Fractional Sovereignty

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The axiomatic beginning of every conflict of laws case is that a court must choose the law of one sovereign and disregard the law of all other sovereigns. One wins, gets to set the rules and regulate behavior, all others lose. This all-or-nothing scenario is the result of enshrining an old view of indivisible sovereignty into conflict of laws rules. The Article begins by explaining how this happened. Despite the importance of this assumption of indivisibility, no articles have examined why and how it became enshrined in conflict of laws doctrine. All too often it is treated as a truism without need for explanation or examination. The explanation, it turns out, is not compelling and has more to do with inertia and historical conditions hundreds of years ago than present concerns. Next, the Article critiques undivided sovereignty as outdated, descriptively misleading, and beholden to normative claims that are incompatible with modern conditions and sensibilities. It also explains the harm that adherence to indivisible sovereignty creates within the currently dominant conflict of laws methodologies.

In its place, the Article proposes that we reimagine conflict scholarship based on a fractional conceptualization of sovereignty. Instead of asking which sovereign gets to set all the rules, we should ask how to equitably share governance power and responsibility. The guiding insight of this proposal is that when conduct, assets, and litigants are distributed across multiple sovereigns, picking a single victor to provide governing law necessarily leads to a windfall of sovereignty for some and an undue denial of sovereignty for others. Instead of such a binary model of sovereignty, a fractional model of shared authority distributes the power to regulate conduct according to the fraction of the conduct that touches and concerns the sovereign. Sovereigns share responsibility over cross-border conduct. A deeper relationship to one sovereign leads to that sovereign having a greater fraction of influence, while a more fleeting relationship leads to a sovereign having a smaller fraction of influence. Each conflict of laws case would thus present a spectrum of influence to be divided into fractions among relevant sovereigns. Governing law in any given case is the mix of those fractions of influence. All concerned sovereigns would be able to regulate conduct but in a shared and mediated manner. Sovereignty becomes fractional.

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INTRODUCTION

Sovereignty is supreme power within a territory.[1] It is either present or absent. Sovereignty can never be partial or shared.[2] Borders must be clear, walls built, and fiercely policed. You decide over there; we decide over here. Still, sometimes sovereigns clash. They try to regulate the same conduct. In an interconnected world where people, goods, and information cross borders nippily, this happens with increased frequency. When it does, conflict of laws doctrines allocate and prioritize sovereign power by determining which sovereign's rules will govern.[3] Such an

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1. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714, 722 (1878) ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and "no State can exercise direct jurisdiction and authority over persons or property without its territory."); Schooner Exchange v. McFaddon (*The Schooner Exchange*), 11 U.S. (7 Cranch) 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving from an external source, would imply a diminution of its sovereignty . . . to the same extent in that power which could impose such a restriction."); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS 8 (Boston, Hilliard, Gray, & Co. 1834) ("[S]overeignty, united with domain, establishes the exclusive jurisdiction of a nation within its territories, as to controversies, crimes, and rights arising therein."); RESTATEMENT (THIRD) OF THE FOREIGN RELATION LAW OF THE UNITED STATES § 206 (Am. L. Inst. 1987) ("[A] state has sovereignty over its territory." Sovereignty as used here "implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 3 (Am. L. Inst. 1971) ("[T]he word 'state' denotes a territorial unit with a distinct general body of law."); ROBERT JACKSON, SOVEREIGNTY, at ix (2007) ("Sovereignty is an idea of authority embodied in those bordered territorial organizations we refer to as 'states' or 'nations' and expressed in their various relations and activities, both domestic and foreign."); F. H. HINSLEY, SOVEREIGNTY 25–26 (2d ed. 1986) ("[A]t the beginning, at any rate, the idea of sovereignty was the idea that there is a final and absolute political authority in the political community . . . 'and no final absolute authority exists elsewhere.'"); JEREMY RABKIN, WHY SOVEREIGNTY MATTERS 2 (1998) ("A sovereign state is one that acknowledges no superior power over its own government.").

2. *See, e.g.*, Hans J. Morgenthau, *The Problem of Sovereignty Reconsidered*, 48 COLUM. L. REV. 341, 350 (1948) ("Sovereignty over the same territory cannot reside simultaneously in two different authorities, that is, sovereignty is indivisible."); DON HERZOG, SOVEREIGNTY, RIP, at xi (2020) ("The classic theory of sovereignty . . . holds that every political community must have a locus of authority that is unlimited, undivided, and unaccountable to any higher authority."); CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 17 (George Schwab trans., Mass. Inst. of Tech. 1985) (1922) ("[T]he old definition False . . . is always repeated: Sovereignty is the highest, legally independent, underived power.").

3. *See, e.g.*, William Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 11–12 (1963) ("[T]he resolution of conflict-of-laws cases is essentially a process of allocating respective spheres of lawmaking influence."); Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 173 (1959) [hereinafter Currie, *Notes on Methods*] ("The central problem of conflict of laws may be defined, then, as that of determining the appropriate rule of decision when the interests of two or more states are in conflict–in other words, of determining which interest shall yield."); Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2449, 2470 n.111 (1999) [hereinafter Roosevelt, *Myth of Choice of Law*] ("What a conflicts theory must do is manage the competing claims of authority; it must oversee the conflicts between rights."); Joseph W. Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 75 (1989) ("Conflict cases raise fundamental questions about the substantive norms governing social relationships and the relations among neighboring political communities."); ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 309 (1962) ("Much of the lawyer's daily work consists of choosing between two rules or bodies of rules that seem to conflict." Such conflicts are "'interterritorial' . . . if the choice is between the

allocation is binary: either a sovereign's rules govern, or they do not; one sovereign wins, and the other loses.[4] Sovereignty is present or absent, but never fractional. That has been a core tenet of popular conceptions of statehood, conflict of laws doctrines, and political theory since at least the 1648 Treaty of Westphalia.[5] Every conflict of laws case relies on this view of sovereignty. It is also misguided.[6]

Building conflict of laws rules on this outdated view of sovereignty contributes to endless doctrinal riddles, inefficiencies, and is ill-suited for modern conditions and sensibilities.[7] It is in urgent need of replacement with a modern conception for allocating and sharing responsibility over conduct and people that cross borders.

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laws of more than one territory."); Paul B. Stephan, *Competing Sovereignty and Laws' Domains*, 45 PEPP. L. REV. 239, 250 (2018) ("Any official actor—judges, but also government officials and legislators—must determine which it will honor when faced with multiple domain claims. This choice constitutes a domain assignment. An authoritative actor decides that the law of Sovereign X, not that of Sovereign Y, applies to the matter before the actor. This decision assigns the issue at hand to the domain of Sovereign X.").

4. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICTS § 1 cmt. b ("If the local law rules of X and Y differ in relevant respects, the X court may be called upon to decide whether to apply the rules of one state rather than the rules of the other."); Laura E. Little, *Conflict of Laws Structure and Vision: Updating a Venerable Discipline*, 31 GA. ST. U. L. REV. 231, 246 (2014) ("[Commonly] conflicting laws come from sovereigns of equal status. When this occurs, courts must draw on creativity in order to designate a rational 'winner.'"); David Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROBS. 732, 734 (1963) ("Where both states can reasonably be said to be concerned with a matter in dispute, the effect will, of course, be to extend the reach of one state's policy and to curtail the other's."); Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601, 1631–33 (2002) ("Sovereignty is a zero-sum game: if one governmental entity has sovereignty, then by definition the other does not.").

5. *See, e.g.*, Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT'L L. 20, 28–29 (1948) ("[A] new system characterized by the coexistence of a multiplicity of states, each sovereign within its territory, equal to one another, and free from any external earthly authority."); William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2085 (2015) ("After the Peace of Westphalia in 1648, the world was understood to be divided into separate and independent states whose territorial sovereignty was deemed to be exclusive and absolute."). *But cf. infra* notes 286–91 and accompanying text.

6. I am certainly not the first to argue against the follies of sovereignty but, as far as I know, I am the first to examine the implications of this critique in the context of conflict of laws doctrine. For very different types of attacks, consider: HERZOG, *supra* note 2, at 258 ("The classic theory of sovereignty is an atrocious guide to our problems and possibilities. It fails to pick out what matters about our governments, and it fails so badly that I'm tempted to say it fails even to refer to them."); STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 24 (1999) ("[T]he most important empirical conclusion of the present study is that the principles associated with both Westphalian and international legal sovereignty have always been violated."); Jacques Derrida, *The "World" of the Enlightenment to Come (Exception, Calculation, Sovereignty)*, 33 RSCH. PHENOMENOLOGY 33, 47–48 (2003) ("[T]he state's use of power is *originally* excessive and abusive . . . . It is thus no doubt necessary to erode not only its principle of indivisibility but its right to the exception, its right to suspend rights and law."); Jacques Maritain, *The Concept of Sovereignty*, 44 AM. POL. SCI. REV. 343 (1950) ("[P]olitical philosophy must eliminate Sovereignty both as a word and as a concept."). *But cf.* JENS BARTELSON, A GENEALOGY OF SOVEREIGNTY (Steve Smith ed., 1995) (arguing that without the concept of sovereignty, modern politics becomes unmoored).

7. *See infra* Part III. *See generally* Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1926 (2003) ("The rise of dignity (inter alia) has changed the meaning of sovereignty."); Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029 (2003) (explaining the need for sovereignty to be responsive to changing conditions).

This Article proposes that we replace the complete and binary view of sovereignty with a model of fractional authority and responsibility. Doing so would drastically restructure and improve how courts, scholars, and legislators discuss horizontal conflict of laws principles, as well as sovereign immunity, tribal authority and jurisdiction, the *Erie* doctrine, and extraterritoriality.

Instead of asking which sovereign gets to set all the rules, we should ask how to equitably share governance power and responsibility. The guiding insight of this proposal is that when conduct, assets, and litigants are distributed across multiple sovereigns, picking a single victor to provide governing law necessarily leads to a windfall of sovereignty for some and an undue denial of sovereignty for others. Instead of such a binary model of sovereignty, a fractional model of shared authority distributes the power to regulate conduct according to the fraction of the conduct that touches and concerns the sovereign. Sovereigns share responsibility over cross-border conduct. A deeper relationship to one sovereign leads to that sovereign having a greater fraction of influence; a more fleeting relationship leads to a sovereign having a smaller fraction of influence. Each conflict of laws case would thus present a spectrum of influence to be divided into fractions among relevant sovereigns. Governing law in a given case would be the mix of those fractions of influence. All concerned sovereigns would be able to regulate conduct, but in a shared and mediated manner. Sovereignty becomes fractional.

This proposal would break with centuries of conflict of laws doctrine and scholarship. Conflict of laws has a "tradition of all or nothing rules."[8] Fractional conflict of laws approaches have been proposed in the past, but only rarely, briefly, or mockingly. In a few instances, scholars raised them as far-fetched hypothetical possibilities.[9] These suggestions were quickly dispatched as "justice without law"[10] or met with ridicule.[11] In the end, a "plaintiff ordinarily receives all or nothing at all."[12] This Article is the first to lay out a sustained argument based on new conceptual foundations for a fractional approach to conflict of laws. A focus on the old unitary view of sovereignty explains why previous conflict of laws scholars typically did not take fractional accounts seriously and helps to map blind spots and

8. Michael Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845, 866 (1961).

9. *See, e.g.*, Arthur Taylor von Mehren, *Choice of Law and the Problem of Justice*, 41 LAW & CONTEMP. PROBS., Spring 1977, at 27, 38 ("A third and quite different type of procedure, which may present certain advantages, has been proposed with a view to reconciling the principles of equality and of advancement in cases of true conflict. The suggestion is that, in those cases, the values held by each concerned state should be compromised. In some cases this compromise would be on the basis of equal respect; in others, rules would be applied only to the extent that, on the actual facts, the rule's underlying policy so required.").

10. Traynor, *supra* note 8.

11. Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 775 (1963) [hereinafter Currie, *Disinterested Third State*] (noting "the imaginative and semi-serious [solution] of dividing the loss equally" between parties); von Mehren, *supra* note 9 ("[T]raditionally, Western jurists have, in principle, opposed the compromising of conflicting views or policies in the articulation of private-law rules and in the administration of these rules in discrete cases. Where the choice is inescapable, justice is ordinarily taken to require the delineation and vindication of generalized and abstract principles rather than the advancement of harmony in the human relations at stake.").

12. von Mehren, *supra* note 9.

conceptual problems with previous approaches. Building on flawed foundations might also help to explain why "[c]hoice of law has vexed the finest legal minds since the Middle Ages."[13] It is time to examine these foundations before building new shaky edifices on top of them.

Unfortunately, that is currently happening. Drafters are hard at work completing the Third Restatement of Conflict of Laws.[14] It, too, enshrines an all-or-nothing view of sovereignty and conflict of laws solutions.[15] High time, then, to closely examine the conceptual foundations of conflict of laws, for the "future of choice of law is up for grabs."[16]

To influence this future, we must understand the past. That past is a hideous mess.[17] Both conflict of laws doctrine and its scholarship are a quagmire where spirits do not break; they shatter. Though varied in many ways, all conflict of laws approaches are built on the same unsteady foundation: a view of sovereignty that is as outdated as it is misguided. Because the previous literature never correctly identified the root cause of the malaise, it failed to administer the proper remedy. To make this plain but radical argument, this Article will proceed in four parts.

Part I reveals the forgotten conceptual foundation of conflict of laws scholarship grounded in a notion of undivided sovereignty. All too often, sovereignty's existence and shape are taken for granted. Sovereignty was so successful to now appear uncontestable, obvious, and inevitable.[18] Much of modern conflict of laws doctrine takes it that way. Uncovering the historical and conceptual roots of our assumptions about sovereignty will shed this patina of inevitability and lay the groundwork for a broader conception of sovereignty. To chip away at sovereignty's sacred status, Part I rehearses the historical roots and development of the concept of sovereignty, including the key axiom of indivisibility. The core takeaway from this Part is that sovereignty is a conceptual solution to a particular moment in history, one that has passed.

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13. Friedrich K. Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, 14 U.C. DAVIS L. REV. 907, 907 (1981).

14. *See also* 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); Kermit Roosevelt III & Bethan R. Jones, *The Draft Restatement (Third) of Conflict of Laws: A Response to Brilmayer & Listwa*, 128 YALE L.J.F. 293 (2018). *See generally* Symeon C. Symeonides, *The Third Conflicts Restatement's First Draft on Tort Conflicts*, 92 TUL. L. REV. 1 (2017).

15. *See, e.g.*, RESTATEMENT (THIRD) OF CONFLICTS OF LAWS (AM. L. INST., Tentative Draft No. 3, 2022) ("[I]f states' internal laws overlap and conflict, it must be decided which law shall be given priority.").

16. Lea Brilmayer & Daniel B. Listwa, *A Common Law of Choice of Law*, 89 FORDHAM L. REV. 889, 893 (2020) ("At stake in this debate are some of the most basic foundational principles of the American legal system. Today, we find ourselves at a potential inflection point; the future of choice of law is up for grabs."); *see also* Joseph William Singer, *Choice of Law Rules*, 50 CUMB. L. REV. 347, 347 (2020) ("THE THIRD RESTATEMENT OF CONFLICT OF LAWS is still being written, but it is well on its way to proposing substantial revisions in choice of law doctrine.").

17. *See, e.g.*, Roosevelt, *Myth of Choice of Law*, *supra* note 3, at 2449 ("Choice of law is a mess. That much has become a truism.").

18. *See, e.g.*, R.B.J. Walker, *Gender and Critique in the Theory of International Relations*, *in* GENDERED STATES: FEMINIST (RE)VISIONS OF INTERNATIONAL RELATIONS THEORY 179 (V. Spike Peterson ed., 1992) ("[F]or the most part state sovereignty expresses a commanding silence.").

Part II shows how the notion of indivisible sovereignty was incorporated into conflict of laws doctrine and scholarship. It explains why the axiomatic beginning of every conflict of laws case is that a court has to choose the law of one sovereign and disregard the law of all other sovereigns. There are, of course, many different ways to decide which sovereign wins: government interest analysis, most-significant relationship tests, comparative impairment, better rule of law, vested rights, and many others. But, despite otherwise massive conceptual and practical differences between these different approaches, they all share the view that at the end of the day one sovereign's rules govern the case, and the rules of all other sovereigns are disregarded. The ultimate question in all of these approaches is how to decide *which* sovereign gets to dominate, not *whether* one should dominate. Notions of undivided sovereignty animate otherwise diverging projects. That these approaches share a common core is a surprising and consequential finding. If they are all built on the same rickety foundations, then they all stand or fall together.

Part III begins with a general critique of undivided sovereignty as outdated, descriptively misleading, and beholden to normative claims that are incompatible with modern sensibilities. Part III then explains how undivided sovereignty sustains self-inflicted wounds on the main conflict of laws methodologies. These flaws and shortcomings in the dominant conflict of laws approaches have long been recognized but not correctly diagnosed. Divided sovereignty is the root cause of the ailment, fractional sovereignty the cure. Conflict of laws doctrine and scholarship have been hampered by a commitment to an outdated, unnecessary, and harmful conception of undividable sovereignty at its core. It is time to start anew.

Part IV reimagines conflict of laws doctrine from the ground up: what would it mean to design a conflict of laws approach that distributes sovereignty fractionally rather than declare one sovereign the victor and all others the loser? Part IV makes the case for fractional sovereignty in the context of quotidian conflict of laws fact patterns. It demonstrates how fractional sovereignty can serve as a compelling foundation for conflict of laws decisions. In a wide range of fact patterns ranging from the common to the obscure, a harmonizing conflict methodology based on fractional sovereignty produces more consistent, fine-tuned, and predictable outcomes with fewer negative externalities than the currently dominant approaches. If undivided sovereignty is not inevitable, and perhaps not advisable, then that might also open our imagination to new doctrinal possibilities in a broad range of doctrinal contexts. But before we can explore these possibilities, we need to unburden ourselves of the stranglehold the classical theory of indivisible sovereignty has over our imagination.

I. THE CLASSICAL THEORY OF INDIVISIBLE SOVEREIGNTY

Sovereignty is all around us.[19] Politicians invoke sovereignty when discussing borders, tariffs, treaties, human rights, and wars. Widespread fear about the erosion

19. *See* Diane P. Wood, Judge, U.S. Ct. of App. for the 7th Cir., Opening Remarks (May 12, 2003), *in* 80 THE AMERICAN LAW INSTITUTE REMARKS AND ADDRESSES 80TH ANNUAL MEETING 1, 4 (2003) ("[Sovereignty] is perhaps the most important legal topic on the table today. It determines *who* makes laws. It determines *what* laws that body may legitimately enact; what is the scope of its legislative jurisdiction? And it determines *where* those laws might be enforced; which courts, which

and divisibility of sovereignty has fueled a visceral backlash in many countries against supra-national and international institutions.[20] Anxieties about sovereignty contribute to a movement to reign in "borderless" data and assert "internet sovereignty."[21] Across the political spectrum there is concern that global markets[22] and global migration[23] threaten core tenets of sovereignty. Even evaluations of government assassinations[24] and military interventions[25] abroad turn on traditional sovereignty constraints.

Despite this ubiquity and importance, sovereignty's core assumptions are rarely critically evaluated. All too often, sovereignty's existence and shape are taken for granted. Sovereignty was so successful to now appear uncontestable, obvious, and inevitable. Much of modern conflict of laws doctrine takes it that way. Uncovering the historical and conceptual roots of our assumptions about sovereignty will shed this patina of inevitability and lay the groundwork for a broader conception of sovereignty.

To chip away at sovereignty's sacred status, this Section rehearses the historical roots and development of the concept of sovereignty, including the key axiom of indivisibility.[26] The core takeaway from this Section is that sovereignty is a

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tribunals."); DIETER GRIMM, SOVEREIGNTY: THE ORIGIN AND FUTURE OF A POLITICAL AND LEGAL CONCEPT 3 (Dick Howard ed., Belinda Cooper trans., Colum. Univ. Press 2015) ("For centuries, *sovereignty* has been a key concept in political and legal discourse").

20. *See, e.g.*, Donald Trump, President, United States, Speech at the U.N. Gen. Assembly (Sep. 25, 2018) ("We will never surrender America's sovereignty to an unelected, unaccountable global bureaucracy."); Boris Johnson, Prime Minister, United Kingdom, Video Address to the United Kingdom (Jan. 31, 2020) ("Tonight we are leaving the European Union . . . . This is the moment when the dawn breaks and the curtain goes up on a new act in our great national drama. And yes, it is partly about using these new powers—this recaptured sovereignty—to deliver the changes people voted for. Whether that is by controlling immigration or creating freeports or liberating our fishing industry or doing free trade deals."); MANIFESTO FOR GERMANY: THE POLITICAL PROGRAMS OF THE ALTERNATIVE FOR GERMANY (2016), https://www.afd.de/wp-content/uploads/sites/111/2017/04/2017-04-12_afd-grundsatzprogramm-englisch_web.pdf [https://perma.cc/9MJS-R97U] ("We believe in a sovereign Germany . . . . The increasing centralisation [sic] of sovereignty rights, and attempts to create a European federal state, are irrational and not sustainable.").

21. *See, e.g.*, Samuel Woodhams, Opinion, *The Rise of Internet Sovereignty and the End of the World Wide Web?*, GLOBE POST (Apr. 23, 2019) ("[In 2010], Chinese authorities published the white paper *The Internet In China*. The paper was responsible for popularizing the now ubiquitous term 'internet sovereignty' and laid out its basic principles. 'Within Chinese territory, the internet is under the jurisdiction of Chinese sovereignty. The internet sovereignty of China should be respected and protected,' it said.").

22. GRIMM, *supra* note 19, at ix ("Today the sovereignty of the state appears to be threatened . . . . [T]he forces of the global market limit its ability to determine its own destiny and care for the welfare of its citizens.").

23. *See generally* Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457 (2020).

24. *See, e.g.*, Michael Crowley, Falih Hassan & Eric Schmitt, *U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces*, N.Y. TIMES (July 9, 2020), https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html [https://perma.cc/ZW7M-9G64].

25. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 202 (June 27) ("The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent.").

26. *See generally* HERZOG, *supra* note 2 ("I treat sovereignty as a bid to solve contingent but pressing problems thrown up by social change.").

conceptual solution to a particular moment in history.[27] Later Sections will explore how this solution was replicated in conflict of laws doctrine and how that particular moment of history has passed. But the story begins with bloodshed—buckets of it.

A. Sovereignty's Indivisibility as a Solution

In August of 1572, the streets of Paris were stained with blood. Catholics butchered thousands of Huguenots (French Calvinist Protestants) in what came to be known as the St. Bartholomew's Day massacre.[28] Neighbors killed neighbors,[29] including women and children.[30] Violence quickly spilled to the countryside. These events echoed throughout Europe. Pope Gregory XIII added a fresco to the Sistine Chapel's antechamber to celebrate the slaughter.[31] Christopher Marlowe dramatized the event for an English audience in "The Massacre at Paris" (1593). And the massacre inspired wave upon wave of Catholic and Protestant propagandistic pamphleteers.[32]

The full history is endlessly complicated, but for present purposes it is only necessary to point out that this bloodbath was one among many in an age of religious violence and intolerance. Official state-sanctioned violence mingled with private extremism. There were ruthless persecutions of heretics, repressions of rebellions, large-scale slaughters, and spontaneous bouts of extreme violence across the European continent. Entire countries drowned in decades of violence. Distrust, fear, and loathing split countries internally and frayed international relations. Civil wars mingled with sweeping international campaigns. Both produced horrors of war difficult to imagine.[33] Millions were killed, persecuted, tortured, and displaced in these waves of violence and wars of religion. Nobody was unaffected. Internal division and external threats were the dominant themes of the age.

One person deeply influenced by the St. Bartholomew's Day massacre was Joan Bodin.[34] He published his premiere work, *Les six libres de la République*, just

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27. I will leave largely untouched the question of whether it was a successful solution or whether it was the only solution. *But cf.* HERZOG, *supra* note 2.

28. Estimates of the number of dead and injured vary considerably.

29. *See, e.g.*, H. G. Koenigsberger, *Introduction*, *in* THE MASSACRE OF ST. BARTHOLOMEW: REAPPRAISALS AND DOCUMENTS 1, 4–5 (Alfred Soman ed., 1974) ("These were Frenchmen killing Frenchmen, respectable neighbors murdering respectable neighbors . . . .").

30. *See, e.g.*, HENRI NOGUÈRES, THE MASSACRE OF SAINT BARTHOLOMEW 111–12 (Claire Elaine Engel trans., George Allen & Unwin Ltd. 1962) (1959).

31. Giorgio Vasari, *Defenestration of Coligny and Massacre of St. Bartholomew* (illustration), WIKIPEDIA (1573), https://en.wikipedia.org/wiki/Sala_Regia_(Vatican)#/media/File:Giorgio_vasari,_seconda_storia_della_notte_di_san_bartolomeo,_1573,_01.jpg [https://perma.cc/JJK3-R5DX].

32. *See* 2 QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT 302–37 (Cambridge Univ. Press 1978).

33. *See generally* HERZOG, *supra* note 2, at 3–10 ("[For example,] Lower Austria, 1620: Cossack and Wallon troops raped not just women, but also boys. They roasted pregnant women on the fire until men could see the fetuses.").

