Book Review. After the Revolution

Gene R. Shreve

Indiana University Maurer School of Law, shreve@indiana.edu

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub

Part of the Comparative and Foreign Law Commons, and the Conflict of Laws Commons

Recommended Citation
http://www.repository.law.indiana.edu/facpub/479
Book Reviews


Reviewed by Gene Shreve*

After the Revolution

Dean Symeonides has produced a splendid book on conflict of laws, one that I doubt anyone else could have written. He prepared The American Choice-of-Law Revolution in the Courts: Today and Tomorrow (hereinafter “Choice-of-Law Revolution”) in conjunction with his recent lectures at the Hague Academy of International Law. He means by the term “revolution” the “intellectual movement that challenged and eventually demolished the foundations of the established American system of conflicts law” (p. 25). Symeonides “chronicles this revolution, but also looks to the future and explores the question of what is, or should be, the next phase in the development of American conflicts law.” Id. The book is lucid, cogent and stimulating. Among its attributes, Choice-of-Law Revolution provides a path out of the labyrinth of contemporary conflicts law and theory.¹

Readers in the conflicts field are already familiar with Symeonides’s work. He has written over a dozen books and numerous articles on the subject over the past twenty-five years. We have come to depend upon his annual survey of developments appearing in this

---

* Richard S. Melvin Professor of Law, Indiana University, Bloomington. A.B., University of Oklahoma, 1965; LL.B., Harvard Law School, 1968; LL.M., Harvard Law School, 1975. The author wishes to thank Hannah Buxbaum for her helpful comments on the manuscript.

journal,² his path-breaking work on choice-of-law codification,³ and his penetrating critiques of conflicts law and theory.⁴ Choice-of-Law Revolution consists of ten chapters, including [the] introduction. Chapter II discusses the traditional American choice-of-law system and the academic dissent it generated—the "scholastic revolution." Chapter III chronicles the judicial manifestation of the same phenomenon—the "judicial revolution"—and the eventual abandonment of the traditional system. Chapter IV surveys and charts the methodological landscape as it exists in the various states and jurisdictions of the United States at the beginning of the twenty-first century.

Chapter V explores the distinction between tort rules that primarily regulate conduct (conduct-regulating rules) and rules that primarily allocate or distribute the losses caused by tortious conduct (loss-distributing rules). Chapter VI discusses loss-distribution conflicts, Chapter VII discusses conduct-regulating conflicts, and Chapter VII discusses products-liability conflicts. Finally, Chapters IX and X gauge the current position of American conflicts law with regard to six basic methodological and philosophical benchmarks, and then explore the question of what should be the next step in the evolution of American conflicts law. The thesis posited here is the next step should include the development of new "smart" choice-of-law rules based on the lessons of the American conflicts experience. Chapter X concludes by describing the essential and desired features of these rules (p. 26).

The author explains why conflicts issues are so numerous in American courts, and why "there is no single American conflicts law" (p. 27). Under our strongly federal system of government, states (rather than the nation government) create most of the substantive law governing civil actions in state or lower federal courts. Moreover, while Congress or the Supreme Court has power under the Constitution to reduce conflicts law to federal law, little of that power has been used. The consequences of this situation are twofold. First, conflicts choices for American courts are usually intranational (between local state law and that of another state). Second, choice is essentially self-regulated (largely through common law of the forum state). These realizations are necessary for any understanding of the shape and content of American conflicts law. Moreover, they are cru-

cial to comprehension of the subject by foreign observers. The latter are usually from unitary legal systems where regional subdivisions lack the authority to make local substantive law (obviating the possibility of conflicts). Foreign observers, who are usually accustomed to finding conflicts law in codes, also need special help in understanding that most of our conflicts law is common law and why.

Symeonides explains these matters early and well. I only wish he had not perpetuated the exasperating distinction between vertical and horizontal conflicts in American cases. "Vertical conflicts", he writes, "are those that occur between federal law and state law." In contrast, "[h]orizontal conflicts are those that occur between or among the laws of the states of the United States (interstate conflicts) or between the laws of these states and the laws of foreign countries (international conflicts)" (p. 27). Despite the impeccable provenance of this distinction, it has always been confusing because vertical conflicts (between state and federal law) are not conflicts at all. Everyone understands that valid and applicable federal law always wins. The supremacy clause makes this result automatic and instantaneous. Federal law is the only valid choice.

