our view have met our standards admirably) as our testing ground. In Part I, we begin with a brief description of the two choice of law methodologies at play in the Eleventh Circuit—the First and Second Restatements. We then describe how Alabama and Georgia have adopted an all-or-nothing approach to choice of law while Florida has openly taken the a la carte route. In Part II, we pin down what is generally included under the label a la carte and survey state practice on this issue. A la carte decision-making is not openly practiced in a majority of states, but it is not uncommon either. In Part III we explain why we believe a la carte decision-making is not inherently unacceptable (and is, in fact, wholly desirable at times), and we identify the key considerations that make it better or worse.

PART I: CHOICE OF LAW AMONG THE STATES OF THE ELEVENTH CIRCUIT: SOME BACKGROUND

Choice of law, sad to say, lacks most of the delights of fine dining. But it does resemble the dining experience in one respect: some states prefer to order a la carte and others would simply rather order the meal of the day. Florida has chosen to make its own selections; Alabama and Georgia are satisfied to honor the menu combinations their predecessors arranged so many years ago.

To set the stage for our topic—a la carte versus all-or-nothing choice of law approaches—it is necessary to start with some background about why and how things got to where they are in choice of law theory today. This requires saying a bit about the development of choice of law in the twentieth century, in particular about the two Conflict of Laws Restatements.

A. A Brief History of the Two Restatements

There are about a half dozen choice of law theories in use in American courts these days. In the states on which we focus for this Article, the two Restatements are the only ones requiring detailed exposition. The First and Second Restatements of Conflicts of Law are the workhorses of the Eleventh Circuit's choice of law jurisprudence. The three states of the Eleventh Circuit either use the First exclusively (Alabama and Georgia) or use the First and Second in combination (Florida). We therefore focus our attention on the two Restatements.³

1. The First Restatement of Conflicts of Law

The history of choice of law is tied inextricably to the history of the two Restatements. Professor Joseph Beale of the Harvard Law School, who is generally credited with systematizing the foundations of the subject,⁴ was the Reporter for the American Law Institute's First Restatement of Conflict of Laws.⁵ Beale created the "vested rights theory" which, under his leadership, the First Restatement authoritatively promulgated.

This theory was based on Beale's notion of territorial sovereignty—perhaps typical of its time, but somewhat outmoded in appearance today. The vested rights theory held that once all of the events necessary to create a cause of action had taken place, rights "vested" pursuant to that cause of action. Courts litigating the dispute were then duty bound to honor those rights. Moreover, since each state had

³ The two Restatements are also of particular interest here because both were intentionally designed to represent a complete and internally coherent body of conflicts law. Both contain an initial statement of the premises underlying the interstate system followed by detailed rules about how these underlying premises apply. For this reason, both Restatements present a strong case for all-or-nothing choice of law. See discussion *infra* Section III.

⁴ This is not to deny the influence of other authors. For example, the renowned nineteenth century jurist Justice Joseph Story was an influence on Beale himself. Additionally, early choice of law theory was heavily influenced by the writings of international jurists such as Ulrich Huber and Barotolus of Sasferato. URlich HUBER, *DE CONFLICTU LEGUM DIVERSARUM IN DIVERSIS IMPERIIS*, translated in *SELECTED ARTICLES ON THE CONFLICT OF LAWS* 136 (Ernest G. Lorenzen, ed. 1947); BARTOLUS DI SASSOFERRATO, *SUPER PRIMAM ET SECUNDAM PARTEM CODICIS COMMENTARIA*, translated in *BARTOLUS ON THE CONFLICT OF LAWS* (Joseph Henry Beale, ed. 1914). But these early writers concerned themselves mainly with *international* conflicts of law—that is, conflicts between the laws of different nation states. It was not until the birth of the American federal system that *interstate* conflicts began to assume its current importance. Interstate and international choice of law theory have by now diverged to the extent that the latter area of study (which has now become known as "private international law") can largely be disregarded for purposes of the present discussion.

⁵ RESTATEMENT (FIRST) OF CONFLICT OF LAWS (AM. LAW INST. 1934).

exclusive authority to determine the legal consequences of activities occurring within its territory, rights vesting in one state had to be respected by others. The objective of the choice of law process, accordingly, was to determine where the rights vested. This was assumed to be the place where the last act occurred that was necessary to complete the cause of action.

In order to determine the place where the last act occurred, the First Restatement categorized choice of law issues as belonging to one of our familiar legal categories such as torts, contracts, property, marriage, etc. For each of these legal categories, a Restatement rule identified the occurrence that caused the rights to vest. The rule for torts cases, often referred to as “*lex loci delicti*,” mandated application of the laws of the place where the tortious injury occurred. The rule for contracts cases, “*lex loci contractus*,” instructed the judge to apply the law of the place where the contract was entered into. The other legal categories had similar rules, such as the “*situs* rule” for real property cases and the “place of incorporation” rule for matters of corporate affairs.

Beale’s choice of law theory garnered substantial judicial support. At one point in time the vested rights theory (or something very much like it) was adhered to in almost every state in the country. Indeed, some Supreme Court cases even suggested that the First Restatement method had constitutional status—that failure to honor vested rights created by other states was a violation of the Due Process or Full Faith and Credit Clauses.⁶ During the rise of American legal realist school of jurisprudence, however, critical commentary made substantial inroads into the First Restatement’s popularity.⁷ Since the middle of the last century, these critics have developed a number of “modern” approaches to choice of law challenging the First Restatement’s steadfast commitment to vested rights.⁸

⁶ See, e.g., *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). That view has now been decisively discredited. See, e.g., *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493 (1939) (either the place where the employment relationship was created or the place of the accident may apply its law in a worker’s compensation case); see also *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532 (1935). Constitutional oversight of state choice of law today is truly minimal. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

⁷ For a thorough description of the connection between legal realism and modern choice of law theory, see generally, Lea Brilmayer & Charles Seidell, *Jurisdictional Realism: Where Modern Theories of Choice of Law Went Wrong, and What Can Be Done to Fix Them*, 86 U. CHI. L. REV. 2031 (2019).

⁸ See, for example, Brainerd Currie’s governmental interest analysis, BRAINERD CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 177, 183–87 (1963); the theory of comparative impairment, William Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); and a method that has come to be known as “Leflar’s better law approach,” Robert A. Leflar, *Conflicts*

2. The Restatement (Second) of Conflict of Laws

The Restatement (Second) of Conflicts of Law, published in 1971, was heavily influenced by the critical attacks on the First Restatement, in particular those of Professor Brainerd Currie. Currie was the author of a chief competitor of the Restatement Second, the theory of governmental interest analysis.⁹ Facing a total erosion of popular support for Beale's theory of territorial sovereignty and "vesting," the drafters of the Second Restatement hoped that carefully thought-out concessions to modern critics such as Currie would steal their thunder and keep the Restatement alive in the face of competition from Currie's increasingly influential school of thought.¹⁰ As a result, the Second Restatement gave up considerable ground to the modern theorists' critiques of the First Restatement, abandoning the vested rights approach completely.¹¹ Indeed, the Second Restatement explicitly states that it supersedes the First.¹²

In place of the theory of vested rights, the Second Restatement installed what has become known as the "most significant relationship" test, also sometimes called the "center of gravity" test because it initially drew support from a series of New York cases using that label.¹³

Law: More on Choice-Influencing Considerations, 54 CAL. L. REV. 1584, 1586-88 (1966).

⁹ BRAINERD CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 177, 183-87 (1963).

¹⁰ According to Professor Reppy, Section 6 was a "sop":

Personally, I do not think Professor Reese [the Reporter] intended [S]ection 6 to diminish in any way the focus on territorialism underlying his "most significant relation" method. I consider [S]ection 6 a sop tossed in 1967 to members of the American Law Institute who were unhappy with a purely territorial methodology. Examination of the five factors enumerated in [S]ection 6 in addition to the policy of the interested forum and the other interested states shows that many are almost silly and will never have any influence on the outcome of the choice of law process under the Restatement Second.

Reppy, *supra* note 1, at 662 (footnote omitted).

¹¹ As far as the timing of its publication was concerned, the Second Restatement was definitively modern. Though in practice it is probably the least modern of any of the theories in this category. Today, none of the modern theories has been nearly as successful a competitor to the First Restatement as the Second Restatement. Indeed, it is the only competitor that has gained any traction in the Eleventh Circuit.

¹² According to the introduction to the Second Restatement, the Second Restatement "supersede[s] entirely the original Restatement of this subject published by the Institute in 1934." *RESTATEMENT (SECOND) OF CONFLICTS OF LAW* Introduction (AM. LAW INST. 1971).

¹³ See, e.g., *Haag v. Barnes*, 175 N.E.2d 441 (N.Y. 1961); *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954).

The “most significant relationship” or “center of gravity” approach is based on the notion that states have identifiable “relationship[s]” to disputes, and that the objective of the choice of law process is to identify and apply the law of the state whose relationship to the dispute is “the most significant.”¹⁴

Among the important elements that the Second Restatement took from the literature critical of the First Restatement was the centrality of state policy. Borrowing an argument from Brainerd Currie, the Second Restatement conceded that the relative significance of the various contacts a state had with a dispute could only be assessed through the determination of a state’s substantive policies. A central element of the methodology, therefore, is construction of the substantive laws that create the cause of action or defense.

