Choice of Law: Current Doctrine and "True Rules"

NO, MR. JUSTICE TRAYNOR, "THIS CONFLICT IS NOT REALLY NECESSARY. BUT . . . ."

Albert A. Ehrenzweig*  

IN YOUR 1959 address at the Texas Law School you asked, Mr. Justice, how it came about that "the plot got so thick when the mystery was so thin" in the mystery play we like to call "the choice of law." I have tried to tell this story elsewhere and I shall only state my conclusion again. The mystery, far from being essential to ours or anybody's law, is the by-product of two grand illusions: the internationalists' nineteenth century dream, which for a while expected to save the world by allocating political, judicial and legislative "jurisdictions" within a new world community; and the Restaters' twentieth century nightmare, which for a while pretended to solve problems of living law by what you have called a "gospel" of false concepts "with an attendant catechism of questions and answers."  

Yes, Mr. Justice, it is the job of judges and scholars "to work their way out of the wreckage of [these] meretricious theories." And in charting our course we must first know where there is "really" a conflict. You have, with Currie, duly (though no doubt with some reservation) limited our field of operations by the exclusion of cases "wherein a court refers to foreign law, not for the rule of decision, but for a datum point." And you would no doubt agree that it is high time for our courts and writers also to exclude from conflicts authorities those incredibly numerous cases in which courts have been misled by false doctrine into invoking conflicts rules without being faced with conflicting laws. But you also seem to approve of Currie's removing from the proper sphere of choice of law, as presenting

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1 Traynor, Is This Conflict Really Necessary?, 37 Texas L. Rev. 657 (1959).
4 Ibid.
5 Ibid.
6 Traynor, Is This Conflict Really Necessary?, 37 Texas L. Rev. 657, 667 (1959). Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 Duke L.J. 171, 172, concedes that "the distinction is difficult to formulate and difficult to apply." Indeed, the ghost of the "preliminary question" (Ehrenzweig, The Lex Fori—Basic Rule in the Conflict of Laws, 58 Mich. L. Rev. 637, 683–85 (1960)) is not far away.
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“false problems,” all cases except those in which the application of either forum or foreign law, while advancing the interest of the state whose law would be applied, would impair the other state’s interest in having effect given to its own policy. And it is here, Mr. Justice, that I beg leave to part with you for a little while, in the comforting knowledge that our paths will soon join again.

At the outset, we may all agree that courts, once “freed of metaphysical rules of choice of law,” which would make us believe in “governing” foreign laws, will and should do openly and consciously what they have done in fact, though covertly and subconsciously, through the centuries—they will take their own laws as the starting point for the examination of cases involving foreign facts. They will thus be able to do away with such artificial and dangerous academic tools as characterization, renvoi and public policy, which have been forced upon them by the need to avoid and evade the consequences of false dogma. For no longer will these tools need be relied upon to restore the lex fori in a situation where foreign law now is allegedly “applicable.” And courts will apply foreign laws only when prompted or at least permitted to do so by the policy underlying the “displaced” rule of the forum. But in making this decision, I submit, courts will not be concerned with the forum state’s, or any other state’s, interest in the application of its respective policies. To see in any such interest the key to the actual and desired practice of our courts would introduce, I fear, another vague concept that would encumber the interpretation of the forum’s policies and would thus become another dangerous tool in the hands of unskilled courts. Moreover, this approach fails, I believe, to recognize that however confused by bad theory and language, our courts, skilled and unskilled, have produced in their unique laboratory many a “true rule” of choice of law which relieves, and indeed prohibits, us from engaging in a search for interests. In evaluating my own view and relating it to the one which you have so forcefully expressed, Mr. Justice,


8 Traynor, Is This Conflict Really Necessary?, 37 Texas L. Rev. 657, 674 (1959).


you may find it helpful to review with me the currents and countercurrents of American and foreign doctrine today.

I

NEOREALISM AND NEOIDEALISM: JUSTICE, ADJUSTMENT AND PHILOSOPHY

It was a counsel of despair when distinguished authors, at the climax of the conceptualist era, suggested that traditional choice of law rules be completely discarded and that the choice be made in each case with a view towards doing justice between the parties. Professor Cavers, in "a familiar, if rather bald, misdescription" of his position, continues to be referred to as the protagonist of this "free law" theory. But he has restated his views to the effect that the test of justice should be applied to the question whether in the particular case "resort to the other state's law [would be] more just to the parties than [would be] resort to the forum's own law." Since Cavers, moreover, disavows an "intuitive and atomized" choice-of-law process, and thus no doubt advocates the adoption of generalized standards, his approach is at least reconcilable with the theory which will be advanced in this article.