So-called vertical conflicts may be difficult because of issues of federal law interpretation or (less frequently) validity. But this has nothing to do with real conflict-of-laws analysis. The latter assumes the plausibility of applying either of two conflicting rules of law. In the choice-of-law setting, each of the rules vying for application enjoys a pedigree of validity in the place from which it is taken. The laws in that sense are equally correct in their conflicting applications. The law not chosen is not invalidated by the conflicts decision. It is merely passed over.

Symeonides describes at length the conflicts revolution in the legal academy and in the courts. He is warranted in making this phenomenon the centerpiece of his book, for it was the last decisive and intelligible development in the history of American conflicts theory. It was in short the collapse of the lex loci approach, particularly lex loci delicti for torts conflicts.

Lex loci was a strong statement of multilateralism—that is, a body of rules designed to be administered throughout a community of jurisdictions. The object was to secure the same choice-of-law result for a particular kind of case, wherever that case might be tried. Strong in the nineteenth century, the approach peaked with the

---

6. United States Constitution, Article VI.
7. Symeonides makes the book’s emphasis on torts cases clear from the beginning, correctly observing that “tort conflicts are not only the most challenging, but also the most numerous of conflicts cases” (p. 26). He adds:
   The reason for this concentration is that tort conflicts make up the main area of the conflicts revolution and have been the focus of, and catalyst for, a fundamental reorientation of choice-of-law thinking in the United States. Thus, tort conflicts are an excellent vehicle for re-examining the methodological and philosophical foundations of American choice of law in general. Id.
adoption in 1934 of the American Law Institute’s original Restatement of the Law of Conflicts.  
Even before adoption of the original Restatement, academics had begun to question both the theoretical underpinnings of lex loci and its reliability in operation. Judicial rejections of the original Restatement began later and were spreading by 1971, when the ALI backed away from lex loci through publication of the Restatement (Second) of Conflicts. “By the beginning of the twenty-first century, there is little doubt that the old order has collapsed. In this sense, the revolution that began in the 1960’s has prevailed” (p. 89).

The author reports that no consensus about what conflicts law is or should be has emerged from the revolution. We have instead a series of methodologies, or approaches, vying for acceptance by commentators and courts. Symeonides provides concise and helpful descriptions of contending approaches including Currie’s Governmental Interest Analysis, Baxter’s Comparative Impairment, Leflar’s Choice-Influencing Considerations, and the ALI’s Restatement (Second) of Conflicts (pp. 38-63).

Symeonides reaches the correct conclusion in evaluating the role of the conflicts academy in the last quarter of the twentieth century, although he may be too polite. He writes that “four decades after the revolution began, it is high time to see how it should end. It is time to develop an exit strategy that consolidates and preserves the gains of the revolution and turns its victory into success” (p. 419). The American conflicts movement may founder, he warns, “if the revolution drags on much longer.” Id.

That may be an understatement. Major differences among conflicts scholars (e.g., over the value of interest analysis, the role of party expectations, the propriety of the judge’s own substantive preference) became intractable years ago. In a failed attempt to make things better, some of our best conflicts scholars wrote massive articles attempting to reconceptualize the subject. These exercises in conflicts metatheory are erudite and highly ambitious. But they are also abstruse, contentious, and virtually impossible to convert into practice or to assimilate into a more catholic understanding of conflicts theory.

