CHOOSING THE CHOICE: DISTILLING AND DESIGNATING CONTRACT CHOICE OF LAW IN VIRGINIA

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by
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Choice of law\(^1\) has been said to cause more “consternation and confusion among the bench and bar” than any legal subject.\(^2\) Contract interpretation, in turn, has been identified by the great choice of law theorist Joseph Beale as the most confusing issue in the conflict of laws.\(^3\) Unfortunately, the perplexity of this legal topic is paralleled by its practical importance. Choice of law is a matter of paramount concern in any dispute involving more than one jurisdiction, as a court cannot adjudicate a case without first ascertaining which law applies. Particularly in contract cases where the laws of different jurisdictions conflict, the choice of law decision may determine which party prevails and which suffers defeat. It is thus imperative that states implement a uniform and systematic approach that allows judges and lawyers to readily ascertain the rules governing contract choice of law. Virginia has yet to achieve this goal.

Consider, as illustration, the following hypothetical case. A Maryland manufacturer and a Virginia retailer contract in Maryland that the manufacturer will produce items to be delivered to and sold by the retailer in Virginia. The parties do not specify which law should govern the contract in the case of conflict. The plaintiff brings suit in Virginia, where the breach allegedly occurred. Which law applies? Common sense would say that the question is simple: should a contract be governed by the law of the place where it was made or where it was to be performed? Unfortunately, the heart of the problem lurks beneath this superficial layer. The question is not what law should govern as much as it is why.


\(^3\) Joseph H. Beale, What Law Governs the Validity of A Contract, 23 Harv. L. Rev. 1 (1909) “NO [sic] topic of the Conflict of Laws is more confused than that which deals with the law applying to the validity of contracts.”
In the above hypothetical, Virginia’s earliest precedent, rooted in the theory of comity, would designate Virginia law as controlling since the parties presumably chose Virginia as the place of performance with the intent that Virginia law would govern matters of “validity, nature, interpretation and effect.” The irksome yet surviving holding of Poole v. Perkins would also designate Virginia law as governing, but on the rationale that whenever the law of the place of making differs from that of the place of performance, the parties presumptively contracted “with reference” to the latter.

Many Virginia courts have exerted herculean effort to definitively answer the question of why a particular law should govern in contract choice of law cases. For over two centuries, Virginia courts have sampled and even mixed various choice of law theories, only to find this area to be a legal slip knot: as theories are proposed and rules are tweaked, the confusion has become increasingly choking. Today, Virginia courts struggle with analytical gaps and irreconcilable precedent. Theories and principles appear and reappear, feeding discussion yet offering little guidance. Courts claim theories and rules but follow the analysis of another. Ultimately, Virginia courts are at a loss, left with irreconcilable and sometimes incomprehensive precedents.

The purpose of this Article is two-fold: First, to dispel some of the confusion that has clouded Virginia’s contract choice of law jurisprudence by identifying issues that must be addressed if Virginia is to achieve a workable approach. Second, to propose a solution that should bring uniformity and predictability, maximize state and party interests, and preserve values that Virginia courts have historically found paramount.

This Article begins with an explanation of general principles in Part One, the understanding of which are prerequisite to a discussion of choice of law in Virginia. This section includes a brief explanation of Latin terminology that frequently appears in choice of law discussions, as well as an overview of the narrow circumstances in which choice of law cases are dispositive in Virginia jurisprudence. Part Two surveys Virginia’s early contract choice of law cases, focusing on the influence of early legal theorists and the impression of the comity theory. Part Three examines Poole v. Perkins, analyzes the rationale behind this decision, and reviews its impact on Virginia jurisprudence. Part Four distinguishes Virginia’s choice of law jurisprudence from that of the First

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Restatement of the Conflict of Laws, highlighting the theoretical differences between the two and emphasizing the independent development of Virginia’s choice of law theory. Part Five presents observations on the current status of Virginia’s contract choice of law jurisprudence and notes several issues that should be addressed. In conclusion, this Article in Part Six suggests that Virginia should reaffirm its traditional rule that “matters of making” are governed by the law where the contract was made, while “matters of performance” are governed by the law of the place of performance. It also recommends that Virginia refine this bifurcated framework to define the precise meaning of “matters of making” and “matters of performance.” This Article submits that this approach would greatly assist Virginia courts seeking to address this intricate subject in a manner that is not only predictable and uniform, but also deferential to the principles that have long distinguished Virginia jurisprudence.

