# Jurisdictional Problems, Comity Solutions

By Daniel B. Listwa* & Lea Brilmayer**

*American choice of law is today portrayed as a story of how a more modern and functionalist methodology came to overthrow the long-dominant territorial system. Against this background, the situs rule—the territorial rule requiring that all property-related issues be governed by the law of the jurisdiction in which the property is located—is seen as an unusual straggler of a now-debunked theory. Central to this narrative is the idea that the vested rights theory, which was embraced by the Restatement (First) of Conflict of Laws and assumed away the possibility for overlapping jurisdictions, represented "traditional" choice of law, going back to Justice Joseph Story, the father of American conflicts law. This is the perspective adopted by the now-in-the-works Restatement (Third), which aims to usher in a new era for American conflict of laws by cutting out all vestiges of the traditional model—the situs rule included.*

*But this narrative, while broadly held, is wrong. It is a mistake to associate choice of law during the early Republic with an early twentieth-century model of territorialism. In this Essay, we explain that the early American choice-of-law model, as described by Justice Story, was not territorial but rather intensely functional, with its prime focus being resolving the uncertainty created by the constitutional law governing the limits of personal jurisdiction and the recognition of sister-state judgments. In this context, the persistence of the situs rule appears to be not an anachronism but rather an indication that "modern" choice-of-law theories misunderstand the forces shaping conflict-of-laws doctrine today. Using the situs rule as a window into the foundations of choice of law, this Essay thus calls into question the standard narrative underlying contemporary choice-of-law literature and challenges the approach of the proposed Restatement (Third).*

## Introduction

In the United States, no evaluation of choice of law and its foundations is complete without a recitation of the field's origin story. As the oft-told history goes, for centuries formalistic territorial rules defined private international law; but in the mid-twentieth century, drastic change overtook America. Spurred by the legal realist movement, scholars debunked the then-

* Law Clerk to Judge Jed. S. Rakoff, Southern District of New York, 2021–22.

** Howard M. Holtzmann Professor of International Law, Yale Law School. We are grateful to Perry Dane, Kermit Roosevelt III, Claire Priest, Akhil Amar, Will Baude, and the participants in the Philosophical Foundations of Private International Law Workshop for their helpful comments and conversations. Alexander Rigby and the other editors of the *Texas Law Review* provided invaluable editorial assistance.

dominant view—associated with Harvard Professor Joseph Beale—that the fundamentals of legal rights required adherence to a mechanical regime of territorialism.[1] Instead, they argued that choice of law should be viewed as another tool by which states can achieve their substantive ends. A focus on states' interests came to define the academic literature, as "modernist" scholars condemned the "traditional" rules as frustrating states' policy goals.[2] These criticisms proved influential within courtrooms, as many states renounced the territorialist regime and adopted more context-sensitive approaches to choice-of-law problems.

But while this "conflicts revolution" rocked American choice of law, one element of the old guard remained steadfast: the "situs rule" for real property—that is, the principle that disputes involving real property are exclusively governed by the law of the state in which the property is located. Though dismissed by many as a relic of an archaic time, the rule persisted.[3] Some have postulated that state courts are just too squeamish to mess with tradition when it comes to real property. We disagree. While the situs rule may be flawed, its retention reflects rational decision-making by state courts. But to understand why, one must rethink not only the situs rule but also the very conceptual foundations of modern choice-of-law theory. In this Essay, we undertake such a reassessment of the field's historical origins, looking in particular to the model put forward by Justice Joseph Story and what that model offers for understanding choice of law today.

This reevaluation of the situs rule and, more broadly, the foundations of choice of law could be no more timely. For the first time in half a century, the American Law Institute (ALI) is drafting a new restatement for conflict of laws: the *Restatement (Third)*. As the most recent drafts of the *Restatement (Third)* describe, the drafters intend for this latest iteration to represent a dramatic step into the future, leaving behind any remnants of the traditional method's territorialism. And one of the new Restatement's central targets is the situs rule for real property, which the *Restatement (Third)* rejects in all but a few cases. This, it says, is consistent with "conflict-of-laws scholars' extensive criticism of a categorical situs rule for real-property-related issues."[4]

In this Essay, we suggest that this broad rejection of the situs rule is premature and is based on a broadly held misunderstanding of the rule's origins and modern function. But to understand why, it is not enough to look at property conflicts in isolation; rather one must reevaluate the standard

1. Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2458 (1999).

2. *Id.* at 2461.

3. ALBERT A. EHRENZWEIG, CONFLICT OF LAWS 189–90 (1959).

4. RESTATEMENT (THIRD) OF CONFLICT OF LAWS ch. 7, intro. note (AM. L. INST., Preliminary Draft No. 5, 2019).

historical narrative of American choice of law in its entirety. We begin by taking on an idea central to the standard narrative—that Beale's "vested rights theory," which assumed away the possibility of overlapping jurisdictions, represented the traditional mode of thinking about choice of law. As one prominent conflicts and constitutional law scholar has written, "[f]rom the mid-eighteenth to the early twentieth centuries, Anglo-American law produced a crude system of territorial choice-of-law rules," which "were crystallized in Joseph Beale's treatise."[5] The drawing of a straight line from the days of the early Republic to Beale remains the accepted wisdom, which views "[t]he erosion of the territorial conception" and the "possibility of conflict between laws," as a uniquely mid-twentieth century idea.[6]

The literature abounds with assertions that Justice Story, father of American conflicts law, held a "vigorous commitment to traditional territorial limits on legislative jurisdiction," which freed him from needing to "reckon[] with any possible sister-state effect for statutes."[7] The view that Justice Story was a proto-Bealean provides important credence to the mythology of the conflicts revolution.[8] If the power of the academic arguments could take down a theory of conflicts so deeply rooted that it goes back to Justice Story, then surely—the view seems to be—those arguments ought to be able to shake courts free of the situs rule. Indeed, that is the position taken by the *Restatement (Third)*, which endorses a historical account that links both Beale and Story to the traditional territorial model.[9]

But this narrative is wrong. It is a mistake to associate choice of law during the early Republic with an early twentieth-century model of territorialism. As this Essay will explain, the conflicts revolution represents less a modern enlightenment and more a return to an earlier conceptual model where choice of law was understood to be grounded in functional concerns, not formalistic limitations of legislative jurisdiction. However, while the modernists argue that courts should craft rules that resolve disputes so as to forward legislatively promoted ends, Justice Story primarily saw choice of law as a solution adopted by individual states to problems created by the law

5. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 252 (1992); *see also* LEA BRILMAYER, CONFLICT OF LAWS 20 (2d ed. 1995) ("The continuing American legacy of Huber and Story can be found in the theories of Joseph Beale.").

6. Roosevelt, *supra* note 1, at 2505.

7. *E.g.*, David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1654 (2009).

8. Beale, who dedicated his treatise to Story, helped this narrative along by presenting his theory as an extension of Story's. *See* 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS x–xi (1935) (discussing the historical differences between American and European conflict-of-laws jurisprudence and scholarship). However, Beale also criticized Story's reliance on comity. *Id.* § 6.1.

9. *Reporters' Memorandum*, *in* RESTATEMENT (THIRD) OF CONFLICT OF LAWS xix (AM. L. INST., Tentative Draft No. 2, 2021).

governing adjudicative jurisdiction and the recognition of sister-state judgments, which were areas of the law over which the states had no individual control. Assuming that the state courts share their legislatively driven choice-of-law model, modernists have struggled to explain the persistence of the situs rule. But this mystery is readily explained from the perspective of Story's model because the U.S. Constitution's special treatment of real property for purposes of adjudicative jurisdiction and sister-state judgment recognition remains largely the same today as it stood when Story wrote.

The retention of the situs rule thus provides reason to believe that even today's courts prioritize what we call "system values," a set of concerns that include uniformity and predictability, in the context of crafting choice-of-law rules. This casts doubt on modernist scholars' emphasis on legislative interests as well as the very soundness of "interest analysis" as a theoretical foundation for modern choice of law. More fundamentally, restoring Justice Story's approach to the choice-of-law narrative elevates a pluralistic mode of resolving interstate disputes that recognizes the appropriate political function of judges in creating law and balancing sometimes competing sets of values. In this manner, we hope that by restoring the narrative, we can encourage courts and scholars to move beyond the debates that characterized twentieth-century conflict of laws and towards a conceptual outlook that views American choice of law as another arm of the common law. In other words, looking anew at the situs rule and its origin in property conflicts provides not just a reason to reconsider the academic criticism of the rule—but the very conceptual model of choice of law more generally.

This Essay proceeds in three parts. Part I provides an overview of the traditional narrative of American choice-of-law theory, beginning with Beale's vested rights theory and continuing with the conflicts revolution. It then discusses the rules governing property conflicts as well as the more common critiques. Part II offers a restorative counter-narrative by reconstructing Justice Story's nineteenth-century choice-of-law model and placing it in the context of the limitations on adjudicative jurisdiction imported from the law of nations into the enforcement of the Constitution's Full Faith and Credit Clause as applied to sister-state judgments. Finally, Part III discusses the theoretical and practical implications of this restorative account for choice of law and the continued persistence of the situs rule, including for the *Restatement (Third)*.