The Second Restatement sums up the entire argument in its central provision, Section 6:

6. CHOICE OF LAW PRINCIPLES

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.¹⁵

The remaining portions of the Second Restatement are largely devoted to explaining what Section 6 means and what it requires in particular types of cases.¹⁶

¹⁴ RESTATEMENT (SECOND) OF CONFLICTS OF LAW Introduction (AM. LAW INST. 1971).

¹⁵ RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 6 (AM. LAW INST. 1971)

¹⁶ Thus, in some instances, the Second Restatement provides presumptive rules for choice of law decisions in discrete substantive contexts. In others, it simply lists the “contacts”

B. Surveying State Practice Nationwide

There is no single theory of choice of law that dominates the field today as the First Restatement did in its heyday. The states have exercised their freedom to experiment with choice of law by adopting a wide variety of different approaches. Professor Symeon Symeonides has tallied the different approaches used across the United States on an annual basis since 1994.¹⁷ Each year, Professor Symeonides sorts the choice of law doctrine for torts and contracts of all fifty states, the District of Columbia, and Puerto Rico.¹⁸ His collection and systematization of judicial decisions make our task considerably easier.

Looking at Professor Symeonides's 2019 survey, we find that the Second Restatement holds a strong plurality among the states and territories.¹⁹ This is true even though the Second Restatement has prompted many complaints to the effect that it is too amorphous to be of any use.²⁰ Twenty-five jurisdictions utilize the Second Restatement

relevant to the substantive issue for a court. Regardless of whether such particularized guidance is provided, the Restatement indicates that the ultimate choice of the applicable law must be the law of the state with "the most significant relationship." RESTATEMENT (SECOND) OF CONFLICTS OF LAW Introduction (AM. LAW INST. 1971).

¹⁷ These surveys are published annually by the *American Journal of Comparative Law*. Within his survey, Professor Symeonides includes all fifty states as well as the District of Columbia and Puerto Rico. Beyond choice of law, Professor Symeonides's annual articles also review Supreme Court jurisprudence on conflicts of law and provide a survey on the extraterritorial reach of federal statutes and recognition of foreign judgments and awards. See, e.g., Symeon Symeonides, *Choice of Law in the American Courts in 2019: Thirty-Third Annual Survey*, 68 AM. J. COMP. L. (forthcoming 2020) (on file with authors).

¹⁸ Professor Symeonides uses seven categories: "Traditional," "Significant Contacts," "Restatement (Second)," "Interest Analysis," "*Lex Fori*," "Better Law," and "Combined Modern." *Id.* The first six categories reflect the major choice of law theories and approaches promulgated by scholars and adopted by courts since the early twentieth century. The final category, "combined modern," represents jurisdictions whose choice of law methodology borrows from some or all of the "modern" choice of law theories to create a unique, eclectic, and definitively "modern" result.

¹⁹ The choice of law methodology table presented in Professor Symeonides's annual surveys has remained largely unchanged since the year 2000. The only changes since then are Wyoming's shifting from the traditional approach to the Second Restatement for both torts and contracts in 2017, Symeon Symeonides, *Choice of Law in the American Courts in 2017: Thirty-First Annual Survey*, 66 AM. J. COMP. L. 1, 60 (2018), New Jersey's switching from interest analysis to the Second Restatement for torts in 2008, Symeon Symeonides, *Choice of Law in the American Courts in 2016: Thirtieth Annual Survey*, 65 AM. J. COMP. L. 1, 32 (2017), and Nevada's switching from *lex fori* to the Second Restatement for torts in 2006, *id.*

²⁰ See, e.g., ROGER C. CRAMTON ET AL., CONFLICT OF LAWS 318 (3d ed. 1981) ("The critical question is whether the series of compromises that produced the Restatement, and the attempted fusion of jurisdiction-selecting rules with open-ended policy analysis, has resulted in a flabby, amorphous and sterile product"); Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV.

for torts and twenty-four for contracts.²¹ Though the Second Restatement cannot claim adoption by a majority of states, neither can any other methodology; there is no single choice of law approach that is more popular than it is. The only group that is larger is that of “modern” theories generally²²; at least forty-one jurisdictions rely on a modern approach for torts and forty-one for contracts.²³

C. Alabama, Georgia, and Florida’s Approaches to Choice of Law

While we cannot go in detail into the choice of law practices of all fifty states, a closer look at the choice of law methods of our three Eleventh Circuit states illustrates how the First and Second Restatement work in practice.

1. Alabama

Alabama is one of a minority of states that follows the so-called “vested rights” approach laid out by Professor Joseph Beale in the First Restatement of Conflicts. The state’s commitment continues long after the abandonment of vested rights theory by other, more “modern,” states.²⁴ A pair of cases in the early 1990s reaffirmed its commitment

1232, 1239 (1997); Lea Brilmayer & Daniel B. Listwa, *Continuity and Change in the Draft Restatement (Third) of Conflict of Laws: One Step Forward and Two Steps Back?*, 128 YALE L.J.F. 266 (2018), http://yalelawjournal.org/pdf/BrilmayerListwa_9bg766tn.pdf.

²¹ See Symeonides, *supra* note 17, manuscript at 24–25. It is important to note that most scholars who have surveyed choice of law doctrine in the United States have done so only for conflicts as applied to tort and contracts cases. Although choice of law as a field and issue area encompasses much more than tort and contracts (disputes involving property, business corporations, trusts, and partnerships may all present choice of law problems), disputes involving choice of law in torts and contracts are by and large the most frequent, and they are also where courts tend to stake their claims on significant questions of choice of law. We have therefore chosen to categorize a state as taking an a la carte or all-or-nothing approach to conflicts based on how that state approaches conflicts specifically in torts and contracts cases choice of law. Below we highlight substantive areas in addition to torts and contracts where it is common for courts to take something resembling an a la carte approach to conflicts. See *infra* Section II.C.2.

²² This includes jurisdictions that Professor Symeonides has categorized as applying a “significant contacts” test, the Second Restatement, interest analysis, Professor Leflar’s “better rule,” or some “combined modern” approach that borrows from any of the modern theories. It does not include the two jurisdictions (Kentucky and Michigan) that utilize a *lex fori* rule. See Symeonides, *supra* note 17, manuscript at 24–25.

²³ See *id.* It is a coincidence that both numbers add up to forty-one. It is not the same forty-one jurisdictions that are applying modern approaches to torts or contracts. At least six jurisdictions apply the First Restatement to either torts or contracts and a modern theory for the other. *Id.*

²⁴ Only thirteen states adhere to the vested rights theory of the First Restatement today. *Id.* Of the thirteen, Alabama is one of seven that takes an all-or-nothing approach to the First Restatement with torts and contracts cases. *Id.*

to traditional theory.

The first of these was *Fitts v. Minnesota Mining & Manufacturing Co.*²⁵ *Fitts* was a wrongful death case, involving an incident in which a husband, wife, and their three children—all Alabama residents—were killed when the plane the husband was piloting crashed in Florida. The administrator of the decedents' estates sued the defendants in Alabama state court. Contrary to what the traditional *lex loci delicti* rule would prescribe, the Alabama plaintiffs sought the application of Alabama law, believing that doing so would increase damages recoverable.²⁶

The court in *Fitts* "consider[ed] the question of whether Alabama should retain the traditional conflict of laws principle of *lex loci delicti* in tort cases or embrace the 'most significant relationship' approach of . . . the *Restatement (Second) of Conflict of Laws*."²⁷ The court discussed the merits and demerits of the modern approaches, in particular the Second Restatement, and concluded that there was simply not a strong enough reason to abandon its long-settled practice.²⁸ Alabama's decision to retain the First Restatement was largely based on tradition: "*Lex loci delicti* has been the rule in Alabama for almost 100 years."²⁹ That, and simplicity: "The newer approaches to choice of law problems are neither less confusing nor more certain than the traditional approach. Until it becomes clear that a better rule exists, we will adhere to our traditional approach."³⁰

Alabama also adheres to the First Restatement of Conflicts in contracts cases. In accordance with the First Restatement, Alabama applies the rule of *lex loci contractus*. First, it looks to whether the parties specified a particular law to govern their contract; if not, Alabama applies the law of the place where the contract was formed.³¹ This approach was reaffirmed without extended discussion of alternative choice of law approaches in the case *Cherry, Bekaert & Holland v. Brown*.³²

²⁵ 581 So. 2d 819 (Ala. 1991).

²⁶ *Id.* at 820 n.1.

²⁷ *Id.* at 820.

²⁸ *Id.* at 820, 823 ("After careful consideration, we are not convinced that we should abandon the *lex loci delicti* rule for the approach of the *Restatement (Second)*. Professor Kay and other commentators tell us that the adoption of the approach of the *Restatement (Second)* has not brought certainty or uniformity to the law.") (citing Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 561-62 (1983)).

²⁹ *Id.* at 820.

³⁰ *Id.* at 823 (quoting *Gen. Tel. Co. v. Trimm*, 311 S.E.2d 460, 462 (Ga. 1984)).

³¹ *J.R. Watkins Co. v. Hill*, 108 So. 244, 245 (Ala. 1926).

³² 582 So. 2d 502, 506 (Ala. 1991). Alabama will not apply the law of the place of contracting if it is contrary to Alabama's public policy, an "escape hatch" mechanism that is

2. Georgia

Like Alabama, Georgia is one of the minority of states that follows the traditional approach for both torts and contracts. On a number of occasions since the early 1980s, the Supreme Court of Georgia has had the chance to evaluate the advantages and drawbacks of its traditional approach relative to the more modern methods of other states. But like its sister state of Alabama, it remains unconvinced that a change in choice of law is appropriate.