I. INTRODUCTION TO CONTRACT CHOICE OF LAW IN VIRGINIA

Before discussing Virginia choice of law jurisprudence, one should have a prerequisite knowledge of Latin terminology commonly used in choice of law deliberations. Moreover, it is imperative that one analyzing Virginia choice of law in the context of contracts recognize the narrow circumstances in which well-settled rules dispositively determine the governing law.

A. Latin Terminology Commonly Used in Choice of Law Discussion

Virginia courts have shown a propensity to employ Latin terminology when dealing with choice of law. While the use of Latin terms undoubtedly has historical and etymological value, it easily lends to misunderstanding and confusion. Thus, since this Article occasionally cites to Virginia cases that use Latin terms, this section identifies and defines the Latin phrases that most frequently appear in choice of law discussions.

The Latin terms and definitions used in choice of law dialogue vary somewhat between jurisdictions. In Virginia, however, use of Latin terms is fairly consistent. Virginia courts regularly employed three Latin phrases, the two most common of which are *lex loci contractus*, which means the “law of the place where the contract was made” and *lex loci solutionis*, which entails the “law of the place where the contract is to be performed.”

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Thus, in reference to the hypothetical case at the beginning of this Article, in which the parties agreed to a contract in Maryland that the manufacturer would produce goods to be sold in Virginia, the *lex loci contractus* would be the law of Maryland, as that is where the manufacturer and retailer signed the contract. The *lex loci solutionis*, in turn, would be the law of Virginia, since that is the place where the contract was to be performed. A third and far less common phrase that appears in contract choice of law cases is *lex loci celebrationis*, a term specific to marriage contracts. In the case of *Poole v. Perkins*, this term indicated the place where the marriage is celebrated.7

B. Narrow Circumstances Where Choice of Law is Dispositive

Amidst the disarray of Virginia’s choice of law jurisprudence, there are narrow circumstances in which the law is established. Foremost of these is the rule that party intent is dispositive. In Virginia, is well-settled that where contracting parties have revealed their intent for which law governs the contract, that intent determines choice of law.8

This rule lends itself to three narrower exceptions which are also dispositive. The first is that when the substantive law of a chosen jurisdiction stands “contrary to the established public policy of the Commonwealth,” the law of that jurisdiction will “never be applied.”9 The second is that in the “extraordinary” circumstance where the parties’ intent “evince[es] a purpose in making the contract to commit a fraud on the law,” Virginia courts will choose the governing law in a manner that eradicates the fraud.10 Finally, Virginia will never apply the law of any jurisdiction that is not “reasonably related to the purposes of the agreement.”11

II. EARLY (PRE-POOLE) CONTRACT CHOICE OF LAW JURISPRUDENCE

The history of Virginia’s choice of law jurisprudence is covered with the fingerprints of legal theorists. Virginia’s earliest choice-of-law decisions borrowed heavily from continental systems and are traceable to the handiwork of Ulrich Huber, an eighteenth-century Dutch legal theorist.12 In his 1689 dissertation entitled “De Conflictu Legum

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7 Poole, 126 Va. at 331, 101 S.E. 2d at 214.
9 Black, 48 Va.  App. at 127, 628 S.E. 2d at 553.
10 Tate, 181 Va. at 410, 25 S.E. 2d at 324.
Diversarum in Diversis Imperiis,” Huber set forth three maxims upon which he believed the conflict of law rested. First, “the laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.” Second, “[a]ll persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.” Third, “sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the powers or rights of such government or of their subjects.”

At first glance, the wording of the Huber’s third maxim appears to indicate that comity is a political concession that the sovereign arbitrarily grants or withholds. However, Huber clarifies that comity decisions should be guided by “convenience and the tacit consent of nations.” As Huber further explains:

Although the laws of one nation can have no force directly with another, yet nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law. And that is the reason for the third maxim concerning which hitherto no doubt appears to have been entertained.

Thus, at its core, Huber’s theory was that states are sovereign and laws are territorially governed. The exception was that, in cases where the movement of goods and people trigger conflict between the laws of sovereignties, the sovereign could accept the foreign laws “by consent and not compulsion.” The sovereign’s decision to accept the foreign laws, in turn, are guided by simple utilitarianism.