Conscious of the unsatisfactory results often reached under the traditional rules of choice of law, but conscious also of the anarchy threatened by a regime of "justice" unguided by such rules, some writers in this country and abroad have suggested that sound results can usually be had by "adjusting" local rules to the demands of justice. Where, for example, a Massachusetts dog bites a man in New Hampshire and neither double damages under the Massachusetts law of strict liability nor denial of liability under the New Hampshire common law appears a satisfactory answer, it has been said that the court should "adjust" the two laws by giving simple damages. It would seem that this Solomonic device has little more

16 See KEGEL, INTERNATIONALES PRIVATRECHT 94–102 (1960); LEWALD, RÈGLES GÉNÉRALES DES CONFLITS DE LOIS 139–48 (1941); Cansacchi, 79 RECUEIL DES COURS 79–162 (1953).
to commend itself in the law of conflict of laws than it would have in any other field.\(^{18}\)

In the face of this despondent "neorealism" outstanding "neoidealists" have rekindled that hopeful spirit of international cooperation which characterized the publicist ideology of the last century.\(^{19}\) Thus, France's Henri Batiffol, while recognizing the primary character of the law of the forum, expects universalist progress from learned discussion and from general ideas of natural law and sociology.\(^{20}\) Hessel Yntema has applauded Batiffol's philosophy, and suggested that "long experience rationally crystallized in doctrines generally accepted in the civilized world is a valid touchstone to ascertain the law by reference to which positive legislation should be construed and supplemented."\(^{21}\) In this endeavor he concedes a decisive role to tests of "comparative justice,"\(^{22}\) which are to be derived largely from such comparative research as that initiated by Ernst Rabel. But Yntema has not failed to recognize that all these programs are "but beacons that point the way" and must be supplemented by "investigation of the typical transactions or occurrences in the course of international and interstate commerce."\(^{23}\)

II

NEOCOMITY: "GOVERNMENTAL INTERESTS"

At mid-century, American scholarship seriously began to attack the gap left by the victory of the "local law" doctrine over the superlaw of the Restaters. To be sure, long before Currie developed his own ground-breaking theory of governmental interests, it was "largely taken for axiomatic" that "choice-of-law rules should rationally advance the policies or interests of the several states."\(^{24}\) But we had gained little by this insight. In general,}


\(^{20}\) Batiffol, Aspects philosophiques du droit international privé (1956).


\(^{22}\) Id. at 735.

\(^{23}\) Id. at 742.

\(^{24}\) Hill, Governmental Interest and the Conflict of Laws—A Reply to Professor Currie, 27 U. Cin. L. Rev. 463, 481 (1960). Hill does not purport to use Currie's terminology in this statement.
both in this country\textsuperscript{25} and abroad,\textsuperscript{23} writers have been satisfied with implementing the axiom through the compilation of catalogues of such policies or interests, without denying the continued significance and at least partial workability of traditional formulas. These policies and interests, in varying priorities and combinations, are said to include "uniformity of legal consequences, minimization of conflicts of laws, predictability of legal consequences, the reasonable expectations of the parties, uniformity of social and economic consequences, validation of transactions, relative significance of contacts, recognition of the 'stronger' law, co-operation among states, respect for policies of domestic law, internal harmony of the substantive rules to be applied, location or nature of the transaction, private utility, homogeneity of national law, ultimate recourse to the lex fori, and the like."\textsuperscript{27}