34. *See generally* GRIMM, *supra* note 19, at 18 ("The reason for Bodin's work was the wars of religion that swept France in the sixteenth century."); JACKSON, *supra* note 1, at ix ("The idea [of sovereignty] originated in the controversies and wars, religious and political, of sixteenth–and seventeenth–century Europe."); Stéphane Beaulac, *The Social Power of Bodin's 'Sovereignty' and International Law*, 4 MELB. J. INT'L L. 1, 9 (2003) ("[Les six libres] was also undoubtedly influenced

four years after the massacre. In it, he grapples with the basic configuration of government to reduce the risk of future mayhem.[35] Bodin was, of course, not the only person to search for a solution that would end the havoc of his age, but his account proved influential and provides a good starting point to think about sovereignty.[36]

He diagnosed, like many, that the abundance of domestic and international violence was the result of overlapping and distributed governing authority.[37] It is difficult to imagine now for modern readers, but Bodin and his contemporaries lived in an age where sovereignty was not the sole or dominant model of political power. Bodin's efforts remind us that there was a time when individuals could be subject to multiple commands from conflicting sources at the same time.[38] Governing authority was distributed and overlapping. For example, secular regional authority had to account for a transnational theological competitor.[39] In a world of fairly unified religious authority, this might have remained a manageable tension. However, the Protestant reformation changed that fundamental feature of Europe. The once-unified authority of the Catholic church was now contested on multiple fronts. Religious thought and authority splintered into an ever-broadening array of options. Many blamed the resulting dissolution of authority for the strife of the era.[40] Some, of course, simply wanted to undo the great schism. But that just led to more bloodbaths.

Bodin is notable because he was part of the movement to find another solution to the problems of his age.[41] Perhaps the cat was out of the bag, and, however troublesome, it was time to contemplate a Europe without a singular unifying religious authority. How could such a world be governed without dissolving into endless civil war and regional conflicts?

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by his personal experience of the threat of anarchy represented by the St. Bartholomew's Day Massacre in 1572, from which, we are told, he narrowly escaped with his life.").

35. *See generally* HERZOG *supra* note 2, at 16 ("[W]e can grasp and evaluate Bodin's views as a bid to put an end to grotesque social and political turmoil.")

36. *See, e.g.*, HANS KELSEN, DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS, 2 (1920) (characterizing Bodin as "den Begründer der Souveränitatslehre"); *see also* GRIMM, *supra* note 19, at 13 ("*Sovereignty is linked*, like no other principle of politics or law, with the name of one author: Jean Bodin."); JOACHIM BERTELE, SOUVERÄNITÄT UND VERFAHRENSRECHT 17 (1998) ("Bodin gilt weithin als der Schöpfer des Souveränitätsbegriffs.").

37. I will leave aside, for now, the question whether this diagnosis was accurate or not.

38. GRIMM, *supra* note 19, at 17 ("[P]ersons . . . could be subject to a variety of lords, depending on the respective powers they exercised."). *See generally* Brian Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 376 (2008) ("[P]ortray[ing] the rich legal pluralism that characterized the medieval period.").

39. JACKSON *supra* note 1 at ix ("[Sovereignty] stands in marked contrast to ideas of authority of other eras, particularly the preceding medieval period of European history, which revolved around the theocratic and transnational idea of Latin Christendom.").

40. GRIMM, *supra* note 19, at 5 (emphasizing the role of "the religious schism of the sixteenth century" in undermining the "medieval order" and "concentrating and augmenting the powers of the ruler while simultaneously limiting their reach territorially").

41. *See generally* JACKSON *supra* note 1, at xi ("The rulers of early modern Europe initially came up with the idea in their repudiation of the overarching authority of the pope, who was then theocratic head of Latin Christendom. Their successful assertion of sovereignty was a way of escape from papal authority, an act of secession.").

Bodin's main argument was that this new world could only be governed by a superior power capable of imposing peace internally and coordinating peace externally.[42] Governing authority could no longer be limited, shared, or divided. Instead, it must be "the most high, absolute, and perpetual power over the citizens and subjects in a Commonwealth . . . that is to say, the greatest power to command."[43] Sovereignty thus understood could never be divided or shared. That would invite conflict and destruction. Where sovereignty is divided, corruption is inevitable.[44] Divided sovereignty is a "confusion of the state" that produces "endless stirs and quarrels, for the superiority, until some one, some few, or all together have got the sovereignty."[45]

As such, sovereignty must, by definition according to Bodin, consolidate all scattered sources of power. The central characteristic of the sovereign ("le point principal de la maiesté souveraine") is that he "makes law for the subject, abrogates law already made, and amends obsolete law."[46] All law. This law-giving function encompasses all subject areas, including domains traditionally under the control of the church.[47] Power becomes concentrated in the sovereign, who is the highest and ultimate authority in the land. As such, a person or entity[48] subject to the commands of another cannot be sovereign, because "the distinguishing mark of the sovereign [is] that he cannot in any way be subject to the commands of another, for it is he who makes law for the subject, abrogates law already made, and amends obsolete law." [49] The sovereign answers to no other person or entity, for "if he be enforced to serve any man, or to obey any man's command he loses the title of majesty, and is no more a sovereign."[50] The sovereign might temporarily delegate power but can never surrender or share power.[51] Others beside the sovereign might hold and exercise power, but only insofar as their power is derived from the sovereign.[52]

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42. GRIMM, *supra* note 19, at 20 ("In [Bodin's] view, a superior power was necessary to achieve the goal of restoring internal peace, one that could rise above the warring factions and force them into a secular order that would allow the opposing faiths to exist side by side, by turning faith into a private matter.").

43. Perhaps even more forceful in its original form: "*La souveraineté est la puissance absolue & perpétuelle d'une République.*"

44. JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH (M.J. Tooley trans., Basil Blackwell 1967) ("[Such] states as wherein the rights of sovereignty are divided, are not rightly to be called Commenwealths, but rather corruption of commonwealths.").

45. *Id.* at Book II, Chapter 1.

46. *Id.* at Book I, Chapter 8.

47. GRIMM, *supra* note 19, at 21 ("No area of law could be reserved to the Church. Ecclesiastical sanctions could not be allowed to affect the worldly status of the individual.").

48. For Bodin and many of his contemporaries, the sovereign would most likely be a king, but the account leaves open the possibility that sovereignty could reside elsewhere.

49. BODIN, *supra* note 44, at Book 1, Chapter 8.

50. *Id.*

51. *Id.* at 25 ("The true sovereign remains always seized of his power."); *see also* ROBERT FILMER, PATRIARCHA: OR THE NATURAL POWER OF KINGS, 73–74 (London, R. Chiswell 2d ed. 1685) ("As for that Shew of Popularity which is found in such Kingdoms as have General Assemblies for Consultation about making Publick [sic] Laws: It must be remembered [sic] that such Meetings do not share or divide the Sovereignty with the Prince: but do only deliberate and advise their Supreme Head, who still reserves the Absolute Power in himself.").

52. BODIN, *supra* note 44, at 92 ("One is the sovereign right which is absolute, unlimited, and above the law, the magistrates and all citizens. The other is legal right, subject to the laws and the

Divided sovereignty "is a manifest absurdity, considering that the sovereign is always excepted personally, as a matter of right, in all delegations of authority, however extensive."[53]

Sovereignty, in short, could never be divided or subordinate to the will of another.[54] It must be indivisible.[55] Partial sovereignty is incoherent and dangerous. This understanding of the core features of sovereignty[56] reverberated through time and remains influential to this day.[57]

B. Developing Sovereignty

Many scholars, politicians, theorists, authors, and eventually lawyers and judges utilized related conceptions of sovereignty in the decades and centuries following Bodin. Though they differ in innumerable ways and often fiercely disagreed with each other, on this point they accorded: sovereignty is and must be indivisible. Let me offer here just a brief whirlwind sightseeing tour, in rough chronological order, of some of the more popular attractions strewn across the 200 years between Bodin and the U.S. Declaration of Independence. The account does not focus on who holds sovereignty (e.g., the king, parliament, the king in parliament, etc.).[58] Similarly, it ignores important questions about whether

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sovereign . . . . These persons can exercise the right only until their office is revoked or their commission expired.").

53. *Id.* at 25.

54. *Id.* at 40–49.

55. I will leave aside for now the question of whether sovereign power could be subject to legal restrictions. *See generally* GRIMM, *supra* note 19, at 22 ("Bodin did not, however, go so far as to define sovereignty as unlimited power . . . . [For example,] the sovereign only exercised his legislative power lawfully if he did so in conformity with the 'constitutional laws of the realm.'").

56. *See generally* Stéphane Beaulac, *The Social Power of Bodin's 'Sovereignty' and International Law*, 4 MELB. J. INT'L L. 1 (2003) ("The conclusion [of this article] shows that Bodin's work was the first seminal step in the development of contemporary ideas of 'internal sovereignty' and 'external sovereignty.'").

57. GRIMM, *supra* note 19, at 23–24 ("The effects of [Bodin's] theory cannot be overstated . . . . Sovereignty became the model for European princes.").

58. *See, e.g.*, HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE, Book I, Chapter III, Section XI (1625) ("We must distinguish between the Thing itself; and the Manner of enjoying it."); SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW IN TWO BOOKS, Book II, 142 (James Tully ed., Michael Silverthorne trans., Cambridge Univ. Press 1991) (1673) ("The different forms of government . . . arise from the vesting of sovereignty in one man or in one assembly consisting of a few or of all."); THOMAS HOBBES, LEVIATHAN OR THE MATTER, FORMED, & POWER OF A COMMON-WEALTH: ECCLESIASTICALLL AND CIVILL, 94 (London 1651) ("[T]he Soveraignty [sic] is either in one Man, or in an Assembly of more than one."); MONTESQUIEU, THE SPIRIT OF THE LAWS, Book II, 8 (1748) ("There are three species of government . . . republican government is that in which the body, or only a part of the people, is possessed by a supreme power; monarchy, that in which a single person governs . . . despotic government, that in which a single person directs everything by his own will and caprice."); IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL PROPOSAL, 27 (Helen O'Brien trans., Sweet & Maxwell 1927) ("The different types of State (civitas) may be classified according to who wields the supreme power in the State or according to the method by which the people is governed by its ruler, be who he may."); THOMAS PAINE, RIGHTS OF MAN, 175 (Claire Grogan ed., Broadview Press 2011) (1791) ("Sovereignty, as a matter of right, appertains to the Nation only, and not to any individual").

sovereignty could be restricted (for example, by a constitution),[59] or how sovereignty is acquired. Instead, our focus here is exclusively on sovereignty's allegedly indivisible nature.

We begin with Hugo Grotius, who shares Bodin's concerns about religiously motivated civil strife and prolonged warfare. His personal life was intertwined with the Protestant Dutch struggle against Catholic Spain and internal disputes between orthodox and reformist Calvinists. Sometimes called "the father of international law"[60] and writing at the height of the Thirty Years War, Grotius provides another influential account of how states must be organized to avoid mayhem, or, if that is unavailable, how to reduce mayhem. Sovereignty again looms large in Grotius's account. For him, "sovereignty is a unity, in itself indivisible."[61] In each state there must be a supreme power "whose Acts are not subject to another's Power, so that they cannot be made void by any other human Will."[62] That does not mean that states cannot have parliaments, senates, or the like in addition to kings. That would not imply a "partition of sovereignty"[63] as long as political authority is ultimately undivided so that "in Civil Government . . . there must be some last Resort, it must be fixed either in one Person, or in an Assembly; whose Faults, because they have no superior Judge, [only] God declares."[64]

On the other side of the English channel, Thomas Hobbes puzzled through another European experience with religious violence.[65] For him, sovereignty is the solution to the famously "solitary, poor, nasty, brutish, and short" life in the state of nature.[66] To escape this state, people agree and covenant to create a government "on whom the sovereign power is conferred by the consent of the people."[67] In what is now often called a social contract, people exchange anarchic freedom for security by empowering a ruler with sovereign powers.[68] These powers are "incommunicable and inseparable"[69] for "power unlimited is absolute

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59. *See, e.g.*, HOBBES, *supra* note 58, at 137 ("The Soveraign [sic] of a Common-wealth, be it an Assembly, or one Man, is not Subject to the Civil Lawes [sic]."); FILMER, *supra* note 51, at 104 ("[T]he King must of necessity be above the Laws; there can be no Sovereign Majesty in him that is under them; that which giveth the very Being to a King, is the Power to give Laws; without this Power he is but an Equivocal King."); *see also* SCHMITT, *supra* note 2, at 5 ("Sovereign is he who decides on the exception.").

60. *See, e.g.*, Boutros Boutros-Ghali, *A Grotian Moment*, 18 FORDHAM INT'L L.J. 1609, 1609 (1995).

61. GROTIUS, *supra* note 58, at Book I, Chapter III, Section XVII.

62. *Id.* at Book I, Chapter III, Section VII.

63. *Id.* at Book I, Chapter III, Section VII ("But they are much mistaken, who suppose, because Kings will not allow some of their Acts to be of Force, till they are ratified by the Senatore, or some other Assembly, that there is a Partition of Sovereignty.").

64. *Id.* at Book 1, Chapter III, Section VII, 70.

65. *See generally* GRIMM, *supra* note 19, at 28 ("[L]ike Bodin, [Hobbes] assumed that restoring domestic peace required an omnipotent and irresistible authority."); KRASNER, *supra* note 6, at 11 ("Both [Bodin and Hobbes] were anxious to weaken support for the religious wars that tore France and Britain apart by demonstrating that revolt against the sovereign could never be legitimate.").

66. HOBBES, *supra* note 58, at 62.

67. *Id.* at 88.

68. *Id.* at 88–93 (listing sovereign powers); *id.* at 102 ("[M]en who choose their sovereign do it for fear of one another.").

69. *Id.* at 92.

sovereignty."[70] Separation, for Hobbes, is the root of the present religious and civil strife "[f]or what is it to divide the power of a commonwealth, but to dissolve it; for powers divided mutually destroy each other."[71] If people had not believed that sovereign powers "were divided," England would not have "fallen into this civil war, first between those that disagreed in politics, and after between the dissenters about the liberty of religion."[72] If separation is the problem, unification is the solution. Sovereignty must be restored and understood as "indivisible" with all powers "inseparably annexed to the Sovereignty."[73] For Hobbes, "it is the Unity of the Representer, not the Unity of the Represented, that maketh the Person One."[74]

Writing also in the wake and in response to the new Westphalian order, Samuel Pufendorf similarly tried to make sense of the new emerging relationships within and between states. Like Grotius and Hobbes, he predicated his analysis on the seeming fact of persistent religious division. In such a world, sovereign power must be able to enforce peace internally and externally. For Pufendorf, states are "either regular or irregular."[75] A state is regular, strong, and coherent where sovereignty "pervades all the parts and affairs of the state, undivided and unimpaired."[76] In such a state, "[e]very authority by which a state in its entirety is ruled, whatever the form of government, has the characteristic of supremacy" where "its exercise is not dependent on a superior."[77] All other states are irregular, weak, and incoherent. Where sovereign power is divided, "the government will be defective and unfitted to achieve the end of a state."[78] Such division must result in "an irregular form of government" that is "liable to disintegration."[79]

Robert Filmer, extending the metaphor of the patriarchal family to an authoritarian state, similarly required sovereignty to be indivisible. The father rules over the state just as the sovereign rules over the country. And just as there is solely one father in the family, there is only one sovereign in the country. If the sovereign admits anybody else to partake in power "he leaves to be a King, . . . he is but a Titular and no Real King, that hath not the Sovereignty to Himself; for the having of this alone, and nothing but this makes a King to be a King."[80]

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70. *Id.* at 115.
71. *Id.* at 170.
72. *Id.* at 93.
73. *Id.*
74. *Id.* at 82. *See generally* 3 QUENTIN SKINNER, VISIONS OF POLITICS: HOBBES AND CIVIL SCIENCE 177–208 (2002).
75. *See generally* SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 142 (James Tully ed., 1991) (distinguishing strong and coherent "regular" states and weak and incoherent "irregular" states). *See also* HOBBES, *supra* note 58, at 115 ("By Systems, I understand any numbers of men joined in one interest, or one business. Of which, some are *regular* and some *irregular*. *Regular* are those where one man or assembly of men is constituted representative of the whole number. All other are irregular.").
76. PUFENDORF, *supra* note 75, at 142.
77. *Id.* at 146.
78. *Id.* at 141.
79. *Id.*
80. FILMER, *supra* note 51, at 73.

John Locke, though fundamentally at odds with Filmer,[81] still shared this basic sentiment.[82] As with Hobbes, Locke posits a state of nature from which "men so unite into one society as to quit every one his executive power of the law of Nature, and to resign it to the public, there and there only is a political or civil society."[83] Thus, they "enter into society to make one people one body politic under one supreme government."[84]

Such an undivided sovereign rules exclusively over a given territory and never beyond it. As Ulricus Huber[85] taught, back on the continent, the principle of undivided territorial sovereignty[86] demanded that "the laws of each state have force within the limits of that government and bind all subjects to it, but not beyond."[87] For him and his many followers,[88] sovereignty entails a division of responsivity that allocates responsibility over all persons based on where their feet touch the ground, regardless of "whether they live there permanently or temporarily."[89] Sharing a vision of undivided sovereignty familiar by now,[90] Huber argued that the sole way in which foreign laws could be enforced elsewhere is by the comity,[91] the entirely voluntary choice, of another sovereign.[92] When it pleases them, sovereigns might

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81. Consider the opening sentence of the Two Treatises: "Slavery is so vile and miserable an Estate of Man, and so directly opposite to the generous temper and courage of our Nation; that it is hardly to be conceived that an *Englishman*, much less a *Gentleman*, should plead for't. And truly I should have taken [Robert Filmer's *Patriarcha*] as any other treatise, which would persuade all Men that they are Slaves, and ought to be so; for such another exercise of Wit as was his who writ the Encomium of *Nero*, rather than for a serious Discourse meant in earnest."). JOHN LOCKE, TWO TREATISES OF GOVERNMENT 1 (1690).

82. *See generally* Lea Brilmayer, Jennifer Haverkamp, Buck Logan, Loretta Lynch, Steve Neuwirth & Jim O'Brien, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 749 (1988) ("The American federal system incorporated a theory of state sovereignty that paralleled Locke's theory of sovereignty of independent nations.").

83. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 89 (1689).

84. *Id.*

85. Also sometimes referred to as "Ulrik Huber" or "Ulrich Huber."

86. *See generally* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2085–86 (2015) ("[Huber's first two maxims] stated the territorial view of sovereignty in the strongest terms and permitted no discretion on the part of the sovereign, which could not regulate extraterritorially even to promote its most compelling interests.").

87. ULRICUS HUBER, PRAELECTIONUM JURIS CIVILIS 25 (1787) ("[*L*]*eges cujusque imperii vim habent intra terminos ejusdem reipublicae omnesque ei subjectos obligant, nec ultra*").

88. *See, e.g.*, ERNEST G. LORENZEN, *Huber's De Conflictu Legum*, *in* SELECTED ARTICLES ON THE CONFLICT OF LAWS 136, 136 (1947) ("[Huber's treatise] has had a greater influence upon the development of the Conflict of Laws in England and the United States than any other work.").

89. HUBER, *supra* note 87, at 25 ("*Pro subjectis imperio habendi sunt omines qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorentur.*").

90. *See generally* LEA BRILMAYER, CONFLICT OF LAWS 14, 16 (2d ed. 1995) ("Ulrich Huber . . . built a [conflict of laws theory] based on earlier writers such as Grotius who discussed state sovereignty.").

91. *See generally* Dodge, *supra* note 86, at 2085 ("The history of international comity begins with the seventeenth-century Dutch jurist Ulrich Huber.").

92. HUBER, *supra* note 87, at 25 (Maxim 3: "*Rectores imperiorum id comiter agunt . . . .*"); LORENZEN, *supra* note 88, at 160 ("A foreign law could have no effect ipso jure outside the territory of the enacting state. It must be recognized or accepted, that is incorporated, by the law of the forum. This is Huber's doctrine in essence. This is also the standpoint of the Anglo-American law and of the continental courts."). *See generally* Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 24–32 (1967); Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of*

apply the law of another sovereign but always in an all-or-nothing manner. A high bar. Still, comity, in this context, serves to soften the harsh effects of impenetrable boundaries beyond which sovereign govern unhindered, unconstrained, and independent.

Or consider Emer de Vattel, recently called by the Supreme Court "the founding era's foremost expert on the law of nations."[93] He continues to enjoy frequent appearances in Supreme Court opinions authored by a broad range of justices.[94] Vattel influenced many areas of law but is perhaps best known for explicating the notion of equality among sovereigns. Vattel was from Switzerland, a country with its fair share of knotty allegiances, religious conflicts, civil wars, cantonal rivalries, and a precarious position in the constantly shifting tides of European power politics. Vattel's nationality is often invoked to help explain his main contribution to the law of nations. He extended the metaphor of the state of nature for individuals to the state of nature for nations.[95] Just as individuals in the state of nature are governed by the law of nature, so are nations in the state of nature governed by the law of nations.[96] Such law is built on the equality and independence of individual states. A small republic, like Switzerland, has an equal claim to sovereignty as a mighty kingdom.[97] The U.S. Supreme Court, after citing Vattel, echoed this view: "No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights."[98]

For Vattel, this equality of sovereign status entails independence from other sovereigns.[99] Just as no sub-sovereign unit can—or should—divide proper

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Laws, 44 U.C. DAVIS L. REV. 11, 19–22 (2010); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1179–81 (2007) (listing comity doctrines).

93. Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1493 (2019).

94. *See, e.g.*, Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 710 (2021); Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1942 (2021) (Gorsuch, J., concurring); Trump v. New York, 141 S. Ct. 530, 546 (2020) (Breyer, J., dissenting); Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004); District of Columbia v. Heller, 554 U.S. 570, 587 n.10 (2008); Arizona v. United States, 567 U.S. 387, 417 (2012) (Scalia, J., concurring); Sessions v. Dimaya, 138 S. Ct. 1204, 1246 (2018) (Thomas, J., dissenting).

95. *See generally* EMER DE VATTEL, THE LAW OF NATIONS, 5 (Knud Haakonssen ed., 1758) ("There certainly exists a natural law of nations, since the obligations of the law of nature are no less binding on states, on men united in political society, than on individuals.").

96. *See generally id.* at 68 ("Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, lived together in the state of nature, —nations or sovereign states are to be considered as so many free persons living together in the state of nature . . . . As men are subject to the laws of nature,—and as their union in civil society cannot have exempted them from the obligation to observe those laws, since by that union they do not cease to be men,—the entire nation, whose common will is but the result of the united wills of the citizens, remains subject to the laws of nature, and is bound to respect them in all her proceedings.").

97. *See id.* at 75 ("Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature, —nations composed of men, and considered as so many free persons living together in the state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom."). *See generally* KRASNER, *supra* note 6, at 14 ("The concept of the equality of states was introduced into international law by Vattel.").

98. The Antelope, 23 U.S. 66, 122 (1825).

99. *See, e.g.*, VATTEL, *supra* note 95, at 74 (1758) ("Nations being free and independent of each other, in the same manner as men are naturally free and independent, the second general law of their

sovereignty, for Bodin, Hobbes, and Pufendorf, no *supra*-sovereign unit should interfere with the indivisibility and exclusivity of sovereignty.[100] Vattel's "law of nations is the law of sovereigns."[101] And such sovereignty is an all-or-nothing proposition.[102] To "be really sovereign and independent," a country must "govern itself by its own authority and laws."[103] Foreign influence is inherently injurious.[104] You decide over there, we over here. No mingling.

The list goes on and on, with many authors from many contexts all agreeing on the indivisibility of sovereignty. Le Bret in 1632: "Sovereignty is no more divisible than a point in geometry."[105] Jean-Jacques Burlamaqui in 1747:

> Sovereignty can admit of no share or partition, that there is no sovereign at all when there are many, because there is no one who commands then in the last resort, and none of them being obliged to give way to the other, their competition must necessarily throw every thing into disorder and confusion.[106]

Jean Jacques Rousseau in 1762: "Sovereignty, for the same reason as makes it inalienable, is indivisible; for will either is, or is not, general."[107] The French Constitution of 1791: "La Souveraineté est une, indivisible, inaliénable et imprescriptible. Elle appartient à la Nation; aucune section du peuple, ni aucun individu, ne peut s'en attribuer l'exercice."[108] Hegel in 1821, in a characteristically Delphic description: "Die Souverainetät, zunächst nur der allgemeine Gedanke dieser Idealität, existiert nur als die ihrer selbst gewisse Subjektivität und als die abstrakte, insofern grundlose Selbstbestimmung des Willens, in welcher das Letzte der Entscheidung liegt."[109]

Over time, there is a subtle shift from proscription to description. Where early writers were closer to arguing that this view of sovereignty was useful to reign in the current chaos, later writers were more inclined to describe indivisible

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society is, that each nation should be left in the peaceable enjoyment of that liberty which she inherits from nature.").

100. *See, e.g.*, *id.* ("As a consequence of that liberty and independence, it exclusively belongs to each nation to form her own judgment of what her conscience prescribes to her, —of what she can or cannot do, —of what it is proper or improper for her to do.").

101. *Id.* at 18.

102. *See, e.g.*, *id.* at 83 ("Every nation that governs itself, under what form soever, without dependence on any foreign power, is a *sovereign state*.").

103. *Id.*

104. *Id.* at 96 ("If any intrude into the domestic concerns of another nation, and attempt to put a constraint on its deliberations, they do it an injury.").