While Huber did not dedicate his choice of law theory exclusively to contract law, his work had a foundational influence in the context of contract law. In 1827, James Kent stated in his Commentaries on American Law that Huber’s theory was not only “relative to contracts,” but also established the general rule that “the interpretation of the

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14 Id. at 103.
15 Id.
16 Id.
17 Id. at 139.
18 Id. at 165.
contract is to be governed by the law of the country where the contract was made; but the mode of suing and the time of suing, must be governed by the law of the country where the action is brought.”

Even before James Kent published his *Commentaries*, Virginia was already applying Huber's choice of law theory to contract choice of law questions. In the 1821 case of *Lewis v. Fullerton*, the Virginia Supreme Court tackled the question of whether a plaintiff should be emancipated under the law of Ohio, where the contract was made, or remain enslaved under the law of Virginia, where the contract was intended to be performed. Harking back to Huber's theories, the Court decided that the “*lex loci contractus* should govern the interpretation of contracts.”

Interestingly, the *Lewis* court also added its own tweak to the “place of making” rule. In reference to Huber's theory that the sovereign may choose to accept a foreign law, the Court noted that when a contract specifies a place of performance, it ought to be presumed that the contract was formed with “an eye towards” that state. In such cases, the court explained, the law of the place of making “ceases to operate” and the contract must then conform to the law of the place of the contract’s “operation and effect.”

Thereafter, Virginia began to regularly employ language that referred to the theoretical “vision” of contracting parties. In 1836, shortly after deciding that contracts may be drafted with an “eye towards” a particular state, the Virginia Supreme Court announced that contracts may be drafted not only in reference to a state as a geographic region, but also with a specific “view to the laws of another [state].”

In the 1836 case of *Nelson v. Fotterall*, the Virginia Supreme Court gave a judicial nod in the direction of *Lewis* and again set out to expand the rule. The *Fotterall* Court recited Huber's maxims to support the holding that the law of the place of performance should apply.

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20 *James Kent, Commentaries on American Law* 616 (John M. Gould & Oliver W. Holmes eds., Little, Brown & Co. 1901) (1827).


22 *Id.*

23 *Id.* at 23.

24 *Id.*

25 *Id.* at 15.

26 *Id.*

27 *Id.*

28 Nelson v. Fotterall, 34 Va. 179, 201 (1836) (emphasis added) (“Where persons enter into a personal contract in a foreign state or country, and a litigation grows out of it, the law of the place where the contract was made, gives the rule of decision.” The exception to this general rule was that “where the transaction is entered into with a view to the laws of another country, then the law of the place of contract will not govern.”).

29 *Id.*
Nelson court did not stop there. The Court further elaborated that the law of the place of performance is most appropriate when dealing with matters concerning a “particular act” or “effect of a contract.”\footnote{30} Interestingly, the Nelson court’s analysis strongly indicates that it was “Huberus,” as Ulrich Huber was frequently called, who first impelled Virginia courts to adopt and develop the bifurcated approach (determining governing law by first deciding whether the issue involved matters of making or matters of performance) to contract choice of law cases.\footnote{31}

Virginia’s early choice of law cases of Nelson and Lewis demonstrate two noteworthy points. First, Virginia exhibited an early disposition to the practice of “imputing” intent to parties, even if the parties never indicated intent regarding what law should govern their contract. Indeed, the cases of Nelson and Lewis reveal that by the early 1800’s, the Virginia Supreme Court had already determined that where contracts designate a place of performance, courts may presume that the parties intended that the law where the contract is to be performed should govern. Second, it is apparent that, based on the theory of Ulrich Huber alone, Virginia had already developed the notion that contract choice of law cases should be bifurcated according to the issue before the court. If the issue at hand dealt with matters of making, then the contract should be governed by the law of the place where the contract was made. Conversely, if the issue dealt with matters of performance, then the contract should be governed by the law where the contract was to be performed.

