AMERICAN CASEBOOK SERIES

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CASES—COMMENTS—QUESTIONS

Eighth Edition

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David P. Currie, Herma Hill Kay,
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PREFACE

Law comes from many sources. In an ideal world, the authority of these sources would be clearly defined and neatly demarcated, so that no event or occurrence was ever subject to control by more than one law maker or law enforcer. But such is not our world. The power of different bodies to make or administer law is often unclear and, even when clear, frequently overlaps. Conflicts arise, and a way is needed to resolve them. This, broadly speaking, is the subject matter of "conflict of laws."

The classic conflict-of-laws problem—classic at least in the sense of being the problem most thought about and discussed—involves a choice of law between or among states. In the United States, for example, a transaction or occurrence may have contacts with more than one state: the parties may live or action may be taken in different places. When this is so, and a dispute arises, whose law should govern? That inquiry, in turn, may be broken down into at least three further questions: (1) What are the limits of each state's power to regulate? (2) Acting within those limits, has more than one state sought to apply its law to the particular dispute? (3) If so, how should we choose among them? The first question is one of fundamental or constitutional law, ordinarily resolved in interstate disputes by reference to the United States Constitution. The latter two questions, in contrast, involve matters of policy that are decided by examining the relevant state or federal law. As the materials in this book illustrate, the states and Congress have used many different methods to identify and resolve choice of law problems.

Choice of law is not the only situation in which judges or policymakers must sort out overlapping exercises of authority. It is, however, the situation that has received the most careful scrutiny. Studying choice of law is thus useful not merely for its own sake, but also to understand other types of conflicts. The organization of the book reflects this conception. Part I focuses on choice of law; it is designed to teach students the law in this area but also to get them thinking more generally about techniques for resolving conflicts among law or policy making entities. Part II then presents additional contexts in which the activities of more than one authority may overlap and be inconsistent. By comparing the basic choice of law model to solutions developed in other areas, we believe students will develop a better understanding of both choice of law and these other areas.

Part I consists of the first three chapters, which present choice of law as both a policy and a constitutional problem. The first two chapters address the policy question. Chapter 1 lays out the old learning. Choice of law has been thoroughly reexamined in the last fifty years, but it is premature to abandon the teaching of traditional theories. Analytically, one cannot fully understand the new learning except in light of the old. Moreover, even apart from

jurisprudential considerations, judicial rejection of the traditional approach is by no means unanimous, and the careful lawyer must still be prepared to argue this theory in support of his or her case.

Chapter 2 explores modern departures from the traditional approach. The chapter emphasizes four approaches in particular: party autonomy, interest analysis, the Second Restatement, and the "better law" approach. Time and judicial practice have shown these to be the most viable modern alternatives. So apart from a short introductory section on statutory solutions, other approaches are included only insofar as they pertain to or help to clarify the four established methods.

In this edition, we have revised and updated the materials on complex litigation and conflicts in cyberspace as the law in those areas continues to evolve. One problem facing a teacher of conflicts is how to give students a sense of the field's relevancy. Most choice-of-law doctrine developed in cases dealing with guest statutes, interspousal immunity, spend-thrift provisions, and other matters unlikely to stir the imagination. Many of these cases must be retained, because they still contain the best and clearest explanations of the law (though we have ruthlessly pruned the materials to eliminate redundancy). But too large a dose of such problems risks leaving students feeling that choice of law is arcane, unimportant, even a bit silly. In fact, choice of law is—or can by a good lawyer be made—central to practically any case, and choice-of-law problems are critical in our interdependent modern world. We emphasize this point throughout the book, but the materials on complex litigation and cyberspace especially are intended to focus attention on the centrality of choice of law to some of today's most pressing legal issues.

Chapter 3 turns to the problem of constitutional limits on choice of law. Essential to any regime in which more than one law making authority exists is a process for defining the outer boundaries of each law maker's power; this process determines the field within which the policy debate takes place. Among states of the United States, limits on sovereign authority are framed as constitutional questions, mainly questions of due process, full faith and credit, and privileges and immunities. Generally speaking, these clauses reflect concern for interstate relations and for fairness to individuals, issues the Supreme Court has dealt with in several fascinating lines of cases. Chapter 3 presents these cases in a manner designed to allow teachers simultaneously to explore three distinct themes: the doctrine as it has actually developed; the complex substantive issues raised in thinking about limits on sovereignty; and the institutional difficulties faced in designing these limits.

Part II consists of the final five chapters. As noted above, chapters 4 through 8 examine other conflicts among law makers or law enforcers. Our choice of topics by no means exhausts the possibilities, and we invite readers to think of additional contexts in which the basic choice of law model applies or helps to clarify analysis. We have selected what we believe are the most salient and illuminating problems. Some of these raise policy questions of constitutional limits more closely related to the material covered in chapter 3.