A 1984 case, *General Telephone Co. v. Trimm*, involved a dispute over whether a third-party could enforce a contractual indemnity provision against an employer who had paid an injured employee under Georgia's worker's compensation scheme. The court noted the "recent development" of the "center of gravity system" of the Second Restatement.³³ Citing courts in Tennessee, Michigan, and Delaware that had apparently found the new approach "neither less confusing nor more certain than our traditional approach," the court stated that it would withhold adoption of a new choice of law methodology "[u]ntil it becomes clear that a better rule exists."³⁴

In 2003, the court revisited the choice of law question in a contract case and held that a better rule had not—from its perspective—yet developed.³⁵ Whereas twenty years earlier in *Trimm* the court had highlighted concerns that the non-traditional approaches were "confusing" and "[un]certain," in 2003 the court emphasized the importance of

consistent with the First Restatement. Interestingly, however, as guidance for what constitutes the state's "fundamental public policy," the Alabama Supreme Court has looked to the language of and comments to Section 187 of the Second Restatement for guidance. See *id.* Remarkably, that choice of the Alabama Supreme Court was informed by a decision of the U.S. District Court for the Southern District of Alabama. See *id.* at 506 (citing *Blalock v. Perfect Subscription Co.*, 458 F. Supp. 123 (S.D. Ala. 1978)). In *Blalock*, involving a contract with an anti-competition covenant, the federal court could not determine where the contract was made and was therefore left without much guidance under the traditional approach of *lex loci contractus*. See *Blalock*, 458 F. Supp. 123, 126. The contract did specify that Pennsylvania law would govern, but the court found that because "[t]here has been no Alabama appellate decision involving factual circumstances such as those in the matter [s]ub judice . . . it is appropriate to look to the teachings of the American Law Institute[s] . . . Second Restatement of Conflict of Laws." *Id.* at 127. Constructing the statutes of Alabama with guidance from Sections 187 and 188 of the Restatement (Second) of Conflicts, the federal district court held that anti-competition covenants "fl[y] directly in the face of the public policy of Alabama as set out by statute," and refused to apply Pennsylvania law to that provision of the parties' contract. *Id.*

³³ 311 S.E.2d 460, 462 (Ga. 1984).

³⁴ *Id.* (citing *Winters v. Maxey*, 481 S.W.2d 755 (Tenn. 1972); *Great Am. Ins. Co. v. Hartford Accident & Indem. Co.*, 519 S.W.2d 579 (Tenn. 1975); *Abendschein v. Farrell*, 170 N.W.2d 137 (Mich. 1969); and *Friday v. Smoot*, 211 A.2d 594 (Del. 1965)).

³⁵ *Convergys Corp. v. Keener*, 582 S.E.2d 84 (Ga. 2003).

outcome determinative tests to prevent judicial policymaking:

We recognize that some of our sister states have developed analyses which seem to be derived from the Restatement [(Second)] provisions. But despite the adoption of some very complex rules in these jurisdictions, in actuality it does not appear that these rules are outcome determinative. Instead, the cases seem to turn on a court's interpretation of its own public policy considerations. Therefore, . . . Georgia will continue to adhere to the traditional conflicts of law rules.³⁶

In a 2005 tort case involving a Tennessee resident suing his Missouri employer over injuries sustained on the job in Georgia, the court again reiterated its commitment to the traditional approach and its preference for a choice of law methodology that values simplicity³⁷ and prevents "judicial . . . policymaking."³⁸ Like Alabama had done in *Fitts*, the Georgia court also highlighted the importance of stare decisis and long-standing tradition:

The doctrine of *lex loci delicti* has served the resolution of conflict of laws issues in tort actions in this State for nearly 100 years. It is desirable to have stability and certainty in the law; therefore, stare decisis is a valid and compelling argument for maintaining the doctrine. Moreover . . . *lex loci delicti* has the virtues of consistency, predictability, and relative ease of

³⁶ *Id.* at 87. For a criticism labeling Georgia's choice of law approach as "sui generis" in its own right, see Symeon Symeonides, *Choice of Law in the American Courts in 2003: Seventeenth Annual Survey*, 52 AM. J. COMP. L. 9, 27–29 (2004) ("Georgia courts do not apply the common law (as opposed to the statutory law) of another state Even when [another state's law could apply] . . . Georgia courts tend to find escapes in a manner typical of courts that purport to like the traditional theory but not its solutions.").

³⁷ *Dowis v. Mud Slingers, Inc.*, 621 S.E.2d 413, 416–17 (Ga. 2005) ("The crux of the matter . . . is the common underlying misconception that the resolution of conflict of laws in complex litigation requires an equally complicated mechanism to do so. The approach taken by the Restatement (Second) of Conflict of Laws (1971) certainly fits the description of complexity. . . . The very flexibility of the Restatement (Second) has proved to be problematic"). The case involved a Tennessee employee suing his Missouri employer for injuries sustained on the job in Georgia after he fell four stories from the basket of a forklift; the court relied on the traditional approach to apply Georgia's exclusive remedy provision of its worker's compensation act, resulting in summary dismissal for the defendants.

³⁸ *Id.* at 418–19 ("[T]he array of 'modern' conflict approaches and their seemingly unending variations have been described as creating a 'veritable playpen for judicial policymakers.' . . . This Court declines to engage in such a policymaking exercise").

application.³⁹

With nearly forty years of hard-fought resistance to the modern theories and the Second Restatement behind them, it is difficult to imagine Georgia or Alabama departing from traditional choice of law approaches anytime in the near future.⁴⁰

3. Florida

Florida is not like her sister states of the Eleventh Circuit. As early as the late 1960s, members of the Florida Supreme Court signaled that they would not be disturbed by a choice of law methodology combining aspects of the traditional and modern approaches. In *Hopkins v. Lockheed Aircraft Corp.*, a 1967 wrongful death suit against California-based Lockheed after a Florida resident was killed in a plane crash in Illinois, the court came close to an outright rejection of the *lex loci delicti* rule, citing particular discomfort with the rule's application to the "purely fortuitous circumstances" of multistate accidents.⁴¹ Though

³⁹ *Id.* at 416 (citations omitted).

⁴⁰ Georgia did arguably make one minor diversion from its long-standing commitment to the traditional approach: *Amica Mutual Insurance Co. v. Bourgault*, 429 S.E.2d 908 (Ga. 1993). In this case involving an automobile insurance contract, the Supreme Court of Georgia relied on Section 193 of the Restatement (Second) as supporting authority to apply the law of the state of the principal location of the insured risk, i.e. the state where the plaintiff's car was garaged (New York), rather than the state where the insurance policy was delivered to the plaintiff (Georgia). Although this marked a departure from traditional *lex loci contractus* rules, the decision was based primarily on a reading of a Georgia statute and has not since been cited as a deliberate departure from traditionalist choice of law methodology.

⁴¹ 201 So. 2d 743, 747–48 (Fla. 1967). The court at first held that a diluted version of the *lex loci delicti* rule permitting "a more flexible [approach] [with] analysis of the policies and interests underlying the particular issue before the court" was appropriate. *Id.* at 747. But this holding was abandoned, and the court returned to its strict adherence to *lex loci delicti* after a petition for rehearing was granted. *Id.* at 749–52. In its first opinion, the court wrote that "policy considerations are a [s]ine qua non to the exercise by a court of the judicial principle of comity." *Id.* at 746. It stated further:

By giving full effect to the law of a foreign state when—and only when—such purposes or policies would be served or effectuated, the forum state does, as a practical matter, accord 'due deference and respect' to such foreign law—which is all that the rule of comity requires; and 'judicial comity' in unintentional tort cases becomes a meaningful and useful part of our jurisprudence instead of 'a blunt tool in the judicial process (which) frequently produced results that were not rationally supportable.'

Id. at 747 (quoting *Johnson v. Johnson*, 216 A.2d 781, 781 (N.H. 1966)) (alteration in original).

the court maintained the *lex loci delicti* rule *Hopkins*, the doctrine was not long for torts cases in Florida courts.

In 1980, another case involving Florida residents killed in an out-of-state plane crash apparently gave the Florida Supreme Court the opportunity it was seeking to "recede from prior decisions of this Court . . . [and] adopt[] a more flexible rule" for choice of law in tort cases.⁴² The court emphasized that South Carolina's only relationship to the cause of action was "the happenstance of the plane coming into contact with South Carolina soil after developing engine trouble in unidentified airspace."⁴³ The court then proceeded to adopt the Second Restatement as applied to multistate tort cases, noting that the Second Restatement would not displace the traditional rule of applying the law of the place of injury.⁴⁴ Rather, the court observed, the Second Restatement creates a presumption that the law of the place of injury applies unless "[o]ther factors . . . combine to outweigh the place of injury as a controlling

Justice Drew, who authored the majority's opinion upon rehearing, wrote in an opinion dissenting from the court's initial decision that

any extensive discussion of . . . the [l]ex loci delicti or place-of-wrong rule[] is inappropriate in connection with a proceeding explicitly characterized as one based on warranty. There are, however, obvious virtues, in consistency and stability, supporting the application of laws whenever possible, in a cohesive rather than piecemeal fashion. . . . [T]he applicability or inapplicability of foreign law should so far as possible be based on objective and stable standards. While the place at which an event occurs may indeed be fortuitous, that circumstance nevertheless seems to me of primary importance in determining the legal effect to be accorded any occurrence upon which a cause of action depends. . . . I am not persuaded that this case presents any necessity or justification for abandonment of guiding principles in past decisions or for expression of broad rules better left to be established by the slower but more certain judicial method of case disposition.