In the mid 19th century, Joseph Story introduced his Commentaries on the Conflict of Laws, leaving his own indelible mark on Virginia choice of law theory.\footnote{32} Story rubber-stamped Huber’s maxims as “just principles” commendable “in point of truth as well as of simplicity” but remained equally convinced that Huber’s theories were, standing alone, insufficient.\footnote{33} In Story’s own words, Huber’s guidelines left “grave questions as to [their] application” owing to their excessive

\footnote{30} Id. According to the Court in Nelson, this rule was established in England by Lord Mansfield the 1760 case of Robinson v. Bland. The Robinson case involved a bill of exchange drawn at Paris but payable in England. Lord Mansfield, who presided over the case, cited Huberus and determined that since the parties intended that the bill be performed in England, the law of England governed. \textit{Id.}

\footnote{31} Id.

\footnote{32} \textsc{Joseph Story, Commentaries on the Conflict of Laws, Foreign and Domestic} § 31 (Melville M. Bigelow ed., Little, Brown & Co. 1883) (1846) (“[Huber’s maxims] can scarcely be disputed by anyone: and the last seem irresistibly to flow from the right and duty of every nation to protect its own subjects against injuries resulting from the unjust and prejudicial influence of any foreign laws.”).

\footnote{33} Id. at § 33.
generality. Story thus set out to embellish Huber’s axioms with comprehensive discussions of state sovereignty and comity.

A state may prohibit the operation of all foreign laws, and the rights growing out of them, within its own territories. It may prohibit some foreign laws, and it may admit the operation of others. It may recognize and modify and qualify some foreign laws; it may enlarge or give universal effect to others. It may interdict the administration of some foreign laws; it may favor the introduction of others.

Placing paramount emphasis on the unquestionable nature of sovereign authority, Story subsequently posited that the court of one sovereign state might apply the laws of another sovereign for the sake of the “mutual interest and utility” of the sovereign interests involved in the conflict. This was a discretionary decision that each sovereign was to make on its own terms. Story did clarify, however, that the mutual interest “presupposes that the interest of all nations is consulted, and not that of only one.” Thus, Story’s “comity doctrine” essentially embraced the notion that the rules of the conflict of laws “have their foundation, not in considerations of law and justice but of self-interest and courtesy to other states.”

Although Story’s comity doctrine made an undeniably deep impression on Virginia jurisprudence, it did little to resolve the “grave questions” of application as Story had hoped. This is evident in the 1860 case of Freeman’s Bank v. Ruckman, in which the Virginia Supreme Court cited Joseph Story’s theory to buttress the “general rule” that contract matters pertaining to a right are governed by the law of the place where it is made, where matters concerning the remedy of a contract are governed by the place where the contract is to be performed. In fact, immediately after stating this rule, the Court admitted that it was “difficult to determine whether a matter relates to the right or to the remedy.”

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34 Id.
35 Id. at § 23.
36 Id.
37 Id. at § 38.
38 LORENZEN, supra note 14, at 35.
39 STORY, supra note 32, at § 33.
40 Freeman’s Bank, 57 Va. at 127 (stating that matters of right include “validity, nature, interpretation and effect” while matters of remedy involve “matters of performance”); see also Union Cent. Life Ins. v. Pollard, 94 Va. 146, 26 S.E. 421, 423 (1896) (“[M]atters of procedure, rather than matters touching the rights of the parties under their contracts . . . are generally to be governed by the law of the country where the court sits.”).
41 Freeman’s Bank, 57 Va. at 127.
In essence, Virginia courts continued to wrestle with the same analytical flaw that Story had criticized in Huber’s theory: determining how to apply the principles. More specifically, *when* and *how* the principle of comity, or the idea of judicial discretion, ought to should be applied. The principles were clear enough – the sovereign has the discretion to apply foreign law when is in the “mutual interest and utility” of the sovereign’s interest to do so. But the question remained as to when it is appropriate for a sovereign to defer to the law of another state. What exactly entails “mutual interest and utility”? With such questions unanswered, Virginia courts continued to look to Story’s doctrine of comity yet struggle with its application.

By the mid-1900’s, the bulk of Virginia courts applying Story’s comity doctrine had settled on a dichotomy between matters of *right* and *performance*. Matters of *right*, which included issues of “validity, nature, interpretation, and effect,” fell under the law of the place where the contract was made. Matters of *performance*, in turn, were to be governed by the place where the contract was to be performed. In *C.I.T. Corp. v. Guy*, the Virginia Supreme Court presented its own outlook on the comity doctrine: the “nature, validity and interpretation of contracts are governed by the law of the place where made . . . frequently, by courtesy or comity, statutes are given effect in a foreign jurisdiction when they do not contravene public policy, are not immoral and violate no positive law of the forum.” The Court in *C.I.T.* introduced the terms of “nature,” “frequently,” “courtesy,” “policy,” and “immoral” as guidelines for how the comity rule should be applied. Unsurprisingly, these abstract concepts left the application question as unclear as before.