105. CARDIN LE BRET, TRAITÉ DE LA SOUVERAINÉTÉ DU ROY 71 (1632).

106. J.J. BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 32 (2d ed. 1763).

107. JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 33 (1762).

108. CONST. DE 1791 Sep. 3, 1791, title III, art. 1 (Fr.) ("Sovereignty is one, indivisible, unalienable and imprescriptible; it belongs to the Nation; no group can attribute sovereignty to itself nor can an individual arrogate it to himself.").

109. GEORG WILHELM FRIEDRICH HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS 322 (1981) ("Sovereignty, which is initially only the universal thought of this ideality, can exist only as subjectivity which is certain of itself, and as the will's abstract—and to that extent ungrounded—self-determination in which the ultimate decision is vested.").

sovereignty as an ontological feature of the universe.[110] The common refrain that emerges here, in all these varied contexts, is that sovereignty is indivisible, not limited from below or above, and legal systems must decide law in an all-or-nothing manner.

C. Importing Sovereignty to U.S. Law

Not surprisingly, the broad success of this view of sovereignty has legal roots and legal consequences. The writers surveyed above articulated, developed, and reflected an increasingly common view, one that legal scholars, attorneys, judges, and legislators shared as well.

Consider, for example, William Blackstone's über-famous *Commentaries on the Laws of England*. There, Blackstone notes that in every state "there is and must be . . . a supreme, irresistible, absolute, uncontrolled authority, in which the jura summi imperii or the rights of sovereignty reside."[111] This is the "conventional British position" at the beginning of the revolutionary period, a view of sovereignty where a "single supreme political will had to prevail."[112] The fact that American colonists shared this conception of sovereignty escalated tensions and made reconciliation increasingly difficult.[113] Perhaps that is what made sovereignty "the most important abstraction of politics in the entire Revolutionary period."[114] No surprise, then, that founding documents and court opinions reflect this common view. For example, Federalist No. 20 summarizes:

> The important truth, which it unequivocally pronounces in the present case, is, that a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals; as it is a solecism in theory; so in practice, it is subversive of the order and ends of civil polity,

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110. *See, e.g.*, BURLAMAQUI, *supra* note 106, at 45 ("That in every government there should be such a supreme power, is a point absolutely necessary; the very nature of the thing requires it, otherwise it is impossible for it to subsist.").

111. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 48–49 (1765).

112. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1430 (1987) ("The conventional British position understood 'sovereignty' as that indivisible, final, and unlimited power that necessarily had to exist somewhere in every political society. A single nation could not operate with two sovereigns any more than a single person could operate with two heads; some single supreme political will had to prevail, and the only limitations on that sovereign will were those that the sovereign itself voluntarily chose to observe."). *See generally* AKHIL REED AMAR, AMERICA'S CONSTITUTION 28–30 (2006).

113. *See* Jack N. Rakove, *Making A Hash of Sovereignty*, *Part I*, 2 GREEN BAG 2d, Autumn 1998, at 35, 37 ("Blackstone's Commentaries first appeared, conveniently enough, amid the Stamp Act controversy of 1765–66, which in turn quickly placed sovereignty at the heart of the constitutional quarrel which ended in American independence a decade later."); HERZOG, *supra* note 6, at 113 ("[M]y claim is not that the concept of sovereignty explains the American Revolution. But I do think sovereignty enthusiasts on both sides of the Atlantic helped polarize the debate."); *see also* EDMUND MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 267 (1989) ("Madison was inventing a sovereign American people to overcome the sovereign states.").

114. GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 345 (1998); *see also* H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949, 987 (1993) ("The term [sovereignty] was both central to the founding era's political grammar and essentially ambiguous.").

> by substituting *violence* in place of *law*, or the destructive *coercion* of the *sword*, in place of the mild and salutatory *coercion* of the *magistracy*.[115]

Again, the view remains that divided sovereignty must end in calamity.[116] Similarly, James Wilson agreed during the Pennsylvania ratification convention "that there cannot be two sovereign powers on the same subject," and that in every society there "of necessity must be, a supreme, absolute and uncontrollable authority."[117] Anything else would create a "political monster of an imperium in imperio,"[118] a "hydra in government."[119]

Courts at the time, unsurprisingly, also considered the nature of sovereignty and came to similar conclusions. They cited Grotius,[120] Pufendorf,[121] and Vattel,[122] often together,[123] then and now, in a steady stream of opinions to probe the depths of sovereignty. What they found, again, is that sovereigns must be separate and sovereignty indivisible. For example, shortly after the U.S. Constitution was promulgated, a court, in a case about the recognition and enforcement of prior judgments, leaned on Vattel to explain that "the law of nations, is the law of nature applied to nations, and that one sovereign power cannot be bound by another."[124] Elsewhere, courts used the notion of undivided sovereignty to explain that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute" and that anything else "would imply a diminution of its sovereignty."[125] Conversely, laws cannot have an extraterritorial effect as "the necessary result of the independence of distinct sovereignties."[126] Whether it is in the context of the recognition of a judgment, jurisdiction, or the extraterritorial application of law, undivided sovereignty allocates power to distinct and separate geographical chunks.[127] Whatever else may change, whoever might rule, whatever their laws

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115. THE FEDERALIST NO. 20 (James Madison & Alexander Hamilton) (emphasis in original).

116. *See generally* HERZOG, *supra* note 2, at 34 ("'The central thrust and insistent refrain of their work is that social order must hang on sovereignty. It's that or the doom of religious civil war, of rampant disorder more generally: take your pick.").

117. James Wilson, Speech at the Pennsylvania Convention (Dec. 4, 1787), *in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 471–74 (Merrill Jensen ed., 1976).

118. THE FEDERALIST NO. 15 (Alexander Hamilton).

119. THE FEDERALIST NO. 80 (Alexander Hamilton).

120. *See, e.g.*, The Marianna Flora, 24 U.S. (11 Wheat.) 1, 15 n.N (1825); Young v. United States, 97 U.S. 39, 47 (1877).

121. *See, e.g.*, Torres v. Madrid, 141 S. Ct. 989, 998 (2021); Bond v. United States, 572 U.S. 844, 884 (2014) (Thomas, J., concurring); Alden v. Maine, 527 U.S. 706, 767 (1999) (Souter, J., dissenting); Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 120 (2015) (Thomas, J., concurring).

122. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 53 (1831); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 66 (1824); Tr. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 602 (1819); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 121 (1810).

123. *See, e.g.*, M'Ilvaine v. Coxe's Lessee, 6 U.S. (2 Cranch) 280, 325 (1805); Holmes v. Jennison, 39 U.S. 540, 547 (1840); The Venus, 12 U.S. (8 Cranch) 253 (1814); United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820).

124. Camp v. Lockwood, 1 U.S. 393, 398 (Pa. Com. Pl. 1788).

125. Sch. Exch. v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812).

126. Blanchard v. Russell, 13 Mass. 1, 4 (1816).

127. *See also* The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of [a] nation . . . can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction.").

might be, "sovereignty survives" because, we are told, "[a] political society cannot endure without a supreme will somewhere."[128]

The dominant view at the founding, then, was to view sovereignty as a bundle of ideas to structure inter- and intra-state relations.[129] The world was carved up into separate chunks,[130] each with a separate sovereign and separate law.[131] There is now an inside and an outside.[132] But a sovereign is only sovereign within its territory and never beyond it. Outside are other sovereigns with their own territory, their own sovereign powers, and their own laws. Acting beyond one's territory or trying to extend the reach of one's laws elsewhere necessarily steps on the toes of another sovereign.[133] To be sovereign entails not to be subject to another sovereign, its command, or its laws.[134] If people never walked across a border, or goods were never sold in another state, or transactions never involved people from different places, then this framework might be workable. But, as every conflict of laws case attests, our world is not like that. What then? Which sovereign gets to set the rules? And what about the sovereign that does not? Two hundred years of conflict of laws scholarship and doctrine has tried to answer these questions, all while clinging to the belief that sovereignty must be undivided, never fractional.

II. DOCTRINAL IMPLICATIONS OF INDIVISIBLE SOVEREIGNTY IN CONFLICT OF LAWS

The axiomatic beginning of every conflict of laws case is that a court must choose the law of one sovereign and disregard the law of all other sovereigns.[135]

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128. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 316–17 (1936) ("Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense.").

129. *See generally* JACKSON, *supra* note 1, at 6 ("Government supremacy and independence is that distinctive configuration of state authority that we refer to as 'sovereignty.'").

130. A few exceptions, for example, Antarctic by treaty and convention. *Id.* ("There is no inhabited territory anywhere on the planet that is outside [of sovereign states].").

131. *See generally* SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES 77–82 (2006); GRIMM, *supra* note 19, at 77 ("The crucial phenomenon in understanding modern sovereignty . . . is the territorialization of political rule by means of state formation.").

132. *See, e.g.*, LUZIUS WILDHABER, WECHSELSPIEL ZWISCHEN INNEN UND AUSSEN (1996) (facilitating the formation of national identities); GRIMM, *supra* note 19, at 78 ("[The formation of national identities can be linked to the] distinction between the internal and the external and, in relation to people, between nationals and foreigners."); CHARLES MCILWAIN, THE GROWTH OF POLITICAL THOUGHT IN THE WEST 392 (1932) ("[C]onducive to a theory of sovereignty, is the idea of nationality, growing gradually into a sentiment of national unity.").

133. *See, e.g.*, T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 1993 (2004) (summarizing the view of some that understand that "sovereignty as a 'final say' is a sine qua non of statehood, and it is indivisible. To the extent that a state is subject to law made elsewhere, it has lost its sovereignty and, perhaps, in some deep way, its right to call itself a 'state.'").

134. *See generally* JACKSON, *supra* note 1, at x (emphasizing that sovereignty implies "political and legal independence of geographically separate states").

135. *See, e.g.*, Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1822 (2005) [hereinafter Roosevelt, *Resolving Renvoi*] ("The task of a court confronted with a choice-of-law problem, conventionally conceived, is to determine which of several different jurisdictions' laws applies to the case before it."); BRAINERD

One wins and gets to set the rules and regulate behavior, while all others lose.[136] This all-or-nothing scenario is the result of enshrining an old view of sovereignty into conflict of laws rules.[137]

There are, off course, many different doctrinal approaches in the United States to decide which sovereign's laws will govern in a case.[138] They differ in many important ways. But, despite otherwise massive conceptual and practical differences between these different approaches, they all share the conviction that, at the end of the day, one sovereign's rules must govern the case, and the rules of all other sovereigns must be disregarded. Though at fundamental odds in many ways, these conflict of laws approaches are all built on a conception of undivided sovereignty that Bodin would have recognized. The ultimate question in all of these approaches is how to decide *which* sovereign gets to dominate, not *whether* one should dominate.

The purpose of this Section is to explain how an undivided view of sovereignty became the cornerstone of otherwise divergent conflict of laws approaches in the United States.[139] The story of these warring conflict of laws approaches and the individuals behind them has been told before,[140] many times.[141] But no scholarship has examined the foundational role of sovereignty in shaping different conflict of laws approaches. That these approaches share a common core is a surprising and consequential finding. If they are all built on the same rickety foundations, then they all stand or fall together.

This Section will examine different conflict of laws approaches one-by-one, explaining for each how an undivided view of sovereignty animates otherwise diverging projects. It also explains how undivided sovereignty incurs self-inflicted wounds on each project. These flaws and shortcomings in the dominant conflict of laws approaches have long been recognized but not correctly diagnosed. Divided sovereignty is the root cause of the ailment, fractional sovereignty the cure. To

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CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 163 (1963) ("[T]he basic problem in conflict of laws is to reconcile or resolve the competing interests of different states.").

136. *See, e.g.*, Walter W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 459–60 (1924) ("[T]hat for every situation dealt with in the conflict of laws there is always some one and only one 'law' which has 'jurisdiction,' i.e. power, to determine what legal consequences shall be attached to the given situation. They then proceed to determine on this basis what 'law' has 'jurisdiction' in each group of cases—torts, contracts, property, etc.—and take the position that no other 'law' than this appropriate or 'proper' law has 'jurisdiction.'" (internal citations omitted)).

137. *See generally* HERZOG, *supra* note 2, at 264 ("Plenty of legal texts with current authority are flecked with appeals to sovereignty, and we need to continue to make sense of them."); Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 885 (2002) ("The most accurate characterization of the sovereignty-based approach may be that it is the product of the long history of choice-of-law scholarship rather than a deliberately chosen frame-work.").

138. *See generally* Symeon C. Symeonides, *Choice of Law in the American Courts in 2020: Thirty-Fourth Annual Survey*, 69 AM. J. COMPAR. L. 177 (2021).

139. Alas, many conflict of laws approaches in other countries are built on similar conceptual foundations and subject to similar analyses and critiques.

140. *See generally* Herma Hill Kay, *Ehrenzweig's Proper Law and Proper Forum*, 18 OKLA. L. REV. 233, 233 (1965) ("Conflict of laws is a field, not of laws, but of men.").

141. *See generally* LEA BRILMAYER, CONFLICT OF LAWS, FOUNDATIONS AND FUTURE DIRECTIONS 11 (1991) ("There are few other fields of law in which the history of the subject exerts as much fascination as conflicts.").

demonstrate that point, we begin close to where conflict of laws in the United States begins, with Justice Story in the early decades of the Republic.

A. Joseph Story

Conflict of laws doctrine in the United States was heavily and lastingly influenced by Joseph Story, professor of law, associate justice on the Supreme Court, and writer of multiple treatises. One of these treatises was the first textbook in the United States on conflict of laws.[142] First published in 1834, Story's *Commentaries on the Conflict of Laws* (Commentaries) is the primary reason why Story was revered, by some, as the "father of the conflict of laws."[143]

In his Commentaries, Story puts undivided sovereignty at the heart of his conflict of laws account.[144] He explains that "[t]he first and most important general maxim or proposition is that . . . every nation possesses an exclusive sovereignty and jurisdiction within its own territory."[145] Notice that this claim about sovereignty is not defended or explained. It is a "maxim or proposition" presented as an inherent feature of sovereignty. It is presumed true, and all other deductions follow from it. Similarly, elsewhere Story declares with little argument that "[i]t is an essential attribute of every sovereignty, that it has no admitted superior, and that it gives the supreme law within its own domains on all subject appertaining to its sovereignty."[146] For Story, sovereignty is inherently exclusive, supreme, and undivided.

Taking a cue from the standard Westphalian account, Story explains that "[t]he Earth has long since been divided into distinct Nations, inhabiting different regions."[147] This division and the origins of conflict of laws doctrine, Story reminds

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142. JOSEPH STORY, CONFLICT OF LAWS, at v (1st ed. 1834), https://archive.org/details/commentariesonc17storgoog/ [https://perma.cc/DVM8-Y5QZ] ("There exists no treatise upon [this topic] in the English language."); *see also* Kurt H. Nadelmann, *Joseph Story's Contribution to American Conflicts Law: A Comment*, 5 AM. J. LEGAL HIST. 230, 243 (1961) ("Before Story's Commentaries, no textbook existed in the English language on conflict of laws."). *See generally* William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1374 (1997) ("Conflicts law in this country developed from Justice Story's magisterial treatise on the subject.").

143. LORENZEN, *supra* note 88, at 193–94, 202 ("[Story's Commentaries] were without question the most remarkable and outstanding work on the conflict of laws which had appeared since the thirteenth century in any country and in any language . . . . In the United States and England, Story is revered today as the father of the conflict of laws."). *See also* JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 39 (1935) ("The focal point in the history of the Conflict of Laws is the work of Joseph Story."); ALBERT EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS, § 2 at 4 (1962) ("American conflicts law, as we know it today, goes back to Joseph Story. When he wrote his Commentaries . . . American courts had not yet fully recognized the need for, nor the existence of, such a law."); ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS 2 (1992) (describing Story as "the prime architect of nineteenth-century American conflicts law"); Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 11, 24 (1989) ("Story's influence, both in the United States and abroad, can hardly be overestimated.").

144. *See generally* Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 24 (2010) ("Story . . . erected his conflict of laws system on sovereignty and comity.").

145. JOSEPH STORY, CONFLICT OF LAWS § 18 (8th ed. 1883).

146. *Id.* § 8.

147. *Id.* § 1.

us, originated with the Reformation where "the Christian world was divided into many independent sovereignties, acknowledging no common head."[148] Since then, all are equal, and that equality necessitates exclusion of foreign interference.[149]

Sovereigns, then, must have no competitors from above or below. Each sovereign is independent from all others and admits of no internal challengers. Story bases his account of conflict of laws on this understanding of undivided and unchallenged sovereignty, deducing that "[t]he direct consequence" of this view of sovereignty is that sovereigns can bind property, persons, and acts within their territory but not outside.[150] Each sovereign must regulate property, persons, and events within its borders but never beyond its borders.[151] Doing otherwise "would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nation" and equivalent to the absurd declaration "that the sovereignty over a territory was never exclusive in any nation, but only concurrent with that of all nations."[152] It would be, for Story, an invitation for lawlessness where "all might establish rules, which none were bound to obey."[153] Instead, each sovereign is responsible for one patch of earth and regulates within it, exclusively and completely. When enforcement of such regulations is sought elsewhere, the courts of other sovereigns, out of respect, will give force to the regulations of the sovereign where the property, activities, and people were originally located. But no matter where enforcement is sought, only one sovereign can be responsible for any given act, or piece of property, or person.[154] Its laws must govern; all others must be disregarded.

This understanding of sovereignty as Story articulated it served as a cornerstone of Supreme Court conflicts jurisprudence for decades.[155] It also shaped

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148. *Id.* § 3.

149. *Id.* § 20 (emphasizing the importance for conflict of laws principles of "the equality and exclusiveness of the sovereignty of any nation").

150. *Id.* § 18 ("The direct consequence of this rule is, that the laws of every state affect, and bind directly all property, whether real or personal, within its territory; and all persons, who are resident within it, whether natural born subjects, or aliens' and also all contracts made, and acts done within it.").

151. *Id.* ("A State may, therefore, regulate the manner and circumstances under which property, whether real or personal or in action, within it shall be held, transmitted, bequeathed, or transferred, or enforced; the condition, capacity, and state of all persons within it; the validity of contracts, and other acts, done within it; the resulting rights and duties growing out of these contracts and acts; and the remedies, and modes of administering justice in all cases calling for the interposition of its tribunals to protect, vindicate, and secure the wholesome agency of its own laws within its own domains.").

152. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 20 (2d. ed. 1841) ("[I]t would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory. It would be equivalent to the declaration, that the sovereignty over a territory was never exclusive in any nation, but only concurrent with that of all nations.").

153. *Id.* ("[T]hat each could legislate for all, and none for itself; and that all might establish rules, which none were bound to obey").

154. *See generally* Matthias Lehmann, *Liberating the Individual from Battles Between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT'L L. 381, 399 (2008) ("Joseph Story . . . made 'sovereignty' of the state over a territory the premise of his conflicts theory.").

155. *See, e.g.*, Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done . . . . For another jurisdiction, if it should happen to

the traditional understanding of personal jurisdiction,[156] with many echoes to this day,[157] that hinges on the view that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[158] The Supreme Court not only utilized this "elementary principle," but also attributed it to Justice Story.[159] Elsewhere, the Supreme Court invoked this conception of sovereignty to explain Due Process limitations.[160]

The shorthand way of describing this approach to conflict of laws is "territorialism." But it is misleading to focus solely on geography or territory. What Story is describing is a way to think about and utilize one understanding of sovereignty to partition people and legitimize a particular way of exercising authority over them. As the previous Section made clear, Story did not invent this understanding of sovereignty. But his account helps to explain what kind of understanding of sovereignty is embedded in subsequent conflict of laws doctrine and scholarship.

B. The Traditional Approach

From Story it was not a far leap to what is now referred to as the "traditional approach." Once the dominant conflict of laws methodology, the traditional approach is still followed by numerous jurisdictions.[161] Also known as the "vested-rights" or "territorial" approach, it provides a conflict of laws methodology based on determining in which sovereign's territory a right vests. Once vested, the right can then be taken elsewhere for enforcement.

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lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the law of nations, which the other state concerned justly might resent.").

156. *See generally* Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2509 (2005) ("One need only read Justice Stephen Johnson Field's opinion in *Pennoyer v. Neff* to see the connection between Westphalian territorial sovereignty as understood in international law and the prevailing jurisdictional principles of nineteenth-century American law.").

157. *See, e.g.*, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1025 (2021) ("[T]his Court has considered alongside defendants' interests those of the States in relation to each other. One State's 'sovereign power to try' a suit, we have recognized, may prevent 'sister States' from exercising their like authority.").

158. Pennoyer v. Neff, 95 U.S. 714, 722 (1878).

159. *Id.* at 722–23 ("'The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists as an elementary principle that the laws of one State have no operation outside of its territory except so far as is allowed by comity, and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity, and incapable of binding such persons or property in any other tribunals.'").

160. *See, e.g.*, N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 162, 164 (1914) ("[A] State may not consistently with the due process clause of the Fourteenth Amendment extend its authority beyond its legitimate jurisdiction . . . [and therefore a] state, by a license, may [not] acquire the right to exert an authority beyond its borders."); Home Ins. Co. v. Dick, 281 U.S. 397, 407 (1930) ("A State may, of course, prohibit and declare invalid the making of certain contracts within its borders, . . . [I]t may prohibit performance within its borders, even of contracts validly made else-where, if they are required to be performed within the State and their performance would violate its laws.").

161. *See, e.g.*, Symeonides, *supra* note 138.

In the United States, the traditional approach is most closely associated with Joseph Beale, the reporter for the First Restatement of Conflict of Laws. Beale, like Story, emphasized the notion that conflict of laws doctrines are to be derived from fundamental principles.[162] Accused of formalism, Beale defiantly endorsed a dogmatic approach.[163] The foundation of his formalistic approach is the claim that "[t]he civilized portion of the earth is divided up into certain units of territory."[164] Beale presents this as a simple observation rather than a complicated claim brimming with normative baggage.[165] For him, before we can "apply laws in space," we must "delimit the space to which each law is applicable."[166] Such "law-giving is a function of sovereignty."[167] Sovereignty, then, is at the core of Beale's territorial conception of conflict of laws.[168] He noted that so "obvious a proposition seems hardly worth argument; yet few writers on the subject have included this topic in their works."[169] Once again, sovereignty is the bedrock of a conflict of laws approach.[170]

Predictably, Beale advocates for an undivided and undividable understanding of sovereignty where one sovereign's laws dominate and all others must be disregarded. Within each legal unit, only one law can govern, the "one and undivided law of that territory."[171] That law must "extend over the whole territory" and "apply to every act done there;" it cannot be in competition with the laws of any other sovereign.[172] A state's law, "[b]y its very nature . . . must apply to everything and must exclusively apply to everything within the boundary of its jurisdiction."[173] Beale reminds readers, harkening back to the Age of Reformation, that "[i]f two laws were present at the same time and in the same place upon the same subject we should also have a condition of anarchy."[174]

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162. *See* 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, 2033 (2019) (noting that the traditional approach "appl[ied] formalistic rules based on respect for a sister state's territorial sovereignty and the need for decisional uniformity").

163. BEALE, *supra* note 143, at xiii ("One cannot deny that most of the statements in this work will be dogmatic. Does not the Bar desire dogmatic statements?").

164. *Id.* at 16.

165. *See generally* Roosevelt, *Myth of Choice of Law*, *supra* note 3, at 2455 n.33 ("Nowadays Beale's first principles appear to be somewhat arbitrary assumptions, but within the jurisprudential climate of his day, they were fairly unremarkable.").

166. BEALE, *supra* note 143, § 1.6.

167. *Id.*

168. *See* Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1291–92 (1989) ("Territoriality was derived from a notion of state sovereignty that was not itself rights-based.").

169. BEALE, *supra* note 143, § 1.6.

170. *See generally* Brilmayer & Listwa, *supra* note 16, at 898 ("[Beale] argued that such a territorial conception of choice of law—and specifically, his articulation of that conception—was mandated by the very nature of state sovereignty.").

171. BEALE, *supra* note 143, at 18 ("The law of a single legal unit must be one law, the one and undivided law of that territory.")

172. *Id.* § 4.12 ("[N]ot only must the law extend over the whole territory subject to it and apply to every act done there, but only one law can so apply.").

173. *Id.*

174. *Id.*

The role of conflict of laws then, for Beale, is to mediate between sovereigns and keep chaos and discord at bay. Beale's answer, a variation on a theme we have encountered before, is to divide responsibility between sovereigns so that one and only one sovereign can be responsible for a legal occurrence. A sovereign's rules govern all occurrences within its territory, but none beyond it.[175] That is the only way to prevent sovereigns from clashing.[176] In many ways, in Beale's framework there is no conflict of laws, only a framework for figuring out which sovereign's laws governs.[177] And in the end, always, the "law of one or of another country" must govern.[178]

The resulting view, still powerfully intuitive at first sight, is that each legal occurrence is located in space, in the territory of one sovereign, and that the sovereign's laws govern the occurrence.[179] Because sovereignty is indivisible and supreme, one and only one sovereign can be in charge, and all others cannot.[180] For example, a tort committed in Alabama is governed by Alabama law; the validity of a contract entered in Florida is governed by Florida law; a marriage in Texas is governed by Texas law. Rights vest in the territory of one sovereign[181] and then

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175. *See generally* Brilmayer & Listwa, *supra* note 16 ("Beale offered a detailed set of rules built on the territorial premise that a state's law was supreme within its own jurisdiction but powerless beyond those borders.").