To be fair, each of these authors faced profound difficulties perhaps inherent in any contemporary attempt to reconceptualize American conflicts law. For as confused and controversial as conflicts law always has been, the subject became far more difficult after the collapse of lex loci. “More recently,” acknowledged one metatheorist,

8. For more on multilateralism, see the text following note 14, infra.
9. The author lists thirteen state jurisdictions whose lex loci precedents (in torts, contracts, or both) have not been overruled. P. 91. Some of these cases are old and it is unclear whether the same courts would follow them today. Id. at p. 90.
11. 1. The unpopularity of conflicts law imperiled publication of the original conflicts Restatement. An ALI insider wrote:
“choice of law has sometimes resembled the law’s psychiatric ward. It is a place of odd fixations and schizophrenic visions.” There is now in our conflicts literature such a disparate, often contradictory, accretion of policies, rules, systems, catchphrases, diagnoses, and proposed cures that it seems almost impossible for theorists now writing to demonstrate with complete success how their ideas are new, helpful, or even intelligible.

This may be why the role of conflicts scholarship in judicial opinions seems to be diminishing and why most new discussion about conflicts theory has been confined to a small, if respected, academic circle. Through the ages of Story, Beale, Currie, Baxter and Leflar, American conflicts law took much of its shape and energy from legal scholarship. Today’s metatheorists could be thought of as the Curries of our age. If they exert significantly less influence on courts than their predecessors, does that bode ill for the future? How much hope remains for clarity, coherence, and reform in conflicts theory?

If anyone can lead us out of this mess, it is Dean Symeonides. His scholarship has always been a heartening exception to the rule. More than a few of his learned colleagues may have been inclined to impenetrable analysis, harsh dismissal of opposing views and hollow claims of victory. But he has continuously demonstrated that exercise of a sharp, critical mind does not require antagonism; that one can present important and original work without condemning the work of others; that theory and critique can be both intelligible and profound; and that conflicts colleagues, the bench and the bar can be supported in their struggles with conflicts law and are worth caring about. Choice-of-Law Revolution is perhaps the most tangible evidence of that commitment.

Symeonides presents an extensive amount of case data tracking the revolution to the present time (pp. 64-153). He must have this task in mind when he writes later in the book of “the thankless job of collecting, sorting out, synthesizing, and recasting in systematic descriptive statement what courts have done” (p. 429). The principal

The law book people with whom the Institute was associated in publishing the Restatement shook their heads dolefully at the mention of a volume in the conflict of laws. They predicted that any book bearing that title would be a financial failure because of the unpopularity of the subject. Only when marked as part of a set of books, they said, would the Restatement volume in conflict of laws reach the shelves of lawyers and law libraries.


13. Continuing, he suggests that the task
means by which he sorts his cases (tort and contract) is to assign each to one of a set of methodological categories.\textsuperscript{14} For one part of his study, his categories are “Traditional, Restatement 2nd, Significant Contacts, Interest Analysis, Lex Fori, Better Law,” and “Combined Modern” (p. 71).

Some readers might question the utility of separating cases by methodology. The author does himself. He acknowledges that for some jurisdictions “precedents are equivocal, or even irreconcilable” (p. 93). Moreover, “[e]ven if the above uncertainties did not exist, one might have good reason to object to classifying states on the basis of choice-of-law methodology, because such classifications tend to inflate the importance of methodology in explaining or predicting court decisions” (p. 96). In defense, Symeonides writes:

The author’s view is that these classifications are helpful, at least as tentative indications of where a particular jurisdiction stands. The study of any plurilegal system, especially on as vast as that of the United States, would be far more difficult in not impossible, without a modicum of categorization and sorting out, of seeking and cataloguing the common denominators among the various units. Taxonomy is not an end in itself; but it is a necessary first step in any study of multiple objects. It is also a medium for seeing the forest from the trees (p. 97).

How true.

Two distinctions have become important recently in American conflicts thinking: (1) multilateralism versus unilateralism\textsuperscript{15} in choice-of-law policy; and (2) loss distribution versus conduct regulation in torts cases.\textsuperscript{16} Choice-of-Law Revolution adds significantly to the discussion of both.