Perhaps the most distinguishing characteristic of Virginia’s contract choice of law doctrine is its remarkably intent-centric approach. As noted above, Virginia had begun to “impute” intent on entirely silent parties in early decisions, stating that contracts may be drafted with an “eye towards” or “view to the laws of another [state].” By the latter half of the nineteenth century, Virginia courts’ willingness to impute intent was becoming less of a phenomenon and more of a regular practice. In *Nelson v. Fotterall*, for instance, the Virginia Supreme Court stated that “every one [sic] is understood to have contracted in that place

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43 See, e.g., Armistead, 37 Va. at 517 (1839) (citing Joseph Story to support the bifurcation of matters concerning the nature, obligation and interpretation of a contract from matters of performance and subsequently struggling to determine how this bifurcation is actually applied).
44 Freeman’s Bank, 57 Va. at 127.
45 Id.
47 Lewis, 22 Va. at 23.
48 Nelson, 34 Va. at 201 (1836) (emphasis added).
in which he bound himself that he would pay.” Similarly, in the 1866 case of Fant v. Miller & Mayhew, the same Court opined that parties are “naturally and reasonably supposed to contemplate in the transaction” the governing law; because the parties signed a contract in Virginia and then sent their signatures to Baltimore for the contract to be performed, the Court assumed that parties intended that their contract be a “Maryland contract.” The apparent rationale was that where the parties sign an agreement with the intention that it is to be performed in a jurisdiction other than where the contract was signed, the place of performance is “in the minds of the parties” the governing law.

Thus, with a positivist flair, pre-Poole courts regularly assumed that where the intent of the parties was not provided, the parties presumptively intended what the court decided. Virginia courts were willing to presume the intent of parties that were entirely silent. As this Article later points out, this approach is theoretically flawed. In practical terms, it was of little avail. The doctrine of comity, even with Huber’s clarification, Story’s enhancement, and Virginia’s tweaking, failed to fill the gap of application. Implementation of the principles themselves continued to lead to unpredictable results. In sum, there remained, in the words of Joseph Story, “grave questions” as to application. Thus, the concept of imputed intent was arguably another attempted caulking mechanism—one that did not hold. Virginia’s choice of law jurisprudence continued to leak. The leaks, in turn, created Poole.

III. DISTILLING POOLE AND ITS PROGENY

By the early 1900’s, Virginia jurisprudence had settled into a consistent—albeit structurally unstable—precedential trend. The decision in Poole v. Perkins rattled this foundation when it radically deviated from the bifurcated “matters of making” and “matters of performance” approach. In Poole v. Perkins, the issue before the Virginia Supreme Court was whether a contract invalidated in the place of making may be deemed valid under the law where the contract was to be performed. In that case, the defendant, Poole, signed a promissory note

49 Id. at 201.
50 Fant v. Miller & Mayhew, 58 Va. 47, 59 (1866)
51 Id. at 59; see also S.H. Hawes & Co. v. Wm. R. Trigg Co., 110 Va. 165, 65 S.E. 538, 548 (1909) (“[L]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated into its terms.”) (emphasis added).
52 Childress, supra note 20, at 28 (noting that neither Huber nor Story clarified how the doctrine of comity should be applied).
53 See, e.g., Poole 126 Va. at 331, 101 S.E. at 242 (citing Joseph Story’s theory to support the concept that the law of the party’s domicile ought to govern).
54 STORY, supra note 32, at § 33.
in favor of the plaintiff, Perkins, in the state of Tennessee. Poole made and delivered a promissory note in Tennessee, where the law rendered her contract voidable. Because the note was payable in Virginia, however, Perkins brought a collection action in Virginia when Poole defaulted. The court in Poole explicitly rejected the bifurcated matters of making and matters of performance test for a rigid “place of performance” and presumed that when the parties contracted in Tennessee, they did so with reference to the place of performance. Thus, the validity of the note was to be governed by Virginia law, where the contract was to be performed “as if it had been signed and delivered here; that by the laws of this state.”