176. BEALE, *supra* note 143, at 192 ("Which of the two independent sovereigns should yield is a question not susceptible of a solution on which all parties would agree.").

177. *Id.* at 13 ("The laws of different sovereigns do not contend with one another for the mastery. Each one keeps within its sphere of operation, and only asserts its power in a foreign country when the law of that country commands or permits it. In practice, a conflict is impossible."). *See also* Robert Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 295 (1966) [hereinafter Leflar, *Choice-Influencing*] ("A vested rights approach called for a choice between states, not between laws and there was thought to be some tinge of the unethical in the conduct of a judge who, unlike blind Justice, deliberately opened his eyes to see the consequences of his choice."); Lee Farnsworth, *Conflicts of Law, Federalism, and Institutional Competence*, 68 U. KAN. L. REV. 495, 498 (2020) ("Indeed, according to the vested rights approach, the term 'conflict of laws' is something of a misnomer. The traditional understanding is that the territorial law of the place where the legal right vested is totally sovereign."); Roosevelt, *Myth of Choice of Law*, *supra* note 3, at 2463 ("Beale's account denies the possibility of conflict—only one law governs the transaction.").

178. BEALE, *supra* note 143, § 1.1 ("Whenever a question is raised of applying to a juridical situation the law of one or of another country, the question so raised must be settled by the principles of the Conflict of Laws.").

179. JOSEPH H. BEALE, *Summary of the Conflict of Laws*, *in* THREE CASES ON THE CONFLICT OF LAWS § 41, 515 (1902) ("Rights being created by law alone (§ 2), it is necessary in every case to determine the law by which a right is created."). *See generally* Jeffrey M. Shaman, *The Choice of Law Process: Territorialism and Functionalism*, 22 WM. & MARY L. REV. 227, 228 (1980) ("[C]hoice of law decisions under the traditional approach follow the maxim that events are to be governed by the law of the state in which they occur."); David Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 178 (1933) ("[A] court faithful to the conventional approach will turn in search of a conflicts of laws rule to determine the jurisdiction whose law should govern the question at issue. The conflicts rule indicates in which jurisdiction the appropriate law may be found.").

180. BEALE, *supra* note 143, at 311 ("Since the power of a state is supreme within its own territory, no other state can exercise power there.").

181. *See generally* Ibrahim J. Wani, *Borrowing Statutes, Statutes of Limitations and Modern Choice of Law*, 57 UMKC L. REV. 681, 682 (1989) ("Underlying the concept of vesting is the notion of sovereignty.").

become portable.[182] The only action other sovereigns may take, by their grace, is to recognize and enforce the tort cause of action created in Alabama, the Florida contract, or the Texas marriage.[183] Based on this view, which was, in Beale's mind, the summary of the law of the time,[184] Beale drafted the First Restatement that similarly "allocate[d] each case to the legal system of a single state."[185] Not surprisingly, the notion of undivided and exclusive sovereignty is enshrined in the opening paragraphs of the First Restatement.[186]

A.V. Dicey is the British analogue to Beale in the United States.[187] Dicey's "Digest of the Law of England with Reference to The Conflict of Laws" ("Digest") presents the traditional territorial view from a British perspective.[188] First published in 1896, it is now in its Fifteenth Edition (2018). Called "careful and thoughtful" by the U.S. Supreme Court at the time,[189] the Digest was also favorably reviewed by Beale upon its first publication.[190] As expected, an undivided notion of sovereignty is also embedded in Dicey's work. For example, Dicey defines a "country" as "the whole of a territory subject under one sovereign to one system of law."[191] Dicey clarifies what he means by sovereignty, stating first, like Beale, that "it need hardly be observed," but then going on to observe that sovereignty is "the power, whatever

182. *See, e.g.*, Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904) ("The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligation, which like other obligations, follows the person, and may be enforced wherever the person may be found.").

183. *See, e.g.*, BEALE, *supra* note 143, at 105 ("A right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called into question anywhere."); *see also* Brilmayer, *supra* note 168, at 1281 (The First Restatement held "that the forum did not really enforce the first state's laws, as such, but only recognized the rights that were created by those laws. If certain relevant activities occurred in the first state, then rights would vest under its laws and these rights would acquire an extraterritorial effect—a claim for recognition in the courts of another state—that the laws themselves would not have.").

184. *See, e.g.*, *Slater*, 194 U.S. at 126 ("The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligation, which, like other obligations, follows the person, and may be enforced wherever the person may be found.").

185. DAVID CAVERS, THE CHOICE-OF-LAW PROCESS 65 (1965).

186. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 2 (AM. L. INST. 1934) ("State denotes a territorial unit in which the general body of law is separate and distinct from the law of any other territorial unit."). *See also* John T. Cross, *The Conduct-Regulating Exception in Modern United States Choice-of-Law*, 36 CREIGHTON L. REV. 425, 443 (2003) ("[N]otions of exclusive sovereignty were a linchpin of the classical approach to choice of law."); Cavers, *supra* note 179, at 178 ("Deduction from territorial postulates could indicate *only one jurisdiction* as a source of law in a given case, the content of that law would be logically irrelevant.") (emphasis added).

187. *See generally* CAVERS, *supra* note 185, at 5–6 ("In Anglo-American jurisdictions, the development of choice-of-law doctrine has been greatly influenced by the works of the English scholar and jurist A.V. Dicey, and the American law professor, Joseph H. Beale.").

188. *See generally* A.V. DICEY & A BERRIEDALE KEITH, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS (4th ed. 1927).

189. United States v. Wong Kim Ark, 169 U.S. 649, 657 (1898).

190. J.H. Beale, Jr., *Dicey's "Conflict of Laws"*, 10 HARV. L. REV. 168, 168 (1896) ("He has done the work as well as it could be done.").

191. DICEY & KEITH, *supra* note 188, at 57.

its form, which is supreme in an independent political society."[192] These independent societies come into contact and their independence and undivided sovereignty mandate that the law of one be observed and the law of the other disregarded. Conflict of laws, for Dicey, is the branch of law that deals with the question which law and which sovereign is to prevail.[193] Like Beale, Dicey answered that question (largely, though not completely[194]) with reference to territorial rules that allocate the power to regulate completely to one sovereign. The basic positions of Beale and Dicey continue to have adherents to this day, here and abroad.[195]

But, of course, there are also many critiques of these territorial approaches to conflict of laws. Many of the problems with the territorial approach can be traced back to its commitment to undivided sovereignty. For example, the territorial approach needs a device to locate legal occurrences in space. Because of its commitment to undivided sovereignty, that device must yield a single occurrence, in the territory of a single sovereign, that then provides governing law. Sometimes (often?) such singular locating can seem arbitrary and deeply counterintuitive. Perhaps the most famous example of this is *Alabama Great Southern R.R. Co. v. Carroll*.[196] There, Alabama was the forum, the plaintiff's domicile, where the defendant was incorporated, where the majority of the railroad line was located, where the employment contract was formed, and where a train-link was already defective when the train left. Yet, because the link broke and caused injury while the train was briefly in Mississippi, its laws were held to govern under the unique localizing provision of the traditional approach. Of course, one could argue that a different localizing provision (say, where the link was originally defective) would lead to the more intuitive result that Alabama law applies. However, the point remains that *any* localizing principle under the traditional approach must favor one legally significant event (here, where the link broke), one territory where that event happened, one sovereign who is responsible for the event, and therefore only one sovereign who can provide governing law. A commitment to the indivisibility of sovereignty paired with a territorial framework locks the traditional approach into this position and its often counterintuitive conclusions.

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192. *Id.* at 60 n.a; *see also* A.V. DICEY, ENGLAND'S CASE AGAINST HOME RULE (1973 ed.) ("[English sovereignty] is, like all sovereignty at bottom, nothing less but unlimited power.").

193. DICEY & KEITH, *supra* note 188, at 11 ("[In many conflict of laws cases] the question at issue . . . is [w]hether the law of England or [a foreign country] is to prevail. Here we have a conflict, and the branch of law which contains rules for determining it may be said to deal with the conflict of laws, and be for brevity's sake called by that title.").

194. *See, e.g.*, *id.* at 591 ("[T]he term 'proper law of a contract' means the law, or laws, by which the parties to a contract *intended*, or may fairly be presumed to have intended, the contract to be governed.") (emphasis added).

195. *See, e.g.*, Regulation 846/2007 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations (Rome II), art. 4.1, 2007 O.J. (L 199) 44 ("Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.").

196. Ala. Great S.R.R. Co. v. Carroll, 11 So. 803 (1892).

Still, on both sides of the Atlantic, both in Beale's time and in some jurisdictions and among some modern scholars to this day,[197] undivided sovereignty was and remains the foundation of the traditional conflict of laws methodology. However, the hegemony of the traditional approach as exemplified by the First Restatement came increasingly under siege by judges[198] and academics[199] disgruntled by the stifling formalism, abstractions, and rigidity of Beale and Dicey's way of thinking.[200] In what is now termed the "Conflicts Revolution," a new generation of scholars would drastically upend conflicts scholarship and doctrine. Would they also do away with undivided sovereignty?

C. The Conflicts Revolution

Put most succinctly, the conflicts revolution aimed to reorient conflict of laws doctrine from a deductive framework based on territoriality toward a practical framework for comparing intersecting government interests. At first sight, it is tempting to assume that this monumental switch also entailed abandoning adherence to centuries-old and formalistic beliefs about the indivisibility of sovereignty. Modern conflict of laws scholarship and doctrine, surely, would do away with such formalism and shift our focus from axioms to outcomes. However, despite otherwise massive changes, the core assumptions about sovereignty embedded in the traditional methodologies have been reproduced (in new forms) in modern methodologies. Indivisible sovereignty is still the lynchpin of modern approaches. Sovereignty did not go away; it was simply draped in new garb.

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197. *See, e.g.*, Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1205 (1987) ("[T]his Article, [Dane] explain[s] and defend[s] a specific counterrevolutionary normative proposition in choice of law, which [Dane] call[s], 'vestedness.' The notion of vestedness represents a reworking of the first principle in the constellation of ideas that . . . [is] associated with the vested rights theory of Beale and Dicey."); Aaron D. Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373 (1971). *See generally* Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 389 (1966).

198. *See, e.g.*, Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 162 (1946) (expressing dissatisfaction with "the mechanical formulae of the conflicts of law").

199. *See generally* Arthur Leon Harding, *Joseph Henry Beale: Pioneer*, 2 MO. L. REV. 131, 133 ("Most of the criticism which has centered about Mr. Beale has been an attack phrased in terms of legal method. 'Unscientific' and '*a priori*' have been the epithets most commonly used."); Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L. J. 468, 474 (1928) ("The first and principal observation upon [Beale's] method of dealing with the problems of the conflict of laws is that it is superficial and, to that extent, unscientific . . . . The account it takes of the social, economic and practical considerations of justice which have been urged in numerous fields more or less directly bearing upon technical law is quite inadequate."); Cavers, *supra* note 179, at 173 ("For the commentator on the conflict of laws, it is an article of faith, attested by works if not avowed in words, that its proper study will disclose rules or principles which, like the hazel want of the diviner, will indicate the 'appropriate' jurisdictions whose laws are to determine those controversies that, in one way or another, have failed to respect state lines.").

200. *See generally* Maurice Rosenberg, *The Comeback of Choice of Law Rules*, 81 COLUM. L. REV. 946, 958–59 (1981) ("'Today no one would defend the system of broad and mechanistic choice-of-law rules that held sway through the first half of this century and that was largely embodied in the first *Restatement*.").

Leading this push for a new attire was Brainerd Currie, together with Herma Hill Kay,[201] who led the "conflicts revolution."[202] Their academic work reoriented conflicts scholarship and eventually entire swaths of law in what some have described as "a feat without parallel in the history of the common law."[203]

Currie begins by re-characterizing law as a "tool of state policy."[204] To properly use the tool, judges had to examine the policies underlying the law.[205] In contrast to Story, Beale, and Dicey's approaches, which were content neutral, Currie's approach put content and policy front and center.[206] For Currie, the central task of conflict of laws scholarship and doctrine is to "assess[] the respective values of the competing legitimate interests of two sovereign states."[207] Courts, as part of the state apparatus, must promote forum policies.

Not surprisingly, then, Currie's starting place was that a court would apply forum law.[208] Parties were free to argue for the application of another state's laws

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201. *See, e.g.*, Andrew D. Bradt, *Herma Hill Kay and Conflict of Laws: A Tribute*, 104 CALIF. L. REV. 579, 582 (2016) ("It would be more accurate to refer to the method as 'Currie and Kay's governmental-interest analysis.'"); BRILMAYER, *supra* note 90, at 49 n.6 ("It seems likely that [Kay's comprehensive statement and defense of interest analysis] will come to be accepted as the authoritative treatment of Currie's work.").

202. *See* Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1637–38 (2005) ("Nothing in the intellectual history of the American conflicts revolution was of greater moment than the publication of a law review article some still consider the greatest law review article ever written, Brainerd Currie's *Married Women's Contracts*. In the American conflicts revolution, this would become the shot heard round the world."); Shaman, *supra* note 179, at 227 ("This criticism [of the first Restatement and Beale] culminated in the seminal work of Brainerd Currie, which not only took exception to the traditional approach, but also proposed a new theory to replace it. Currie's 'governmental interest analysis' . . . has garnered strong praise from most choice of law scholars."); Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271, 284–85 (1996) ("Unilateralism shares with multilateralism the idea that choice of law should search for the appropriate sovereign (law source) rather than for the best law . . . . Much of the credit for launching unilateralism in this country goes to Brainerd Currie, the principal creator of interest analysis.").

203. Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1588 (1985).

204. Roosevelt, *Myth of Choice of Law*, *supra* note 3, at 2461.

205. *See, e.g.*, David P. Currie, *Comments on* Reich v. Purcell, 15 UCLA L. REV. 595, 605 (1968) ("Interest analysis . . . has the virtue of recognizing that laws are adopted in order to accomplish social goals and that they should be applied so as to carry out their purposes."); Kay, *supra* note 143, at 169 ("[Currie] consistently focused on the content of the conflicting laws as the beginning point of the choice of law analysis.").

206. *See, e.g.*, CAVERS, *supra* note 185, at 72 (1965) ("Professor Currie and I both see the choice-of-law problem as posed by the need to choose between two specific rules of law, not between the legal systems of two jurisdictions.").

207. Currie, *Notes on Methods*, *supra* note 3, at 176.

208. *See, e.g.*, Currie, *Disinterested Third State*, *supra* note 11, at 764 ("[W]here the interests of two states are clearly in conflict, the obvious, sensible, and constitutional course is for the forum to apply its own law."). Numerous scholars have argued that this position is unconstitutional. *See, e.g.*, John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 180 (1981) ("Currie used to argue, in essence, that the Supreme Court had constitutionalized his system, which meant, among other things, that the Court had indicated that states had no constitutionally legitimate business regarding out-of-staters as within the scope of their protective ideas."); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 310 (1992) ("Currie's original interest analysis proposed to apply forum law to all 'true conflicts.'"). *But cf.* Kay, *supra* note 143, at 169 (1989) ("[Currie's] initial focus was on the law of the forum as the normally applicable law . . . [b]ut in his

but had to overcome the initial presumption in favor of forum law. Courts would then examine the government interests of the competing states. Currie's "great triumph" was the recognition that, sometimes, the policies of two states are not really in conflict. In such so-called "false conflict" situations, Currie and others[209] instructed courts to pick the law of the state that had an interest and disregard the law of the state that did not. Currie argued that it would be foolhardy to favor the law of a disinterested state over the interested one. The traditional approach, blind to policies and government interests, had been unable to detect such situations. In all other, non-false conflict situations, government interest analysis instructs courts to simply apply forum law. That is so whether the foreign state is interested or not, is much more or much less interested than the forum, or whether no state is interested at all ("unprovided-for cases").[210]

The many pitfalls associated with Currie's basic approach and his "great triumph" derive in large part from Currie's continued reliance on treating sovereignty as an all-or-nothing proposition. He believed, like the many scholars and judges who came before him and whom he rejected in other matters, that conflict of laws, as that name implies, is about "determining the appropriate rule of decision when the interests of two or more states are in conflict—in other words, of determining which interest shall yield."[211] Such conflict is inevitable because the world is divided into many sovereigns and there is no single "all-powerful central government."[212] Each of these sovereigns has a government, and that government has unique and varied interests.[213] For Currie, multistate cases are conceived as "clashes between sovereigns, each attempting to impose its own regulatory scheme in furtherance of its own policies."[214] Courts and conflict of laws doctrine in this framework must be understood as part of this clash between sovereigns.[215] After all, interest analysis is *not* concerned with the interests of the parties, but instead is focused on the interests of the sovereigns whose laws the parties are invoking. It is this primacy of sovereign interests that leads Currie to the presumption for application of forum law. And it is the unmediatable, all-or-nothing nature of undivided sovereignty that requires Currie to resolve conflicts between sovereigns

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final statement of his method, Currie no longer gave priority to forum law once a foreign law had been invoked by a party.").

209. *See also* Roger J. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959). ("Professor Brainerd Currie has demonstrated that often there is no real conflict and therefore no real basis for advancing an exception to the local law.").

210. *See generally* Kay, *supra* note 143, at 171 ("[Currie] rejected both the ranking of policies and the weighing of interests.").

211. Currie, *Notes on Methods*, *supra* note 3.

212. *Id.*

213. *Id.* ("The problem would not exist . . . if the independent sovereignties in the real world had identical laws.").

214. Roosevelt, *Myth of Choice of Law*, *supra* note 3, at 2463.

215. *See* Ralf Michaels, *Economics of Law as Choice of Law,* 71 LAW & CONTEMP. PROBS., Summer 2008, at 73, 83 ("Governmental-interest analysis assumes that conflicts of law are conflicts among sovereigns over which of them gets to regulate a specific conduct.").

by examining how their interests match up. Interest analysis, then, is "an attempt to derive solutions to conflicts problems from the notion of sovereignty."[216]

The problems with interest analysis derive from the undivided notion of sovereignty as well. For example, as many commentators and courts have remarked, application of forum law in "true conflict" and "unprovided-for cases" seems arbitrary at best and deeply counterintuitive at worst.[217] Yet Currie was compelled to advocate for such a position because of his adherence to the classical account of sovereignty. There, as we have seen, sovereignty implied equality among sovereigns and exclusiveness of their claims. If the forum state and another state have an interest in the case (as in true conflict situations), then, because of their inherent equality, "there is no basis on which to prefer any other state, . . . no way to choose between them."[218] Whether one state is more or less interested cannot be relevant under this framework. Similarly, whether one state's interests are more relevant or legitimate than the other's is of no concern.[219] Neither are any other criteria. In the end, Currie was committed to treating all sovereigns as equals.[220] Similarly, he was committed to treating their sovereignty as indivisible. One sovereign had to set the rules. No compromise was possible. But a court had to pick applicable law. Currie recognized that this approach would steer courts into a dicey dead-end road. Courts had to pick a winner but had no way to choose between the contestants. In the end, Currie sidestepped the riddle. He argued that such an "assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order."[221] Courts should not pick between sovereigns or their interests.[222] Instead, the choice should be made via presumption. Where there is doubt, forum law should be applied. Alas, this is not a satisfying solution.[223]

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216. Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 38 (1984). *But cf.* Wani, *supra* note 181 ("Pragmatism replaced the formalism and conceptualism of the traditional approach and the focus of choice of law analysis shifted from territorial sovereignty to the expectations of the parties and the fairness of the results reached.").

217. *See* Roosevelt, *Myth of Choice of Law*, *supra* note 3, at 2463.

218. *Id.* at 2464.

219. Currie, *Notes on Methods*, *supra* note 3, at 176 ("[A] court is in no position to 'weigh' the competing interests, or evaluate their relative merits, and choose between them accordingly."). *See also* Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958) [hereinafter Currie, *Constitution and the Choice of Law*]; Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1, 50–51 (1960).

220. *See generally* Kermit Roosevelt III, *Brainerd Currie's Contribution to Choice of Law: Looking Back, Looking Forward*, 65 MERCER L. REV. 501, 513 (2014) [hereinafter Roosevelt, *Currie's Contribution*] ("But what if there is a true conflict? This is not a question about the meaning of either state's law. It's a conflict between the laws of two co-equal sovereigns.").

221. Currie, *Notes on Methods*, *supra* note 3, at 176.

222. Currie, *Constitution and the Choice of Law*, *supra* note 219, at 77 (1958) ("[C]hoice between the competing interests of coordinate states is a political function of a high order, which ought not, in a democracy, to be committed to the judiciary."); Currie, *Disinterested Third State*, *supra* note 11, at 758 ("Resolution of a conflict between the interests of co-ordinate states is a function of a high political order, which courts are not equipped to perform.").

223. *See, e.g.*, M. Traynor, *Conflict of Laws*, 49 CALIF. L. REV. 845, 862 (1961) ("Currie's concern about courts exercising functions they should not exercise in a democracy would seem to be a false problem."). *But cf.* Kay, *supra* note 143, at 173–74 ("Toleration . . . denotes respect to the

D. Diversity

Subsequent scholars tried to remedy this theoretical embarrassment. They have provided us with a rich diversity of modern approaches to conflict of laws situations. However, they all continue to rely on the same model of complete sovereignty to allocate governing law in an all-or-nothing manner.

For example, William Baxter's comparative impairment approach tries to resolve true conflicts by examining which state's interests would be more frustrated.[224] While developing the Currie/Kay government interest analysis further, Baxter's model still insists that only one sovereign can provide us with governing law, while the objectives of all others must be "subordinated."[225]

Similarly, the Second Restatement amalgamates various prior approaches, thereby incorporating their conceptual underpinnings.[226] It is the most widely adopted conflict of laws methodology in the United States, utilized by a majority of states. The Second Restatement begins by reminding readers that "[t]he world is composed of territorial states" with separate laws[227] and that when they come into conflict, "civilized nations"[228] need special rules to resolve such conflict. Such rules should recognize the virtues of "greater flexibility;"[229] instead of using "rigid rules,"[230] the Second Restatement utilizes the "broad principle" of "the most significant relationship."[231] Rights and liabilities are usually[232] "determined by the

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divergent laws of another sovereign. But toleration may be shown merely by one sovereign's acknowledgement that another sovereign acts appropriately when it enforces its own laws in its own courts in a multistate setting under circumstances where the first sovereign, had the case been before its courts, would also have enforced its own law. The practice of toleration in this sense requires no overt governmental action by the tolerating state. Nevertheless, its existence is vital to the smooth functioning of states bound together in a federation.").

224. Baxter, *supra* note 3, at 9 (accepting the possibility of borderline cases "that thwart easy application of every principle of law" and urging that one sovereign must still win even if it is "on the basis of some marginal factor"); *See generally* David E. Seidelson, *Resolving Choice-of-Law Problems Through Interest Analysis in Person Injury Actions: A Suggested Order of Priority Among Competing State Interests and Among Available Techniques for Weighing Those Interests*, 30 DUQ. L. REV. 869, 878 (1992) ("That critical question—given an adverse choice-of-law result, which state's interest would be more frustrated?—is the cornerstone of comparative impairment."); Richard A. Posner, *Introduction to Baxter Symposium*, 51 STAN. L. REV. 1007, 1007 (1999) ("[Baxter's] first article . . . applied an informal economic analysis to conflict of laws; needless to say, this was the first time such a thing had been attempted. Today, 35 years later, it continues to be cited as a major contribution to the scholarly literature on conflict of laws . . . .").

225. Baxter, *supra* note 3, at 17 ("In each real conflicts case the external objective of one state must be subordinated.").

226. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. L. INST. 1971). *See generally* Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 507–08 (1983) ("eclectic . . . in nature" and utilizing "a variety of different theories and values"); BRILMAYER, *supra* note 90, at 74 ("grab bag").

227. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 1 (AM. L. INST. 1971).

228. *Id.* § 1, cmt. c.

229. *Id.* at vii.

230. *Id.* at vii. *Cf.* SciGrip, Inc. v. Osae, 838 S.E.2d 334, 344 (N.C. 2020) (refusing to adopt the Restatement (Second) and noting the tradeoffs between "increased flexibility" and "the cost of introducing significant uncertainties into the process").

231. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, vii-viii, § 6(2) (AM. L. INST. 1971).

232. Subject to potential "statutory directives." *Id.* § 6(1).

local law of the State"[233] that has the most significant relationship to the occurrence and the parties, using various enumerated factors to assess the strength of the relationships.[234] This approach is then supplemented by "a secondary statement" of the choice of law "the courts will 'usually' make in given situations." All rights and liabilities determinations are binary. Courts must look for *the* most significant relationship and then apply either "its own local law or the local law of another state."[235] Sovereignty is once again an all-or-nothing proposition. That has not changed. All that has changed is the addition of a new, more flexible method of weighing the connections that parties and transactions have to different sovereigns. Whichever sovereign has more of these connections wins.