## I. The Standard Narrative in Choice of Law

Historical narrative has a special place in choice-of-law jurisprudence. Frequently, academic works and even court opinions[10] engaging with choice of law will begin with the story of the field's development. Sometimes that mythos begins colorfully with a reference to the first written choice-of-law rule, found in an Egyptian crocodile mummy.[11] More often, such histories begin in earnest with a discussion of Beale's traditional model of choice of law—setting up the description of the conflicts revolution that followed. The success of the revolution is then, in turn, used to justify an assertion that choice of law is a field particularly amendable to scholarly intervention. This Part briefly lays out that familiar narrative, with particular emphasis on the way it has been used to call for reform of the situs rule. An overview of the standard narrative in turn provides the background for the restorative take offered in Part II.

### *A. Vested Right Theory*

For the first half of the twentieth century, Beale's vested rights theory dominated conflict of laws both in the classroom and the courts. As is often the case, history has flattened and simplified Beale's contributions[12]—but since our primary interest here is choice-of-law mythos, it is to this received wisdom that we turn. The central tenet of Beale's theory was that laws are territorially bound—that is, every state's legislative jurisdiction was circumscribed by the state's geographic borders.[13] Thus, a state's law applies to all events that occur within that state, but to no events beyond the state's boundaries. Beale is understood to have argued that this was a necessary consequence of what it means to be law: "By its very nature law must apply to everything and must exclusively apply to everything within the boundary of its jurisdiction."[14] As the current draft of the *Restatement (Third)* explains,

10. *See, e.g.*, Feldman v. Acapulco Princess Hotel, 520 N.Y.S.2d 477, 479–80 (N.Y. Sup. Ct. 1987) ("Traditional conflict-of-law theory in the United States reflected the tension between the doctrine of comity, associated particularly with the writings of Justice Story, . . . and the notion of 'vested rights' developed in large part by Joseph Beale during the early 1900's.").

11. *See* Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMPAR. L. 297, 300 (1953) (noting how the Fayoum papyri contains the first instance of a conflicts rule and was "preserved to posterity in the wrappings of a crocodile mummy" in ancient Egypt).

12. *See* Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2090 (1995) (criticizing the form of positivism advocated for by Beale as "crude and implausible").

13. *See* Siegmann v. Meyer, 100 F.2d 367, 368 (2d Cir. 1938) ("[I]t is basic in the whole subject that legislative jurisdiction . . . is territorial, and that no state can create personal obligations against those who are neither physically present within its boundaries, nor resident there, nor bound to it by allegiance.").

14. BEALE, *supra* note 8, § 4.12.

this approach was understood to reflect "the nature of law."[15] According to Bealean theory, when some event takes place, the legal system of the location in which the event takes place attaches legal consequences.[16] For example, the event of a contract signing in State A gives the signatories a right to enforce the contract according to the laws of State A.[17] The key idea is that when certain events occur, a right will "vest," and once vested, the right becomes akin to the personal property of the person for whom the right vested—it can be carried to other states and asserted in those other states' courts.[18]

The vested rights theory conceptually simplifies conflict of laws, at least to a point. To determine what law should govern any lawsuit, one must look at the type of action asserted—e.g., contract or tort—and determine which facts caused the right to vest. Then, one need only discover the location in which those facts occurred and apply the law of that place. Beale, first in his well-known treatise and then as the Reporter of the *Restatement (First) of Conflict of Laws*, provided rules dictating for each type of action which facts caused the right to vest and thus which state's law applied. These rules described the correct understanding of the law—Beale believed—regardless of whether they had "the sanction of judicial decision," because they emerged logically from initial premises about the territorial nature of law.[19]

Because Bealean theory committed to the view that legal authority was fundamentally territorial in character, there could only be one law that reached any given set of geographically bound facts.[20] Thus, under Beale's view, there were never any true conflicts of law in the choice-of-law context. In fact, Beale thought the label "conflict of laws" was inaccurate, explaining that "[t]he only conflict is among the legal authors who are doing this work."[21] To put it another way, under Beale's model, all legislative jurisdiction was uniquely partitioned between the states such that there were no overlapping jurisdictions.

The *Restatement (First)*, completed in 1934, was intended to be part of the project of encouraging jurisdictions to set aside their "local peculiarit[ies]" and instead embrace the rationalistic rules Beale developed.[22]

15. *Reporters' Memorandum*, *in* RESTATEMENT (THIRD) OF CONFLICT OF LAWS xix (AM. L. INST., Tentative Draft No. 2, 2021).

16. BEALE, *supra* note 8, § 5.4.

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

18. Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1194–95 (1987).

19. BEALE, *supra* note 8, § 4.2.

20. Dane, *supra* note 18, at 1195.

21. BEALE, *supra* note 8, § 1.19.

22. Ernest G. Lorenzen & Raymond J. Heilman, *The Restatement of the Conflict of Laws*, 83 U. PA. L. REV. 555, 556 (1935) (quoting Joseph H. Beale, *The Necessity for a Study of Legal System*, *in* 14 PROC. ASS'N. AM. L. SCHS. 31, 38 (1914)).

But even before the Restatement's publication, Beale's theories came under the forceful attack of legal realists.[23] With unabashed ferocity, the rising school of legal realism discredited the vested rights theory and the man behind it.

### *B. The Conflicts Revolution*

American legal realists rejected the notion that law can be reduced to a quasi-scientific rational process,[24] making Beale's mechanical and formalist conception of choice of law a prime target. Scholars like Walter Wheeler Cook argued that Beale was wrong to ground choice-of-law rules in an abstract metaphysics, suggesting instead that judges attend to functional arguments for enforcing the law of one jurisdiction or another.[25] Indeed, realists argued that Beale's rules were unavoidably indeterminate and merely provided a false sheen of logic behind which judges acted from other motivations, including picking the law that brought about their desired result.[26]

Beginning in the mid-1960s, states by the dozen took to heart the realists' critiques and began shifting away from traditional theories of choice of law—a movement that came to be dubbed the "conflicts revolution."[27] Over the next decades, a variety of different alternative theories took hold in courtrooms, with the traditional approach (meaning Beale's) surviving in only a minority.[28] None of the modern approaches have obtained a clear dominance among the courts, making it difficult to generalize about choice of law today; however, these theories all share a general rejection of the traditional reliance on abstract rules and instead provide for a more flexible policy-oriented analysis that does not deny the possibility of overlapping legislative jurisdictions.

Consider, for example, the approach followed by the *Restatement (Second) of Conflict of Laws*, which has been endorsed—at least in some

23. *See generally, e.g.*, Bruce Wardhaugh, *From Natural Law to Legal Realism: Legal Philosophy, Legal Theory, and the Development of American Conflict of Laws since 1830*, 41 ME. L. REV. 307 (1989) (describing the impact of legal realism on conflict-of-laws jurisprudence).

24. *See* L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 435 (1934) (arguing judicial decision-making often depends on "non-technical" considerations).

25. *See* WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAW 33 (1942) (suggesting the validity of choice-of-law rules depends on their "value as a reasonably accurate, understandable and workable description of judicial phenomena as they have occurred . . . and as they are likely to occur again").

26. *E.g.*, Fuller, *supra* note 24.

27. *See* Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 387 (1966) (highlighting differences between three choice-of-law theories as demonstrating "a revolution of conflicts doctrine").

28. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2018: Thirty-Second Annual Survey*, 67 AM. J. COMP. L. 1, 35–36 (2019) (identifying 13 U.S. states or territories that follow the traditional choice-of-law methodology for torts or contracts).

form—by a majority of American jurisdictions.[29] For issues in tort, the *Restatement (Second)* essentially provides judges with a list of considerations to be weighed as part of a balancing test by which one determines which state has the "most significant relationship" to the dispute in question.[30] These factors include, among others, the substantive policies of the implicated states as well as concern for predictability, uniformity and reducing forum shopping.[31] The court is then left, more or less, to choose the state's law that most appropriately balances the broad set of implicated interests.

Although the *Restatement (Second)* has been criticized as a "mush"[32] with "no explanatory power,"[33] it has also been praised for the way in which it sidesteps the most damning issue with the Bealean approach. What made the traditional theory so troublesome was that it caused the choice-of-law determination to rest on a "single factor," the location in which the right vested, even in cases in which the dispute at issue was "overwhelmingly connected to a different state."[34] This would sometimes lead to absurd results, placing pressure on judges to fudge the application of its rules.[35] But the *Restatement (Second)* avoids that problem, instead allowing the choice of law to follow the court's judgment of the case's "center of gravity."[36] By breaking free of the rule-bound single factor approach, the *Restatement (Second)* gives judges greater freedom to achieve the result that strikes them as appropriate, which likely explains its broad appeal.

But oddly enough, single-factor tests did not disappear entirely from the *Restatement (Second)*. While the multi-factored balancing test was its answer to most choice-of-law questions, for a few particular areas the *Restatement (Second)* supplied a firm and single-factor rule.[37] Most significantly, for a broad range of legal issues implicating real property rights, the *Restatement (Second)* and those courts that follow it continue to follow the traditional Bealean rule that issues relating to real property law must be resolved according to the law of the location in which the property is located: its

29. *Id.*

30. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (AM. L. INST. 1971).

31. *Id.* § 145 cmt. b.