Poole stands unique in two ways. The first and perhaps more latent characteristic is the Court’s willingness to presume that once contracting parties decide that a contract should be performed in a particular state, that decision is sufficient evidence that the parties expected their contract to fall under the laws of that state. Ernest G. Lorenzen noted this presumption and labeled it an “erroneous premise.” While the practice of imputing intent on silent parties was far from novel in Virginia jurisprudence, Poole carried the concept of imputed intent a giant step further. Notably, the Court in Poole not only presumed that the parties intended that matters of performance, but also matters of making be governed by the law of the place of performance. As the Court stated, it may be assumed that the parties executed the contract “with reference to the laws” of the place of performance. What is perhaps most remarkable is that the Court in Poole believed that this indulgence in attenuated presumptions was truest to the theory that the intent of the parties should govern.

A second and more visible distinction of Poole is its dramatic deviation from precedent that spanned more than a century of Virginia jurisprudence. The Poole Court was fully aware that its adoption of a rigid place of performance rule would deviate from Virginia precedent. Poole, 126 Va. at 331, 101 S.E. at 243 (“As to precedent and authority for the adoption of this test, it would require some boldness in the

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55 Poole, 126 Va. at 331, 101 S.E. at 242.
56 Id. at 331, 101 S.E. at 245.
58 Poole, 126 Va. at 331, 101 S.E. at 245 (“We conclude, therefore, that the note sued on in this case must be construed as having been executed with reference to the laws of the state of Virginia; that it became to all legal intents and purposes, so far as its validity is concerned, as truly a Virginia note as if it had been signed and delivered here; that by the laws of this state Mrs. Poole could have legally executed the same; and that, therefore, the lower court was right in holding her liable.”).
59 Id. at 331, 101 S.E. at 242 (“If the true criterion as to the proper or governing law is to be found in the intention of the parties, then the law of the place of performance controls.”).
60 The Poole Court was fully aware that its adoption of a rigid place of performance rule would deviate from Virginia precedent. Poole, 126 Va. at 331, 101 S.E. at 243 (“As to precedent and authority for the adoption of this test, it would require some boldness in the
“matters of making” and “matters of performance” approach for a rigid “place of performance” rule.

Essentially, the Court in Poole could not tolerate the notion that a contract might be simultaneously void under the law where it was made and enforceable under the law where it is to be performed. The law of the place of making governs whether the parties had the capacity to enter into a contract in the first place. Thus, if a contract is invalidated by the law of the state where it was made, that contract cannot operate under the laws of any other state. It is void ab initio.

Aware that this analysis would undoubtedly result in a large number of invalidated contracts, the Court in Poole held that in cases where a contract is invalid under the law where it was made, the contract must be considered “to all legal intents and purposes . . . as if it had been signed and delivered” in the place of performance. This was, in the eyes of the Poole Court, truest to the theory of intent.

The reaction of Virginia courts to Poole has been paradoxical. It has been said that Poole’s rejection of the bifurcated system for a rigid place of performance approach was confronted with almost “universal criticism.” While the reaction of Virginia courts to Poole could hardly be characterized as “universal criticism,” it is clear that Virginia courts have remained consistently unwilling to follow Poole’s rationale.

Federal courts, in particular, provide a third-party view of the discord that exists between Poole and Virginia’s mainstream precedent. In Chesapeake Supply & Equip. Co. v. J.I. Case Co., for instance, the court in the Eastern District of Virginia declined to apply Poole, observing it is “no longer valid to the extent [it] contradict[s] well-settled Virginia choice of law rules.” Part of the Chesapeake court’s conclusion was the “infrequency” with which Poole had been relied on in Virginia. The court also buttressed its decision with a chilling illustration of what would occur if Poole were applied. Confronted with a choice of law case face of the multitude of apparently conflicting decisions and text-book discussions bearing more or less directly on the question, to undertake to affirm that the decided weight of authority is either for or against it.”