Even modern choice of law methodologies that are explicitly content based utilize the background assumption of undivided sovereignty. Consider, for example, the "Choice-Influencing Considerations" approach.[236] Most closely identified with Professor Leflar, this approach seeks to frankly acknowledge the factors that courts consider in practice, independent of what courts claim to consider.[237] As such, the "Choice-Influencing Considerations" approach incorporates dominant practices. Since the dominant practice was to treat sovereignty as undivided, so too do Leflar's choice-influencing considerations. For example, one of the considerations is "advancement of the forum's governmental interests," along the lines of Currie's arguments.[238] Because government interest analysis was built on undivided sovereignty, so too is this prong of Leflar's work.[239]

One of Leflar's considerations stands out from the others and has garnered the most attention: the Better Law prong, which posits that courts do (or should?[240]) examine whether one of the proposed governing laws is superior to the other.[241] They might disregard law that is "medieval," "anachronistic," or "contrary to currently accepted social standards" in favor of "the more enlightened rule of

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233. *Id.* at vii.

234. A conceptual cousin is New York's old Center of Gravity approach. *See* Haag v. Barnes, 175 N.E.2d 441, 444 (N.Y. 1961); Auten v. Auten, 124 N.E.2d 99, 101 (N.Y. 1954).

235. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 2, cmt. a.3 (AM. L. INST. 1971).

236. *See* Leflar, *Choice-Influencing*, *supra* note 177, at 267.

237. *See generally* Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Consideration*, 54 CAL. L. REV. 1584, 1585, 1587–88 (1966) [hereinafter Leflar, *Conflicts Law*] ("[C]ourts can replace with statements of real reasons the mechanical rules and circuitously devised approaches which have appeared in the language of conflicts opinions, too often as cover-ups for the real reason that underlay the decisions.").

238. *See infra* notes 204–07 and accompanying text.

239. Despite some general protestations. *See, e.g.*, Leflar, *Choice-Influencing*, *supra* note 177, at 284, 286 ("The concern with claims to sovereignty that enters into international choice of law ought not to be very important where the choice is between the laws of the states of the United States. The political concerns of the states, apart from mere preference for local law and local persons, is primarily with a need for systematization, for an orderliness that will make our federal system work with reasonable efficiency in the complicated choice-of-law field.").

240. *See, e.g.*, Leflar, *Conflicts Law*, *supra* note 237, at 1585 ("[B]asic choice-influencing considerations that actually *lead, or should lead*, the courts to one result or another in a particular cases or types of cases.") (emphasis added).

241. *See, e.g.*, Leflar, *supra* note 177, *Choice-Influencing*, at 296 ("Superiority of one rule of law over another, in terms of socio-economic jurisprudential standards, is far from being the whole basis for choice of law, yet it is without question one of the relevant considerations.").

law."[242] Courts have followed this invitation,[243] though arguably they have always done so, even if not in explicit terms.[244] But even here, the choice is between the laws of different sovereigns, and the court's task is to pick the one best law.

A variation on the Better Law approach of recent prominence is the economics school of thought.[245] A broad and unruly family of approaches,[246] its central tenet is to inform conflict of laws doctrine with a concern for economic efficiency. Courts are encouraged to pick the law of the forum that will lead to the maximization of welfare.[247] But they still pick one law—the efficient one. The criteria for picking now has an economic flavor, but the main assumption remains: only one sovereign's rules can govern. Undivided sovereignty maintains its monopoly.

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242. Leflar, *Conflict Law*, *supra* note 237, at 1590–91 (1966). *See also* Elliott E. Cheatham & Willis L. M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 980 (1952) (discussing law that is a "drag on the coat tails of civilization").

243. *See, e.g.*, McDaniel v. Ritter, 556 S.2d 303, 316–17 (Miss. 1989) ("Both from the point of view of civil justice and economic efficiency . . . [the Tennessee rule] is demonstrably superior . . . ."); Milkovich v. Saari, 203 N.W.2d 408, 412–414 (Minn. 1973); Mitchell v. Craft, 211 So. 2d 509, 514 (Miss. 1968); Clark v. Clark, 222 A.2d 205, 209 (N.H. 1966); Conklin v. Horner, 157 N.W.2d 579, 587 (Wis. 1968).

244. *See* Leflar, *Conflict Law*, *supra* note 237, at 1585 ("By using [these rules], courts can replace with statements of real reasons the mechanical rules and circuitously devised approaches which have appeared in the language of conflicts opinions, too often as *cover-ups* for the real reasons that underlay the decisions.") (emphasis added); Leflar, *Choice-Influencing*, *supra* note 177, at 303 ("The court can concern itself with the quality of the opposing laws between which it has to choose, and there is plenty of evidence that courts do concern themselves with this question of quality even though they do not often phrase their opinions in terms of it.").

245. *See generally* Michael E. Solimine, *The Law and Economics of Conflict of Law*, 4 AM. L. & ECON. REV. 208, 215 (2002).

246. *See generally* Michaels, *supra* note 215, at 76 ("[M]ost economic models make very concrete proposals as to how choice-of-law rules should be shaped. In this sense, economic analysis is like any other analysis of law. And to the extent it aims to inform the resolution of cases, it can, and should, be measured against the same standards. This article makes it clear that economics does not and probably cannot fulfil this function."); *see also supra* notes 275–78 and accompanying text.

247. *See, e.g.*, Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT'L L. 1, 8–9 (2001) ("The underlying assumption of this article is rationalist: that states use and design international institutions, including regimes for prescriptive jurisdiction and choice of law, to maximize the members' net gains (NG), which equals the excess of transaction gains from engaging in intergovernmental transactions in prescriptive jurisdiction (TG), over the sum of transaction losses (such as loss of autonomy) from engaging in intergovernmental transactions (TL), and transaction costs of intergovernmental transactions (including those occasioned by strategic and information asymmetry problems, TC). Thus, stated mathematically, they maximize the value of NG = TG - (TL + TC).") (emphasis omitted); Giesela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT'L L. 801, 803 (2006) ("I will try to determine the efficient design of choice of law rules by analyzing the costs and benefits of existing or proposed approaches to choice of law."); Michael J. Whincop & Mary Keyes, *Towards an Economic Theory of Private International Law*, 25 AUSTL J. LEGAL PHIL. 1, 14 (2000) ("Litigation engenders major social costs, both for the parties and the states in which litigation proceeds . . . . One objective of private international law should be to minimise these costs."). *See generally* Dieter Schmidtchen, *Territorialität des Rechts, Internationales Privatrecht und die privatautonome Regelung internationaler Sachverhalte: Grundlagen eines interdisziplinären Forschungsprogramms [Territoriality of Law, Conflict of Laws and Private Ordering of International Transactions: Foundations of an Interdisciplinary Research Program*], 59 RABEL J. COMPAR. & INT'L PRIV. L. 56 (1995) (Ger).

The same holds true for other approaches that have little to do with economic efficiency. Consider, for example, the rights-based approaches often identified with Lea Brilmayer. There, conflict of laws questions are recast as questions about the ability of a state to "exercise coercive power in a legitimate fashion."[248] This approach redirects the doctrine away from territoriality, government interests, and better law toward considerations of "whether the parties deserve their treatment," "ask[ing] about the appropriateness of the placement of burdens," and "whether the burdens are justified."[249] Though focused on rights, sovereignty always lurks in the background. As Brilmayer puts it, the political rights-based argument "is a claim that the state would be exceeding its legitimate sovereignty if it were to apply its law."[250] Sovereigns that "exceed the legitimate scope of [their] sovereign power" violate individual rights.[251] Such violations are binary—they have to be, because sovereignty itself is binary. Either a state acts within its legitimate scope, or beyond it. Either it can compel individuals to follow its laws, or it cannot. Either it makes rules within a given territory, or another sovereign does. In all of this, Brilmayer argues that we must accept undivided territorial sovereignty as axiomatic.[252] It is the bedrock principle. All choice of law doctrines that take "seriously the notions of political rights and fairness" must be "gauged by reference to appropriate assumptions of territorial sovereignty."[253] Notions of consent and the like are based on the bedrock principle of undivided sovereignty, not foundations for it.[254]

The school of thought that came closest to abandoning undivided sovereignty is called the transnational substantive law approach. Its primary organizing principle is the idea that courts can and should fashion law unbound from the law of any sovereign.[255] Long recognized as a theoretical possibility,[256] it now also features a

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248. Brilmayer, *supra* note 168, at 1301; *cf.* Harold G. Maier, *Baseball and Chicken Salad: A Realistic Look at Choice of Law*, 44 VAND. L. REV. 827, 843 (1991) (arguing that Professor Brilmayer's account is jurisdictional in nature rather than focused on choice of law).

249. Brilmayer, *supra* note 168, at 1301.

250. *Id.* at 1296.

251. *Id.*

252. *See generally id.* at 1305 ("To a certain extent, territoriality must simply be taken as axiomatic for choice of law purposes.").

253. *Id.* at 1318 ("A state law of choice of law that took seriously the notions of political rights and fairness would address the following questions . . . . Satisfaction of any of these alternatives must be gauged by reference to appropriate assumptions of territorial sovereignty.").

254. Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 12 (1989) ("Our conflict of laws analysis reveals that consent arguments depend on some prior assignment of territorial sovereignty."); *see also* Brilmayer, *supra* note 168, at 1304 ("England may infer tacit consent from the act of walking upon English soil only because England has sovereign authority over English territory . . . . [O]ne is better off to proceed directly to the fairness question and skip all discussion of consent.").

255. *See, e.g.*, JOSEPHUS JITTA, LA SUBSTANCE DES OBLIGATIONS DANS LE DROIT INTERNATIONAL PRIVÉ 20–23 (1906) ("[A] juridical relation may not belong to the active life of a society but to the active, international or universal life. [In such instances a judge] is under a duty to apply to the international juridical relationship the law belonging to it in the universal active life . . . . Such law may be identical either with the law of a certain country . . . or it may be an independent provision which is derived from a consideration of the local public order and the universal public order.").

256. *See, e.g.*, Cavers, *supra* note 179, at 193 n.35 (recognizing "the logical alternative that a rule derived from none of the domestic laws in question should be fashioned for the case").

broad cast of more recent adherents.[257] For example, Professor Juenger argues that domestic laws typically are not designed to reach international facts, and stretching them this far warps them beyond recognition.[258] Juenger argues that, rather than trying to identify the correct domestic law,[259] courts should form new laws that transcend the laws of any one sovereign.[260] Courts should articulate the best substantive law for interstate and international conflicts, untethered from the constraints of local law,[261] by "devising teleological choice-of-law rules that promote those substantive policies that merit supranational recognition."[262] Domestically, the implication is[263] out with *Erie*,[264] reinstitute *Swift*.[265] In short, this is Leflar's Better Law approach untethered from concerns with sovereignty.

Others have echoed this approach from a variety of directions. There are historical accounts about the allegedly supranational Roman *ius gentium* and medieval Lex Mercatoria,[266] arguments for "international solutions" that "incorporate global values and policies" in copyright cases,[267] and cosmopolitan perspectives.[268]

The perhaps most common objections to many of these transnational law approaches are that they provide little guidance on what law to construct, and

257. *See* Luther L. McDougal, *"Private" International Law: Ius Gentium Versus Choice of Law Rules or Approaches*, 38 AM. J. COMP. L. 521, 536–37 (1990) ("[T]he best way to take appropriate account of substantive policies is to do so directly through the development and application of transnational laws.").

258. FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 133–35 (1993).

259. *Id.* at 154.

260. *Id.* at 136, 160–61.

261. *Id.* at 236; *see also* Friedrich K. Juenger, *The Need for A Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309, 1317 (1999) ("Instead of determining whether a contract is French or New York in nature or whether the New York rule on consideration applies, the substantive law approach asks whether there is an interstate or international rule on point.").

262. JUENGER, *supra* note 258, at 190.

263. *Id.* at 136, 165–67.

264. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

265. *See generally* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

266. Friedrich K. Juenger, *American Conflicts Scholarship and the New Law Merchant*, 28 VAND. J. TRANSNAT'L L. 487, 490 (1995); *see also* Juenger, *supra* note 261, at 1317 (arguing that the Supreme Court invoked in *Swift* "a federal common-law rule derived from a supranational law merchant"). *See generally* McDougal, *supra* note 257, at 536–37 ("[I]n many instances the best way to take appropriate account of substantive policies is to do so directly through the development and application of transnational laws.").

267. Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms,* 149 U. PA. L. REV. 469, 470–71, 542 (2000) ("Under this approach, which stakes a conscious claim to be part of the substantive law method, a court faced with an international copyright dispute would not necessarily apply the copyright law of a single state to the contested issues. Instead, it would consider whether the international dimension implicated policies of other states or the international copyright system, and develop (and apply) a substantive rule of copyright law that best effectuates this range of policies.").

268. Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1865 (2005) ("[C]osmopolitanism, like the substantive law method, asks courts resolving multistate disputes to see themselves as international and transnational actors who are engaging in an international dialogue about legal norms. Accordingly, they must consider how best to construct a world system of law (and not just pursue parochial interests), and they may develop hybrid norms for resolving multistate disputes.").

whatever transnational law courts do construct is unconnected to sovereignty considerations and lacks authority, accountability, and legitimacy. Many of these objections are old.[269] Instead of rehearsing them again, I will focus here only on the role of sovereignty. As many have recognized, "the rise of nation-states—and the accompanying positivist idea that law must be clearly identified with a sovereign entity—pushed substantive approaches to the background."[270] To advance a transnational substantive regime, then, requires as a first step to diminish sovereignty.[271] Not surprisingly, some of these approaches stress affiliations and contacts other than the traditional sovereignty-based inquires of Story, Beale, Currie, and the like.[272] In order to fashion fresh transnational law in multistate cases, judges need "a welcome measure of creative freedom."[273] Sovereignty considerations deny them that freedom. Therefore, judges must be "freed from the constraints of sovereignty to fashion enlightened substantive law appropriate for the multistate situation."[274] Perhaps this kind of approach does not so much abandon undivided sovereignty as it abandons all of sovereignty.

Similarly, a second strand of law and economics thought (we encountered another one previously)[275] also seeks to cut the cord to bothersome sovereignty considerations. To maximize efficiency, "[e]conomically minded scholars have suggested . . . that choice of law should stop focusing on sovereign interests."[276] They argue that it is time to "abandon[] the traditional and almost universal reliance on notions of sovereignty as normative justification for choice-of-law rules and focus[] instead on the welfare of the parties affected by those rules."[277] This approach suffers from similar shortcomings to other transnational substantive law approaches. By untethering themselves from sovereignty concerns, they leave a

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269. *See, e.g.*, Ernest G. Lorenzen, *Validity and Effect of Contracts in the Conflict of Laws*, 30 YALE L.J. 655, 669 (1921) (Such approaches "leave[] the judge practically without any definite guide to go by.").

270. Berman, *supra* note 268, at 1853.

271. *See* Juenger, *supra* note 266, at 497 ("Preoccupied with the idea of sovereignty, U.S. traditionalists find it difficult enough to accept the principle of party autonomy . . . . Those who question the parties' freedom to choose the law governing their contract are likely to feel even more uncomfortable about the emergence of rules that owe their existence to the realities of an international marketplace, rather than a sovereign's fiat.").

272. *See, e.g.*, Berman, *supra* note 268, at 1822, 1863–65 ("Perhaps most importantly, because a focus on community affiliation may lead us to consider *nonstate* communities, a cosmopolitan framework is far more likely to allow a pluralist consideration of how norms generated outside of formal governmental channels may bind sub-, supra-, and transnational communities . . . . A cosmopolitan approach focuses less on literal contacts with a territorially-based sovereign entity and more on the extent to which the various parties might be deemed to have affiliations with the possible communities seeking to impose their norms.").

273. JUENGER, *supra* note 258, at 192.

274. Stanley E. Cox, *Back to Conflicts Basics: Choice of Law and Multistate Justice by Friedrich K. Juenger*, 44 CATH. U. L. REV. 525, 531 (1995) (book review).

275. *See supra* notes 245–47 and accompanying text.

276. Roosevelt, *Currie's Contribution*, *supra* note 220, at 518; *see also* Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1152 (2000) ("Instead of a choice-of-law system that allocates political power among the states, this Article proposes a system based on principles of wealth-maximization and individual choice.").

277. Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 884–85 (2002).

doctrine which is unstable, unpredictable, unaccountable, unworkable, and, most damning—unjustifiable in a democratic context.[278]

III. BUT, A FRACTIONAL WORLD

The indivisibility of sovereignty assumption echoes through the ages, shaping the core functioning of all conflict of laws doctrines with little examination or evaluation, guiding judges into an unnecessary and harmful all-or-nothing determination that leaves one sovereign impoverished and the other unduly advantaged. Before proposing a conflict of laws approach based on a fractional understanding of sovereignty in the next Section, I will argue here that it is time to let go of the old view of undivided sovereignty. I begin by making the argument against undivided sovereignty in general before turning to arguments specifically in the context of conflict of laws doctrines.

A. Beyond Westphalia

The old view of sovereignty is rooted in a historical moment that has passed.[279] We are not beholden to it. Doctrine and scholarship do not have to replicate the notion of undivided sovereignty. There is no constitutional provision, statute, or treaty that commits us to it.[280] Nothing forces this choice upon us except inertia and old habits. Prior writers, as we have seen, believed that undivided sovereignty was a good solution to the problems of their day.[281] They thought that a strong sovereign who did not have to share with others could lead them, perhaps, out of a century of turmoil and warfare. Perhaps they were mistaken. Perhaps undivided sovereignty had nothing to do with an exhausted Europe ending the bloodshed. Or perhaps there were other, equally good conceptual solutions. Paths not taken. But even if undivided sovereignty was the solution, and the only solution, the problems and concerns of Bodin, Huber, and Hobbes are not ours. No Huguenots have been massacred in Paris as of late. European capitals are not ransacked by armies whipped up into religious fervors. German principalities do not have to worry about the whims of the Electors of the Holy Roman Empire. Reformed and orthodox Calvinists have learned to live side-by-side in Holland. Swiss cantons no longer fret that their neighbors will impose religious orthodoxy upon them. "Bloody Mary" invokes a drink, not an executioner. Perhaps it is time to stop worrying about the

278. *See* Roosevelt, *Currie's Contribution*, *supra* note 220, at 518 ("States have the power to set the scope of their laws. Economists do not, not even if they are really smart and know what is efficient. This is a terrible, indeed unconstitutional, idea, a classic example of economic imperialism (the tendency of economic analysis to impose itself on other fields without any care for their own inner structures).") (footnote omitted).

279. GRIMM, *supra* note 19, at 5 (Sovereignty "owes its central role to a very particular historical constellation and is thus not immune to loss of meaning if this constellation disappears.").

280. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) ("[T]he Court has [only] invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.").

281. *See infra* Part I; *see also* HERZOG, *supra* note 6, at 48 (2020) ("Sovereignty . . . didn't just happen to arise in early modern Europe. It was an intelligible, intelligent response to the savage strife of the wars of religion . . . . It's another question whether or to what extent it remains an incisive tool for us.").

problems and fears of people dead for hundreds of years and evaluate whether their proposals serve our current needs. That project begins with recognizing that undivided sovereignty is not the sole game in town. There are alternatives, if we are willing to broaden our imaginations, just as Bodin and company did in their own time.

Scholars and courts have done so in other conflict of laws contexts.[282] For example, it once seemed uncontroversial, perhaps even natural, to assign the domicile of the father to a legitimate child and the domicile of the mother to an illegitimate child.[283] Domicile is an important determination for jurisdictional and choice of law purposes, and this approach seemed like it was built on solid foundations to accurately determine a child's domicile in tricky situations. Alas, this approach is out of step with modernity, and scholars questioned the foundations of the old approach, broadened their imaginations, and considered alternatives. There is nothing sacred about particular methods for determining domicile; for it and similar choice of law questions we must ask whether they achieve the basic goals that are relevant for their time, and, if not, whether there are better alternatives.

Beyond being designed for a different time, there are additional reasons to be skeptical about undivided sovereignty. First, undivided sovereignty has always been more complex and contested than the classical account of indivisible sovereignty would suggest. It is closer to a myth, a Weberian ideal type or platonic form, than a lived reality—either now or then. Most states simply never featured anything approximating undivided sovereignty.[284] For example, when Bodin was writing, there "was no country in which the legal position of the rule corresponded to Bodin's concept of sovereignty."[285] Similarly, the Peace of Westphalia, often cited as a shorthand for establishing the international system of independent sovereigns, did not go that far.[286] There have always been innumerable limitations and caveats to undivided sovereignty. For example, there is a steady stream of examples wherein claims to complete and inviolable sovereignty were conveniently disregarded, like

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282. *See generally* CAVERS, *supra* note 185, at 114–16 (noting how conflict of laws doctrine does or perhaps must respond to changing historical circumstances).

283. *See, e.g.*, RESTATEMENT (SECOND) CONFLICT OF LAWS §14(2) (AM. L. INST. 1971) ("The domicil of a legitimate child at birth is the domicil [sic] of its father at the time . . . . If the child is not the legitimate child of its father, or is born after the father's death, its domicil at birth is the domicil of its mother at that time.").

284. *See* KRASNER, *supra* note 6, at 24 ("[T]he most important empirical conclusion of the present study is that the principles associated with both Westphalian and international legal sovereignty have always been violated.").

285. GRIMM, *supra* note 19, at 23. *But see* JACKSON, *supra* note 1, at xi ("The political arrangements and legal practices of sovereignty came first, the academic theories later."); *cf.* JOSEPH STRAYER, ON THE MEDIEVAL ORIGINS OF THE MODERN STATE, 91 (1970) ("[R]ecognition of the kings' unique executive power came several generations before Bodin formulated his doctrine of sovereignty.").

286. *See, e.g.*, KRASNER, *supra* note 6, at 20 ("The norm of nonintervention in internal affairs had virtually nothing to do with the Peace of Westphalia."); *see* CHRISTOPHER R. ROSSI, SOVEREIGNTY AND TERRITORIAL TEMPTATION: THE GROTIAN TENDENCY 17 (2017) (the Peace of Westphalia "did not . . . contain any recognizably modern notion of territorially bounded sovereignty." (quoting JENS BARTLESON, SOVEREIGNTY AS SYMBOLIC FORM 28 (2014)) (omission in original); Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 251, 281 (2001).

when assassinating terrorists and generals in other countries.[287] Legal pluralism similarly challenges the traditional narrative of undivided sovereignty.[288] Many treaties also severely circumscribe the acting space of signatory sovereigns.[289] The argument that the sovereigns agreed to these treaties cannot plaster over the fact that the EU can dictate to Belgium the proper curvature for bananas.[290]

Many countries, of course, also divide sovereignty internally in ways that the classical account of undivided sovereignty cannot explain or justify.[291] Perhaps the most familiar example of this is found in the United States. Here, as the Supreme Court put it, the "framers split the atom of sovereignty."[292] This was achieved in spite of substantial doubt that it could be done at all. For example, Alexander Hamilton maintained, in a now familiar refrain, that "[t]wo Sovereignties can not [sic] co-exist within the same limits . . . . [N]o amendment of the confederation can answer the purpose of a good government so long as state sovereignties do, in any shape, exist."[293] Others at the Constitutional Convention similarly questioned whether sovereignty could be divided or shared, arguing that "in all communities there must be one supreme power, and one only,"[294] and explaining "the necessity of one supreme controlling power, . . . as the corner-stone of the present system."[295] Either the federal or the state governments must be supreme[296] because "sovereign and independant [sic] states can never constitute one Nation."[297]

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287. *See, e.g.*, Michael Crowley, Falih Hassan & Eric Schmitt, *U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces*, N.Y. TIMES (July 9, 2020) https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html [https://perma.cc/2WQ3-A789].

288. *See, e.g.*, Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 409 (2008) (exploring overlapping and conflicting regulatory regimes and arguing that "[t]he longstanding vision of a uniform and monopolistic law that governs a community is plainly obsolete").

289. GRIMM, *supra* note 19, at 6 ("[N]o state today is sovereign in the traditional sense [like the EU, UN, or WTO], which ruled out any form of external control.").

290. Commission Regulation (EC) 2257/94, art. 3, 1994 O.J. (L 245) (requiring that bananas must be "free from malformation or abnormal curvature," and noting that Class 1 bananas can have "slight defects of shape" and Class 2 bananas may feature full "defects of shape") (repealed 2011).

291. *See generally* LÉON DUGUIT, LAW IN THE MODERN STATE (Frida Laski & Harold Laski trans., Howard Fertig 1970) (1919) ("[T]his principle [of undivided sovereignty] is inconsistent with two facts of increasing importance in the modern world - decentralization and federalism."); HANS KELSEN, DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS, §16 (1920).

292. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

293. Notes by James Madison & Robert Yates, *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 287, 294 (Max Farrand ed., 1911) [hereinafter FARRAND RECORDS]. *But cf.* THE FEDERALIST NO. 32 (Alexander Hamilton) ("An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, EXCLUSIVELY delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases . . . .").

294. 1 FARRAND RECORDS, *supra* note 293, at 34 (Note by James Madison).

295. *Id.* at 169 (Note by Robert Yates).

296. *Id.* at 172 (Note by Rufus King) ("If we mean to establish a national Govt. the States must submit themselves as individuals—the lawful Government must be supreme—either the Genl. or the State Government must be supreme . . . .").

297. *Id.* at 188 (Note by William Paterson).

Treason, for example, "could not be both [against] the U. States—and individual States; being an offence [against] the Sovereignty which can be but one in the same community."[298]

Yet the Articles of Confederation[299] and the Constitution[300] both recognized a messy sharing of sovereign powers between the federal government and the states.[301] States have always had and continue to have some degree of sovereignty, but clearly not complete sovereignty.[302] Most U.S. citizens are also citizens of a specific state. Diversity jurisdiction exists between "citizens of different States."[303] On top of that, federally recognized tribes have substantial, though also clearly not full, attributes of sovereignty as well.[304] So here we have three partial sovereigns

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298. 2 FARRAND RECORDS, *supra* note 293, at 346 (Note by James Madison).