These catalogues are virtually meaningless in view of their generality, comprehensiveness and inevitable inconsistency. In order to derive concrete solutions from them it would be necessary to limit their scope severely and to establish standards of relative effectiveness. Brainerd Currie has in effect done both within a new framework which so far, however, seems to be limited to interstate conflicts. He suggests that "normally, even in cases involving foreign factors, a court should as a matter of course look to the law of the forum as the source of the rule of decision," but that having ascertained the policy of that law, it should determine whether in the light of "the relationship of the forum state to the case at bar—that is, to the parties, to the transaction, to the subject matter, to the litigation . . . . the state has an interest in the application of its policy in this instance."\textsuperscript{28} Only where this is not the case, and where at the same time another state has such an interest in the application of its own policy should the forum court


apply the law of that state. Perhaps it is not without significance that Currie's concern for the other state's interest in the application of its own law, recalls the preoccupation of the statutist theory with the scope of the foreign law as determined by its creator—a theory which in varying forms and degrees prevailed through half a millennium, and found its latest expression in the "comity" to the foreign sovereign. Since Currie's suggestions have become the center of extensive controversy, and since my own approach both resembles and conflicts with Currie's in significant aspects, a brief comparative analysis of both approaches seems in order.

Like Currie, I have suggested that the law of the forum be treated as the starting point. Like Currie, I believe that we could thereby eliminate such pseudo problems as characterization, renvoi and public policy, which are now needed as correctives of overgeneralized formulas. But we seem to differ essentially as to the relative scope of the application of foreign and forum law which results from this primacy of the lex fori. I have stressed that the entire current discussion about new methods of choice of law is properly concerned only with those admittedly limited conflicts situations in which the courts have not already established rules as to the applicable law through a consistent practice (as distinguished from the much more frequent lip service paid to presumably established, but in effect unheeded pseudo-rules).

I have stressed further that for this reason the forum law's primacy is merely analytical and that through careful analysis of those situations in which foreign laws are typically applied in effect, we shall ultimately promote rather than reduce the actual application of foreign laws. In a series of articles I have attempted to isolate some of those situations in which the courts' ultimate decisions (as distinguished from their language) have produced such true rules of choice of law, and I hope to

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31 See infra text at notes 62-65.

present the over-all result of this approach in the second part of my treatise. Lacking a statement to the contrary, we must assume that Currie, on the other hand, would give effect to the primacy of the lex fori, even in disregard of such rules, whenever the forum can claim at least a competing "interest." Outside the constitutional area, I do not consider the concept of governmental "interest" as distinguished from the policy underlying a rule, as a useful tool or even a usable concept in the law of choice of law.

In the first place "conflicts law is private law ...," Any general test involving a government as such, even though only in terms, is therefore open to objection at the outset. To be sure, Currie has broadly defined governmental "policy" as including "social, economic, or administrative policy." But he has insisted on making the effectuation of this policy depend upon the existence of a much narrower governmental "interest," i.e., of a "reasonable basis for the application of the law in order to effectuate the specific policy that it embodies." Any such test of "reasonableness" would necessarily involve an observer who would look at law and policy from a higher ("governmental?") level. And this observer exists only in the exceptional case in which the government, as such, is actually interested in

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"When a state has determined upon the policy of placing upon local industry all the social costs of the enterprise, it may well decide to adhere to this policy regardless of where the harm occurs and who the victim is." Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 DUKE L.J. 171, 180 (1959). Indeed, it may. But in making this decision the court will not limit itself to, or even concern itself about, a "rational" or "irrational" interest of its government, but will ascertain the predominant purpose of the domestic rule of loss distribution, which it will probably find expressed in a line of precedents reconcilable only under a principle of reasonable insurability of the loss. See Ehrenzweig, [Enterprise Liability in the Conflict of Laws], 69 YALLE L.J. 595, 794, 978 (1960). For a thoughtful criticism see Morris, Enterprise Liability and the Actuarial Process: The Insignificance of Foresight, 70 YALY L.J. 554 (1961).
the outcome—as where the suit involves the enforcement of currency regulations or the avoidance of the public charge.\textsuperscript{88}

Second, Currie seems to consider a primacy of forum law which prevails even in the presence of another state's "interest," as the inevitable result of his proposition that the judge is functionally unequipped to engage in a process of weighing competing governmental interests, and that therefore this task must be left to Congress.\textsuperscript{89}

To be sure, the Supreme Court, although frequently using "interest" language,\textsuperscript{40} has never been able to establish and retain substantive tests and is not likely to have occasion to do so in the future.\textsuperscript{41} And this is as well. For the interests thus far "weighed" by the Court in workmen's compensation, insurance and tort cases were anything but "governmental," and any adjudication of this kind could not help but ignore many of the facts of the individual cases.