Id. at 748-49.

⁴² *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999, 1000 (Fla. 1980). The case involved a plane crash in South Carolina, resulting in the death of numerous family members who were guest passengers on a private plane leased by the defendant company and piloted by the company's president. The family, the company, and the pilot were all Florida residents. The family alleged negligent operation of the aircraft. Under Florida law, airplane guest passengers could recover upon a showing of ordinary negligence; South Carolina, on the other hand, required a showing of intentional misconduct or recklessness, which plaintiffs conceded they could not meet. The court in this case specifically adopted Sections 145 and 146 (and by extension Section 6) of the Restatement (Second) of Conflicts of Law as the state's choice of law methodology in multistate torts cases. This resulted in the application of Florida law to the parties at bar.

⁴³ *Id.*

⁴⁴ *Id.* at 1001.

consideration, making the determination of the applicable law a less mechanical, and more rational, process.”⁴⁵

Despite its transition to the Second Restatement for torts cases, Florida has long-maintained a preference for the mechanical, traditional doctrine of *lex loci contractus* in multistate contracts cases.⁴⁶ In a 1988 case extending the rule of *lex loci contractus* to contracts for automobile insurance, the Florida Supreme Court explained this apparent inconsistency by describing why it views contracts cases as inherently different—and requiring a choice of law approach distinct—from the types of multistate tort cases discussed above.⁴⁷ “With tort law, there is no agreement, no foreseen set of rules and statutes which the parties had recognized would control the litigation. In the case of a . . . contract, the parties enter into the contract with the acknowledgement that the laws of that jurisdiction would control their actions.”⁴⁸ The transitory and fortuitous aspects of accidents like plane crashes that caused the court great discomfort in applying the traditional approach to tort cases were the same features that encouraged the court in *Sturiano* to hold the line for contracts cases:

⁴⁵ *Id.* Florida’s application of the Second Restatement to multistate torts cases has been criticized for what some perceive as loose adherence to the Restatement’s design and intended approach. See, e.g., Shirley A. Wiegand, *Getting Nowhere: Florida’s Failed Choice of Law Approach to Torts and a Proposal for Change*, 8 FLA. A&M U.L. REV. 1, 9–10 (2012) (“[O]ver seventy percent of the time, [Florida state and federal courts conducting choice of law analysis under the Restatement (Second) of Conflicts in torts cases] rely almost exclusively on the section 145 list of ‘contacts to be taken into account.’ Most of the courts simply list some or all of those contacts, count them up, and choose the law of the one that has the most contacts or the contacts that the court believes are most relevant, without explaining their relevance. . . . [M]ost Florida state and federal courts ignore section 6 altogether.”).

⁴⁶ For a classic example of how Florida courts apply the *lex loci contractus* rule to contract cases, see, for example, *Goodman v. Olsen*, 305 So. 2d 753, 755 (Fla. 1974).

⁴⁷ *Sturiano v. Brooks*, 523 So. 2d 1126 (Fla. 1988). In *Shapiro v. Associated International Insurance Co.*, 899 F.2d 1116, 1119 (11th Cir. 1990), the Eleventh Circuit Court of Appeals declined to extend Florida’s adherence to *lex loci contractus* in cases involving automobile insurance contracts to a case involving real property insurance, noting that the two types of insurance present fundamentally different questions of risk and mobility and thus, of choice of law. Instead, the federal appeals court applied the Restatement (Second), “surmis[ing]” that the Florida Supreme Court “would espouse these [same] principles if faced with the [same] case.” *Id.* at 1120. The Florida Supreme Court has never directly addressed the appeals court’s holding in *Shapiro*. However, in a 2006 case, the Florida Supreme Court noted that it has “long adhered to the rule of *lex loci contractus*,” including in cases involving “an issue of insurance coverage,” and implied that it would do so regardless of the type of property or person insured. *State Farm Mut. Auto. Ins. Co. v. Roach*, 945 So. 2d 1160, 1163 (Fla. 2006).

⁴⁸ *Sturiano*, 523 So. 2d at 1130.

While it is true that *lex loci contractus* is an inflexible rule, we believe that this inflexibility is necessary to ensure stability in contract arrangements. . . . The very reason . . . that we live in a migratory, transitory society, provides support for upholding [the traditional] doctrine. Parties have a right to know what the agreement they have executed provides. To allow one party to modify the contract simply by moving to another state [thereby potentially triggering a more 'significant relationship' between that state and the parties' contract] would substantially restrict the power to enter into valid, binding, and stable contracts.⁴⁹

Florida has in this way provided an explanation for *why* it takes a distinct approach to choice of law questions in torts and contracts cases—an explanation that we find to be relatively clear and succinct.

Yet Florida has not addressed the questions we pose in regard to this practice as a general matter. It does not explain why it appears problematic to some people to “mix and match” choice of law theories, and it does not explain why it considers such doubts to be misplaced. That issue is our focus. It raises complex issues and questions that bring no easy answers—but that are nonetheless critical to address.⁵⁰

PART II: A LA CARTE DECISION-MAKING

The examples we have given of choice of law decision-making in a variety of states give some picture of what it means to make a decision *a la carte*. We now attempt to make that picture explicit.

A. Identifying a la Carte Decision-Making

The relevant difference between a *la carte* and all-or-nothing decision-making is this: all-or-nothing states use one choice of law methodology for all of their choice of law problems; other choice of law methodologies are not used at all. A state that has an all-or-nothing approach to selecting the applicable law uses the same methodology consistently. An all-or-nothing approach does not change choice of law methods back and forth within a single case; nor does it change methods back and forth from one case to another. At any particular point in time, there is only one choice of law approach that it employs. A *la carte* states, in contrast, employ more than one choice of law theory, methodology, or approach, or parts of approaches, at a single point

⁴⁹ *Id.* at 1129–30.

⁵⁰ See *infra* Part III.

in time.

We see the same diversity of viewpoints on the question of a *la carte* decision-making as we saw on adoption of the choice of law methodology in the first place. As we have seen in our description of the three Eleventh Circuit states, above, both Alabama and Georgia present themselves as all-or-nothing states. In contrast, Florida by its own acknowledgement applies an *a la carte* approach (although the state does not use our dining-inspired terminology). Florida uses both the First and Second Restatements—the former for contracts actions and the latter for torts.

Taking Professor Symeonides as our guide once again, it turns out that Alabama and Georgia are in the majority and Florida in the minority. The all-or-nothing approach is the most common form of adopting a choice of law theory. At least thirty jurisdictions follow the all-or-nothing pattern and apply the same theory to both torts and contracts disputes.⁵¹ Among them, the Second Restatement is the most popular, with nineteen of the thirty jurisdictions applying the Second Restatement to both torts and contracts.⁵² This is followed by the First Restatement, with seven jurisdictions—including Alabama and Georgia—applying the First Restatement all-or-nothing.⁵³

A significant minority of jurisdictions—at least twenty-one—follow an openly *a la carte* approach to choice of law.⁵⁴ Eleven of them, including Florida, follow an *a la carte* approach to the extent that they apply a different choice of law methodology to torts than they do for contracts. However, within a single characterization—as tort or contract, that is—they apply a single theory consistently. The ten other jurisdictions that follow an *a la carte* approach are slightly different. These jurisdictions combine aspects of some or all of the various “modern” theories to come up with a unique choice of law methodology which they then apply to torts cases, contracts, or both.⁵⁵

⁵¹ See Symeonides, *supra* note 17, manuscript at 24–25. This does not include six states that apply what Professor Symeonides calls a “combined modern” approach to both torts and contracts. For the purposes of this article, those states are categorized as following an *a la carte* approach to choice of law. This is because, although they may use the same “combined modern” approach for both torts and contracts, their “combined modern” methodologies all borrow *a la carte* from some or all of the various modern theories.

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *id.* Note that we do not treat these variations on the *a la carte* approach as fundamentally different for the purposes of this Article. Jurisdictions like Florida that rely on one pre-established theory for torts conflicts and another for contracts conflicts are in effect operating under a broader, unique “unitary” theory about what choice of law doctrine in their state ought to look like and why. We do not view this as substantially different from

B. *Three a la Carte Look-Alikes*

Importantly, not all phenomena involving multiple choice of law approaches qualify as a la carte for our purposes. There are at least three situations which are simply a la carte "look-alikes": what has been called "dépeçage" in traditional choice of law scholarship; ordinary changes in methodology; and mistakes in the application of a single method.

Dépeçage means simply that a state decides a case by combining the laws of several different states.⁵⁶ This does not necessarily implicate multiple choice of law methodologies. Take, for example, a case that has issues of both tort and contract. Assume that it is being litigated in Alabama, which consistently employs the First Restatement. Under the First Restatement the law of the place of injury applies to torts issues, and the law of the place where the contract was formed applies to contracts issues. If, in our hypothetical case, these two events occurred in different states, the resulting dépeçage would involve an Alabama court's application of more than one state's laws to the case. Thus, it is possible for a state that takes an all-or-nothing approach to choice of law to apply the laws of more than one state in a single case. This is different from taking an a la carte approach to choice of law generally. The point is that, as an all-or-nothing state, Alabama is consistent in its commitment to the traditional rules and premises of the First Restatement, even in the case of dépeçage. The two are not the same thing.