32. Laycock, *supra* note 5, at 253.

33. Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 321 n.149 (1990).

34. Lea Brilmayer, *Hard Cases, Single Factor Theories, and a Second Look at the Restatement 2d of Conflicts*, 2015 U. ILL. L. REV. 1969, 1970 (2015).

35. *Id.*

36. *Id.* at 1987–88.

37. *See* 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, 300 (2018) (noting "that some areas of the *Restatement (Second)* remained rule-governed").

"situs."[38] But the *Restatement (Second)* is not unique in its adherence to the situs rule. Regardless of the choice-of-law theory endorsed, American courts generally follow the situs rule, and place real property rights exclusively under the legislative competence of the state in which the property is located.[39] Somehow, real property has remained largely undisturbed by the conflicts revolution.

But while the situs rule may have endured thus far in the courtrooms, it has fared less well among academics. For decades, the special treatment of property has been ridiculed by conflict-of-laws scholars, who have referred to the situs rule as "outdated," "simplistic," "irrational,"[40] "crude," and a product of a "sterile methodology,"[41] to list just a few of the epithets. Indeed, in one famous turn of phrase, the rule was labeled the "land taboo,"[42] a reference to Freudian psychotherapy suggesting that its persistence derived merely from the fear courts have of disturbing something as sacrosanct as property. Law review articles deride courts for holding onto the special treatment of property, dismissing the situs rule's resilience as a byproduct of courts' inability to think rationally about property law more generally.[43] Overall, the weight of academic voices has been in favor of bringing to property the realist modernization that has altered the rest of choice of law. In the next subpart, we outline the situs rule as applied to property and provide an overview of the scholarly reactions.

### *C. Real Property Conflicts*

The location of the property, its situs, looms large in property conflicts, but its exact role depends on whether the property in question is real or personal in nature.[44] Real property, under the traditional approach, is always governed by the law of the state where it is located (*lex rei sitae*). This applies to essentially all issues without exception: conveyance, adverse possession,

38. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS. § 233 (AM. L. INST. 1971) ("The effect of marriage upon an interest in land owned by a spouse at the time of marriage is determined by the law that would be applied by the courts of the situs.").

39. Joseph William Singer, *Property Law Conflicts*, 54 WASHBURN L.J. 129, 129 (2014).

40. Robby Alden, *Modernizing the Situs Rule for Real Property Conflicts*, 65 TEXAS L. REV. 585, 598 (1987).

41. Moffatt Hancock, *"In the Parish of* St. Mary le Bow*, in the Ward of* Cheap*,"* 16 STAN. L. REV. 561, 567, 627 (1964).

42. *See, e.g.*, Brainerd Currie, *Ehrenzweig and the Statute of Frauds: An Inquiry into the "Rule of Validation*,*"* 18 OKLA. L. REV. 243, 317 (1965) ("[C]onflict-of-laws doctrine in general is plagued with a 'land taboo.'").

43. *See, e.g.*, James Y. Stern, *Property, Exclusivity, and Jurisdiction*, 100 VA. L. REV. 111, 114 n.19, 115 & n.22 (2014) (collecting scholarly criticism likening courts' adherence to the rule as "a kind of primitive superstition").

44. Under the *Restatement (Second)*, which adopted more functional language, this distinction was instead referred to as "immovable" and "movable" property. RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 9, topic 2, intro. note (AM. L. INST. 1971).

mortgages, encumbrance, and inheritance of property, among other things, is controlled by the law of the situs.[45] The breadth of the rule is sometimes surprising. It requires, for example, that the capacity of an heir and validity of a will be determined by the law of the property's situs—even if neither the decedent nor the heir have ever stepped foot in the situs jurisdiction and the will also implicates other property around the world.[46] More modern approaches, including the *Second (Restatement*), essentially leave the traditional rules for real property untouched.[47] This is true despite a general movement away from broad and hard-edged rules and toward analyzing particular issues—such as the formal validity of a conveyance and the capacity of the transferee—separately.[48]

Moreover, it is not just the substantive law of the situs that must be applied but also that jurisdiction's choice-of-law rules. This notion of applying another state's choice-of-law rules, called renvoi, provides that if State B is resolving a dispute involving property located in State A, then it should adjudicate the case as though the case were brought in State A.[49] The *Restatement (Second)* and modern courts more generally have retained renvoi for real property conflicts,[50] even though renvoi has largely been rejected in all other contexts.[51] It can thus be understood why commentators have been so insistent on pointing to this area of the law as one problematically captured by a fear of modernization.[52]

Why then does the *Restatement (Second)* maintain the traditional territorial rules in the area of real property alone? For decades, certain

45. SYMEON C. SYMEONIDES, CHOICE OF LAW 581–83 (Stephen M. Sheppard ed., 2016).

46. *Id.* at 582–83.

47. *Id.* at 582.

48. *Id.*

49. For example, if New York had to determine the validity of a testamentary disposition of real property in California, it would look to how California would determine the validity; and if California applied the law of the testator's domicile in determining validity, then New York would as well. *See In re* Estate of Schneider, 96 N.Y.S.2d 652, 655 (N.Y. Sur. Ct. 1950) (involving real property in Switzerland owned by a New York domiciliary).

50. *E.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 245, 248–49, 253, 255 (AM. L. INST. 1971).

51. PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 162–64 (5th ed. 2010).

52. That same criticism cannot be carried over to personal property, however. *See* KERMIT ROOSEVELT III, CONFLICT OF LAWS 14 (2d ed. 2015) (noting how under the traditional approach, personal property was not always governed by the law of the place in which the property was located). Also, in contrast to real property, the *Restatement (Second)* broke away from much of the territorialism of the *Restatement (First)* with regard to personal property and, instead, endorsed the "most significant relationship" test, thus making the treatment of personal property more like that of contracts and torts. The introductory note in the *Restatement (Second)* explicitly states that this similar treatment was important given that there is no clear line between property rights and contract rights in the first place. RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 9, intro. note (AM. L. INST. 1971). But the notion that there is no clear line between property rights and other legal rights cannot be limited to personal property; it applies equally well to real property.

scholars have dismissed this as mere irrationality—a fear of upsetting land-related rights that lacks justification.[53] The issue is not the situs rule, per se. It is recognized that the interjurisdictional uniformity provided by the rule lends certainty and clarity to title, for example.[54] But the interest in certainty applies to personal property and contracts as well. Further, certainty of title only goes so far in justifying the rule's breadth. This is particularly true when, for example, its application to the formalities governing the validity of such things as a prenuptial agreement unexpectedly frustrates a couple's intent.[55] In such cases, it is hard to find that the situs state's interest in maintaining certainty in its title system outweighs the parties' interest in effectuating their intention through an agreement—particularly when the interest in maintaining the title system's accuracy is more directly satisfied by requiring a courtroom victor to record her title in the situs.[56]

Academics have been making these arguments for decades, and yet the courts have remained largely unmoved. But while that has been the state of affairs for some time now, there is reason to believe change might be on the horizon. The American Law Institute is currently at work on the *Restatement (Third) of Conflict of Laws*, and the latest draft embraces the prevailing scholarly opinion, narrowing the situs rule as applied to real property and doing away with renvoi.[57] In justifying this position, the *Restatement (Third)* explicitly endorses the academic view that while jurisdictions have a compelling interest in maintaining certainty in their title systems, that interest is not sufficiently compelling to require the application of the situs rule in all contexts involving real property.[58]

Should this be praised as a further step towards the modernization of choice of law? Perhaps. But as we have argued before, the *Restatement (Third)*, in its pursuit of reforming choice of law in the modernist image, risks missing some of what history has to offer.[59] Indeed, once the retention of the situs rule is placed in its historical context, it becomes clear that the modernist theories of the conflicts revolution have misunderstood a critical component

53. *See, e.g.*, Alden, *supra* note 40, at 597–98 (rejecting the "argument in support of the situs rule" as "no more persuasive for real property conflicts").

54. SYMEON C. SYMEONIDES, CHOICE OF LAW 583 (Stephen M. Sheppard ed., 2016).

55. *See* Michael S. Finch, *Choice-of-Law and Property*, 26 STETSON L. REV. 257, 288–89 (1996) ("The situs rule has potential to upset an appreciable number of out-of-state nuptial agreements.") (emphasis omitted).

56. *See* Brainerd Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 639–40 (1954) (noting the benefits of executing and recording a deed "resulting from local judicial proceedings" and "preceded by an action abroad").

57. RESTATEMENT (THIRD) OF CONFLICT OF LAWS ch. 7, intro. note (AM. L. INST., Preliminary Draft No. 5, 2019).

58. *Id.*

59. 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, 267–68 (2018).

of American choice of law—the role of comity. As the following Parts explain, contrary to the scholarly consensus, the situs rule is not simply about protecting a jurisdiction's interest in maintaining the certainty of the title system—rather the situs rule is a straightforward by-product of jurisdictional rules and the broader interest in the protection of system values. Once this different rationale is understood, the academic argument for pressing states to dramatically narrow the situs rule is substantially weakened.