As the Court has gained a clearer appreciation of the varied nature of all these interests, so it has wisely abdicated any role which would compel it to choose which state policy is preferable when several states' policies may rationally be applied because of the reasons and interests behind policies and factors in the case local to each state.\textsuperscript{42}

But one may ask whether Congress is in a better position than a judge to make a proper decision between conflicting interests of the several states. Indeed, as stated by you, Mr. Justice, though such decisions may be

ultimately the responsibility of Congress . . . as we now finish one long servitude to categorical imperatives, we should be on guard against another . . . . Only as progressive case law accumulates can we gain the necessary perspective for determining the areas in which conflicting state interests so chronically threaten interstate harmony as to call for federal legislation.\textsuperscript{43}

Third, Currie would make application of another state's law depend on the "legitimacy" of that state's interest in such application. But does not the legitimacy test thus left for the court, involve the very process of

\textsuperscript{88}See infra note 61.


\textsuperscript{40}For detailed analysis, see Currie, \textit{The Constitution and Choice of Law: Governmental Interests and the Judicial Function}, 26 U. Chi. L. Rev. 9, 19–84 (1958).


\textsuperscript{43}Traynor, \textit{Is This Conflict Really Necessary?}, 37 Texas L. Rev. 657, 675 (1959).
Fourth, if all kinds of "governmental interests" were to be examined in determining the applicability of the law of the forum, inclusion of both short term and long range interests would at the outset compel comparison of incomparables and thus make impossible any finding of predominance, or, for Currie's purposes, exclusiveness. If, on the other hand, one were to limit these interests more narrowly to short range ones, one might "dangerously ignore certain basic interests, peculiarly important in the field of conflict of laws, such as the need for uniformity of results, for certainty and predictability of decisions, for vindication of the legitimate expectations of the parties, for promoting a general legal order, fostering amicable relations among states." Critics have pointed out that Currie has not yet come to grips with this question. Many an apparently "false" conflict may turn out to be a true one in the light of long range policies or "group interests."

Finally, judicial weighing of "interests" would become inevitable where the forum, in the absence of a legitimate interest of its state in the application of forum law, would have to choose between competing legitimate interests of two other states, a task which Currie properly considers as "impossible."

Thus, we must fear that little more has been achieved so far than to establish a frame of reference for debate on the desirability of particular solutions, and little has been gained to prevent, or at least hamper, the continuation of that harmful enterprise of the American Law Institute which insists upon forcing living law into dead letter.

III

NEONIHILISM: THE SECOND RESTATEMENT

The American Law Institute has now, at least in part, made the long overdue concession that its first attempt at restating unstatable law was


a failure in its very conception,\(^{50}\) and has jettisoned vital parts of its first Restatement without even the pretense of an intervening change in the law. Such an about face could be praised as a belated admission of error. But instead of abandoning an enterprise which has found near-unanimous rejection among scholars, caused unending confusion in the courts,\(^{61}\) and grossly misled foreign lawyers concerning its official standing,\(^{52}\) the Institute is about to replace what—*sit venia verbo*—must be called a misstatement of the law, with a "Second Restatement," which, to use Weintraub's happy phrase,\(^{53}\) should at best be called a "pre-statement." Again it seems, two generations of American scholars may have to spend the better parts of their lives in proving to the profession the futility and fatality of this effort, in the same manner as those great scholars, Cook and Lorenzen, had to spend most of their life work on the destruction of the Institute's first product.

The first Restatement led us close to disaster through an unchartered sea—not looking left or right, refusing to accept the experience of generations of pilots, and proceeding with little more to guide it than a set of magic tools. Those who advance the theory of governmental interests, impatient with such fumbling, have set out to explore the universe, "tossing overboard the... navigational aids which centuries of effort have devised."\(^{54}\) And the draftsmen of a second Restatement, weary of its outworn heritage and yet unwilling to heed either the pilots or the explorers, have dismissed the old seadog with his magic trust, and discarding faith, experience and courage, threaten to take us on a zigzag course to nowhere.