The second "look-alike" case is the phenomenon of a state changing its choice of law methodology. Such a change does not immediately justify characterizing a state's approach to choice of law as a la carte. As we saw earlier, Alabama has throughout its entire history applied the traditional First Restatement approach.⁵⁷ But let's assume that at some fixed date in the future, the Alabama Supreme Court decides that it wants to go "modern," and switches the state's choice of law doctrine to follow the Second Restatement, abandoning adherence to the First Restatement in its entirety. It might be argued that Alabama is using more than one choice of law system, and that it therefore ought

the states whose eclectic a la carte approaches (either to torts, contracts, or both) are characterized as "combined modern" by the surveyors, because those states, too, operate under a broader (even if implicit) unitary theory that embraces an a la carte approach. The more important issue for us here is what these unitary theories look like, how they are developed by the courts, and whether they are ever fully explained or justified. See discussion *infra* Part III.

⁵⁶ Willis L.M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973).

⁵⁷ See summary of Alabama's choice of law doctrine *supra* Section I.C.1.

to be classified as taking an a la carte approach. But this would be mistaken.

In the example above, Alabama presumably stops using the First Restatement at the point that it starts using the Second. At the advent of the “modern” theories and the Second Restatement in the second half of the twentieth century, such immediate and total shifts by high courts from one choice of law approach to another were relatively commonplace. But for a state’s approach to qualify as a la carte, the state would have to retain the former choice of law theory at the same time that it adopts the new one. Our hypothetical example about Alabama is a simple case of a state changing its methodology from one approach to another; it does not satisfy the definition of a la carte approaches because the state isn’t using more than one methodology simultaneously.

Finally, one should not confuse a la carte approaches with simply making a mistake. States using a la carte approaches deliberately employ two different methodologies; they do not try to use a single method but mistakenly apply a second one on occasion. Assume, for example, that although Georgia uses the First Restatement approach, it consistently misinterprets that approach as requiring application of the law of the state that would actually be selected by the Second Restatement as the state of the “most significant relationship.” It could possibly be argued that due to this consistent mistake, Georgia was applying two different choice of law methods (the First Restatement and the Second Restatement) at the same time. This would not be correct, however. Our definition would not classify Georgia as taking an a la carte approach. In referring to a state as “*using more than one methodology*” our definition of a la carte approaches assumes that the employment of more than one choice of law approach is deliberate.

These three categories of a la carte look-alikes indicate that some phenomena that seem to qualify as a la carte decision-making may turn out on second look to be something rather different. This discovery is balanced, however, by the existence of a number of cases where the converse is true. There are common instances where a la carte decision-making has become so well accepted that purportedly all-or-nothing states fail to notice that the employment of a la carte decision-making has occurred, or that it may not fit with the state’s otherwise-applicable choice of law method. As we describe below, these situations are characterized by special substantive considerations that seem to make a la carte decision-making desirable, if not unavoidable.

C. Special Substantive Contexts

The line between torts and contracts is a choice of law “fault line,” along which courts inclined towards a la carte decision-making tend to

develop and justify their a la carte methodologies.⁵⁸ The court that openly favors a la carte decision-making is more likely to apply different choice of law methods along the line of torts and contracts than in any other context.

But this fault line is not unique. Beyond torts and contracts, there are a number of other substantive contexts where something resembling an a la carte approach has become so commonplace among the various states that courts and commentators hardly give the phenomenon a second glance. These include real property, corporate governance, rules of procedure, and choice of law clauses. In cases characterized by these issues, nearly all jurisdictions follow the same version of certain rules. This is true even where a state's application of the commonplace rules creates inconsistencies with the state's general choice of law methodology (or methodologies). Though such is often the case, these inconsistencies are rarely highlighted or addressed.

1. Contracts Versus Torts

As we saw above with the case of Florida,⁵⁹ the differences presented by contracts and torts cases can occasionally encourage courts to "split" their state's choice of law methodology and apply different approaches to the different types of actions. From one standpoint, this makes a great deal of sense. Contracts and torts disputes arise out of highly divergent contingencies. Whereas the aggrieved party to a contract dispute is thought to have anticipated the law that would apply to such a dispute, the victim of tortious conduct often has little say over where they will be harmed and what law ought to apply. Though a majority of states believe there is no reason to have different choice of law approaches for contracts and torts,⁶⁰ states such as Florida find the above differences a sufficient justification to utilize different approaches.

Consultation with Professor Symeonides's annual survey reveals that at least fifteen states use a different choice of law approach for contracts than for torts.⁶¹ Interestingly, there is little discernible pattern indicating which approaches these states tend to favor actually selecting the applicable law. For example, among the fifteen states, eight of them follow a traditionalist approach (the First Restatement or *lex fori*) for either contracts or torts and a modern approach for the other.⁶² We

⁵⁸ See summary of Florida's choice of law approach *supra* Section I.C.3.

⁵⁹ See summary of Florida's choice of law approach *supra* Section I.C.3.

⁶⁰ See, e.g., *Phillips v. Gen. Motors Corp.*, 995 P.2d 1002, 1007 (Mont. 2000).

⁶¹ See Symeonides, *supra* note 17, manuscript at 24–25.

⁶² See *id.* We classify the rule of *lex fori* (apply the law of the forum) as a "traditionalist"

know that Florida is one of these states.⁶³ But only three other states agree with Florida that this is how traditionalist and modern approaches should be parceled out between torts and contracts.⁶⁴ An equal number of states believe just the opposite—that a rigid, traditionalist approach should apply to torts and a modern, flexible one to contracts.⁶⁵ Of the seven remaining states—the ones that apply different modern approaches for torts and contracts⁶⁶—there is little in the way of a pattern. It's all a jumble.

2. Other Substantive Contexts

The line between torts and contracts is not the only potential “fault line” in choice of law. There are substantive areas in which all or nearly all states apply the law of a state other than the one that is indicated by their usual choice of law methodology. For example, all states seem to follow the “situs rule” for cases involving the validity of a conveyance of real property.⁶⁷ This is true even though the rule is generally attributed to the First Restatement, and even though no effort is made to explain the rule in terms congenial to the choice of law method otherwise applied by forum states.

Assume, for example, that a case is brought in Alpha concerning the ownership of real property in Beta and Alpha usually applies the theory of governmental interest analysis. Under the situs rule, Alpha will nonetheless apply the law of the property's location. It will do so almost automatically, without the analysis of interests that would be required by the governmental interest approach. And it may not even recognize the anomaly thus created.

A similar example is the principle that the forum will apply its own “procedural” rules.⁶⁸ In a state that applies the modern choice of law

(as opposed to “traditional”) approach here only because the rule's strict rigidity and overtly outcome determinative nature more closely align with the First Restatement than any of the flexible, “modern” choice of law approaches.

⁶³ Above, we showed how Florida explained that the transitory, accidental nature of torts ought to favor a more flexible, modern approach, while the determinate nature of contracts ought to favor a more outcome determinative, traditional approach. See *supra* Section I.C.3.

⁶⁴ These are Oklahoma, Rhode Island, and Tennessee. Symeonides, *supra* note 17, manuscript at 24–25.

⁶⁵ These are Kentucky, Michigan, North Carolina, and West Virginia. *Id.*

⁶⁶ These are Arkansas, California, District of Columbia, Nevada, New Hampshire, New Jersey, and North Dakota. *Id.*

⁶⁷ RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 215 (AM. LAW INST. 1934); see Russell J. Weintraub, *Inquiry into the Utility of Situs as a Concept in Conflicts Analysis*, 52 CORNELL L. REV. 1 (1966).

⁶⁸ RESTATEMENT (FIRST) OF CONFLICT OF LAWS ch. 12, intro. Note (AM. LAW INST. 1934).

theory such as "governmental interest analysis" there should be no place for such categorical, rigid rules. Application of local procedural law would have to be justified (as any other choice of law result) according to the analysis of governmental interests that the methodology requires. Yet many if not all states—even ones that apply interest analysis—typically apply their own procedural law without consulting the choice of law methodology that the state applies as a general matter. And courts typically do not see the need to explain why they approach the procedure-substance distinction in this way.

Another example concerns application of the law of the place of incorporation to matters of internal corporate governance.⁶⁹ Nearly all states, it seems, in cases of internal corporate affairs tend to automatically apply the same law—the law of the state where the business was incorporated—without first considering whether a different result is required by their usual choice of law methodology, such as the Second Restatement.⁷⁰

A final example concerns the enforcement of choice of law clauses. In some choice of law theories, the idea that parties would include in a contract a provision choosing the law to govern their dispute over the contract is antithetical to the principles espoused by the theory. For Joseph Beale, for example, such a practice was inconsistent with the concept embodied in the First Restatement that rights to a cause of action—to have a law govern and adjudicate a dispute—only vest when all the events necessary to create that cause of action occur.⁷¹ The same could be said of the governmental interest analysts, whose preferred choice of law approach includes little to no consideration of the parties' private preferences.⁷²

The Second Restatement of Conflicts takes a different approach centered on party autonomy, which has become the near-universal rule for choice of law clauses. Section 187 of the Restatement states:

(1) The law of the state chosen by the parties to

Even states that no longer adhere to the First Restatement follow the principle of the forum applying its own procedural rules.

⁶⁹ RESTATEMENT (FIRST) OF CONFLICT OF LAWS ch. 6, topic 5 (AM. LAW INST. 1934).

⁷⁰ P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1, 16–18; see RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 302–306, 309 (permitting a state other than the state of incorporation to apply its laws if it "has the more significant relationship to the occurrence and the parties").