Multilateralism strives for uniform results in choice of law. To the multilateralist judge, the possible sources of chosen law are sovereigns, or jurisdictions, that make up a kind of legal community. Each type of case has its own conflicts rule, administrable throughout that legal community. The lex loci delicti rule that the place of injury is helpful in at least two independent ways: (1) it helps to sharpen academic theory and ground it on reality rather than intuition. Indeed, it is one thing to propagate a theory and look for cases to support it, and another think to read all the cases and then to formulate a theory; and (2) it is a necessary prerequisite to the next step—articulating normative rules that can correct in the future what has been wrongly decided in the past. Thus, descriptive rules are a necessary foundation for prescriptive or normative rules, of one considers the latter desirable. \textit{Id.}

\textsuperscript{14} He also sorts case data by other modes, for example a jurisdictional time line for rejection of lex loci delicti (p. 65).

\textsuperscript{15} The distinction is central to the organization of two recent books. Friedrich Juenger, \textit{Choice of Law and Multistate Justice} (1993); Gene Shreve, \textit{A Conflict-of-Laws Anthology} (1997).

is the source of governing tort law would be an example. Ideally, each member of this community of jurisdictions would use the common conflicts rule, and uniform choice-of-law results would exist in fact. If so, the high-minded suppositions of interjurisdictional order and comity attending the conception of multilateralism offered by Joseph Story\textsuperscript{17} would be vindicated. To many multilateralists, however, complete or even substantial interjurisdictional cooperation in fact is unnecessary to justify their approach. They have contended that multilateralism in any event advances policies of antidiscrimination. And some like Joseph Beale used vested rights analysis to maintain that multilateralism leads to the only valid source of law.\textsuperscript{18}

Unilateralism in the United States shares with multilateralism the idea that choice of law should search for the appropriate sovereign (law source). But unilateralism displays a keen interest in the content of the laws vying for application. The unilateralist examines them to determine whether each, upon closer study, is truly applicable. A unilateralist finds a law truly applicable only if the case at hand is one of the cases that the law was designed to govern. Then the sovereign who created the law may be said, in Brainerd Currie’s words,\textsuperscript{19} to be interested in having it applied. Interest analysis is the linchpin for conflicts unilateralism in this country. Correspondingly, it is the focal point of unending debate between unilateralists and multilateralists.\textsuperscript{20}

Not only does Choice-of-Law Revolution provide a clear and thorough examination of the multilateral/unilateral distinction (pp. 357-376), but the author enriches our understanding of that distinction by demonstrating its relationship to a number of other distinctions important to conflicts discourse: territoriality versus non-territoriality (pp. 376-379); international uniformity versus ethnocentrism (pp. 379-385); jurisdiction-selection versus law-selection (pp. 385-397); conflicts justice versus material justice (pp. 397-405); legal certainty versus flexibility (pp. 405-413).

Symeonides devotes three chapters to loss-distribution and conduct-regulation policies in tort conflicts. Loss distribution policies address questions whether or to what extent plaintiff’s harm should be compensated. The author writes:

one of the common points of reference among all branches of the revolution has been the acceptance of the parties’ domicile as the focal point around which to resolve conflicts be-

\begin{enumerate}
\item[17.] Joseph Story, Commentaries on the Conflict of Laws (1834).
\item[19.] See, e.g., Brainerd Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 DUKE L. J. 171.
\end{enumerate}
between loss-distribution rules. In the span of a few years, the parties’ domicile, which was an irrelevant factor under the lex loci delicti rule, became a primary factor in loss distribution conflicts, and territoriality has been forced to make room for the principle of personality (p. 174).

Thus, where the parties are from different states, plaintiff would seek application of his home-state, pro-recovery law upon a showing that the policy behind that law was to more fully compensate citizens. But defendant would seek application his home-state, anti-recovery law upon a showing that the policy behind that law was to limit the financial responsibility of citizens for their torts.

In contrast are those substantive rules of tort law “whose primary function is to regulate conduct, even if they ultimately also have a bearing on loss distribution” (p. 239). Symeonides notes that “[u]nlike loss-distributing rules which focus both on people and on territory, conduct-regulating rules are primarily territorial.” Id. At the same time, conduct may have more than one geographical reference point. “[O]ne should be prepared to accept the premise that, when the conduct and the injury are not in the same state, both of these contacts deserve due consideration” (p. 240). More complicated, “the contacts pertinent in identifying the concerned states in punitive damages conflicts are: (a) the place of conduct; (b) the place of injury; and (c) the tortfeasor’s domicile or principal place of business” (p. 262).