299. *See, e.g.*, ARTICLES OF CONFEDERATION of 1781, Art. II ("Each State retains its Sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States in Congress assembled.").

300. *See, e.g.*, U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *see also* THE FEDERALIST NO. 39 (James Madison) ("Each State, in ratifying the Constitution, is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a FEDERAL, and not a NATIONAL constitution . . . . [T]he proposed government cannot be deemed a NATIONAL one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.").

301. *See generally* James Madison, Essay on Sovereignty (Dec. 1835), *in* THE PAPERS OF JAMES MADISON, https://founders.archives.gov/documents/Madison/99-02-02-3188 [https://perma.cc/CJG8-EVCW] (last visited Feb. 4, 2023) ("And if two States, could thus incorporate themselves into one, by a mutual surrender of the entire sovereignty of each; why might not a partial incorporation, by a partial surrender of sovereignty, be equally practicable, if equally eligible. And if this could be done, by two States, why not by twenty or more.").

302. *See* Camp v. Lockwood, 1 U.S. 393, 398 (Pa. Ct. Com. Pl. 1788) ("If nations, unconnected by any tie, thus indirectly give effect to the laws of each other, the principle upon which it is done, must with greater strength prevail in the case of a political union like that of the American States. It is true, that these States are said to be sovereign and independent; but they are evidently bound by a link which must be taken into view, or we shall argue wrong in the abstract."); Milwaukee Cnty. v. M. E. White Co., 296 U.S. 268, 276–77 (1935) ("The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.").

303. 28 U.S.C. §1332(a)(1).

304. *Compare* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) ("England had treated the tribes as sovereign and negotiated treaties of alliance with them. The United States followed suit, thus continuing the practice of recognizing tribal sovereignty. When the United States assumed the role of protector of the tribes, it neither denied nor destroyed their sovereignty."), *and* McGirt v. Oklahoma, No. 18–9526, slip op. at 13–14 (U.S. July 9, 2020) ("Plainly, these laws represented serious blows to the Creek. But, just as plainly, they left the Tribe with significant sovereign functions over the lands in question. For example, the Creek Nation retained the power to collect taxes, operate schools, legislate through tribal ordinances, and, soon, oversee the federally mandated allotment process."), *and* United States v. Wheeler, 435 U.S. 313, 329–30 (1978) ("Since tribal and federal prosecutions are brought by separate sovereigns, they are not 'for the same offence,' and the Double Jeopardy Clause thus does not bar one when the other has occurred."), *and* Joseph W. Singer, *The Indian States of America: Parallel Universes & Overlapping Sovereignty*, 38 AM. INDIAN L. REV. 1, 11 (2014) ("Contrary to the fears of those who believe that sovereignty is unitary and that there cannot be more than one sovereign over a particular land, the truth is that tribal sovereignty is fully compatible with U.S. sovereignty. We know

sharing the same territory.[305] From the beginning, "our practice and theory have made a hash of the traditional concept of sovereignty that the colonists inherited from European theorists."[306] Clearly, this tripartite sovereignty-sharing arrangement is a rickety affair with plenty of friction points, contestations, and abuses. Yet the parade of horribles that the classical writers prophesied ending in dissolution and chaos has not occurred. The question is not *whether* dividing sovereignty is workable, but *how* to make it work best. And that is a question of picking the best approach from among a range of viable contestants.

Other countries have also experimented with different varieties of dividing sovereignty. Consider, for example, the complex systems of French "l'outre-mer" territories[307] or the United Kingdom Overseas Territories and Dependencies,[308] dozens of which are sprinkled across the globe with varying shades and sets of sovereign attributes. On a smaller scale, Lichtenstein is not part of Switzerland, but it is also difficult to maintain that it is a fully independent sovereign. Similarly with Monaco and France; San Marino and Italy; Faeroes and Denmark; Zanzibar and Tanzania; Sint Maarten and the Netherlands; the Kurdistan Region and Iraq; the Azores and Portugal; Tokelau and New Zealand. Or consider Andorra, headed by two co-princes (the Bishop of Urgell in Spain and the President of France). All a bit difficult to explain if one views undivided sovereignty as an ontological fact.

The point here is not that all these examples are the same. Rather, just the opposite. They are all unique adjustments to unique circumstances, attempts to find workable solutions to complex historical problems, some more successful than others.[309] This is a reminder to look beyond the rhetorical claims of exponents of

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this because it has in fact coexisted with U.S. sovereignty since the beginning."), *with* United States v. Kagama, 118 U.S. 375, 379 (1886) ("But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies, with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these."). *See generally* Denezpi v. United States, Case No. 20-7622 (U.S. June 13, 2022) (granting writ of certiorari on the question whether double jeopardy bars prosecuting a defendant in federal district court after conviction in a BIA Court of Indian Offenses).

305. Leaving aside, for now, the role of territories.

306. Jack N. Rakove, *Making a Hash of Sovereignty*, Part I, 2 GREEN BAG 2D 35, 35 (1998) (While the Westphalian notion of sovereignty "emphasized sovereignty's unitary and absolute nature; ours parcels sovereignty out in bits and pieces that are scattered throughout our system of governance, yet somehow mystically reunited in the ineffable concept of an all-sovereign American people.").

307. *See Explorez nos contenus par territoire*, MINISTÈRE DES OUTRE-MER, https://www.outre-mer.gouv.fr/ [https://perma.cc/KCM3-YDTE] (last visited Feb. 4, 2023) (explaining that France oversees 12 territories with a total of 2.6 million inhabitants).

308. *See* FOREIGN & COMMONWEALTH OFFICE, WHITE PAPER ON THE OVERSEAS TERRITORIES 5, 8 (2012), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32952/ot-wp-0612.pdf [https://perma.cc/EGE7-VXCL] ("The United Kingdom's 14 Overseas Territories are an integral part of Britain's life and history . . . . They include thousands of small islands, vast areas of ocean, but also, in Antarctica, land six times the size of the United Kingdom . . . . The UK's Overseas Territories are highly diverse and each has its own relationship with the UK. The constitutional relationships continue to evolve.").

309. GRIMM, *supra* note 19, at 4 ("Despite its great attractiveness, the concept could only be applied in different contexts if its meaning was altered. Thus just as *sovereignty* cannot claim a timeless meaning, it is not a concept that remains the same regardless of location.").

the classical view that sovereignty must be indivisible or that indivisibility is inherent in the very concept of sovereignty.[310] Such claims are arguments to advance concrete political aims, not scientific findings about the natural world.

Understood thus, the claims springing from the classical account of sovereignty look increasingly like prescriptions for another time, preoccupied with outdated normative baggage. It should give us pause, for example, that many of the theorists canvassed above baked perspicuous racism deep into their approaches to conflict of laws. One stark example comes from Justice Story, who begins his treatise on conflict of laws, Section 1, with the claim that "[t]he bold, intrepid, and hardy natives of the North of Europe, whether civilized or barbarous, would scarcely desire, or tolerate, the indolent inactivity and luxurious indulgences of the Asiatics."[311] Whatever other conflict of laws doctrines flow from his account of sovereignty, this principle stands at the beginning and trumps all claims that sovereigns somehow are equal. Sovereignty, we are told, has certain immutable characteristics that drive the conflict of laws analysis—unless, of course, people living in those other sovereignties look or act differently than we do.

Story was not the only one so explicit about his account of how the "Earth has long since been divided into distinct Nations,"[312] some civilized and some not. For example, Dicey, the leading theorist of vested rights on the other side of the Atlantic, made clear that "[t]he Rules in this Digest apply only to rights acquired under the law of a civilized country," certainly not an "uncivilized country, e.g., in Afghanistan or Thibet [sic]."[313] Dicey elaborated as "General Principle No.1" that English Courts should only recognize rights "duly acquired under the law of any civilized country."[314] Similarly, "settlement in an uncivilized country does not change the domicil [sic] of the citizen of a civilized country, or at any rate of a domiciled Englishman."[315] For example, "[a] domiciled Englishman who settles in China, and *à fortiori* who settles in a strictly barbarous country, retains his English domicil."[316] Sovereignty, far from being a neutral description of the world, can be imbued with heavy normative baggage. Here, it was mobilized to divide the world into civilized and barbarous parts, granting respect to some and denying it to others.[317] Despite all of Dicey's talk of neutral principles and deductive arguments

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310. *See* Elliott E. Cheatham, *Sources of Rules for Conflict of Laws*, U. PENN. L. REV. 430, 434 (1941) ("Sovereignty is a particularly unfortunate single basis of reasoning, for not only is the concept an elusive one, but there are states or legal units of varying degrees of independence . . . ."). *See generally* HUGO PREUSS, GEMEINDE, STAAT, REICH ALS GEBIETSKÖRPERSCHAFTEN (1889) ("[*E*]*s ist die Aufgabe der Staatstheorie, das Souveranitatsprinzip [] zu ersetzen durch ein neues Prinzip, welches Raum hat für die Reste des alten und die schon wirkenden neuen Kräfte*.").

311. STORY, *supra* note 145, § 1.

312. *Id.*

313. A.V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 825 (1896).

314. *Id.* at xliii–xliv.

315. *Id.* at app. n. 1, 723–75.

316. *Id.*

317. *See generally* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005); ANDREW FITZMAURICE, SOVEREIGNTY, PROPERTY AND EMPIRE, 1500–2000 (2014); JOHN AGNEW, GLOBALIZATION AND SOVEREIGNTY: BEYOND THE TERRITORIAL TRAP (2018).

that rights vested in the territory of one sovereign become enforceable in the courts of another sovereign, he still found plenty of room for carve-outs.[318] The U.S. Supreme Court, similarly, often found less need to enforce vested-rights "where a tort is committed in an uncivilized country."[319] The International Court of Justice "shall apply" the "general principles of law recognized by civilized nations."[320] The Second Restatement of Conflict of Laws, again, is only concerned with the behavior of "civilized nations."[321]

Beyond a troubling concern with what kind of people count as civilized, theories of sovereignty and conflict of laws also often lean heavily on outdated gender norms. It is not difficult, for example, to see that Filmer's *Patriarcha* has not aged well in this regard. His main theoretical move is to extend the metaphor of the patriarchal family to a patriarchal state. Just as Filmer's theoretical family is ruled by the one father, so is Filmer's state ruled by the one sovereign. Both, we are told, cannot admit of anybody with whom to share power or responsibility. That would emasculate the father, undermine the sovereign, upend the natural order, and thereby spell doom.

Or consider Hobbes's Leviathan (symbolized on the cover of his book as, of course, a giant man). Hobbes also links being "the father or master" of a family to sovereignty.[322] Within the family, the father is "a little monarch" with regard to the "rights of sovereignty." Such rights are typically located in one person, "[a]nd he that carryeth this person is called Soveraigne [sic], and said to have Soveraigne [sic] Power; and every one besides, his Subject."[323] Such sovereign power is attained "by two ways [sic]."[324] The first is by "naturall [sic] force; as when a man maketh his children, to submit themselves, and their children to his government, as being able to destroy them if they refuse."[325] The other way is by what we now call social contract when "men agree amongst themselves, to submit to some Man."[326] Similarly, a character in Shakespeare's *Taming of the Shrew* (1623) echoes the link between sovereignty and patriarchy by declaring that "[t]hy husband is thy Lord, thy life, thy keeper, Thy head, thy soueraigne."[327]

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318. DICEY, *supra* note 313, at 827 ("When an act which damages A or his property is done by X in a barbarous country, the character of the act cannot depend on the law of the country where it is done.")

319. Slater v. Mex. Nat. R. Co., 194 U.S. 120, 129 (1904) (Holmes, J.). *See also* Cuba R. Co. v. Crosby, 222 U.S. 473, 478 (1912) (noting different rules for cases "arising in regions having no law that civilized countries would recognize as adequate."); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 355–56 (1909) (different rules for "regions subject to no sovereign, like the high seas" and for "law that [no] civilized countries would recognize as adequate.").

320. Statute of the International Court of Justice, 1945 I.C.J. Acts & Docs. art. 38(1)(c).

321. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §1 comment c. (AM. L. INST. 1971).

322. HOBBES, *supra* note 58, at 158 ("[A] great Family, if it be not part of some Common-wealth, is of itself [sic], as to the Rights of Soveraignty [sic] a little Monarchy; whether that Family consist of a man and his children; or of a man and his servants; or of a man, and his children, and servants together: wherein the Father or Master is the Soveraign [sic].").

323. *Id.* at pt. 2, ch. 17.

324. *Id.*

325. *Id.*

326. *Id. See generally* OED.

327. WILLIAM SHAKESPEARE, TAMING OF THE SHREW act 5, sc. 2.

This might sound troublesome to many modern ears. But is there a way to cleanse the concept of sovereignty of these associations? Perhaps not. Undivided sovereignty itself might reflect outdated gendered norms. The theorists we encountered above, all men, were fundamentally anxious about sharing power and responsibility. Instead, they insisted that sovereignty must remain undivided, in complete control of the domestic sphere (here with the double meaning of in the house and as opposed to internationally).[328] When there is a clash between sovereigns one must prevail, the other lose. This "classic formulation is a discourse of absolute mastery over internal space and independent vulnerability in the external zone of competing sovereignties."[329] Undivided sovereignty is about having the final say, imposing one's will, choosing for one's own, dominating over a space (however small), and it is about independence from others and a lack of ties that bind people together in shared projects and responsibility. When such sovereigns encounter each other, it is in virile combat. To modern ears, this increasingly sounds like a caricature of a traditional masculine worldview.

Some of this conceptual baggage was imported into conflict of laws doctrine and scholarship along with undivided sovereignty.[330] Perhaps the very name of this area of law[331] harbors traditionally gendered meaning. We do not call it "accommodation of law," "sharing of law," "cooperation of law," "harmonization of law," or the like. In the United States, the most common name is "conflict of laws"[332] and sometimes "choice of law."[333] It is a field of study about conflicts,[334]

328. *See* Jean Bethke Elshtain, *Sovereign God, Sovereign State, Sovereign Self*, 66 NOTRE DAME L. REV. 1355, 1370 (1991). ("There is one very large hint that gender has some-thing to do with the classic formulation of sovereignty, namely, the use of the term domestic in discussions of the supra-domestic, the inter-national.").

329. *Id.*

330. *See, e.g.*, Twerski, *supra* note 197, at 383 (explaining theoretical foundations of his account with a hypothetical parallel situation where a young married husband insults his mother-in-law and incites a nasty argument).

331. *See generally* DICEY, *supra* note 313, at 11 ("The department of law, whereof we have been considering the nature, has been called by various names, none of which are free from objections."). This field of law is called in some parts of the world "private international law" and that helps to limit some of these gendered connotations, but at the cost of introducing other blind-spots.

332. *See, e.g.*, HERMA HILL KAY, LARRY KRAMER, KERMIT ROOSEVELT & DAVID L. FRANKLIN, CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS (10th ed. 2018); LEA BRILMAYER, JACK GOLDSMITH, ERIN O'HARA O'CONNOR & CARLOS M. VÁZQUEZ, CONFLICT OF LAWS (8th ed. 2020); LAURA E. LITTLE, CONFLICT OF LAWS (2nd ed. 2018); SYMEON C. SYMEONIDES & WENDY COLLINS PERDUE, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL (3rd ed. 2012); PETER HAY, PATRICK J. BORCHERS & RICHARD D. FREER, CONFLICT OF LAWS: PRIVATE INTERNATIONAL LAW CASES AND MATERIALS (15th ed. 2017); THOMAS O. MAIN & STEPHEN C. MCCAFFREY, LEARNING CONFLICT OF LAWS (2019).

333. *See generally* Roosevelt, *Myth of Choice of Law*, *supra* note 3, at 2449 (arguing that "the conceptual difficulties of this field can be discerned at the broadest level of generality, in the dual names of the subject itself: 'Choice of Law' and 'Conflict of Laws.'").

334. *See generally* Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 76 (1989) ("Conflicts scholars—if anyone—should recognize that law is an arena of conflict, of competing principles and policies, contradictory moral impulses, and wrenching dilemmas.").

clashes,[335] collision,[336] and competition;[337] it is a "game of power and authority"[338] and ultimately subordination.[339] All these names, terms, and metaphors suggest "struggle among sovereigns who, like medieval rulers, engage in battle to assert the primacy of their local policies."[340] This basic framing leaves little room for compromise, accommodation, or harmony.[341] Perhaps the best we can hope for is that, as the prevalence of "chauvinism" wanes, both in its gendered and nationalistic meaning, conflict of laws doctrine might start to change as well.[342] Perhaps that time is now.

B. Stark Choices

The previous Section focused on general objections to undivided sovereignty as outdated, descriptively misleading, and beholden to normative claims that are incompatible with modern sensibilities. This Section critiques the model of undivided sovereignty specifically in the context of conflict of laws doctrine and scholarship. Adherence to the old view of undivided sovereignty generates some of the lasting problems in the currently dominant approaches to conflict of laws.[343] It has boxed many conflict of laws doctrines into conceptual dead-ends and untenable positions. These are self-inflicted wounds that are shared across otherwise radically different approaches to conflict of laws. They are shared because all of these approaches, as we have seen, adhere to the notion of undivided sovereignty.

To make this argument, I begin with the common observation that conflict of laws is a mess.[344] Few people are happy with the current state of conflict of laws.

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335. von Mehren, *supra* note 9, at 30 ("Ultimately, however, each [choice-of-law] methodology faces the question of which principle to prefer where the two clash.").

336. "Kollisionsrecht" in German. *See, e.g.*, MATTHIAS WELLER, EUROPAISCHES KOLLISIONSRECHT (2016); SEBASTIAN GOSSLING, EUROPÄISCHES KOLLISIONSRECHT UND INTERNATIONALE SCHIEDSGERICHTSBARKEIT (2019).

337. *See, e.g.*, Bruce Posnak, *Choice of Law: Interest Analysis and Its "New Crits"*, 36 AM. J. COMP. L. 681, 689 (1988) (noting that some scholars, despite extensive writing on the issue, have not shown how "courts ought to choose between competing law.").

338. P. John Kozyris, *Interest Analysis Facing Its Critics—and, Incidentally, What Should Be Done About Choice of Law for Products Liability?*, 46 OHIO ST. L.J. 569, 580 (1985).

339. *See* Baxter, *supra* note 3, at 17 ("In each real conflicts case the external objective of one state must be subordinated."); Roosevelt, *Myth of Choice of Law*, *supra* note 3, at 2488 ("When a court 'chooses' the 'applicable law' it is really determining that one right will be recognized and the other subordinated.").

340. Harold G. Maier, *Finding the Trees in Spite of the Metaphorists: The Problem of State Interest in Choice of Law*, 56 ALB. L. REV. 753, 754 (1993).

341. von Mehren, *supra* note 9, at 38 ("[T]raditionally Western jurists have, in principle, opposed the compromising of conflicting views or policies in the articulation of private-law rules and in the administration of these rules in discrete cases. Where the choice is inescapable, justice is ordinarily taken to require the delineation and vindication of generalized and abstract principles rather than the advancement of harmony in the human relations at stake.").

342. *See generally* Leflar, *Choice-Influencing*, *supra* note 177, at 285 ("International accommodation may be quite meager where chauvinistic nationalism prevails, but as chauvinism recedes treaties or other agreements dealing with conflicts matters are likely to develop side by side with domestic conflicts law.").

343. *See also supra* Part II.

344. *See, e.g.*, Roosevelt, *Myth of Choice of Law*, *supra* note 3, at 2449 ("Choice of law is a mess. That much has become a truism.").

This has been true for a long time.[345] Despite a broad and rich range of diverse approaches to choose from,[346] most commentators consider this a choice among lesser degrees of evil. The field is a "disaster,"[347] a "dismal swamp filled with quaking quagmires,"[348] and an "unmitigated nuisance[] for the judge and practitioner."[349]

Typically, practitioners, judges, and academics blame the flaws of this or that conflict of laws approach on the current state of affairs. My argument here is broader. Conflict of laws, across all approaches, is a mess because one of their shared core assumptions makes it so. Consider a simple contract dispute between somebody from California and somebody from Texas. They negotiate the contract, sign it in their respective states, and perform there as well. The contract touches on both states, say, roughly equally. Every conflict of laws approach, no matter how much they differ in all other ways, begins with the premise that a court must determine whether this is, deep down, really a California contract or a Texas contract. The court must choose as governing law, either the law of California *or* the law of Texas. It must set aside the right and responsibility of one state to influence this contract and let the other make all decisions. This is silly. Clearly, this contract is part Californian and part Texan. But courts don't have that option. They must pick. There are different ways to pick. But pick they must.

The same issue arises with a tort where breach occurred in one state and damages in another. Every conflict methodology tries to assign the law of one state to this situation. Which (one) sovereign gets to decide if this really was a tort, or what consequences attach to it? Again, our adherence to undivided sovereignty forces an unnecessary choice upon us. Clearly, the tort in question touches both sovereigns.

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345. *See, e.g.*, John K. Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 YALE L.J. 656, 664 (1917) ("To sum it all up, the almost unbelievable condition of fact is that in one hundred and thirty years, this Union of states bound together into one nation 'as members of one great political family,' has not established a more satisfactory basis for the interstate enforcement of private rights than a rule of imperfect obligation, based upon a discredited fiction, which necessarily breeds inconsistency and conflict of decision . . . ."); Cavers, *supra* note 179, at 177 ("[T]he article on a conflict of laws topic which does not deplore a current 'confusion of authority' is still a rarity."); Baxter, *supra* note 3, at 1 (1963) ("After attempting for several years to teach the rules devised for the resolution of choice-of-law problems, I have concluded that those rules do not yield satisfactory results."). *But cf.* Robert A. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS., Spring 1977, at 10, 26 ("In terms of location, this body of law is being lifted up by the courts to a well-watered plateau high above the sinkhole it once occupied. No location lasts forever, and there are vistas beyond the plateau, but it is a rest-stop now.").

346. *See infra* Part II.

347. William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1371 (1997) ("Choice of law today, both the theory and practice of it, is universally said to be a disaster.").

348. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953) ("The realm of conflict of laws is a dismal swamp filled with quaking quagmires and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.").

349. James E. Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Metholdogies: The Case for Eclecticism*, 40 MO. L. REV. 407, 410 (1975) ("To be blunt about it, choice-of-law problems are and will continue to be unmitigated nuisances for the judge and practitioner.").

Or consider domicile determinations that have a slew of consequences in, for example, intestacy, jurisdiction, taxes, and family law.[350] Domicile is a complicated concept related to a person's physical presence and intent to remain there.[351] But all that complication boils down to one determination: every person can only have one domicile, never more.[352] Again, this might strike many non-lawyers as counterintuitive. Imagine a person who divides her time between Massachusetts and Vermont, intends to continue to do so, and has roughly equal social and business interests in both states. Colloquially one might say she is at home in both states. That person might also very well feel like they have homes in both states. Yet conflict doctrine requires a unitary domicile.[353] In the end, only one sovereign can be responsible for this individual. The law of domicile says, in effect, you are not at home where you think you are at home, but over there. This might feel a bit jarring to many. Common examples include college students, itinerant workers, and #vanlife.

These results in contract, tort, domicile, and many other areas of law are not representative of lived experience. To many they feel imposed, alien, and weird, forced upon us by outdated theoretical commitments. I suspect this is half the reason why many students find conflict of laws such a difficult class. They simply cannot believe that the law would be so counterintuitive. It tries to coerce their experiences into an uncomfortable mold. And when students learn to accept the coercion, they become disillusioned and cynical. Few think of conflict of laws as a shining beacon of justice, compassion, and attentiveness to the lived experience outside of the courtroom. Instead, many see it simply as an unpleasant but unavoidable necessity, like sewage plumbing, root canals, and the Bluebook.

C. Parochialism

The stark choice inherent in conflict of laws determinations is the result of the all-or-nothing assumption intrinsic to undivided sovereignty. Courts must choose the law of one sovereign even when such a winner-take-all mandate is untenable, counter-intuitive, or unjust. And conflict cases *inherently* touch upon multiple sovereigns. Forcing courts to choose the law of a sole sovereign necessarily leaves the other impoverished.

Courts seem to be particularly fearful to leave their own jurisdiction thus impoverished. As many scholars have noted, there is a strong parochial tendency in

350. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 260 (AM. L. INST. 1971).

351. *See, e.g.*, *id.* § 16 ("To acquire a domicil [sic] of choice in a place, a person must be physically present there."); *id.* § 18 ("To acquire a domicil [sic] of choice in a place, a person must intend to make that place his [sic] home for the time at least.").

352. *See, e.g.*, *id.* § 11(2) ("[N]o person has more than one domicil [sic] at a time.").

353. *See, e.g.*, *id.* § 20, comment b ("Both dwelling places may have some of the aspects of a home in the sense used in this Restatement and both in more or less equal degree. In this unusual situation, the domicil [sic] remains at that one of the two dwelling places which was first established.").

conflict of laws.[354] This is a long-standing concern[355] despite occasional admonitions by courts[356] and scholars.[357] With depressing regularity in conflicts cases, all theory, inconvenient facts, public policy, and rhetoric to the side, courts apply forum law.[358] It is tempting to blame different loopholes in different conflict methodologies for this state of affairs. For example, the public policy exception under the First Restatement can easily be invoked by courts to avoid unpleasant foreign law in favor of more familiar forum law.[359] Similarly, government interest analysis can be described as "shortsighted and parochial."[360] Its focus on the policies of the forum,[361] paired with forum-favoring tie-breaking rules, can easily justify application of forum law.[362] Furthermore, government interests are often identified with "protective and compensatory policies . . . intended to benefit residents

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354. *See, e.g.*, Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT'L L.J. 559, 560 (2002) ("Both the empirical evidence and the existing scholarly consensus . . . indicate that there is a strong tendency under all modern conflicts systems to apply forum law.").