⁷¹ See Juenger, "General Course of Private International Law," in 193 *Recueil des Cours*, 119, 209 (1985) (quoting 2 BEALE, *THE CONFLICT OF LAWS* 1080–84 (1935)).

⁷² Patrick Borchers, *Choice of Law in the American Courts in 1992: Observations and Reflections*, 42 AM. J. COMP. L. 125, 135 (1994).

govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.⁷³

Contrary to other methodologies' approaches to choice of law clauses, the Second Restatement promotes party autonomy, presenting courts with a rule that is relatively simple to apply and can save judges the work of going through a separate choice of law analysis. As Patrick Borchers wrote in 1994 after California—not a Second Restatement state—adopted Section 187 of the Second Restatement, "Given these pragmatic virtues of party autonomy, it is probably not surprising that courts of all conflicts stripes have flocked to the Second Restatement's . . . Section 187."⁷⁴ Today, Section 187 remains "a nearly universal principle in the United States," "followed by courts committed to the First Restatement, to the various forms of interest analysis, and of course, by those that otherwise follow the Second Restatement."⁷⁵

This is quite a substantial list of examples, which by no means claims to be complete. Real property ownership, corporate governance, procedural law, and enforcement of choice of law clauses all

⁷³ RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 187 (AM. LAW INST. 1971).

⁷⁴ Patrick Borchers, *Choice of Law in the American Courts in 1992: Observations and Reflections*, 42 AM. J. COMP. L. 125, 135 (1994).

⁷⁵ *Id.*

seem to be decided by some line of reasoning that is distinct from the one that a forum state may use to resolve choice of law issues generally. And this applies both to states like Florida, which recognizes candidly that it is an a la carte state, and to states like Georgia and Alabama which do not.⁷⁶

PART III. ARE A LA CARTE APPROACHES A PROBLEM?

Having seen one state's approach to a la carte decision-making in detail and reviewed a number of substantive contexts where the practice is common, an important question remains: what is the reason for differentiating between a la carte and all-or-nothing approaches to choice of law to begin with? Why spend all of this energy on fine tuning a distinction that may, when push comes to shove, have no utility?

We invest the effort because we believe there is utility in recognizing the phenomenon as it occurs. We believe that courts are entitled to experiment with choice of law methodology and produce results that are the best for their jurisdiction. We also believe that an a la carte approach to choice of law comes with certain risks. An argument can be made that the sort of hybrid approach to choice of law that results from a la carte decision-making is illegitimate, as it merges several potentially incompatible choice of law theories into what is a fundamentally inconsistent methodology. The result (it could be argued) is so irrational as to border on an absence of due process of law.

A. Existing Scholarly Opinion

Professor William Reppy has expressed similar reservations to a la carte approaches (although under a different name). In an article entitled *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, he criticized courts that mix together or cite parts of different choice of law methods.⁷⁷ Following in the footsteps of some earlier authors who had addressed this practice, he referred to the a la carte method as "eclecticism"⁷⁸ which he defined as "[the] use by the court of two or more distinct choice of law methods, or parts of those methods, in deciding a single choice of law issue."⁷⁹

⁷⁶ One explanation for Alabama and Georgia following the trend on these common rules might be that these two states are, in the background, First Restatement states, which already apply forum law on questions of procedure. But application of the First Restatement does not explain the states' approaches in the other substantive contexts, such as enforcement of choice of law clauses.

⁷⁷ Reppy, *supra* note 1.

⁷⁸ *Id.* at 645 & nn. 1-2.

⁷⁹ *Id.* at 645.

1. The Critique of "Eclecticism"

In Reppy's view, eclecticism in the choice of law context is "purposeless" and "deplorable."⁸⁰ Reppy complains that most of the other authors who have considered the matter have been too tolerant of it. The chief targets of Reppy's criticism are Professors Robert A. Leflar and James Westbrook. Professor Leflar, writing throughout the late 1970s and early 1980s, applauds states such as Wisconsin, New Hampshire, Rhode Island, and Minnesota that have adopted his "choice-influencing considerations" approach⁸¹ in "decisions [that] give honest reasons for their results," and which "might have been reached with equal logic . . . by employing any of the other currently publicized approaches to the choice-of-law process."⁸² Surveying the state of choice of law in American courts, Leflar approves of the increasing number of judicial decisions "combining two or more of the [modern choice of law theories] to produce results" which he believes could "be sustained under any or nearly all of the new non-mechanical approaches."⁸³

Professor Westbrook, writing around the same period, takes the view that courts citing multiple methodologies in their choice of law decisions is a necessary, albeit at times challenging reality.⁸⁴ Westbrook does not believe that eclecticism is a phenomenon that could (or should) ever go away.⁸⁵ His pragmatic view of the law is that conflicts cases require courts to reconcile irreconcilable values; that judges approach their positions with different conceptions of their responsibilities; and that societal changes will continue to present new choice of law challenges.⁸⁶ In light of these realities, "an eclectic approach is preferable" precisely because of the flexibility that it promotes—"because the importance of advancing certain values varies with changes in the law-fact patterns in conflicts cases and because different

⁸⁰ *Id.* at 646.

⁸¹ See Leflar, *supra* note 8.

⁸² Robert A. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 L. & CONTEMP. PROBS. 10, 13 (1977); see, e.g., Leflar, *Choice of Law: States' Rights*, 10 HOFSTRA L. REV. 203 (1981); Robert A. Leflar, *The Nature of Conflicts Law*, 81 COLUM. L. REV. 1080 (1980).

⁸³ Robert A. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 L. & CONTEMP. PROBS. 10, 10 (1977).

⁸⁴ James E. Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case for Eclecticism*, 40 MO. L. REV. 407 (1975).

⁸⁵ *Id.* at 410–11 ("[This] is not to argue that improvement is impossible. But it is essential to remember that choices that must be made are not between alternatives that are clearly good or clearly bad, or between methodologies that are essentially defective or completely satisfactory [A] number of values are at stake in the choice-of-law process. Some values can be advanced only by sacrificing others. Some problems can be solved only by ignoring others.") (footnotes omitted).

⁸⁶ *Id.* at 440–47.

methodologies emphasize different values.”⁸⁷ Even where varying choice of law methodologies based on fundamentally inconsistent premises are employed in concert, Westbrook believes that judges simply shouldn’t mind as much as the academics do about these discrepancies. He believes that judges’ wisdom and common sense are such that they can create “rationale[s] . . . capable of being explained to non-lawyers [with] results [that] fulfill their normal expectations when they are confronted with a legal problem,”⁸⁸ and that this alone is enough to ask of a choice of law approach.

Reppy is forceful in his repudiation of the praise heaped upon courts by Professors Leflar, Westbrook, and others. He writes that any “state supreme court that currently tolerates distinct [choice of law] methods in the same opinion should adopt forthrightly one of them as *the* method for the state and should reject expressly the others.”⁸⁹ The foundation of Reppy’s critique is his understanding that modern choice of law methodologies do not in fact consistently point to the same results in the same cases, contrary to what Professor Leflar has claimed. Moreover, Reppy believes it is intolerable that states could cite in an *à la carte* fashion to choice of law theories, the foundational premises of which may be theoretically incompatible. He takes as one example a case decided in New York, which used one method to decide a contract issue and another to decide a tort issue⁹⁰:

Also unacceptable to me is the notion that one method may be appropriate for one category of case and another method based on a different theory of allocation of sovereign power, appropriate for a different category. For example, one New York court has announced that New York uses interest analysis in tort cases and center of gravity in contract cases. I cannot imagine why New York should have different attitudes about allocation of sovereign power depending on a tort or contract label.⁹¹

As we have noted, treating the tort-contract distinction as the fault line of conflicts cases is one of the most common types of a *la carte*

⁸⁷ *Id.* at 412.

⁸⁸ *Id.* at 448.

⁸⁹ Reppy, *supra* note 1, at 646.

⁹⁰ *Am. Home Assur. Co. v. Emp’rs Mutual*, 77 A.D.2d 421 (N.Y. App. Div. 1980).

⁹¹ Reppy, *supra* note 1, at 707.

decision-making that one finds.⁹² It is, of course, exactly what Florida has done. Florida uses both of the Restatements—the First for contracts cases and the Second for torts. Reppy’s objection to the Florida approach would seem to be an emphasis that the Restatements are entirely inconsistent with each other. The First is built upon a particular set of premises about how states operate, who and what they have a right to control, what they owe to other states, and so forth. These are found in the First Restatement’s Chapter One.⁹³ The Second Restatement also is built upon a particular set of premises, but they are a different set; they are summed up in Section 6, which sets out the “most significant relationship” test.⁹⁴ These two sets of premises are indeed inconsistent with one another. In fact, the Second Restatement explicitly states that it supersedes the First.⁹⁵ How can a state choose to incorporate such disparate elements into its choice of law decision-making?

Reppy recognizes that there are certain circumstances where a *la carte* decision making may be acceptable. He recognizes that a state might use the pieces from two different theories to create a “single, new choice of law method”:

This Article repudiates eclecticism except in instances in which a jurisdiction formulates one single, new choice of law method by piecing together aspects of choice of law methods in use in other states, as, for example, when a court that follows interest analysis borrows center of gravity as a device for breaking true conflicts.⁹⁶

This position has some appeal because it seems to allow for hybridizing pre-existing methods from other states’ choice of law methods, so long as the result produced is a single, coherent new approach that alternates between other methodologies based on an established criterion. But for Reppy, whether the result is a single coherent new method or not turns out to be a function of his view of the merits of the choice of law criterion. If one thinks that some criterion is irrelevant to the choice of law process, then one will also object to using that characteristic to select between two preexisting choice of law

⁹² See *supra* Section II.C.1.