## II. A Restorative Take on Choice of Law

Conflict of laws in early America is closely associated with Justice Story and his *Commentaries on Conflict of Laws*, the first systematic examination of the subject written in the United States.[60] Nevertheless, Story's central contributions to the normative foundations of choice of law have been largely excluded from contemporary thinking—either inappropriately dismissed as merely a stepping stone to Bealeanism, as discussed previously, or otherwise "discarded."[61] In this Part, we seek to rectify this oversight, focusing in particular on two concepts core to Justice Story's choice of law: comity and common law decision-making. As we explain, Story advocated that courts should utilize their common law authority to voluntarily adopt uniform choice-of-law rules as a method of overcoming the uncertainty caused by the possibility of overlapping adjudicative jurisdictions.

This model—based on comity and common law—provides a means of rendering explicable the situs rule: real property rights were distinctive in that they could only fall within one state's adjudicative jurisdiction, removing the primary incentive for comity and explaining why the forum state, which was also the situs state, would simply apply its own law to all real property disputes. Since this distinctive treatment of real property for purposes of adjudicative jurisdiction persists, so does the situs rule, revealing the degree to which concern for system values continues to be the primary driving factor behind courts' approaches to choice of law today.

### *A. Comity, Not Jurisdiction*

Although Justice Story wrote a number of influential treatises over the course of his career—including his famous commentaries on the Constitution—he considered his conflicts treatise to be his most important.[62]

60. *See* Friedrich K. Juenger, *A Page of History*, 35 MERCER L. REV. 419, 443–44 (1984) (commenting on the success of Justice Story's treatise as a "massive and comprehensive work in systematic fashion").

61. Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 44 (2010).

62. *See* Letter from Joseph Story to Richard Peters (Apr. 24, 1833), *in* 2 LIFE AND LETTERS OF JOSEPH STORY 140–41 (William W. Story, ed. 1851) (stating of his conflicts treatise: "It will be, I think, my best Law work").

As a New Englander with Federalist leanings and strong associations to the merchant class, Story saw a workable system of conflict of laws as critical to the success of the young Republic.[63] Absent choice-of-law rules, it would be "impracticable for [states] to carry on an extensive intercourse and commerce with each other."[64] The problem was simple: if merchants, creditors, or other commercial actors could not predict what law would ultimately apply to their transactions because it would depend on where a subsequent suit was brought, they would be deterred from engaging in interstate commerce altogether, essentially dooming the federalist project.

The problem was not unique to the United States. On the international level, because each nation might "hav[e] different and even opposite laws on the same subjects," conflicts could lead to "utter confusion of all rights and remedies."[65] Such confusion, Story explained, would not only "weaken all the domestic relations" of the nations with each other, but also "destroy the sanctity of contracts and the security of property."[66] However, while these issues were relevant to all nations, "[t]o no part of the world" was the need to resolve interstate conflicts "of more interest and importance, than to the United States."[67] If the new Union was to thrive, it was absolutely critical that the states adopt "common principles" by which to resolve these conflicts.[68] If the states all adopted uniform rules for resolving conflicts, then people would be able to predict the law that would be selected to govern their disputes regardless of where the suit was brought—avoiding the confusion and "grossest inequalities" that result when parties cannot know what law applies to their dealings.[69] Story's hope then was that the various states in the Union would all adopt the rules he outlined in his treatise, thus ensuring the same jurisdiction's law would be selected to resolve a dispute, regardless of where the case was brought.

Central to Justice Story's theory of choice of law was the concept of comity. Comity finds its roots in the seventeenth-century Dutch jurist Ulrich Huber.[70] Under Huber's model, when a case presented itself before the court of some nation, that nation's sovereignty over the subjects of the dispute was absolute—it could apply its own law to any dispute over which its judicial authority stretched, "*summa potestas*, subject to no superior."[71] According to

63. *See* Morgan D. Dowd, *Justice Joseph Story and the Politics of Appointment*, 9 AM. J. LEGAL HIST. 265, 278, 285 (1965) (describing the judicial appointment of Justice Story).

64. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 242(1) (2d ed. 2001) (1841).

65. *Id.* § 4.

66. *Id.*

67. *Id.* § 9.

68. *Id.* § 4.

69. *Id.* § 5.

70. Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 9 (1966).

71. *Id.* at 18.

Justice Story's model, like Huber's, the "states had no inherent obligation to yield to the laws of one another," and "[b]y the same token, no state had an intrinsic right to give its law extraterritorial effect."[72] However, they could adopt choice-of-law rules by which they would consent to the application of other states' laws.[73] Story explained that such rules, adopted as a matter of comity, "arise from mutual interest and utility; from a sense of the inconveniences which would result from a contrary doctrine; and from a sort of moral necessity to do justice, in order that justice may be done to us in return."[74] Thus, while the choice-of-law rules set out in the treatise were not logically demanded by legal first principles—as Beale saw his own rules—their adoption was consistent with each state's interest in administering a just and convenient legal system.

Having so motivated the project of adopting a uniform set of rules, Justice Story's *Commentaries* set out what those rules ought to be. Consistent with his broader goals, in stating each rule, Story did not merely cite to supporting cases; rather, he explained the justifications for the rules in terms of the convenience, administrability, and justice they would yield.[75] Primarily, Justice Story appealed to the need for uniformity in what law would be picked for any given dispute, explaining that failure of states to conform to the majority rule would lead to "the grossest inequalities" and "[i]nnumerable suits."[76] Uniformity, Story explained, would support various other related interests, including the protection of the natural expectations of the parties involved in the transaction and the simplification of determining what law applied.[77] By attentively weighing these interests in administrability and the protection of expectations, Story hoped to overcome the "confusion" that would otherwise confound interstate commerce.[78]

These rules were not necessary restrictions on the sovereignty of state; rather, they were the "municipal law"[79] of the jurisdiction—that is, binding

72. G. Blaine Baker, *Interstate Choice of Law and Early-American Constitutional Nationalism. An Essay on* Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws, 38 MCGILL L.J. 454, 495 (1993).

73. STORY, *supra* note 64, § 23.

74. *Id.* § 35 (citing Blanchard v. Russell, 13 Mass. 1 (1816)).

75. Justice Story criticized English treatises for being "little more than full Indexes to Reports," noting that, in contrast, continental treatises "discuss every subject with an elaborate, theoretical fulness, and accuracy, and ascend to the elementary principles of each particular branch of the science." JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS viii–ix (1832).

76. STORY, *supra* note 64, §§ 5–6.

77. *Id.* § 384 ("In the ordinary course of trade with foreign countries, no one thinks of transferring personal property according to the forms of his own domicil; but it is transferred according to the forms prescribed by the law of the place where the sale takes place.").

78. *Id.* § 4.

79. *Id.* § 38.

state law just like any other rule adopted as a matter of common lawmaking.[80] This was distinguished from international law, that is, the "law of nations," which is understood as existing outside of the particular law of any state.[81] Thus, Justice Story's approach to choice of law was ultimately grounded in the common lawmaking authority of the courts—it was, we could say, a "common law model" of choice of law. But what distinguished a choice-of-law rule from, say, a particular rule governing first possession, was not the nature of the rule but rather its motivation for adoption. While the latter might be justified because the court anticipated it would generate clear property interests,[82] the former would be motivated—first and foremost—by the desire to facilitate the "comity of nations."[83]

But at the same time, it was also understood that in some cases the benefits to be procured from uniformity were insufficient to outweigh the convenience of simply applying forum law. In such cases, it would be consistent with comity to adopt a choice-of-law rule that directed the state court to apply its own jurisdiction's law. This gives rise to what we might call the "comity calculus,"[84] balancing the benefits of uniformity with the convenience of applying forum law. Thus, for example, in *Le Roy v. Crowninshield*,[85] Justice Story held that it would be appropriate for a forum court to apply its own statute of limitations to a claim arising from a contract made out of state because the forum's interest in adhering to its own procedural rules outweighed the costs of disuniformity that such a rule would introduce.[86] As Justice Story explained, "mere comity" did not outweigh the forum's greater interest—borne of "municipal convenience and public utility"—in adhering to its own local procedural rules.[87] Thus, the common law model acknowledged that even though the ideal would be for each suit to be adjudicated in the same manner regardless of the jurisdiction in which it was brought, sometimes the costs associated with such uniformity outweighed the benefits.

80. *See* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1528 (1984) (explaining that municipal law was "declaratory of the practice that would have existence in the absence of a statutory provision").

81. J. Whitla Stinson, *The Common Law and the Law of Nations under the Federal Constitution*, 9 CALIF. L. REV. 470, 479–80 (1921).

82. *See* Pierson v. Post, 3 Cai. R. 175, 179 (N.Y. Sup. Ct. 1805) (applying the rule of capture "for the sake of certainty, and preserving peace and order in society").

83. *See, e.g.*, Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589 (1839) ("[T]he laws of the one [country], will, by the comity of nations, be recognised and executed in another . . . .").

84. To steal Justice Ginsburg's phrase (used in a different context). *See* Levin v. Com. Energy, Inc., 560 U.S. 413, 425 (2010) (discussing the "comity calculus" in determining whether original jurisdiction was precluded).

85. 15 F. Cas. 362 (C.C. Mass. 1820).

86. *Id.* at 365.