355. *See generally* STORY, *supra* note 145, at §28 ("That, in the conflict of laws, it must often be a matter of doubt, which should prevail; and, that whenever a doubt does exist, the court, which decides, will prefer the law of its own country to that of the stranger.")

356. *See, e.g.*, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972) (instructing lower courts not to "insist on a parochial concept that all disputes must be resolved under our laws and in our courts"); Loucks v. Standard Oil Co., 224 N.Y. 99, 111 (1918) (Cardozo, J.) ("We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.").

357. *See, e.g.*, Cavers, *supra* note 179, at 202 (noting the role of the Supreme Court is "to break down the exaggerated insularity of state courts when [it] seemed to stand in the way of justice").

358. *See generally* Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 59 (1989) ("In practice, it is quite clear that what courts ordinarily do in conflicts cases is to apply forum law."); Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1652 (2005) ("[H]istorically, forum law has been the overwhelming judicial choice."); Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 192 (2000) ("One feature of many modern approaches . . . is a marked tendency to apply the law of the forum (the *lex fori*).").

359. *See, e.g.*, Cavers, *supra* note 179, at 199–201 (exploring the idea "[t]hat parochialism which leads a court to employ its own rule of law where the application of a foreign rule would seem preferable, and to invoke incontinently a 'public policy' to reject a foreign law" is "a tendency which should be discouraged.").

360. Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 392 (1980) [hereinafter Brilmayer, *Interest Analysis*] ("'Thus far, the interest analysts have been allowed to argue, in effect, 'Our method may seem shortsighted and parochial, but it is not the courts' business to second-guess a state legislature.'").

361. *See* Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHICAGO L. REV. 227, 261–63 (1958) ("The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law. In this way it can be sure at least that it is consistently advancing the policy of its own state . . . . It will be said that this is a 'give-it-up' philosophy. Of course it is.").

362. *See* Russell J. Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability*, 46 OHIO ST. L. J. 493, 498 (1985) ("It has been charged that functional analysis, particularly the aspect of it that focuses on the policies underlying domestic rules, is a circumlocution for applying the law of the forum. As a practical matter, a court using this method will find a sufficient forum interest to make forum law relevant and then will resolve any clash between forum and foreign policies by finding that forum law is 'better.' There is evidence to support this charge.").

alone."[363] All of this leaves courts "free to apply forum law in almost any case."[364] Similarly, Leflar's Better Law approach, some fear, might simply boil down to judges declaring that forum law should apply because, naturally, it is better.[365]

But the parochial deficiency is not the inherent flaw of this or that conflict methodology. Instead, it is endemic to all methodologies that rely on undivided sovereignty assumptions. If risk-averse courts must pick a single winner, that invites and encourages parochialism. In conflict cases there is often a spectrum of splits between the influence of forum and foreign influences (leaving aside for the moment how to measure that influence). For example, there might be a mostly domestic affair with a tiny foreign element, say a ninety-nine to one percent split. Surely courts would apply domestic law under all conflict methodologies. Or consider a ninety-ten split. Same result. Sixty-forty? That is closer, but still forum law will prevail. What about an even fifty-fifty split? Most courts would still pick forum law to resolve the tie. And now it gets interesting: what about a forty-sixty split, where foreign law has primacy over forum law? The concern here is that this split is still not enough to overcome the fear of many judges to erroneously displace forum law.[366] After all, deciding to apply foreign law would mean that forty percent of domestic influence is thrown to the wind, as if this case only presented foreign components and had nothing at all to do with the forum. At least sometimes, maybe all too often, courts would still apply forum law in this situation. At some point the scales will tip. But by just how much must foreign elements predominate to win? Twenty-eighty? Ten-ninety? Perhaps far indeed. That is the fear behind parochialism.

363. Brilmayer, *Interest Analysis*, *supra* note 360, at 408 ("[One] objection to the interest analysts' methodology is its parochialism, for interest analysis assumes that protective and compensatory policies are intended to benefit residents alone. The consequences of such an assumption are scarcely even-handed.").

364. Juenger, *supra* note 216, at 36 ("[U]ncertainty and disagreements [in interest analysis] provide judges with ample arguments to support the application of local law, which they know best, whenever the forum has some personal or territorial link with a transaction. In other words, as in workers' compensation cases, courts are free to apply forum law in almost any case.").

365. *See generally* Leflar, *Choice-Influencing*, *supra* note 177, at 298 ("It is evident that the search for the better rule of law may lead a court almost automatically to its own lawbooks. The idea that the forum's own law is the best in the world, especially better than fancy new sets of laws based on such nontraditional approaches as research and policy analysis, is unfortunately but understandably still current among some members of our high courts.").

366. *See, e.g.*, von Mehren, *supra* note 9, at 34 ("Essentially automatic application of forum law in cases of true conflict often results in a self-serving parochialism; the views held by other states are ignored in situations where, had they been those of the forum, they would have been given effect.").

But it is not a character flaw of this or that judge, bias,[367] xenophobia,[368] or plain laziness.[369] It is also not solely the flaw of this or that conflict methodology. Instead, all conflict methodologies share this flaw (to different degrees and in different ways) because the basic framing of conflicts questions encourages and invites parochialism: choose forum law or foreign law.

One might speculate that courts would choose less parochially if their choice could be a compromise. Letting a case be governed entirely by foreign law might seem a bit scary and courts might only do so if they are absolutely certain of it. But if courts were allowed to apply foreign law partially, they might be more comfortable with applying a good chunk of forum law and leaving the rest to foreign law.

D. Indeterminacy

Without the ability to compromise, courts might also be more willing to fudge. Often reluctant to swallow the bitter pill of all-or-nothing application of foreign law, courts have found ways to soften the rigid theoretical proscriptions of some conflict of laws approaches; other approaches are squishy by design. Throughout, indeterminacy casts a broad shadow.[370]

Consider first the First Restatement approach. It purports to provide clear rules. No indeterminacy here. For example, the validity of a contract, Beale explicates, is determined by the place of contracting.[371] It seems simple enough. But

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367. *Compare* Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L. J. 883, 893 (2002) ("[J]udges tend to be biased in favor of local law."), *with* Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 719 (2009) (using a dataset of international choice-of-law-decisions by U.S. district courts in tort cases to present evidence that the "decisions are not biased in favor of domestic law, domestic litigants, or plaintiffs; and that they are actually quite predictable").

368. *See generally* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11*, 4 J. EMPIRICAL L. STUD. 441, 464 (2007) ("[T]he data offer no support for the existence of xenophobic bias in U.S. courts."); Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941 (2017) (explaining structural factors that lead judges to favor U.S. litigants and U.S. law in the context of discovery of foreign evidence, forum non conveniens, service of process abroad, and the recognition of foreign judgments).

369. *See generally* Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595, 598 (1983) ("It is true that a myth has arisen that forum preference is the consequence of judicial parochialism, chauvinism, or sloth."); Giesela Rühl, *Method and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT'L L. 801, 839 (2006) ("[T]he American standards that emerged in the course of the American conflicts revolution . . . have mostly served as a justification for application of the law that the courts know best.").

370. Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare:* Spinozzi v. ITT Sheraton Corp., 120 HARV. L. REV. 1137, 1137 (2007) ("[M]odern choice-of-law methodologies are famously indeterminate"). *See generally* Michael H. Gottesman, *Adrift on the Sea of Indeterminacy*, 75 IND. L.J. 527, 527 (2000) ("Today's conflicts scholars no doubt consider themselves a diverse bunch, with widely differing views about how law should be chosen in multistate disputes. But from the trenches, most of them look alike. Each waxes eloquent about the search for the perfect solution—the most intellectually and morally satisfying choice of law for each dispute—and each ends the theorizing by embracing some proposition that will prove wholly indeterminate in practice.") (citations omitted).

371. *See* Joseph H. Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 260, 270–71 (1910) ("The question whether a contract is valid . . . can on general principles be determined by no other law than that . . . of the place of contracting.").

how do we determine that place? Beale first argued that we must examine the place where the "principal event necessary to make a contract" occurred.[372] Elsewhere he defined the place of contracting as "the place in which the final act was done which made the promise or promises binding."[373] But even if these two formulations pointed to the same place—and there is some daylight between them—and even if those were the only competitors for how courts should determine the place of contracting, there is still indeterminacy because of the diversity of contract methods (e.g., informal unilateral contracts, acceptance by performance, acceptance by agent, acceptance by mail/phone, etc.).[374] And all of that just on the question of the validity of a contract, not the "nature and extent of the duty for performance" or the "manner" and "sufficiency" of performance, both of which are governed under different rules.[375] This introduces further indeterminacy.[376] To make matters even more mushy, courts have developed numerous "escape devices" to avoid the otherwise allegedly rigid results mandated by the traditional approach.[377] These devices include a broad menu of tools including characterization, public policy, penal laws, procedure/substance distinction, *dépaçage*, and *renvoi*.[378] All of them, in isolation or combination, can be used for "subterfuge and manipulation,"[379] a gimmick,[380] or a "trick"[381] that furthers indeterminacy by moving "a case over to another governing law when this was thought desirable."[382]

Scholars have long argued that "lawyers and judges who were unhappy with the result thus obtained [by the simple territorial choice-of-law rules] found ways around the mechanical rule."[383] But perhaps the problem is not these specific

372. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 311 (AM. L. INST. 1934).

373. 2 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1045, 1046 (1935).

374. *See generally* RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 312–26 (AM. L. INST. 1934).

375. *Id.* §§ 332, 358.

376. *Id.* § 358 cmt. b ("[T]here is no logical line which separates questions of the obligation of contract, which is determined by the law of the place of contracting, from questions of performance, determined by the law of the place of performance. There is, however, a practical line . . . drawn in every case by the particular circumstances thereof.").

377. *See, e.g.*, Joseph W. Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 734 (1990) ("The arbitrariness and injustice of the First Restatement rules forced judges to invent more and more escape devices, such as recharacterization, renvoi, public policy exceptions, and substance/procedure distinctions. Yet these escape devices were as arbitrary as the basic rules; they were both manipulable and unrelated to the underlying policy concerns of the states.").

378. *See, e.g.*, Cavers, *supra* note 179, at 182–87 (listing escape devices). *See generally* Roosevelt, *Resolving Renvoi*, *supra* note 135.

379. Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1133 (2010).

380. Leflar, *Choice-Influencing*, *supra* note 177, at 295 ("That choice-of-law concepts are susceptible to manipulation has been openly recognized for a long time. The process of characterization, once seriously regarded as the key to many choice-of-law problems, was particularly easy to turn into gimmick.").

381. Russell J. Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability*, 46 OHIO ST. L.J. 493, 496 (1985) ("Characterization tricks . . . [w]hat was alleged to be a 'tort' problem could have its label switched to 'procedural' so that the law of the forum rather than of the place of injury applied. This was formerly fairly common in the United States with an issue as important as the measure of damages for tortious injury and is still found in English decisions.") (citations omitted).

382. Leflar, *Choice-Influencing*, *supra* note 177, at 30.

383. Weintraub, *supra* note 381, at 495.

mechanical rules themselves, but any rules that force courts to pick the law of a single sovereign. Perhaps any rules, no matter how carefully constructed, are experienced as arbitrary if they do not allow for compromise between the laws of different jurisdictions. To cushion litigants from this arbitrariness, courts devise a broad array of escape devices. That explains the seemingly paradoxical situation where the vested-rights approaches are criticized for being too rigid and too mushy at the same time. Such conceptual dexterity might help to alleviate some anxiety among judges who must muddle through conflict of laws cases that rigid theory does not overpower basic justice.[384] However, none of that can overcome the fact that, in the end, judges must still choose the law of one sovereign over another.

The Second Restatement is subject to the same critique. It also forces courts to pick the law of one sovereign and disregard all others. But it is also mindful of the need for "greater flexibility, according sensitivity in judgment to important values that were formerly ignored."[385] Admittedly, this comes at the cost of "certitude and certainty."[386] Commentators have called this "neonihilism,"[387] "a blend of indeterminate indeterminacy [and a] total disaster in practice."[388] They argue that the currently dominant Second Restatement approach can easily be manipulated "to support virtually any result."[389] Again, it is tempting to put the blame for this indeterminacy on the shoulders of the potpourri of considerations in the Second Restatement's famous § 6. Similarly, indeterminacy problems in other approaches can be blamed on their specific methodological choices. But the problem runs deeper than that.

The various conflict methodologies, including the one espoused in the Second Restatement, do not provide much guidance and constraints for judges because anytime they do, judges ignore them.[390] Judges balk when forced to make the stark choice between the laws of two sovereigns that are both clearly involved in a transaction, person, tort, or family. That choice is deeply dissatisfying, no matter how the choice is structured, whether it is by examining the vesting of rights, or government interests, or most significant relationship, or really anything else. If the

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384. *See generally* J.H.C. MORRIS, THE CONFLICT OF LAWS 9 (Sweet & Maxwell 3d ed. 1984) (quoting J., Cardozo) ("The average judge, when confronted by a problem in conflict of laws, feels almost completely lost and like a drowning man will grasp at a straw.").

385. RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 1, intro. note (AM. L. INST. 1971).

386. *Id.*

387. *See generally* ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 351 (1962) (calling the Second Restatement approach "Neonihilism").

388. Gottesman, *supra* note 370.

389. Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230, 1241 (1965).

390. Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 382 (1992) (arguing that "the new theories [of deciding conflicts questions] usually amount to little more than long-winded excuses to do what courts wanted to do in the first place"); Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 987 (1994) ("[M]odern choice of law theory provides ample authority to permit a court to reach virtually any result in any litigated case."). *See generally* Hillel Y. Levin, *What Do We Really Know About the American Choice-of-Law Revolution?*, 60 STAN. L. REV. 247, 251 (2007) (reviewing SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE (2006)) ("[M]any contemporary scholars agree that, in practice, the various doctrinal approaches do not provide much guidance for, or constraints on, judges at all").

choice still requires disregarding clearly relevant law, conscientious judges might have little choice but to fudge the analysis as they muddle through different methodologies.[391] That might appear to be undisciplined, but perhaps it is the best that can be done under the circumstances.

This Section presented a range of arguments, from the general to the specific, why adherence to undivided sovereignty might be harmful, out of step with modern sensibilities and normative commitments, and the root cause for some enduring problems with various conflict of laws methodologies. Even if these arguments will not persuade traditionalists to abandon notions of undivided sovereignty in conflict of laws, at the very least they suggest that the burden is on those who want to defend undivided sovereignty to explain why it still is a good match some 400 years after Bodin.

IV. A NEW FRAMEWORK ON NEW FOUNDATIONS

If indivisible sovereignty is such an outdated and unattractive concept, why have courts and commentators built an entire area of law around it that is utilized every day? I suspect it is for lack of competition. For too long, conflict of laws doctrine and scholarship have taken indivisible sovereignty as a given and tried to build as well as one can from such an unsteady foundation. It does not matter how unsatisfying undivided sovereignty is if there is no alternative.

This Section develops such an alternative.[392] It does so by demonstrating how fractional sovereignty can serve as a compelling foundation for conflict of laws decisions. The approach taken here is therefore not grounded in a metaphysical account of human nature or the essence of statehood. Many of the theorists we encountered above claimed to derive their version of sovereignty from immutable principles and inherent features of the world. They used quasi-historical abstractions like a hypothetical state of nature to explain how they are not presenting arguments but findings. I am a bit weary of such approaches and claims. After all, conflict of laws decisions are not made on an ethereal plane based on metaphysical abstractions. Instead, conflict of laws decisions are a pressing concern for courts that have to decide, every day, what law to apply in a given case. That is a messy business with judges knee-deep in the muck and ambiguities of everyday life. The measure for success in this context must be whether scholarship can help courts improve these decisions or not. Thus understood, conflict of laws scholarship is about finding creative solutions to difficult problems, and the competition is to find solutions that are better than the alternatives.

This Section has two goals: first, to show that basing a conflict of laws account on fractional sovereignty is viable and, second, that it is more capable of handling common conflict of laws riddles that have vexed other approaches. Let's begin with

391. *See generally* Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 466 (1991) ("[J]udges really do seem driven by their desire to apply a preferred substantive law without regard for independent choice of law considerations.").

392. *See generally* Bruce Posnak, *Choice of Law: Interest Analysis and Its "New Crits"*, 36 AM. J. COMP. L. 681, 689 (1988) ("[I]t behooves . . . critics to put their necks on the line and explain what they would like in place of what they criticize.").

a standard scenario and graduate to trickier terrain, addressing potential objections and counterarguments along the way.

A. Common Scenarios

Imagine a simple and common tort that straddles two states: duty and breach in Illinois, causation and damages in Michigan. The tort law is the same in both states except one has a damages cap of $100,000 and the other of $200,000. What now? Traditionally, a court would have to decide which damage cap governs: one sovereign's cap would be utilized, the other disregarded. Under a fractional sovereignty account, a court could utilize both since the tort touched both sovereigns. Imagine, for now, that the tort touched both sovereigns roughly equally. In that situation a court could utilize a damage cap that falls between the two caps: say $150,000. This amount would be a compromise between the two sovereigns. It would respect, to an extent, the policy judgments of both states.[393] In purely domestic situations that state's cap would be the sole governing law. As more and more foreign elements are introduced the states would increasingly have to compromise. Courts could avoid ignoring the relevant damages cap of one state and overemphasizing the cap of the other state. Instead, the utilized in-between cap would reflect the in-between nature of the tort. Also notice the flexibility inherent in this approach. In a different situation, say, where most of the tort has to do with Michigan, its law would be more influential. Conversely, as the tort becomes more closely connected with Illinois, its position gains in prominence. This sliding-scale allows for fine-tuned acknowledgments of real-life situations in a way that the all-or-nothing nature of current approaches prevents.

Now we make this a bit trickier. Imagine that Michigan still has a damages cap of $200,000, but that Illinois, instead of a damages cap of $100,000, does not recognize that the transpired events constitute a tort. Previously, a court would have to either say this is a tort (with a $200,000 damages cap) or not a tort at all. Either answer would completely disregard the law of one of the concerned states. A fractional account would allow a court to find a compromise between these positions. In effect, it could treat the Illinois law as a damages cap of $0. If the events touched both states equally, the court could recognize the tort (reflecting Michigan's influence) but reduce the maximum recoverable amount to $100,000 (reflecting Illinois's position). Allowing for such compromises would make it less likely that courts default to applying forum law or incorporating a "pro-resident bias."[394] That tendency violates basic notions of fairness and equal treatment under the law. It might also violate the equal protection clause and privileges and

393. *See generally* Arthur Taylor von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347, 359 (1974) ("[In] true conflict [cases,] a multistate solution may be adopted in order to achieve decisional uniformity or other values of conflicts justice without requiring one state to sacrifice entirely its views respecting aptness. By according roughly equal respect to the views of each legal order, a basis may be created for agreement upon a mutually acceptable governing rule.").

394. *See generally* Brilmayer, *Interest Analysis*, *supra* note 360, at 392 (arguing that interest analysis suffers, among other things, from a "pro-resident bias" as a result of "the assumption that protective and compensatory policies of the forum can be invoked only by forum residents").

immunities clause.[395] A choice based on a fractional account of sovereignty, in contrast, might find courts more willing to give (partial) effect to the choices of another sovereign. This encourages cooperation and respect for the law and policy choices of sister states.[396] Instead of thinking about policy differences as a clash that requires us to declare a winner (and therefore also a loser), a fractional account recognizes that different sovereigns have different perspectives and concerns. Typically, different laws reflect reasonable disagreements on policy priorities. This calls for dialogue and learning from each other. All-or-nothing scorekeeping is rarely conducive to meaningful dialogue. Fractional choice of law, in contrast, shows respect for the laws of co-sovereigns and humility in the face of good faith attempts to legislate in a complicated world.[397]

This might also help judges overcome old habits of discounting the laws of some partial sovereigns. For example, in our complicated multi-sovereign system, the law of tribal sovereigns has rarely been accorded the same respect as the law of sister states.[398] Courts, not surprisingly, treat the question of whether to apply tribal law as an all-or-nothing determination. Either the tribe gets to set all the rules or none. All too often the answer is none, even where a significant amount of the lawsuit touches and concerns the tribe, tribal members, tribal land, or tribal interests.[399] Perhaps if judges could allow for a fractional influence of tribal law, they would be more willing to break with old habits and give tribal law (partial) influence. Similarly, the U.S. Supreme Court might be more willing to recognize

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395. Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 40 (1984) ("As Currie realized, to reserve the benefits of local law to local residents may violate the equal protection as well as privileges and immunities clauses."); *see, e.g.*, John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981) (pointing out constitutional problems with home-state preferences in conflict of law).

396. *See generally* LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 155 (1991) ("States have much to gain if they can find a way to pursue their interests cooperatively. Simply applying your own law whenever self-interest dictates is not an appealing solution; cooperation seems a better strategy. While this situation may be clear, however, the best way to pursue it is not. With 50 different states, and a wide range of substantive issues and rapidly changing laws, it is difficult to coordinate cooperative behavior.").

397. *See generally* P. John Kozyris, *Interest Analysis Facing Its Critics—and, Incidentally, What Should Be Done About Choice of Law for Products Liability?*, 46 OHIO ST. L.J. 569, 576 (1985) ("While favoring local law has some basic primitive appeal ('my courts apply my law') and produces certainty, its wisdom has been debated for ages. The litmus test of the even-handedness of any conflicts approach is precisely its position on the question of whether comity and mutual self-limitation, or go-it-alone and beggar-thy-neighbor, should predominate.").

398. Katherine J. Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts*, 55 AMER. U.L. REV. 1627, 1651 (2006) (explaining that frequently "state courts have, with little explanation, neglected to engage in choice-of-law analysis at all, simply assuming that state law will apply to cases involving tribes that are brought in state court."); *see* Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 555 (2021) ("[T]here are 574 federally recognized tribal governments within the United States, whose laws are largely ignored.").

399. *See* Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539, 558 (1997) ("[T]he presence of substantial off-reservation contacts automatically has a two-pronged result: the state court has adjudicatory jurisdiction, and state law applies to the dispute"); *see also* Katherine Florey, *Toward Tribal Regulatory Sovereignty in the Wake of the Covid-19 Pandemic*, 63 ARIZ. L. REV. 399 (2021).

broader jurisdictional grants for tribal courts if that would not automatically lead to complete application of tribal law.[400]

Trickier still—imagine that one of the parties involved has immunity under the laws of Illinois (say under a guest statute) but not under the laws of Michigan. Again, the court could quickly and reliably find a compromise position that reflects the degree to which this tort touches both states without wading into the metaphysical terrain of where the tort *really* vested (First Restatement), which governments are interested (Currie), where the most significant relationship is located (Second Restatement), which law is better (Leflar), or any of the other approaches we encountered above. This has the virtue of simplicity.[401] After all, "[j]udges are not dumb, just busy,"[402] and few are thrilled by the prospect of diving into the rabbit's hole of conflict of laws methodologies to make "some sense out of the chaos."[403]

But does this simplicity come at the cost of predictability? As many courts and commentators have argued over the years, our conflict of laws results should avoid unfair surprise, generally match the expectations of common litigants, and be reasonably foreseeable.[404] Without predictability, it is difficult to plan ahead in order

400. Katherine C. Pearson, *Departing from the Routine: Application of Tribal Law Under the Federal Tort Claims Act*, 32 ARIZ. ST. L.J. 695, 725 (2000) (explaining that courts often focus on "adjudicative authority or jurisdiction" to resolve disputes rather than conflict of laws principles); *see also* Florey, *supra* note 398, at 1631 ("As current doctrine stands, the Supreme Court, acting under the assumption that state and tribal forums will each apply their own law, has devoted considerable attention to developing rules that determine whether a case involving tribal contacts should be heard in tribal court or state court."). *See generally* Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (equating jurisdictional reach and regulatory authority in many contexts).

401. Robert A. Sedler, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1628, 1628–29 (1981) (praising interest analysis for "simplifying the choice-of-law process by focusing on the policies reflected in a state's rules of substantive law"). *See generally* CAVERS, *supra* note 185, at 65 (summarizing the First Restatement Method goal of "simplicity" and the "policy considerations supporting these rules" as "certainty, ease of application, facilitation of transactions" and "uniformity").

402. William Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1398 (1997).

403. Kozyris, *supra* note 397, at 580 ("The need for clarity and certainty is the greatest in the [conflict of laws stage], and any system calling for open-ended and endless soul-searching on a case-by-case basis carries a high burden of persuasion. With centuries of experience and doctrinal elaboration behind us, we hardly need more lab testing and narrow findings. Rather, we need to make up our minds and make some sense out of the chaos.").