⁹³ RESTATEMENT (FIRST) OF CONFLICTS OF LAW ch. 1 (AM. LAW INST. 1934).

⁹⁴ RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 6 (AM. LAW INST. 1971).

⁹⁵ RESTATEMENT (SECOND) OF CONFLICTS OF LAW Introduction (AM. LAW INST. 1971).

⁹⁶ Reppy, *supra* note 1, at 646.

approaches. It is because Reppy considers the characterization as a torts or contracts case to be an irrelevant factor that he rejects it as a legitimate criterion in deciding which choice of law theory to apply.

Consider Florida's a la carte combination of First and Second Restatement elements, which turns on whether the dispute is one of contract law or of tort law. Given Reppy's objection to the New York case, we can assume that Reppy would object to Florida's choice of law approach as well. But why? Reppy objects to the hybrid result because it provides no basis for the difference in treatment. He says that he "cannot imagine why New York should have different attitudes about allocation of sovereign power depending on a tort or contract label."⁹⁷ Obviously the Florida Supreme Court would disagree; it explained the difference in treatment by noting that multistate tort cases require "a more flexible rule"⁹⁸ than contract cases in order to avoid producing "results that [are] not rationally supportable," such as the application of foreign law in multistate accident cases where the territorial connecting factor is purely fortuitous. For Florida, the First Restatement's arbitrary and uncritical application of foreign law to parties domiciled in the forum extends beyond what "the rule of comity requires," which is to give "full effect to the law of a foreign state when—and only when—such purposes or policies would be served or effectuated."⁹⁹

You may agree with Reppy on this point or you may agree with the Supreme Court of Florida. Whatever your view is, it is likely to depend on your attitude towards the merits of various choice of law premises and values. Reppy's conclusions are a result of his inability to imagine that a state might have a well-grounded difference in attitude towards torts and contracts cases. Yet *any* adherent of the First or Second Restatement ought to find it extremely easy to imagine that torts and contracts would be treated differently. The most fundamental element of the structure of both of these Restatements is the division into categories such as torts, contracts, property, and so forth. The lifeblood of the Restatement approach is the principle that torts should be handled one way, contracts another, and so on down the line.¹⁰⁰

2. Unitary Versus Hybrid Methods

The fundamental problem that Reppy has identified relates to

⁹⁷ Reppy, *supra* note 1, at 707.

⁹⁸ *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999, 1000 (Fla. 1980).

⁹⁹ *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743, 747 (Fla. 1967).

¹⁰⁰ A Third Restatement is currently being considered by the American Law Institute; it follows the same structural principle. One of the authors of this Article is a member of the Advisory Board of this Third Restatement.

whether the end product of the hybridization process is a single coherent choice of law approach—what might be called a “unitary” theory—or what might be characterized as a “patch job.” A patch job is rejected while a unitary theory is approved. When two compatible choice of law approaches are unified according to some rational criterion that specifies which applies to which cases, this does not create problems for Reppy. But two incompatible theories cannot be merged into a single theory using what he believes is an arbitrary factor. That is what New York (and presumably Florida) supposedly did, and it is—according to Professor Reppy—to be condemned.

The difficulty that Reppy faces in explaining why hybridization is impermissible is that the end product of any judicial hybridization process is indistinguishable from an identical choice of law method that originated in a unitary process. Every approach like New York’s or Florida’s has an equivalent unitary analog. To see why, one need only to combine the multiple methodologies of, say Florida, into a complete and integrated whole by identifying the rule or principle that the courts use in determining when to apply the first choice of law approach and when to apply the other. In the Florida example, there are two theories at play:

1. State territorial sovereignty determines where rights to a cause of action vest and which state’s laws apply; and

2. Analysis of the state with the “most significant relationship” to the parties and their dispute determines which state’s law to apply.

These two theories are obviously inconsistent. The law of the state arrived at by analysis in Point 1 may not be the same as the law of the state arrived at by analysis in Point 2. But as we see in Florida, whether the former or the latter applies depends on whether the case is a contracts case or a torts case. This is the principle upon which application of either theory turns, and it’s therefore possible to combine the theories into a merged, “unitary” approach by simply stating:

Decide contracts cases based on the vesting of rights and torts cases based on the most significant relationship.

For Reppy, if this approach were arrived at through the multi-state, or multi-case process then it seems it would be “eclectic” (to use Reppy’s terminology) or a la carte (to use ours), and reproachable. But

if one were to start with the end product, and have produced it as an end product from the outset, then it seems the single product would be described as “unitary,” or all-or-nothing.

The problem with Reppy’s otherwise-appealing analysis is that the end result of a process of hybridization—whether appropriate or not, according to Reppy’s view—does not seem intrinsically any different by virtue of the fact that it was arrived at through a case method process of hybridization. If a choice of law approach is a jumbled-up patch job, full of unexplained inconsistencies and irrationalities, then why does it matter that it was assembled out of elements selected from different and fundamentally incompatible choice of law theories? Why isn’t the identical rule, established and promulgated in one moment by a single author, equally problematic? Why is a unitary rule acceptable but not its hybridized equivalent?

The answer, perhaps, lies in the difference between a theory developed by a court, in the course of a string of precedents, and a theory spelled out by a law professor or in a Restatement. If a law professor develops a choice of law theory and publishes it, the professor presumably is recommending not only each individual part of the method, but the method as a complete whole. Imagine, for example, that an eminent scholar teaching at a Florida law school writes a law review article propounding a new theory of choice of law. Under her theory, contracts cases are decided according to the law of the place where the rights vest (that would be, the state where the contract was formed). Torts cases, however, are decided according to the state of the “most significant relationship,” and the professor lists a series of factors that are identical to those set forth in Section 145 of the Second Restatement for courts to determine the most significant relationship in a typical torts case.

The professor wishes her writings to be persuasive; and they are unlikely to be persuasive if the results are scattershot, incoherent, unreasoned, or random. She has thought through her recommendation as a single integrated unit, and she endorses the way that the various pieces fit together. The methodology developed by our hypothetical Florida law professor (which mimics the actual Florida approach) would be expected to provide a coherent, well-reasoned, and consistent set of premises fully explaining the difference in treatment for torts and contracts cases in such a manner that provides both transparency and predictability across all multistate cases. Yet the critique of “eclectic” choice of law would apparently leave the professor’s law review article unscathed, while the equivalent practice—when specified by the Florida Supreme Court—is vilified.

Similar to our hypothetical Florida law professor, the reputation of the ALI rests on its tradition of extensive study of the subject by

expert drafters (both academics and practitioners); thoughtful consultation with the general membership of the Institute; solicitation of opinions from the bench and the practicing bar; and critical responses by reputable practitioners, academics, and judges after the draft is published. A Restatement is expected to work as a coherent whole; it should not contain unexplained inconsistencies. The imprimatur of the American Law Institute conveys an endorsement of the way that the various pieces fit together, and not simply a recommendation of individual sections. Like an academic article, both drafts and the final product will presumably have been examined carefully and can be expected to work coherently as an integrated whole.

Judges, on the other hand, are responsible first and foremost to the case before them. This is the essence of the common law case method. Its individualized, case-by-case decision-making process is naturally more likely to produce a patch job methodology comprised of elements linked together by only partially developed decision criteria. That, at least, seems to be the only rational basis for assuming that a theory produced by an academic or Restatement committee is more likely to make sense than a series of precedents decided by a state's highest court strung together in an integrated whole.

We hope that it is clear that we do not accept this assumption for treating unitary and hybridized versions of the same basic rule differently. The assumption borders on claiming that academics and American Law Institute drafters are knowledgeable people who write internally consistent, well thought out recommendations in their articles and Restatements while judges are ignorant, confused, and incoherent dullards who are completely insensitive to how their opinions fit together with past precedents or the cases of the future. We know that is not the case. Personal experience with individuals from all three of these groups (academics, Restatement committees, and judges) indicates that there are geniuses and dullards in all of these categories. Besides, if our view was, *per contra*, that judges were all dullards and professors all geniuses, we would hardly be dull enough to publish that conviction in a law review article!

B. A la Carte Decision-Making: A Better Analysis

In our view, a la carte decision-making is not *per se* problematic. This is demonstrated by the near-universal acceptance of the special substantive treatment given in subjects such as real property, corporate governance, procedural rules, and choice of law clauses. It is also demonstrated by states like Florida who have developed a la carte approaches in a manner that provides transparency and clarity while preserving predictability for lower court judges and litigators.

1. What Specialized Subject Matter Principles Tell Us

The special treatment of the specialized topics discussed above¹⁰¹ has not been the source of widespread dissatisfaction. For all of these topics, treatment of the choice of law question is not determined according to the state's usual choice of law method, but by some independent conflicts reasoning. The law of the location of the real property applies *regardless* of what a state's usual choice of law method might be; the same is true for the rule about corporate governance, choice of law clauses, procedure, and so on. If a *la carte* decision-making was inherently objectionable, the commonplace rules employed in multistate cases dealing with these unique substantive areas should have provoked rioting in the streets. Instead, they are almost universally accepted (although perhaps in some cases grudgingly).

We do not view these specialized rules as "deplorable"¹⁰² examples of eclecticism. A court might adhere to the Second Restatement (or any other methodology), yet, when faced with particular results that it disagrees with, depart from the Second Restatement to fix a problem that it believes the Restatement's text created. Doing so does not create a patch job choice of law methodology; it simply fixes a problem that was already there.