87. *Id.*

As illustrated in *Le Roy*, the paradigm invocation of comity involved a forum court weighing the interests of its own state against the benefits that accrue from uniformity across state lines. But that uniformity is only realized if other states adopt similar rules. This means that comity is fundamentally about considering how one's choice-of-law decision will impact and garner responses from other states. In game-theoretical terms, comity captures the idea that each state is a repeat player in a multi-party coordination problem in which, by sometimes accommodating the interests of other states, everyone could be made better off.[88] The role of the "general law" rules that Story identified in his treatise was as a convenient focal point around which the states could coordinate in order to achieve uniformity with regard to how a case would be resolved regardless of the state in which it was brought.[89] In other words, the central theoretical constraints guiding choice of law in the time of Justice Story were highly functional concerns about lowering the costs associated with forum shopping and unpredictability—not the formalistic conceptions of sovereignty and territory that underlay Beale's vested rights theory.

Note, however, that Story's comity tells us that there *should* be uniform rules, but it does not tell us much about *what* those rules should be. Scholars have long criticized Story for failing to connect the dots between comity and how courts should decide particular cases.[90] Whether or not it is true that Story's approach fails generally to pinpoint particular rules, there is one area of the law where Story's comity calculus does dictate a particular result: real property conflicts. In the remainder of this Part, we explain how, due to the particular jurisdictional rules that applied to real property, Story's comity approach dictates the situs rule. This lays the groundwork for a discussion of the implications of Story's theory today.

### *B. Territorial Limits on Adjudicative Jurisdiction*

As the previous subpart describes, the common law model did not rely on the notion that a state's legislative jurisdiction was strictly territorially

88. Daniel B. Listwa & Bradley J. Polivka, *First Principles for Forum Provisions*, 2019 CARDOZO L. REV. DE-NOVO 106, 119; *cf.* LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 162 (1991) (using game-theory principles to describe the benefits of specific reciprocity in choice of law).

89. *E.g.*, STORY, *supra* note 64. Justice Story was never explicit in drawing this connection between comity and his proffered rules, leading many—Beale included—to characterize (mistakenly, in our view) comity as a vacuous doctrine. *See* Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1213 n.77 (1987) (describing Beale's critical view of the concept of comity).

90. *See* Childress, *supra* note 61, at 31 (noting how *Hilton v. Guyot*, 159 U.S. 113 (1895), constituted a watershed moment "because the Court not only articulated a doctrine of comity . . . but also set the stage for the doctrine to be unmoored from its original grounding in conflict of laws theory").

constricted in order to resolve potential problems involving choice of law. But that does not mean the standard narrative is wholly mistaken in its association of Justice Story with territorialism. Indeed, in the introductory remarks that preface Justice Story's treatise, he describes a state's sovereignty as being importantly territorially confined—but in connection to its adjudicative jurisdiction, rather than its legislative jurisdiction.[91] Story sets out three "general maxims," foundational to conflict of laws and applicable to the American states.[92] The first principle asserts that each state has the authority to "bind" people and property "within its territory."[93] The second is that no state can bind people and property within another state's territory.[94] The third is that "whatever force and obligation the laws of one country have in another, depend solely . . . upon its own proper jurisprudence and polity, and upon its own express or tacit consent."[95]

Justice Story's three maxims are derived directly from Huber's earlier work. The first two maxims articulated the limits to each state's adjudicative jurisdiction grounded in the law of nations. Specifically, under these principles, a state's courts could not legitimately issue judgments respecting foreign property or foreigners who were not within the state's territorial bounds—it could not bind such people or property and a violation of that rule amounted to a violation of the law of nations.[96] Law-of-nations violations were matters of great seriousness—certain ones were considered just cause for war.[97] In contrast, the third maxim "tried to solve a problem that territoriality created," by recognizing the means by which one nation's court can voluntarily apply the law of another nation.[98] While it was the strict rules of the law of nations that governed the boundaries of a nation's adjudicative jurisdiction and thus the recognition of judgments abroad, it was merely the foreign court's choice-of-law rules, adopted as a matter of comity, that determined whether a nation's laws would be given extraterritorial effect. In a sentence, it was the law of nations that governed the recognition of

91. STORY, *supra* note 64, § 1–2.

92. *Id.* § 17.

93. *Id.* § 18.

94. *Id.* § 20.

95. *Id.* § 23.

96. William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2087 (2015).

97. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 449 (2011) (noting "[t]he Constitution was designed to enhance the United States' ability to comply with its various obligations under the law of nations—and thus prevent conflict with other nations").

98. Dodge, *supra* note 96, at 2086.

judgments[99] but the comity of nations that governed the enforcement of extraterritorial laws.[100]

Although this distinction between the law of nations and the comity of nations may seem obtuse now, its implications were perfectly legible in the context of the early nineteenth century and its rules on collateral attack. A court's ability to bind a party depended on whether that party was served process within the forum state's territory or waived its objection to the exercise of jurisdiction.[101] If the state court issued a judgment without having established a proper base for its adjudicative jurisdiction, that judgment would be viewed "a mere nullity"[102] by the courts of other states—open to collateral attack and ultimately unenforceable.[103] As the Supreme Court explained in *D'Arcy v. Ketchum*,[104] this limitation on adjudicative jurisdiction—what we now associate with personal jurisdiction—derived from "international law as it existed among the States in 1790" and became folded into the enforcement of the Full Faith and Credit Clause.[105] In contrast, international law did not provide comparable limits on legislative jurisdiction; as a result, a state court's judgment, under the Full Faith and Credit Clause, could not be collaterally attacked merely because that court applied forum law when comity would arguably dictate a different result.[106]

The focus of the previous discussion has been on a court's ability to exercise adjudicative jurisdiction over a defendant, which, as already noted, required serving the defendant with process within the territorial boundaries of the forum state.[107] This generated the problem that comity sought to solve because people were able to move around and between different states,

99. Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 199, 226 (1919).

100. *See, e.g.*, Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589 (1839) ("[T]he laws of the one [country], will, by the comity of nations, be recognised and executed in another."). Under international law, comity governed the enforcement of foreign judgments that were valid under the law of nations. However, Congress long ago passed legislation that now governs the enforcement of valid judgments. For more on this legislation, see Act of May 26, 1790, ch. 11, 1 Stat. 122 ("An Act to prescribe the mode in which the public Acts, Records, and judicial Proceedings in each State, shall be authenticated so as to take effect in every other State.").

101. *See* James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 ST. LOUIS U.L.J. 1, 2 (1992) (summarizing how the nineteenth-century service of process rule was "preeminently territorial because service of process upon a defendant while within a state's borders . . . invest[ed] a state court with jurisdiction over a defendant").

102. Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (citation omitted).

103. Stephen E. Sachs, Pennoyer *Was Right*, 95 TEXAS. L. REV. 1249, 1279 (2017).

104. 52 U.S. 165 (1850).

105. *Id.* at 176.

106. *See, e.g.*, Fauntleroy v. Lum, 210 U.S. 230, 233–34 (1908) (holding that Mississippi court had to give full faith and credit to Missouri judgment); Elliott v. Lessee of Peirsol, 26 U.S. (1 Pet.) 328, 340–41 (1828) ("Where a Court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other Court.").

107. *See supra* note 101 and accompanying text.

presenting the possibility that a contract entered into in New Jersey might ultimately become subject to a suit in New York, Louisiana, or Maine. If each of those states applied their own substantive law to contract disputes, contracting parties would be unable to predict what law would ultimately govern the agreement's enforcement. The comity approach to choice of law sought to address this problem by balancing the benefits to be gained from interjurisdictional uniformity against the costs associated with requiring a jurisdiction to enforce the laws of another forum instead of its own. In this sense, choice-of-law rules deeply intertwined with the laws governing adjudicative jurisdiction. In the next subpart, we discuss those limitations on adjudicative jurisdiction in relationship to proceedings in rem, revealing how they give rise to a distinctive conflicts jurisprudence in the sphere of real property.

### *C. Property and In Rem Jurisdiction*

Although any state could assert jurisdiction over a defendant once that person entered into the state's territorial boundaries, personal jurisdiction over the defendant was neither sufficient nor necessary to adjudicate every dispute. As it does today, the law in the nineteenth century differentiated between suits implicating in personam rights and those implicating in rem rights; and while the former could be brought in any jurisdiction in which the defendant could be served process, the latter could only be adjudicated in the state in which the property was located. For real property, which could not be moved, this meant that only one jurisdiction would ever be the locus of adjudication, thus eliminating the uncertainty that comity sought to resolve. This subpart sets out the basics of in rem jurisdiction and explains how it alters the role of choice-of-law rules and ultimately explains the much-denigrated situs rule.

*1. The Basics of In Rem Jurisdiction.*—Broadly speaking, a proceeding in rem is one having at issue the rights and obligations surrounding a "thing," that is, some property.[108] As the Supreme Court discussed in *Rose v. Himely*,[109] the law of nations requires that in order for a sovereign to exercise jurisdiction in rem, the property against which the suit is instituted must be located within its territorial jurisdiction.[110] While that would seem to encompass both real and personal property, a fiction prevailed such that personal property was considered to be in whatever jurisdiction its owner

108. *See* Rose v. Himely, 8 U.S. (4 Cranch) 241, 250–51 (1808) (describing the requirements for in rem jurisdiction).