Constitutional questions, for example, are the focus of chapter 4, which deals with adjudicatory jurisdiction. States enact laws to define the particular cases or controversies that the state's law makers want their courts to hear. Choices made by different states may come into conflict if a case falls within the jurisdiction-granting provisions of more than one state. Here, too, deciding which state should hear the case presents both a policy question and a constitutional question. In contrast to "ordinary" choice of law, however, many states have made the policy question moot by adopting statutes that assert power to the full extent permitted by the Constitution. As a result, and also because courts generally exercise jurisdiction over any case within their statutory power, the case law has focused primarily on constitutional limits. Chapter 4 examines the extent to which constitutional constraints on adjudicatory jurisdiction are (or should be seen as) analogous to the constraints on choice of law discussed in chapter 3.

Chapter 5 deals with recognition of judgments. It is relatively unchanged, although it has been updated to reflect important developments since the last edition. Chapter 6 covers selected problems of family law. A new section has been added that examines in detail the conflict of laws issues presented by same-sex families.

Chapter 7 turns to conflicts between state and federal law. Many teachers mistakenly assume that there are no real conflicts here because the supremacy clause of the United States Constitution directs that federal law shall govern. But difficult questions respecting the permissible scope of federal law remain, and the mere fact that Congress can impose federal law does not mean either that it has done so or that it should. Choosing between state and federal law in cases involving both thus presents difficult and interesting questions of constitutional law and federal policy. This edition adds a new section on preemption, but as in previous editions we have chosen to examine only a few of the problems here: federal question jurisdiction, the *Erie* doctrine, federal common law, and the applicability of federal law in state courts. Note, however, that many other aspects of federal jurisdiction—such as separation of powers, sovereign immunity, abstention, and habeas corpus—could just as profitably be examined in choice of law terms.

Finally, chapter 8 deals with international conflicts. There is growing interest in this area among students and teachers, and for good reason. International law is rapidly emerging as the most exciting field of law today. The growth of the European Community, the collapse of the Soviet Union, the spread of democratic institutions around the world, the strengthening of international organizations like the United Nations and WTO, the growth of human rights treaties and conventions, and a variety of other developments highlight the importance of international law and make it essential to pay more attention to our relations with other countries. Conflict of laws, which is, after all, essentially devoted to the problem of facilitating governance by more than one sovereign, obviously has a significant role to play in understanding and shaping these developments.

Chapter 8 exposes students to the core set of issues needed to understand the place of conflict-of-laws analysis in international law. Section 1 deals with

the extent to which international law imposes constraints on legislative jurisdiction analogous to those imposed on the states by the Constitution. The section then turns to the problem of making choices within those limits, using the Supreme Court's recent decisions in *Aramco, Hartford, Hoffman La-Roche*, *Verdugo-Urquidez*, and *Boumediene* to represent the issue. Section 2 contrasts the approach taken in American courts with that developed in Europe; we focus on Europe not because what happens there is intrinsically more important than what happens elsewhere in the world, but because other nations have for the most part simply copied the European model. Section 3 turns to the problem of public international law in the form of the act-of-state doctrine. Finally, the chapter closes with a section on recognition of judgments. The materials are organized to facilitate comparison with domestic choice of law: To what extent are methods and techniques developed in Part I applicable to international conflicts? Structurally, the problems seem identical. But variations in law and culture are much greater in the international arena, while the constraining force of community is weaker. Exploring how these differences matter (if at all) is fascinating and worthwhile.

The editorial practices followed in the book require brief explanations. In general we have reprinted cases rather fully in a desire to provide class material that retains the texture of the originals; we have not carried this approach so far as to preserve passages that are repetitious or irrelevant. Authorities cited in principal cases have been ruthlessly edited, and only those citations that build an understanding of the course as a whole or that a curious student might want to examine have been preserved. Similarly, the notes after the cases do not attempt to double as a treatise, since exhaustive citation to the cases and secondary literature would interfere with our primary goal of fostering discussion. We have discussed and cited all the materials that we think a careful instructor or diligent student might want to examine for class purposes.

Omissions from principal cases or quoted materials are indicated in all instances. Periods (. . .) signal the omission of words or sentences; asterisks (* * *) are used to indicated the omission of citations to cases or other authorities. Periods rather than asterisks are used when words containing substantive content have been omitted even if a citation was contained in the omitted passage. Most of the footnotes in principal cases and quoted materials have been discarded. Those footnotes which have been included retain their original number. Our own infrequent footnotes may be readily distinguished.

Professor Roosevelt has borne principal responsibility for this revision, especially for the extensive new material, apart from that included in chapter 6. Thanks are owed to many people for their advice and support, but we are especially grateful to Ruth Sternglantz, Brian Stevens and Jie Yuan for assistance in preparing the materials.

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