The situs rule of real property provides a clarifying example. Assume that the forum, Alpha, is the domicile of both the plaintiff and the defendant, but the real property that is at issue is located in Beta. The legal issue is whether the plaintiff's legal rights to the property were properly recorded so that his rights are effectively protected. The defendant claims that they were not. Assume that Alpha would ordinarily apply governmental interest analysis and would ordinarily come to the conclusion that the law of the state of common domicile (Alpha) would apply. Here, the situs rule would override the usual analysis of governmental interests and require application of the law of Beta—contrary to Alpha's ordinary choice of law methodology.

What the real property, corporate governance, procedural law, and choice of law clause examples have in common is that courts' decisions to apply divergent conflicts rules are supported by policy reasons requiring special treatment of the area in question. The situs rule of real property is grounded in the need for purchasers of real property to be able to trace ownership of land in the local land records; the rule makes it simpler for purchasers to identify the proper land records to check.¹⁰³

¹⁰¹ See discussion of the place of incorporation rule for corporate internal affairs, the situs rule for real property, rules of procedure, and choice of law clauses *supra* Section II.C.2.

¹⁰² Reppy, *supra* note 1, at 646.

¹⁰³ If the law of any other state were applied, it would be impossible for a purchaser to

The place of incorporation rule for corporate governance is necessitated by the need to avoid the inconsistent regulation of corporations by a number of different states.¹⁰⁴ The application of forum law on matters of judicial procedure is supported (as we all know from the analogous distinction in the law of federal court jurisdiction) by policies about the regulation of in-court behavior—as opposed to primary conduct, or behavior in the outside world. In applying these specialized rules, the courts essentially reject an aspect of their usual choice of law methodologies in order to reach the result that their own, independent processes indicate. These are instances in which courts are creating exceptions or correcting what they view as mistakes in the original methodology. They are experimenting in the spirit of a *la carte* decision-making. Such decision-making supports the ability of courts to make changes to existing methodologies where such changes are perceived as necessary.

2. A Better Analysis

We do agree with Professor Reppy that a *la carte* decision making is potentially problematic. But it is not problematic simply because it combines elements from two or more methods into a single hybrid. The precariousness of an a *la carte* approach stems from the likelihood that it is accompanied by a failure of explanation. Failing to provide an explanation for taking an a *la carte* approach—especially where the multiple methodologies at play are based on premises entirely inconsistent with each other—is arguably worse than providing a bad explanation altogether. While the latter, providing *some* guidance to litigators and lower court judges and, being fairly obvious, is quickly correctable, the former, going unnoticed, is neither transparent nor easily fixed.

One particularly drastic example of a *la carte* decision-making gone wrong is the case of Massachusetts. Among the twenty-one jurisdictions that follow an a *la carte* approach to choice of law, we have found few whose approach to choice of law is as fluid, flexible, and undefined as Massachusetts's. From the standpoint of a *la carte* decision-making, it may be the very bottom of the slippery slope.

Up until the mid-1970s, Massachusetts was a loyal adherent to the First Restatement as an all-or-nothing matter. With time, however, the

perform a satisfactory title search. The only fact that the would-be-purchaser knows for certain about the property is where it is located; there may be other claimants to the property, whose domicile would have an "interest" in having its law applied. But the purchaser has no way of finding out who they are.

¹⁰⁴ *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982).

courts of Massachusetts began to show an affinity for the more modern approaches, expressing a desire to apply the laws of states "more concerned and more involved with certain issues than the State in which the conduct occurred."¹⁰⁵ In 1985, in *Bushkin Associates, Inc. v. Raytheon*,¹⁰⁶ the Supreme Judicial Court finalized its departure from the First Restatement, untethering its boat and drifting into the stormy sea of choice of law doctrine.¹⁰⁷

But the court was not intent on finding any mooring among the doctrines. Jubilant with the "opportunity to elect" a new choice of law approach "among the extant doctrines," the court stated that it would depart from the old ways that "permit[ed] the choice of law question to turn on where the contract was made."¹⁰⁸ Finding agreement with Professor Leflar's 1977 claim that courts applying the various modern choice of law approaches "are arriving at results broadly consistent with each other's holdings,"¹⁰⁹ the Supreme Judicial Court "decide[d] not to tie Massachusetts conflicts law to any specific choice of law doctrine, but to seek instead a functional choice of law approach that responds to the interests of the parties, the States involved, and the interstate system as a whole."¹¹⁰ This "functional approach," according to the Supreme Judicial Court, means that judges in Massachusetts ought to "feel free . . . to borrow from any of the various [choice influencing lists and theories] to help focus . . . attention on the considerations particularly relevant to the case" at hand.¹¹¹

In the case at hand in *Bushkin*, the court relied heavily on Sections 188 and 6 of the Second Restatement as an "obvious source of guidance," as well as Professor Leflar's five choice-influencing considerations.¹¹² The Supreme Judicial Court recognized that providing "little

¹⁰⁵ *Pevoski v. Pevoski*, 358 N.E.2d 416, 417 (Mass. 1976).

¹⁰⁶ 473 N.E.2d 662 (Mass. 1985). *Bushkin* was a contract case in which the court was faced with whether to apply New York or Massachusetts law to an oral agreement between an investment banker and weapons manufacturer Raytheon, an agreement which would be barred under New York's statute of frauds but permitted under Massachusetts's. The agreement was allegedly finalized when a representative of Raytheon—in Boston at the time—accepted the plaintiff's offer over the phone.

¹⁰⁷ The proverbial sea is perhaps best described as a "dismal swamp." William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

¹⁰⁸ *Bushkin*, 473 N.E.2d at 668 (quoting *Choate, Hall & Stewart v. SCA Servs., Inc.*, 392 N.E.2d 1045 (1979)). The court's departure from the traditional approach nonetheless resulted in the same outcome: the court applied Massachusetts's law, thereby enforcing the parties' agreement as a valid contract.

¹⁰⁹ *Id.* (quoting R.A. LEFLAR, *AMERICAN CONFLICTS LAW* § 99, at 198 (3d ed. 1977)).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 670.

¹¹² *Id.* at 669. The court found that the contacts listed in Section 188 balanced out equally for Massachusetts and New York. It then evaluated the Second Restatement's Section 6

guidance” to courts on which choice of law principles, theories, and tests to consider in a case would produce “less predictability” for litigants.¹¹³ Nonetheless, the court continued, “No simple and objective test can provide an acceptable choice of law answer,”¹¹⁴ and “some vagueness in the formulations applied is probably unavoidable” wherever courts assess a variety of factors in order to arrive at the “fair result.”¹¹⁵

In effect, Massachusetts courts may rely on any choice of law methodology in any case, as they see fit. Although the Supreme Judicial Court did not definitively adopt the Second Restatement of Conflicts in *Bushkin* and has not delimited the contours of its “functional approach” to choice of law since, most choice of law cases in Massachusetts following *Bushkin* have relied heavily on the Second Restatement combined with features of interest analysis.¹¹⁶ Nothing seems to be ruled out, so long as it “talks the talk” of modern choice of law.

The criticism of the Massachusetts approach that immediately comes to mind is lack of transparency. This is the framework with which we prefer to engage a la carte decision-making. If a court cites to various persuasive choice of law methodologies but fails to address the question of why certain sources are authoritative, when they are authoritative, and whether they are even consistent with one another, then we cannot say that the multiple methodologies have been successfully merged into a coherent, integrated whole. The result is a choice of law doctrine that is definitively a la carte, but one that lacks the coherence, transparency, and predictability of approaches defined by states such as Florida.

CONCLUSION

A la carte decision-making in the conflict of laws is not per se problematic. It is emblematic of states’ ability to experiment, and in so doing, to find creative solutions to age-old problems. What is threatened by a la carte decision-making is consistency and transparency, and as a result, due process of law.

principles and found that only one—the parties’ justified expectations that their oral agreements would be enforced—was relevant and required application of Massachusetts law.

¹¹³ *Id.* at 668.

¹¹⁴ *Bushkin*, 473 N.E.2d at 670.

¹¹⁵ *Id.* at 668.

¹¹⁶ Joseph Glannon and Gabriel Teninbaum, *Conflict of Laws in Massachusetts Part I: Current Choice of Law Theory*, 92 MASS. L. REV. 12, 24 (2009); see also Symeon Symeonides, *Choice of Law in the American Courts in 1993 (and in the Six Previous Years)*, 42 AM. J. COMP. L. 599, 612 n.97 (1994) (explaining that scholars cannot agree over how to classify the Massachusetts approach).

Judges are not in the same position as academics; the case method is not predisposed to produce choice of law methodologies that are perfectly integrated and air-tight across all substantive contexts. A good opinion seeking to integrate precedents based on a variety of choice of law methodologies should show that prior cases have supporting citations but should also avoid deriving support for an integrated theory from sources whose foundational premises are inconsistent with one another. Justifying a group of choice of law decisions requires more than ensuring that each case individually could be based upon a reputable source of authority; it requires more than examining the cases one by one and showing that Decision 1 is consistent with the First Restatement, that Decision 2 is consistent with the Second Restatement, that Decision 3 conforms to governmental interest analysis, and so forth. It is not enough that each precedent, standing on its own, has support in a law review article or Restatement. The group of decisions must also be consistent with one another. The principles or rules that join them together must be explained, and the values of the newly integrated system must be made clear in order for lower court judges and litigators to have a chance at predictability, consistency, and fairness.