The author’s searching analysis leads to the creation of five choice-of-law rules for loss-distribution cases (pp. 188, 202, 209, 219, 227), a general rule for conduct-regulation cases (p. 260), and a special conduct-regulating rule for punitive damages (p. 275). This rule-based approach is in keeping with the vision of the future he offers at the end of the book.

It is . . . time to recognize that the revolution has gone too far in embracing flexibility to the exclusion of all certainty, just as the traditional system had gone too far toward certainty to the exclusion of all flexibility.

A correction is needed, and a new equilibrium should be sought between these two perpetually competing needs.

The view of this author is that it is now necessary and possible to articulate a new breed of smart, evolutionary choice-of-law rules that will accomplish both objectives: (1) restore a proper equilibrium between certainty and flexibility; and (2) preserve the substantive and methodological accomplishments of the revolution (p. 419, emphasis in original).21

21. He adds: [T]hanks to the first Restatement, we now know what to avoid: broad, all-embracing, inflexible, monolithic rules, based on a single connecting factor chosen on metaphysical grounds. Thanks also to the conflict revolution, we also know what to aim for: narrow, flexible, content- and issue-oriented rules, based on experience, with occasional built-in escape clauses that would allow these rules to grow and to adjust to changing needs and values (p. 422).

Reviewed by Luca Enriques*

The Comparative Anatomy of Corporate Law

I. INTRODUCTION: THE FUNCTIONAL ANATOMY OF THE ANATOMY OF CORPORATE LAW

Seven leading corporate law scholars from top academic and research institutions in seven countries and three continents worked together for nine years1 to produce the first global and comprehensive comparative and functional analysis of corporate law. The authors managed to meet “half a dozen”2 times together, and many more times in smaller groups,3 to discuss their enterprise and prepare “countless”4 drafts of each chapter. Three conferences and a number of seminar presentations gave the authors feedback from other academics,5 and meanwhile the chapters “circulated around the world countless times for revisions, comments etc.”6 The recognized intellectual leader among the authors7 is Reinier Kraakman, a Harvard Law School Professor, who had already made path-breaking contributions to corporate law studies, often in partnership with one of the others, Henry Hansmann. Their team effort was organized under the stewardship of one of the most enterprising and dynamic academics in the field, Gérard Hertig.8 What all this leads to is a volume, The Anatomy of Corporate Law (hereinafter, “the book”), that is certain to

---

* This review is based on an unpublished paper prepared for the conference, “The Anatomy of Corporate Law,” held in London on June 30, 2003, and circulated under the title, “The Comparative Anatomy of Related Party Transactions Law.” I wish to thank Alain Pietrancosta, Peter Mulbert, and Robert Thompson for helpful information about French, German, and US law respectively, and Brian Cheffins, Gérard Hertig, David Skeel, and other participants at the London conference for very helpful comments on earlier drafts. Usual disclaimers apply.

1. See Reinier Kraakman, Preface to REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW v, v (2004) (hereinafter: KRAAKMAN ET AL.). The authors of the book under review are Paul Davies (London School of Economics), Henry Hansmann (now at Yale Law School), Gérard Hertig (ETH, Zurich), Klaus Hopt (Max-Planck-Institut for Foreign and Private International Law, Hamburg), Hideki Kanda (University of Tokyo), Reinier Kraakman (Harvard Law School), and Edward Rock (University of Pennsylvania).

2. E-mail from Gérard Hertig to the author (July 22, 2004) (on file with the author).

3. Id.

4. Id.

5. KRAAKMAN ET AL., supra note 1, at ix.

6. E-mail from Gérard Hertig to the author, supra note 2.

7. As shown by the fact that his name is first among the authors’ on the cover of the book and that the Preface is his.

8. Id. (reluctantly conceding what other authors had agreed upon during the London conference, i.e. that he “did play a coordination/entrepreneurial role,” while at the same time stressing that “it truly was [a team effort]”).