109. *Id.*

110. *Id.*

was, as well as within the jurisdiction it was physically located.[111] For this reason, the distinctive jurisdictional requirements associated with in rem proceedings were generally limited to real property. Real estate, or "immovable property," was thus only subject to the adjudicative jurisdiction of the state in which it was located. This requirement applied broadly, including within its scope claims involving "trespasses and injuries to real property," testamentary issues, and conveyance, among other things.[112]

These distinctive features of in rem jurisdiction carry over to the law governing the recognition of sister-state judgments under the Full Faith and Credit Clause, which remains largely the same today as it stood in the nineteenth century. As with in personam judgments, a sister-state judgment implicating real property rights and issued without proper adjudicative jurisdiction was not entitled to full faith and credit.[113] And since only the situs of the property had jurisdiction, no other state's judgment is owed such conclusive treatment. The breadth of the limitation on the exercise of in rem jurisdiction was—and still is—wider than might be expected at first glance. Even if jurisdiction is obtained so as to affect the party's right in personam, the Constitution does not demand that full faith and credit be given to the court's judgment or decree as it relates to property. For example, the decree of a divorce or probate court is not entitled to full faith and credit insofar as it directs the disposition of property in another state.[114] The persistence of these jurisdictional limitations contrasts with those applicable to personal

111. STORY, *supra* note 64, § 380. If, however, the defendant never appeared, the proceeding was considered in rem and thus not binding on the party in personam. *Id.* § 549. This meant that the judgment could not be enforced outside the state in order to seize any property of the defendant's other than that which was the subject of the in rem adjudication. This provided a protection against states that attempted to assert jurisdiction over defendants merely on the basis of a trivial item, such as their "cane, or a hat." *Id.*; *see also* Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 318 (1870) (holding that a judgment based on attachment of property is "a proceeding in rem" and "has no effect beyond the property attached in that suit") (emphasis omitted); Phelps v. Holker, 1 U.S. (1 Dall.) 261, 264 (Pa. 1788) (analyzing enforceability of foreign judgement obtained through in rem proceeding, where jurisdiction was based on physical location of the personal property).

112. STORY, *supra* note 64, §§ 543, 554–55.

113. *See* Robertson v. Pickrell, 109 U.S. 608, 611 (1883) (discussing nineteenth century cases).

114. *See* Fall v. Eastin, 215 U.S. 1, 14 (1909) (holding deed to land in Nebraska, executed pursuant to Washington divorce decree, was not effective under law of Nebraska); French v. Hay, 89 U.S. (22 Wall.) 250, 252–53 (1874) (holding that court with in personam jurisdiction "had power to require the defendant . . . to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory"); Watts v. Waddle, 31 U.S. (6 Pet.) 389, 400 (1832) ("A decree cannot operate beyond the state in which the jurisdiction is exercised. It is not in the power of one state to prescribe the mode by which real property shall be conveyed in another.").

property, which have—like the rule governing in personam jurisdiction—been subsumed by the flexible "minimum contacts" requirement.[115]

*2. The Situs Rule and Uniformity.*—In the early Republic (as is the case now), these rules governing adjudicative jurisdiction created a very different landscape for suits involving real property rights, as opposed to rights that could be adjudicated in personam. For any given piece of real property, there was functionally only one state that could serve as the forum—the situs state.[116] And in those rare instances in which another state did adjudicate a claim touching upon the rights associated with foreign real property, the situs state retained the final say as to whether that out-of-state judgment or decree would be enforced.[117] This difference in jurisdictional rules significantly impacted the role of comity in connection to the adjudication of property rights.

As discussed, Justice Story described the reasoning underlying the adoption of choice-of-law rules as reflecting a balancing between the costs associated with disuniformity and the costs of requiring a court to apply the law of another jurisdiction.[118] In the case of real property rights, the costs of disuniformity are largely already eliminated through the jurisdictional rules, meaning there was no cost to applying forum law—which was also situs law—to the full spectrum of legal issues implicating real property. Story offers this explanation explicitly in discussing why American courts have rejected the seemingly reasonable position that courts should defer to the law

115. Shaffer v. Heitner, 433 U.S. 186, 228 (1977). That does not mean, however, that a sister-state's decree regarding land would not be recognized by the state of the property's situs. Courts retained the ability to recognize such decrees as enforceable as a matter of comity; however, this was reserved for instances in which the foreign jurisdiction adjudicated the claim in a manner consistent with the situs state's policy. *See* Marshall G. Martin, Note, *Enforcement of Foreign Equitable Land Decrees: Comity vs. Full Faith and Credit*, 16 SW. L.J. 516, 519 (1962) ("The theory that the enforcement of foreign equitable land decrees must depend on whether there are conflicts in public policy . . . was not based on the obligation of the full faith and credit clause but rather upon principles analogous to the theory of comity.").

116. *See, e.g.*, *Robertson*, 109 U.S. at 612 ("[T]he probate of a will of real property in one State is of no force in establishing the validity of the will in another State."); *Watts*, 31 U.S. at 400 ("It is not in the power of one state to prescribe the mode by which real property shall be conveyed in another"); Kerr v. Moon, 22 U.S. (9 Wheat.) 565, 570 (1824) ("It is an unquestionable principle of general law, that the title to, and the disposition of real property, must be exclusively subject to the laws of the country where it is situated.").

117. *See, e.g.*, Phelps v. Holker, 1 U.S. (1 Dall.) 261, 264 (Pa. 1788) (refusing to consider judgment of a Massachusetts court "conclusive evidence," and effectively granting situs state Pennsylvania final authority); Carpenter v. Strange, 141 U.S. 87, 106 (1891) (holding "the courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee, exclusively subject to its laws and the jurisdiction of its courts"); Gilliland v. Inabnit, 60 N.W. 211, 212–13 (Iowa 1894) (holding that because action was in personam rather than in rem, Kentucky court had jurisdiction over conveyance of land in Iowa even though "the land may not be situated in such state").

118. *See supra* notes 84–87 and accompanying text.

of the place where it was made in judging the enforceability of wills disposing of real property. Those who argue for this position, Story states, "have overlooked . . . the inconvenience of any nation suffering property, locally and permanently situate[d] within its own territory, to be subject to be transferred by any other laws than its own; and thus introducing into the bosom of its own jurisprudence all the innumerable diversities of foreign laws . . . ."[119] With no uniformity benefit to be gained by deferring to another state's law, the forum/situs state's interest in avoiding the complication of applying foreign law prevails.

The situs rule, with its breadth and hard-edges, thus emerges as a straightforward product of Story's comity calculus. This contrasts pointedly with other substantive areas of the law, where—as previously discussed—comity could motivate that there *should* be uniform rules but not *what* precisely those rules should be.[120] The difference is due not to some "taboo" in how states relate to land but rather because of the distinctive rules governing adjudicative jurisdiction—rules that persist today. Thus, so long as we accept that courts, as Justice Story describes, are interested primarily in both the convenience of applying their own respective state's law and achieving uniformity in the resolution of particular cases, [121] the situs rule remains the single most rational choice.

## III. Foundational Lessons of the Common Law Approach

Historical narratives have a way of capturing the imagination in a manner mere theorization cannot. The story of the conflicts revolution's triumph over Beale is more human and thus more engaging than any analysis of the relative merits of vested rights and interest analysis. For this reason, it is of little surprise that writing on choice of law—a field that strikes judges and lawyers alike as particularly foreign and obtuse—has so frequently utilized the modernists' origin story as a point of entry into exploring the subject's deeper foundations. That is not necessarily a bad thing. Narrative is unquestionably an effective way of illuminating the central debates underlying the field as well as the key terms and conceptual tools utilized by those operating within it.

But such narratives also have their limits. Boiling down centuries of debate into an easily digested story is, by its nature, a reductive process. And, as a result, it will necessarily result in the loss of subtlety and detail. But sometimes, it does more than that—it occludes entire themes. That, we argue, is what has happened in choice of law. The standard narrative, focused as it is on the realist reorientation wrought by the twentieth-century revolution,

119. STORY, *supra* note 64, § 440.

120. *See supra* subpart II(A).

121. *See supra* note 76 and accompanying text.

has left out Justice Story's common law model of choice of law and its lasting impact. By restoring this model's place in the story of choice of law, we seek to rectify this error. Having offered this restorative perspective, in this Part we explore the manner in which an understanding of a common law model can open up new paths towards understanding and, ultimately, reforming choice of law—using the situs rule as a uniquely situated window into those insights.

### *A. System Values, Not Interests*

The standard narrative has given rise to a dipolar conception of choice of law in the United States. On one end is Bealean "territorialism," characterized by formalism and a full-throated commitment to system values, that is, such principles as uniformity, predictability, and the facilitation of interstate relations.[122] Criticism of territorialism, as previously noted, has been focused on its reduction of choice of law to an exercise in deduction from first principles regarding the basic nature of legal rights.[123] On the other end is post-revolution "modernism," a school of thought most closely associated with Brainerd Currie and interest analysis.[124] The heart of interest analysis is the idea that one ought to resolve choice-of-law disputes by attending to the purposes of the implicated statutes. Courts, Currie argued, should apply their own state's law whenever doing so would serve that state's "interest" by forwarding the underlying, substantive purpose of the statute in question.[125] Emphasizing the facilitation of states' substantive ends, Currie rejected system values. In his view, courts were engaged in inappropriate judicial activism—making "political" rather than legal decisions—when they put Bealean uniformity before the substantive ends of the state.[126]

As we have argued elsewhere, framing choice-of-law theory in this way—with territorialism and modernism offered as two opposites—has resulted in the bundling of certain concepts, namely formalism, judicial activism, and system values.[127] There is nothing logically necessary about

122. *See, e.g.*, David L. Noll, *The New Conflicts Law*, 2 STAN. J. COMPLEX LIT. 41, 86 (2014) (stating that, under the traditional approach, "the law in conflict situations seeks to promote system values such as the protection of parties' 'justified expectations'").