Proof of this sweeping indictment I have offered in part elsewhere.\(^{55}\) But this much is obvious even to the casual reader of the draft. Where the first Restatement, without support in cited case law, proposed such rigid

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\(^{50}\) Thus we learn that the results of Beale's "analytical jurisprudence," are "at variance with a basic statement of method given" by the Institute, according to which the compilation is to proceed "from precedent, from analogy, from legal reason, and from consideration of ethical and social needs." Restatement (Second), Conflict of Laws p. 3 (Tent. Draft No. 6, 1960).


\(^{55}\) Supra note 32.
rules as those referring to the law of the place of contracting or the place of wrong to "govern" in contract and tort cases, the second Restatement has taken refuge in such meaningless generalizations as an ubiquitous reference to the law of the "most significant relationship." That this formula is circular is immediately apparent, since the "significance" of the relationship is the very question which the conflicts rule has to answer. Though meaningless, this new formula could, nevertheless, be at least harmless were it not for the fact that its facile smoothness will no doubt seduce courts less steeped in the ways and byways of our discipline to abandon any attempt to make conscious choices based on policy and common sense, which alone can lay the groundwork for the long-needed common law of conflict of laws. The danger is greatly enhanced by the fact that the Institute has seen fit to claim support for its non-law in the citation of cases the vast majority of which are not authoritative since they lack the issue of a true conflict between different laws. Most regrettable, even the few true conflicts cases that are left among the Institute's "authorities" are not examined for their issues and actual decisions, but are relied upon for their language, which has been corrupted over the last quarter century by the very dogma the Institute is now prepared to discard. The time is ripe for a new beginning, with the old seadog's faith, the pilot's experience, and the explorer's courage, in a search for the living law as it is embodied in the actual decisions of the courts, a search for the true rules of the law of conflict of laws.

THE "TRUE RULE"

The factor which the judges have been feeling for, and responding to, in this situation, has not yet been clearly articulated in the rules in vogue. Here it is. It focusses the real issue; it lines up the facts; stating it this way helps you predict more accurately what will happen; it helps a judge see more clearly what to do, and why. It is "the true rule" of the situation.

—Llewellyn, On Reading and Using the Newer Jurisprudence.

The lex fori is now treated as an exception to a priori propositions which, far from being based on "logical" postulates or practical exigencies, are the heritage of academic aberrations in the history of conflicts law. The latest of these aberrations, in this country as well as abroad, is an internationalist or universalist ideology which has established a fictitious alloca-

66 See Restatement (Second), Conflict of Laws §§ 332, 333, 334, 334a, b, c, c, 346, 346c, d, 353, 354a, 354h (Tent. Draft No. 6, 1960). See also Reese, Contracts and the Restatement of Conflict of Laws, Second, 9 INT. & COMP. L.Q. 531 (1960).

tion of "competencies" thought to entitle the laws of the several states to ubiquitous application according to a small number of broad and vague formulas. This ideology, as suggested earlier, has forced American courts to justify, by various artificial devices, such as arbitrary localization of allegedly decisive contacts, procedural characterization, renvoi and resort to public policy, the actual application of their own law or the law intended by the parties. The current decline of this ideology will facilitate the abandonment of these academic exercises and the return to the lex fori as the basic principle, which alone can remove the prevailing uncertainty and confusion. Extension of traditional jurisdictional concepts and their concomitant limitations under a nascent doctrine of "forum conveniens" may ultimately result in a wide application of the lex fori in the "forum legis," i.e., in that court whose law may be properly applied. Choice of law would thus be limited to those areas in which the defendant would be unfairly dealt with under the law of the forum and those in which a truly governmental interest requires displacement of that law.

Some of these areas in which the law of the forum, as such, has always been and is likely to remain inapplicable have long been established—as where laws have endeavored to secure maximum certainty to the "status" "acquired" in other jurisdictions by spouses or children, to transactions concerning foreign land, or to foreign negotiable instruments. But outside these areas the courts' motivations have often been concealed in language of obsolete dogma, and courts, no longer willing to force justice into this language, will have to "determine the reach of a policy underlying local law," to find and formulate the "true rule."

I have discussed many situations of this kind elsewhere. At this point one example will suffice. Neither the lex contractus, nor the lex solutionis, nor the law of the "center of gravity," nor any other "jurisdiction-selecting" rule will tell us by what law we are to judge the defendant's objection

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60 Even now this situation is probably less frequent than is usually assumed. Kramer, Interests and Policy Clashes in Conflict of Laws, 13 Rutgers L. Rev. 523, 560 (1959).