404. Max Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TULANE L. REV. 4, 17–23 (1944) ("Presumably, the law of conflict of laws fulfills some function in our social order. What is that function? [Law must be chosen to protect the] legitimate expectations of the parties . . . [as a policy which is] basic for the entire legal order."); Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L. J. 271, 286–87 (1996) ("A party may be protected from the choice of unfavorable law if the party reasonably and to his detriment relied on the application of favorable law. The policy justifying this—variously termed party expectations, avoidance of unfair surprise, or foreseeability—is well accepted in conflicts theory."). *See generally* Elliott E. Cheatham & Willis L. M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 970 (1952) ("A person's expectations are likely to be disappointed to the extent that choice of law rules do not lead to uniformity, certainty, and predictability of result. But in a deeper sense this policy is one of the basic reasons why we have choice of law rules at all.").

to avoid litigation or, when in litigation, find a common settlement space.[405] Perhaps "Delaware drivers driving in Delaware deserve Delaware law—for better or for worse" and expect courts to apply it.[406] But what are the expectations about which law would apply to a tort straddling two states? Little empirical work has been done on this question.[407] The parties likely have no strong feelings on this point "for the simple reason that the parties had no expectations whatsoever with respect to choice of law."[408] To the dismay of scholars in the field, most people just do not think about choice of law doctrines before committing torts. Legislation typically does not speak to the issue, likely because legislators typically do not think about conflict of laws either.[409] Perhaps even most lawyers do not.[410] Furthermore, expectations, even if they existed, might not be uniform throughout the population. Whose expectations should we favor? And what about unreasonable expectations? What if somebody born in Switzerland but living in the United States for the last twenty years expects Swiss law to apply to every single transaction and tort to which he might be a party? Clearly, no choice of law approach should countenance such an expectation. Perhaps expectations only count when "we had good reason to believe" legal liability attaches.[411] But that just returns us back to square one because

405. *See* Weintraub, *supra* note 381, at 495 ("There are certain desirable attributes of any legal system. The characteristics most pertinent to the present discussion are predictability of results, just results, and accessibility . . . Predictability is necessary to plan transactions and, when disputes arise, to facilitate settlement. Predictability also reduces the cost and complexity of litigation.").

406. Twerski, *supra* note 197, at 381–82 ("[E]xpectations play a far more potent role in our life. There is a regularity and rhythm to life in which the familiar—the habitual plays a vital role. At times it affects conduct but even when it does not affect conduct, it affects our sense of tranquility . . . People have a right to expect a regularity and rhythm from the law . . . Delaware drivers driving in Delaware deserve Delaware law—for better or for worse . . . It behooves those who advocate fragmented choice-of-law theory to reconsider normal expectancies as an appropriate function of the law.").

407. Perhaps because the question of expectations is either entirely abstract to study participants who did not experience the tort, or, if they were part of the tort, they might lean toward self-interested answers.

408. Cheatham & Reese, *supra* note 404, at 972 ("[P]arties to multistate transactions frequently do not give thought beforehand to the question of what law will govern any disputes which may arise between them . . . In situations of this sort, the policy does not help for the simple reason that the parties had no expectations whatsoever with respect to choice of law.").

409. ERNST RABEL, THE CONFLICTS OF LAWS: A COMPARATIVE STUDY 103 (2d ed. 1958) ("[A]nswers to the regular questions of conflict law are rarely contained in municipal statutes. Private law rules ordinarily do not direct which persons or movables they include. It is as mistaken to apply such rules blindly to events all over the world as to presume them limited to merely domestic situations. They are simply neutral; the answer is not in them."). *See generally* Brilmayer, *Interest Analysis*, *supra* note 360, at 397 ("Many states do not even publish legislative histories, and those that do rarely document the legislator's views on territorial reach."). *But cf.* Sedler, *supra* note 401, at 1631–32 ("If that distinction [between legislative motivation and legislative purpose were] understood by conflicts commentators, they would recognize that there is no great difficulty in determining the policies underlying rules of substantive law.").

410. Consider, for example, the context of professional misconduct. Quick: If a New York attorney arguably commits professional misconduct while making a phone call on a New York matter during a vacation in Hawaii, what law governs? Does the result change if she is also admitted to the Hawaiian bar? Or if she is admitted on another matter pro hac vice in Hawaii?

411. *See* Max Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 17–23 (1944) ("Except where other higher aspirations interfere, expectations must be relied upon, and one of those expectations is that we ought not to be subjected to punishment, liability

we have to identify and justify what counts as "good reasons" in this context. Perhaps we also overvalue expectations. After all, any rule, no matter how silly, that is enforced long enough and consistently enough might form the basis of stable and widely shared expectations (e.g., the law of the jurisdiction with more vowels in its name governs). But if we emphasize such expectations over other concerns, we simply enshrine a statist's attitude that prevents improvements and adjustments to changed circumstances. Therefore, instead of seeking some mystical shared expectations among a population, we should ask whether a given approach meets a basic threshold of reasonableness and social acceptability.[412] I suspect that most laypeople would find it reasonable to adjudicate a tort that straddles two states under the laws of those two states. I also suspect that non-laypeople might find it easier to predict choice of law decisions and structure their client's conduct accordingly under a fractional account. Instead of rolling the dice on an all-or-nothing choice of law decision, they would have more meaningful built-in tools to assess risk and communicate it to their clients.

B. The Three-Sovereign Problem[413]

Let's switch from torts to contracts and add to the trickiness. Imagine two individuals who are developing a business relationship. One lives in New York, the other in Massachusetts, and both conduct business in Connecticut. They travel back and forth, call each other on the phone, text message, email, the whole shebang. After many rounds of back and forth, eventually they settle on terms and sign a contract. Each performs. Things go awry. One sues the other.

As we saw, up until now courts would ask whether this contract is governed entirely by New York law or entirely by Massachusetts law or entirely by Connecticut law. Predictably, New York courts are more likely to find that New York law applies, Massachusetts courts that Massachusetts law applies, and Connecticut courts that Connecticut law applies. That alone might be enough to lead the parties to forum shop (an old concern in conflict of laws scholarship).[414] Knowing that the other might sue, they might rush to get to their preferred court first, which will then apply preferred law. This, then, is one of the engines for a race to the courthouse. Perhaps neither would have sued the other but for this dynamic. Even worse, there is nothing that prevents the person that lost the initial race to the courthouse to initiate a second lawsuit in their preferred forum. This turns the race to the courthouse into the race to judgment. Whoever can secure a final judgment in their preferred forum first can use that judgment to claim preclude and issue preclude the other lawsuit. Predictably, this creates an incentive structure where one party inefficiently rushes proceedings in their preferred forum while simultaneously

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or other legal detriment for conduct which we had good reason to believe would not subject us to such troubles.").

412. In addition to, of course, constitutional requirements like equal protection.

413. With apologies to physicists who study the three-body problem and Liu Cixin's eponymous novel.

414. *See generally* FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE, 32–36 (1993) ("Savigny's basic objective was to achieve uniformity of result or, to put it negatively, to prevent forum shopping.").

dragging their feet in the not-preferred forum. The other party has the exact opposite incentives. This is a recipe for poor and perhaps unethical litigation behavior. It also makes it less likely that the parties can come together and amicably resolve their dispute.

Meanwhile, multiple courts are tasked with the absurd riddle of identifying a contract solely with one state when it clearly has roughly equal connections to three. This heightens the stakes even further. Under previous methodologies, choice of one sovereign's laws now disregards the laws of *two* sovereigns. A minority of influence (say, roughly thirty-four percent) is enough to overcome the majority of influence of the other two states combined (say, roughly sixty-six percent). As we add more states to the mix this dynamic becomes more acute. There might be a state with "the most significant relationship," but "most" could mean very little. Strange, then, to give a state with very little relation to a lawsuit domineering power to determine governing law. A fractional account, in contrast, keeps the influence of different sovereigns in proportion. It combines the law of multiple sovereigns (whether two or twenty) into a mix to determine governing law. No windfall of sovereignty based on a minuscule amount of influence here. This might also reduce the above-mentioned incentives to forum shop. If filing in a state does not lead to the application of all of the favorable law (but only a fraction), this reduces the incentives to file in that state. Fractional choice of law does not eliminate all incentives to forum shop (e.g., it leaves untouched things like favorable judges and juries, docket lengths, etc.). However, big differences in substantive law are an important component of current forum shopping incentives, and fractional choice of law could reduce such incentives.

C. A Little Pregnant

Now we change areas of law again and ratchet up the trickiness once more. How would a fractional account work with an all-or-nothing determination? After all, either you are married or you are not, just as you either are pregnant or are not. Both are inherently binary determinations. As such, one might argue, a fractional account is unable to find a compromise in situations that are based on such binary findings. For example, imagine two people in a relationship that again spans two sovereigns. Under the laws of one they are married, under the laws of the other they are not. How could a court find a compromise here?

The key insight to finding an answer to this question is that binary determinations are rarely what is at stake in the litigation. People litigate over whether they are married or not to get something, such as alimony or an intestate share.[415] Thus, while marriage is binary, the incidents of marriage tend to be divisible.[416] And, again, there are compelling reasons to allocate sovereign regulatory

415. *See generally* FED. R. CIV. P. 8(a)(3) ("A pleading that states a claim for relief must contain . . . a demand for the relief sought, which may include relief in the alternative or different types of relief.").

416. *See, e.g.*, Estin v. Estin, 334 U.S. 541 (1948) ("The result in this situation is to make the divorce divisible to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern.").

power over such a relationship in a fractional manner. If the relationship really touched two sovereigns equally, and one views the relationship as a marriage with various consequences and the other does not, then a compromising position that reflects these various degrees of influence would also compromise on the incidents of the marriage. More concretely, if one sovereign would provide for a fifty percent share of the estate and the other would not recognize the marriage at all and provide a zero percent share, then a court could compromise on twenty-five percent.

But, one might insist, there are areas where such compromising really is impossible. For example, in criminal law a person either violated a bigamy statute or did not. A person cannot be half-criminal. If one state's laws say this is a second, concurrent marriage and the other state does not recognize the marriage then, one might argue, a court simply must choose whose sovereign's law to follow and which to disregard. This stance echoes the notion of undivided sovereignty, simply in a criminal context. Transposing the argument developed above in the civil context, the ultimate question in the criminal prosecution is the extent of liability, typically measured in a term of incarceration. Here, imagine that one sovereign's laws mandate one year of incarceration and the other none. A fractional account creates room for compromise. The influence of both sovereigns could be recognized either through a reduced plea bargain or a reduced sentence. If half of the relationship touched the sovereign that would treat it as a bigamous relationship with criminal sanctions of one year and the other sovereign would not attach criminal sanctions, then a compromise position of six months of incarceration would reflect the concerns of both sovereigns. People who want to avoid this result should attach their relationship more closely to the non-sanctioning sovereign and avoid the sanctioning sovereign.

The main insight here is that, in many lawsuits, the absolute and seemingly binary issue is a device to ascertain rights and measure the extent of obligations and liabilities. While the binary issue might not be resolvable in a fractional account, the underlying rights and obligations can be fractional.

D. Substance/Procedure

Not only substantive law can be the subject of compromise and accommodation under a fractional model. Procedure, similarly, can be part of the calculation. Commonly, conflict of laws methodologies founded on undivided notions of sovereignty call for the application of forum procedure.[417] This is a not-so-hidden form of parochialism. It is anomalous because elsewhere courts and scholars recognize that automatic application of forum law has a slew of deleterious

417. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 585 (1934) ("All matters of procedure are governed by the law of the forum."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971) ("A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case."); STORY, CONFLICT (discussing the assumption "universally admitted and established [that] the forms of remedies, and the modes of proceeding . . . are to be regulated solely and exclusively by the laws of the place, where the action is instituted."); DICEY, CONFLICT ("Rule 188. – All matters of procedure are governed wholly by the local or territorial law of the country to which a Court wherein an action is brought or other legal proceeding is taken belongs (lex fori).").

consequences. It treats procedure as if variation in procedural laws did not have real consequences for the parties, their settlement negotiations, or their chances to succeed on the merits of their case.[418] This is peculiar because procedural differences, after all, are inherently intertwined with substantive goals.[419]

The old approach also creates the problem of having to distinguish between substance and procedure.[420] This is slippery terrain and the bane of every law student who ever had to learn the *Erie* doctrine.[421] Courts are frequently called upon to determine whether a burden of proof, presumption, immunity, statute of limitation/repose, or the like is substantive or procedural in nature. At times, courts have held that something is and is not substantive and procedural, simultaneously![422] The procedure/substance distinction in conflict of laws thus presents conceptual difficulties, parochialism concerns, unpredictability, and high litigation burdens for parties and courts.[423] Perhaps the most that can be said for using forum law for

418. Or intrinsic values. *See* A.D. Twerski, *On Reading Cramton, Currie & Kay—Reflections and Prophecies for the Age of Interest Analysis*, 61 CORNELL L. REV. 1045, 1061–62 (1976) (reviewing ROGER C. CRAMTON, DAVID P. CURRIE & HERMA H. KAY, CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS (2d ed. 1975)) ("If we begin thinking of procedure qua procedure as implementing a broad range of social values, then we may have to reexamine the outcome-oriented approach that now dominates our thinking.").

419. *See, e.g.*, Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801 (2010) ("The substance-procedure dichotomy is a popular target of scholarly criticism because procedural law is inherently substantive. This article argues that substantive law is also inherently procedural."); CAVERS, *supra* note 185, at 279–80 ("In every case in which a court is called upon to employ a rule drawn from the law of another state, there is the risk that differences in judicial procedure between the forum and the other state will defeat the objective which the court has sought to attain in turning to the latter state for the rule of law.")

420. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 584 (1934) ("The court at the forum determines according to its own Conflict of Laws rule whether a given question is one of substance or procedure."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 123–44 (1971); DICEY, CONFLICT 712 ("Whilst, however, it is certain that all matters which concern procedure are in an English Court governed by the law of England, it is equally clear that everything which goes to the substance of a party's rights and does not concern procedure is governed by the law appropriate to the case . . . . The difficulty of its application to a given case lies in discriminating between matters which belong to *procedure* and matters which affect the *substantive rights* of the parties.") (emphasis in original).

421. *See generally* Hanna v. Plumer, 380 U.S. 460, 471 (1965) ("The line between 'substance' and 'procedure' shifts as the legal context changes."); Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 108 (1945) ("Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, 'substance' and 'procedure' are the same key-words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used."). *But cf.* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724 (1974) ("We were all brought up on sophisticated talk about the fluidity of the line between substance and procedure. But the realization that the terms carry no monolithic meaning at once appropriate to all the contexts in which courts have seen fit to employ them need not imply that they can have no meaning at all."); Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103, 106 (2011) ("This Article [. . .] demonstrates that the distinction between substance and procedure is appropriately represented by a single-dimensional spectrum.").

422. *See, e.g.*, Sampson v. Channell, 110 F.2d 754 (1st Cir.), cert. denied, 310 U.S. 650 (1940) (holding that a burden of proof issue is substantive for Erie purposes but procedural for choice of law purposes, a result that "may seem to present a surface of incongruity").

423. *See generally* Roger Michalski, *Pleading and Proving Foreign Law in the Age of Plausibility Pleading*, 59 BUFF. L. REV. 1207 (2011).

procedural questions is that courts are more familiar and comfortable with their own procedures. However, the same might be said for forum substantive law. Mere convenience, then, cannot plaster over the simple fact that courts routinely disregard the laws of foreign sovereigns without much explanation or justification in this space.

A fractional account reduces some of these problems. It allows for treating procedure as an integrated aspect of facilitating compromise rather than as a separate system with fuzzy and difficult to police boundaries. Just as with substantive law questions, courts that confront lawsuits that touch multiple sovereigns could include compromises on procedural questions.[424] Often two states have similar procedures which would not greatly affect the ultimate compromise.[425] However, if there was a big gap in procedures, a court could compromise by giving effect to the procedure of one state but the substantive law of the other. Both sovereigns would still have a hand in guiding the outcome of litigation that touches and concerns them. Both sovereign's policy preferences, whether labeled as substantive or procedural, are respected and incorporated. In this approach, there is no need to distinguish between substance and procedure, no parochial reflexive preference for forum procedure, and no lengthy litigation on the question of whether something falls on this or that side of the line.

E. A Sheep in Wolf's Clothing

In some ways, fractional conflict of laws based on a fractional understanding of sovereignty upends foundational principles that courts and scholars have incorporated into their work for centuries. In other ways it is not as revolutionary as it might seem at first sight.

For one thing, many lawyers already routinely incorporate a compromising stance into their conflict of laws cases. Clients and their attorneys incorporate risk assessments into settlement offers, including the risk that the law of another sovereign is chosen. Imagine, again, a tort that straddles two states. One party just approached the other with a settlement offer. To evaluate the offer for his client, the conscientious lawyer must now examine the likelihood and consequences of different conflict of laws decisions in the case. Sometimes it is fairly obvious which sovereign's law a court will apply. But, given the complexity and fuzziness of many conflict methodologies and the complexity of many real-life interactions, there are also many cases where there is doubt. The more distributed the underlying contacts

424. *See generally* CAVERS, *supra* note 185, at 280 (1965) ("Where the forum has had no prior connection with the event or transaction giving rise to the litigation, the court may properly be viewed as sitting only because the forum is convenient. It should therefore seek, as far as practicable, to resolve the controversy as would a court in the concerned state. To this end, it should be prepared to draw all the rules required for the litigation from the law of that state, subject only to the limitation imposed by the need to preserve the integrity of its own judicial procedure both as an operating mechanism and as a reflection of certain important values."); Walter Wheeler Cook, "*Substance" and "Procedure" in Conflict of Laws*, 42 YALE L. J. 333, 344 (1933) ("How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself.") *But cf.* Edgar H. Ailes, *Substance and Procedure in Conflict of Laws*, 39 MICH. L. REV. 392 (1941).

425. For example, roughly twenty-five states are so-called Replica States that roughly replicate in their state procedural regimes the Federal Rules of Civil Procedure.

are, the more doubt there is. In such a situation of uncertainty, evaluating a settlement offer (or making one), becomes a probabilities game: say, a thirty percent chance the court will apply Florida law, and a seventy percent chance it will apply Georgia law. The settlement offer reflects the outcome of each state's application to the case weighted by the probability of that happening. In other words, the settlement offer reflects a compromise between the laws of the two sovereigns involved that incorporates the extent of contacts to these sovereigns. Since most cases end in settlements, something arguably along these lines is happening already in many conflict of laws cases. This approach is not the same as the formal weighing and compromising by a court that I sketched above, but it is a rough approximation in an informal setting.

Next, there are also examples in domestic law that transcend the all-or-nothing tradition. For example, comparative negligence law "apportions loss between the parties on a sliding scale of percentages."[426] Similarly, admiralty law provides for flexibility and compromise.[427] Even in conflict of laws doctrine there is already a device, though rarely used, to incorporate the law of multiple sovereigns in a lawsuit. Under some approaches, *dépaçage* has allowed some courts to use the law of separate sovereigns for separate determinations on different issues.[428] For example, it has been used by courts to apply California negligence law and Wisconsin interspousal immunity law.[429] *Dépaçage* is rarely used[430] but widely ridiculed. Brainerd Currie, for example, quipped that a party should not be allowed to put "together half a donkey and half a camel, and then ride to victory on the synthetic hybrid."[431] Many courts and modern conflict of laws approaches do not utilize *dépaçage*.[432] Even so, *dépaçage* shows that courts are able, and willing, to use the law of multiple sovereigns, at least in some cases.

The most forceful challenge to the use of *dépaçage* and similar compromising approaches comes from scholars concerned with linking conflict of laws approaches

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426. von Mehren, *supra* note 9.

427. *See, e.g.*, United States v. Reliable Transfer Co., 421 U.S. 397 (1975) (establishing "a rule requiring liability for [admiralty] damage to be allocated among the parties proportionately to the comparative degree of their fault").

428. *See* Russell J. Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability*, 46 OHIO ST. L. J. 493, 501 (1985) ("'Dépeçage' refers to the application of the laws of different states to separate issues in the same case. The problem existed under territorial choice-of-law rules."); Symeon C. Symeonides, *Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect*, 45 U. TOL. L. REV. 751, 757 (2013) ("[D]épeçage occurs only when the court applies the substantive laws of different states to the same *cause of action*, not the same *case*.") (emphasis in original).

429. *See* Haumschild v. Continental Casualty Co., 7 Wis. 2d 130 (1959).

430. *See generally* Symeonides, *supra* note 428, at 761 (2013) ("[D]épaçage is probably more frequent in law school exam questions than in judicial decisions.").

431. Frederick K. Juenger, *How Do You Rate a Century?*, 37 WILLAMETTE L. REV. 89, 106 (2001) (quoting Brainerd Currie in CAVERS, *supra* note 185, at 39).

432. *See, e.g.*, Simon v. United States, 805 N.E.2d 798 (Ind. 2004) ("On the simple merits of dépaçage as a judicial technique, we find ourselves unimpressed."); *But cf.* RESTATEMENT SECOND OF CONFLICT OF LAWS paragraph §145 (providing the rights of parties and their liabilities "with respect to *an issue* in tort" are governed by the law of the state that, "*with respect to that issue*, has the most significant relationship to the occurrence and the parties") (emphasis added).

to a sovereign's authority.[433] The fear is that crafting hybrid rules can create composite results not authorized by any one state.[434] This might leave courts unmoored from the source of their legitimacy that is ultimately tied to their sovereign.[435] It would create "justice without law" and ignore "governmental interests to focus on individual interests."[436]

This argument is strongest if we conceive of courts as narrow instrumentalities of their chartering sovereign. However, if we understand courts more broadly as tools to settle disputes and administer justice, then the question of authority is unproblematic under a fractional account. There, courts do not disregard the authority of the sovereign to issue law but recognize that some disputes are governed by multiple sovereigns. By using the law of these sovereigns, roughly in proportion to their governing responsibility, courts respect the authority of both sovereigns. Arguably, this is a more respectful approach than being hamstrung to pick one sovereign as the lucky winner and designate the other as unlucky loser. The court's legitimacy, in a fractional account, is tied to the authority of both sovereigns to regulate conduct and persons that relate to it.

Some might argue that the legislature, not courts, should craft compromise positions.[437] Legislators are certainly free to do so. But in most U.S. jurisdictions, much of conflict of laws doctrine remains judge-made.[438] Just as courts were able to switch from the vested-rights approach to government interest analysis, so too are they able to set as governing conflict law a fractional account without incurring a democratic deficit.

CONCLUSION

If undivided sovereignty is not inevitable, and perhaps not advisable, then that might open our imagination to new doctrinal possibilities. For example, perhaps state sovereign immunity is not "inherent in the nature of sovereignty"[439] or "a

433. *See, e.g.*, Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 41 (1984) ("[T]hose committed to a method that emphasizes the interests of governments feel uncomfortable about reaching results that none of the 'concerned' sovereigns would condone.").

434. *See id.* at 10 ("[I]f courts are permitted to splice together rules from different legal systems, such dépeçage can yield composite results at odds with those that would follow from applying the local law of any of the interested states.").

435. *See*, *e.g.*, Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1854–55 (2005) ("[A] method that asks judges to craft international or hybrid law unmoored to the positive law of their own states is likely to run into significant objections from the perspective of democratic legitimacy.").

436. Michael Traynor, *Conflict of Laws*, 49 CAL. L. REV. 845, 866 (1961).

437. *See generally* von Mehren, *supra* note 9 ("[C]ompromising policy conflicts may be seen as a peculiarly legislative function and thus an improper task for courts.").

438. There are some states that have codified their conflict of laws rules. *See generally* James A.R. Nafziger, *The Louisiana and Oregon Codifications of Choice-of-Law Rules in Context*, 58 AM. J. COMP. L. 165 (2010); Peter Hay and Robert B. Ellis, *Bridging the Gap Between Rules and Approaches in Tort Choice of Law in the United States: A Survey of current Case Law*, 27 INT'L LAWYER 369, 383 (1993) ("Although phrased in terms of California's 'comparative impairment' approach, the Louisiana Code's broad policy objectives remind of the Restatement (Second).").

439. THE FEDERALIST No. 81 (A. Hamilton).

fundamental aspect of . . . sovereignty."[440] Perhaps it does not need to be conceived as an all-or-nothing affair.[441] Similarly, there might be room in personal jurisdiction doctrine to piece together sovereign contacts. The *Erie* doctrine's division of responsibility between the state sovereigns and federal sovereign might leave room for compromise and accommodation beyond picking straight-up winners in a way the U.S. Supreme Court has recently tried to do but without sufficient theoretical grounding.[442] Doctrinal puzzles surrounding the extraterritorial application of federal law beyond the territory of this sovereign might leave room for an *inter*territorial doctrine. These suggestions might be great or terrible, but the main point is that they must be evaluated on their own terms and in their own contexts. For too long, blind adherence to undivided sovereignty has foreclosed meaningful discussions of imaginative solutions to pressing problems. Let's find contemporary solutions to contemporary problems using a contemporary theory of sovereignty, not one invented 400 years ago.

440. Alden v. Maine, 527 U.S. 706, 713 (1999) ("[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today.").

441. *See also* Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1492 (2019) (finding that "States retain their sovereign immunity from private suits brought in the courts of other States" even where some of the activities underlying the suit occurred beyond their boundaries). *See generally* James Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 581–588 (1994).

442. *See generally* Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 31 (2006) ("In both the Erie setting and the reverse-Erie setting, the court's job is to apply the other sovereign's law."); Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103, 106 (2011) ("Instead of declaring state law applicable or inapplicable, [Supreme Court Justices have recently] claimed for themselves the prerogative to fashion law that purportedly accommodates the interests of both sovereigns.").