123. *See supra* notes 1–2 and accompanying text.

124. Roosevelt, *supra* note 1, at 2461, 2466 ("Interest analysis is the leading scholarly position, and the only doctrine that could plausibly claim to have generated a school of adherents.").

125. *See* BRAINERD CURRIE, NOTES ON METHODS AND OBJECTIVES IN THE CONFLICT OF LAW (1959), *reprinted in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 177, 186–87 (1963) (offering an example of how "determination of what state policy is and where state interests lie" is made under interest analysis).

126. Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 77 (1958).

127. Lea Brilmayer & Daniel B. Listwa, *A Common Law of Choice of Law*, 89 FORDHAM L. REV. 889, 901 (2020).

this conceptual bundling, but—due to the historically contingent fact that Bealean theory is associated with all three—they have become closely bound together in the American choice-of-law tradition. This bundling of ideas has had a lasting effect on how courts and lawyers approach choice of law. The modernists rightly attacked the formalistic commitments of Beale's approach and did a service to the field of choice of law by introducing a more realist perspective to understanding interstate issues and deconstructing the constraints imposed by the vested rights theory. But the modernist critiques were far from targeted—and in tying an anchor to formalism, they sunk regard for system values and common law decision-making (or judicial activism, as the modernists would understand it) in the process.

In this context, the value of restoring Justice Story's model to the choice-of-law narrative comes into focus. Story conceived of choice of law not as a formalistic enterprise dominated by first principles but rather as one guided by principles of "mutual interest and utility."[128] To an extent, Story's approach bears an important philosophical kinship with interest analysis. Like interest analysis, this comity-centric approach is concerned, at least in part, with forwarding the ends of each particular state acting in its individual capacity. Its driving concern (though not its *only* concern) is the consequentialist commitment to policy that is good for the functioning of the state—and particularly its economy. Justice Story was acutely aware of the disruptions interstate disputes posed in light of the background jurisdictional principles to the functioning of a state's economy and thus the importance of generating a system of choice of law that would bring predictability and simplicity. Thus, Story's approach takes a broader view of the ends to which the state (specifically, the forum state) is interested—including both its substantive policies and system values—while remaining consistent with a functionalist point of view. It thus provides a means of breaking apart the historical association between formalism and system values by showing a different model—a third way—for resolving choice-of-law disputes.

One might respond that this contrast mischaracterizes interest analysis by supposing that its adherents merely close their eyes to the fact that states might want to forward system values even above substantive ends in certain cases. Currie argued not that states were indifferent to system values but rather that any act of weighing different legitimate interests would be for a court to assume inappropriately a "political function of a very high order,"[129] and was thus off limits. In other words, Currie thought it inconsistent with the proper role of the courts to be making the trade-off between internal policy and system values.

128. STORY, *supra* note 64, § 35.

129. CURRIE, *supra* note 125, at 182.

But Justice Story's common law approach provides a ready answer to that objection. Story too believed that courts should not be engaged in particularized, case-specific acts of balancing internal policy and system values—he pointedly rejected "comity of the courts."[130] Rather, Story thought the courts should adhere to the choice-of-law rules that governed as a matter of local law.[131] However, in a common law jurisdiction, the courts are a major source of that law. Why should it be any less of an appropriate "political function" for a court to adopt choice-of-law rules sensitive to system values than it is for a court to adopt some particular rule of contract law? If courts can engage in the policy-making inherent in other common law subjects, why can't they do so in connection to choice of law? It is not clear—at least to us—that the modernists have offered any convincing answer to this question.

### *B. The Persistent Situs Rule*

Subsequent generations of modernists have softened Currie's rejection of uniformity and other system values as relevant or appropriate considerations within the context of choice of law—sometimes allowing such factors to serve as "tiebreakers" when more than one state is deemed interested. But the emphasis on narrowly understood "interests" remains. In the last few decades, many scholars have specifically drawn from Currie's analytical framework in criticizing the situs rule for real property conflicts, arguing that the situs/forum state has "no legitimate interest" in, for example, applying its own law to determine the proper division of marital property for a couple domiciled in another state.[132] Such cases present, in the parlance of interest analysis, a "false conflict,"[133] since only one state—the non-forum jurisdiction—is interested, thus making application of the law of the sister state the only appropriate outcome.

Claims that the situs/forum state has *no interest* in a dispute are almost always an exaggeration. Usually, what is really meant is that whatever interest the state has is, in the eyes of scholars, outweighed (perhaps to an inordinate degree) by the sister state's supposed other interest. Modernists contend that in other contexts, in which interest analysis has alerted courts to such stark imbalances, the law has moved—shifting to more reasonable approaches. But not in connection to real property disputes. There the situs rule persists against all odds, leaving only the land taboo as the apparent culprit. This is the view, as discussed above, endorsed by the draft

130. STORY, *supra* note 64, § 38.

131. *Id.*

132. Singer, *supra* note 39, at 135–36.

133. *See, e.g.*, BRAINERD CURRIE, CONFLICT, CRISIS AND CONFUSION IN NEW YORK (1963), *reprinted in* SELECTED ESSAYS ON THE CONFLICT OF LAWS, *supra* note 125, at 690, 712 n.71 (citing examples of false conflicts).

*Restatement (Third)* in the section justifying its recommendations that courts narrow the situs rule.[134]

But the historical model drawn from Justice Story supplies an alternative justification. Under Story's comity calculus, courts do not defer to other states' laws out of recognition of their deeper interests in a particular dispute but rather as part of a balancing act intended to achieve the benefits of interstate uniformity and predictability without undermining the forum/situs state's internal policy.[135] As already described, in case of real property disputes—because of the special jurisdictional rules that apply—the result of this comity calculus is clear and singular: apply the law of the situs/forum. Thus, by positing a different understanding of what states seek to achieve when addressing choice-of-law questions, Story's common law model is able to render explicable what the modernists could only describe as essentially a psychological artifact.

Moreover, Story's approach also suggests why the situs rule has proven less prone to change than other rules. As explained previously, for most substantive areas of law, Story's comity calculus suggests that equilibrium exists when states adhere to *some* sufficiently uniform rule—since at that point, the benefits accruing to system values counterbalance the costs of applying a foreign jurisdiction's law. But no particular rule is picked out in this manner: in the abstract, either "the law of the place of the accident" or "the law of state with the most significant relationship" could serve as the consensus rule for torts, for example, with both requiring deferral to foreign law in some cases. In this manner, the comity calculus is not inconsistent with a shift from one rule to another—guided, perhaps, by changing views of "second-order values." In contrast, the comity calculus picks out the situs rule in particular, as it is the only rule that allows for uniformity without requiring any court to apply foreign law. Changes in second-order values—à la the conflicts revolution—would then leave the situs rule untouched. Thus, the comity approach provides an explanation for the situs rule's unusual staying power.

In light of this explanatory fit, the situs rule's persistence provides support—albeit indirect—for the proposition that courts today, like those of the nineteenth century, attend very seriously to the concerns motivating the comity calculus—that is, system values and a respect for forum law. Both of these factors are integrated into the *Restatement (Second)*'s "significant relationship" test, while, in contrast, Currie's interest analysis rejects system

134. RESTATEMENT (THIRD) OF CONFLICT OF LAWS ch. 7, intro. note (AM. L. INST., Preliminary Draft No. 5, 2019).

135. *See supra* subpart II(A).

values.[136] And notably, while only a small minority of American states have endorsed interest analysis, the *Restatement (Second)*'s approach has gained wide popularity.[137] Thus, the explanatory fit of the comity calculus together with the popularity of the *Restatement (Second)* provides strong support for the notion that states do care deeply about system values in how they confront choice-of-law problems. In this manner, restoring Justice Story's model to the choice-of-law narrative offers a new window into the foundational values actually shaping states' approaches to conflict-of-law disputes.

### *C. Value Pluralism and Coordination Problems*

Of course, that does not mean that courts care about system values to the exclusion of deference to other state's interests. While Currie attempted to eliminate courts' political discretion in choice-of-law contexts by restricting the relevant considerations to a prescribed set of interests, an approach that understands a court's authority to resolve choice-of-law questions as just another arm of its common law authority would find no issue in a court exercising discretion in making what are effectively policy decisions.[138] Thus a common law model recognizes that courts may weigh multiple, potentially competing factors in order to reach a decision as to what rule should apply. This makes space for a pluralistic approach to choice of law, allowing concerns such as legitimacy and fairness to be considered alongside system values, forum-state convenience, and deference to the interests of other states. Indeed, Justice Story seemed to account for this, often referencing concepts like "moral necessity" and "justice" alongside "mutual interest," "utility," and convenience.[139]

In the previous subpart, concerns outside of system values and respect for forum law were postulated as second-order values. Although this could be interpreted to mean that these values are secondary in a lexicographic sense—only serving as "tiebreakers"—that is not a necessary conclusion. Rather, it is probably more accurate (and conceptually defensible) to understand these other factors as simply given insufficient weight in the comity calculus, as a factual matter, to overcome the perceived benefits of the situs rule. Conceiving of the "secondary" factors in this way nuances the

136. *Compare* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (AM. L. INST. 1971) (applying the significant relationship test to issues in tort and outlining contacts to be taken into account to determine applicable law), *with* CURRIE, *supra* note 125 (explaining how "determination of what state policy is and where state interests lie" is to be made under interest analysis).

137. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2018: Thirty-Second Annual Survey*, 67 AM. J. COMP. L. 1, 35–36 (2019).

138. Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 77 (1958).

139. *E.g.*, STORY, *supra* note 64, § 35.

analysis of the persistence of the situs rule, helping to explain why the rule has been resistant to change but also how reform can be achieved.

Consider first the fact that sometimes these different factors will point in opposing directions. This may be particularly true of uniformity as compared to other factors, holding what other states do as a constant. For example, imagine every state other than Georgia looks to the defendant's domicile to determine whether she has an affirmative defense based on a guest statute, but the Georgia Supreme Court—presented with a case of first impression—thinks it would better align with Georgia's policies and approach to justice to look to the place of injury. Nevertheless, the court may still justifiably adopt the domiciliary rule so as to achieve the benefits associated with uniformity. As this hypothetical suggests, because one state cannot dictate the rule to be followed by the other states, it may well decide to adopt a choice-of-law rule that is not its "ideal."

The problem becomes more complicated when we cease to hold the actions of the other states constant. Consider the "stag hunt" described by philosopher Jean-Jacques Rousseau and now a staple in game-theoretic discussions of international politics.[140] This is a scenario that has two equilibria—{stag, stag} or {hare, hare}—but one of the equilibrium—{stag, stag}—is a better outcome than the other. The better equilibrium is also the riskier of the two, as it requires that each hunter risks coming home empty-handed. As a result, when faced with a "stag hunt" type situation, strategic actors will often settle into the less risky but otherwise inferior equilibrium—a fate that can only be circumvented when each actor is able to credibly assure the other of how it will act in the future, such as through entering into an express compact.[141] In situations akin to the stag hunt, it can be difficult to move from one equilibrium to the other. As a result, the strategic actors might find themselves stuck in a less-than-ideal situation.

That may be what has happened with real property conflicts. Although Story likely believed the situs rule to be most appropriate, states today may prefer a narrower version of the situs rule in which the situs/forum defers with greater frequency to the non-situs state (perhaps on the basis that such a result would give rise to fairer or more just results in particular cases); but if a state alters its rules unilaterally, it risks undermining interstate uniformity. Consensus choice-of-law rules, in other words, are sticky. And this is

140. *E.g.*, Richard Jordan, *Lessons from Game Theory About Humanizing Next-Generation Weapons*, 2020 PENN ST. J.L. & INT'L AFF. 1, 15–16, 15 n.46 (2020). The scenario imagines two hunters who can each individually choose to hunt a stag or hunt a hare. Each must choose without knowing the choice of the other but prefers sharing the stag to enjoying the hare alone. If an individual hunter chooses to hunt the stag, she will go home empty-handed unless the other hunter makes the same choice; however, each individual can capture a hare on her own. *Id.* at 15–16.

141. *See* Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 811 (2004) (stating that "external interventions such as treaties and bilateral agreements can provide the necessary push to secure" mutually beneficial outcomes).

particularly true when—as is the case with the situs rule—any unilateral deviation requires subrogating the forum state's law to that of the foreign sovereign. Thus, it may well be that the critics of the situs rule are correct in their calls for reforming real property conflicts—but it also means that their reform proposals are incomplete. It is not enough to assert—as some are wont to do—that system values "do not outweigh the more important concerns of fairness, due process, and protection of a state's fundamental policies."[142] Rather, a proposal for narrowing the situs rule—or, for that matter, calling for any conflicts reform—ought to take seriously the fact that system values matter in the choice-of-law context and present unique challenges in light of the difficulty of interstate coordination.

This includes the forthcoming *Restatement (Third)*. The latest draft of the new Restatement fully endorses interest analysis, brushing off its non-adoption by the courts as being more apparent than real.[143] From that perspective, it encourages certain reforms, including—as already noted—to the situs rule. But if the account provided by this Essay is true, the resistance of many states to the rhetoric of state interests in fact reflects a deeper disagreement between the courts and the academy on the proper role of system values in choice of law and speaks to the importance of addressing those values in the context of any reform. But this need not be an impediment to the project of the *Restatement (Third)*—indeed, the nature of a Restatement makes it particularly well-suited to facilitate coordinated reformation.

Story understood that it would be mutually beneficial if the several states voluntarily adopted uniform choice-of-law rules as a matter of comity. But in order to achieve that goal, some particular set of choice-of-law rules must be identified as those around which some consensus can form. While Justice Story's treatise on conflict of laws, in addition to many of his widely circulated judicial opinions, could serve that purpose during the time of the early Republic, in the current era, that role is appropriately filled by the Restatements. Therefore, the *Restatement (Third)* can be understood as forwarding system values in choice of law by serving as a focal point around which the states can coordinate their exercise of comity.[144] Moreover, the rules selected by the *Restatement (Third)* need not be offered as arbitrary selections among a menu of equally plausible options. Story, as previously noted, explicitly appealed to deontological concepts such as justice in justifying his favored rules.[145] Justice, fairness, and rights are notions that

142. Alden, *supra* note 40, at 597–98.

143. *See* Brilmayer & Listwa, *supra* note 59, at 267 (criticizing the *Restatement (Third*) draft as consisting of "changes and continuities" that "are not compatible").

144. *See* Brilmayer & Listwa, *supra* note 127, at 923–28 (arguing that the drafters of the new Restatement should endorse the "common law of choice of law" framework to forward system values).

145. *See supra* note 139 and accompanying text.

cross state boundaries and can be appealed to as Nozickian "side constraints" that narrow the set of appropriate rules or, alternatively, provide additional reasons for preferring one rule over another.[146] In this way, talk of rights can be integrated into a pluralistic and functionalist perspective in a synergistic, rather than antagonistic, manner.

Moreover, attention to the above account of the persistence of the situs rule provides concrete recommendations for the degree to which the rule ought to be narrowed. As previously noted, the *Restatement (Third)* recommends doing away altogether with renvoi for real property disputes.[147] In other words, the draft Restatement directs courts to apply their own choice-of-law rules to disputes involving real property, even if the property in question is located in a different jurisdiction. If some states move away from the traditional scope of the situs rule, with some, for example, following the *Restatement (Third)*'s narrower version of the rule, this risks rendering the same property subject to different rules depending on where litigation is brought. Recall that under the reasoning of the "stag hunt," it is this particular concern that makes inferior rules "sticky": a state may prefer to defer to another state's law but will not do so out of concern that it will introduce inconsistency.

A better approach would be to recommend the retention of renvoi—that would assure states that even as other jurisdictions narrow the situs rule, they will still defer fully to the choice-of-law rules of the property's situs jurisdiction; this in turn would lower the barriers associated with introducing these reforms. Although revising the current proposed *Restatement (Third)* to retain renvoi would seem to be a step backwards from its goal of modernizing American choice of law, the account of the situs rule and the game-theoretic reasons for its continued use suggest that its retention would—perhaps counter-intuitively—help usher in such reforms.

## Conclusion

At this point, a fuller picture of what is offered by reintroducing Justice Story's common law model into the choice-of-law narrative comes into view. Story's approach provides not only a means of decoupling system values from the Bealean formalism with which they have long been associated, but also a model of how one seeking to bring about reform should talk about the foundations of choice of law—not as a system defined by any one concept (be it vested rights, government interests, or something else entirely), but

146. *See generally* Eric Mack, *Robert Nozick's Political Philosophy*, STAN. ENCYCLOPEDIA PHIL. (June 15, 2018), https://plato.stanford.edu/entries/nozick-political/ [https://perma.cc/CTL7-EKNP] (discussing Nozick's theory of rights as side constraints).

147. RESTATEMENT (THIRD) OF CONFLICT OF LAWS ch. 7, intro. note (AM. L. INST., Preliminary Draft No. 5, 2019).

rather as a complex and pluralistic work of coordination. While Story's *Commentaries* was certainly far from perfect, it embraced these foundations.

Moreover, given the importance of system values revealed by the retention of the situs rule for real conflicts, conflicts scholars today ought to rethink the embrace of interest analysis and other choice-of-law theories which place uniformity, predictability, and simplicity as only second-order desiderata. Courts give pride of place to these values and, as such, scholars should attend to them more earnestly. This is a lesson that ought, in particular, to be heeded by the current drafters of the *Restatement (Third)* as well as anyone seeking to rethink this field. If any new theory—whether in a Restatement or otherwise—is to be successful in bringing greater order and simplicity to a field long mired in complexity, it ought to heed the lessons of history and place common law and comity as its central theoretical tenets.