61 For examples from the law of contracts, see Ehrenzweig, Contracts in the Conflict of Laws, 59 Colum. L. Rev. 973, 1021-24 (1959).


63 Supra note 32.

that his promise was invalid as violating the statute of frauds. And little will be gained by attempting to ascertain the governmental interests of the states of contract, performance, domicile, or forum. For there usually are no such interests discernible, and if there are they are just one of the factors which determine the purpose of the rule. But if we read the cases without paying attention to language long corrupted by deviant dogma, we find that the courts have ordinarily upheld contracts under any "proper" law. This then is the true rule which accords with the purpose of our domestic rule. The Statute of Frauds was enacted to prevent fraud and perjury. And, such fraud and perjury would be promoted rather than prevented if the Statute were made available to a defendant who had made his promise, promised performance, or was domiciled in a state which lacked such a statute altogether. But the search for this purpose is by no means identical with a search for a "governmental interest," nor is it possible if the "most significant relationship" is to be the guide. The search can and must ignore the purpose of the competing foreign law; and thus it becomes accessible to reliable evaluation of forum policies by the forum judge. This has "the exciting aspect of a dynamic intellectual frontier, where the more acute and sensitive problems of current legal doctrine, which are bound to produce conflicts situations, will be subjected to an incisive critique, calculated

65 Currie has analyzed applicability of forum and foreign anti-deficiency judgment statutes. Currie, *Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method*, 1960 DUKE L.J. 1-55 (1960). After having shown in great detail allegedly competing governmental interests in seeing policies effectuated, he advises the lawyer, who wishes to persuade "the court to reach the desired result, . . . to ascertain and make clear the policy of the domestic law and the extent of the state's interest in applying that policy." *Id.* at 55. The need and possibility of ascertaining the state's "interest" as opposed to the law's "policy," does not seem to have been established. As an extreme example for his proposition Currie mentions the case of two Virginia residents dealing with Virginia land in a Virginia contract to be performed in Virginia. Even where defendant resides in North Carolina at the time of suit, Currie would deny that state a "legitimate interest in the application of its policy for the protection of purchasers where the purchaser had no connection with the state at the time of the transaction." *Id.* at 51. Why should this be so? Once the North Carolina court has taken jurisdiction (though perhaps it should not), it is clearly free to effectuate its policy by applying the *lex fori*, though it may very well prefer to interpret its statute as not applicable where jurisdiction was based on facts subsequent to the transaction, without resort to governmental "interests," legitimate or otherwise.

to guide the proper choice of law in specific cases.\textsuperscript{67} This evaluation may even advance the growth of domestic law where this growth is impeded by domestic pressures and emotions. Moreover, emphasis on the predominant purpose of the domestic rule rather than on a forum or foreign governmental interest makes possible the otherwise "impossible" solution of tri-cornered conflicts.\textsuperscript{68} If the state of the contract would invalidate the contract as violating its statute of frauds and the state of the parties' domicile would uphold it under its own statute, the forum will determine the case according to the policy of its own law. The plaintiff cannot complain since he has chosen his forum, and the defendant will not be heard to complain about being held to his agreement.

No, Mr. Justice, there "really" never is a conflict between rules, policies or interests. But this, of course, is not the answer that you looked for in your question. What we understand by "conflict" arises wherever a court finds itself impelled to consider whether a foreign rule is better fitted to do justice than the rule of the forum. And conflict in this sense there is quite "really," not only where the forum has no "interest" in applying its policy, but wherever a "true rule" settled in our jurisdiction has given priority to a foreign law and policy, or where in a case of novel impression interpretation of the forum's domestic rule in the light of its predominant policy calls for this priority. To give us this interpretation, Mr. Justice, is your office and not that of either the legislature or the American Law Institute. We are grateful to you for what you have done and for what you will do, and hope that some of us will be permitted to labor "in advance to break ground for new paths," as you have exhorted us to do.\textsuperscript{69}

\textsuperscript{68} \textit{Supra} note 49.
\textsuperscript{69} Traynor, \textit{Law and Social Change in a Democratic Society}, 1956 U. ILL. L.R. 230, 234.