61 The VIRGINIA LAW REGISTER, NEW SERIES, Vol. 6, No. 3 (Jul., 1920), pp. 230-238.
62 Id.
63 Poole, 126 Va. at 331, 101 S.E. at 245 (stating that parties’ decision to perform a contract in a particular state “results from the parties’ intention to contract with reference to such law”).
66 Chesapeake Supply, 700 F. Supp. at 1418.
67 Id.
68 Id.
in which a contract was made in Maryland but to be performed in Maryland, Virginia, and Delaware, the court pointed out that application of *Poole* would create “three different contracts out of one Agreement.”\(^\text{69}\)

The court cogently stated the problem as follows:

> Maryland contract law would govern the interpretation of the Agreement for the Maryland branch, Virginia law would similarly govern with respect to the Virginia branch, and Delaware law would govern its application to the Delaware branch. Resorting to the laws of three states to interpret a single agreement or to determine its validity is a result that should obtain only if the parties’ intention for this to occur is clearly expressed. No such clear expression of intent appears here.\(^\text{70}\)

In 2000, the Western District Court agreed that that *Poole* is “not supported by more recent cases of the Virginia Supreme Court.”\(^\text{71}\)

The federal courts’ observation that *Poole* has found little more support from Virginia state courts is accurate. Thus far, Virginia courts have cited *Poole v. Perkins* only five times.\(^\text{72}\) Of these, the Virginia Supreme Court has cited *Poole* only once in the 1943 case *Tate v. Hain*, and then only for the unoriginal proposition that the “contractual intent of the parties as to choice of law ought to be given effect.”\(^\text{73}\) The remainder of Virginia court citations to *Poole* merely reinstate the pre-*Poole* bifurcation rule.\(^\text{74}\)

Unfortunately, despite the collective unwillingness of Virginia courts to deviate from the pre-*Poole* bifurcated approach, the decision of *Poole* has never been overturned.\(^\text{75}\) Consequently, *Poole* has become a

\(^\text{69}\) Id.

\(^\text{70}\) Id.


\(^\text{72}\) As of February 4, 2015.

\(^\text{73}\) See *Tate*, 181 Va. at 402, 25 S.E.2d at 324.

\(^\text{74}\) See, e.g., Parish v. Parish, 281 Va. 191, 199, 704 S.E.2d 99, 104 (2011) (citing *Poole* in its decision to recognize exception to Virginia’s lex loci rule for issue of capacity); Black, 48 Va. App. at 129, 628 S.E.2d at 554 (Va. Ct. App. 2006) (citing *Poole* to support the proposition that the “law of the place of performance [the *lex loci solutionis*] will be applied rather than the law of the place where the contract was formally executed.”); Malpractice Research, Inc. v. Norman, 24 Va. Cir. 118 (Va. Cir. Ct. 1991) (citing *Poole* to support the conclusion that “[u]nder Virginia choice of law rules, the validity of a contract is generally determined by the law of the place where it is made, unless it is to be performed in another place; and then it is governed by the law of the place where it is to be performed”).

\(^\text{75}\) John Deere, 118 F. Supp. 2d at 693.
judicial stumbling block. Trapped between ignoring or following Poole, both federal and Virginia state courts have resorted to “tiptoeing” around the Poole decision, pausing long enough to offer it lip service before moving on to their independent holdings. This avoidant approach has proven both inefficient and misleading.

This problem is well exemplified in the 1991 case of Guest Services Co. v. Della Ratta. In Guest Services, two parties entered a contract in Virginia concerning the construction and operation of a restaurant located in Florida. The Plaintiff later sued the Defendant for an alleged breach of the contract and sought to hold the Defendant jointly and severally liable under Florida law. The Defendant argued that the law of Virginia, where the contract was formed, should govern. The circuit court of Fairfax County cited Poole to support its holding that “issues should be resolved by the law of the place where the contract was formed, unless the contract is to be performed in another place, in which case, the law of the latter situs governs.”

The citation to Poole, without further explanation, misrepresented the Guest Services court’s reasoning. Without doubt, Poole would have supported the same holding, but under an entirely different rationale. The court in Guest Services stated while contracts are generally governed by the place of making, the law of the place of performance may be applied as an exception. The Poole court would have disagreed, stating that the place of performance is always the governing law in cases where the contract would have been invalid in under the law of the place where the contract was made.

In light of the analytical differences, why did the court in Guest Services cite Poole? Certainly Poole was not needed to support the holding that the contract should be governed by the law of the place of performance, as this conclusion would have been sustained by Virginia case law that preceded Poole. In fact, the pre-Poole cases would have provided stronger support for the holding in Guest Services, which appears to have employed the pre-Poole bifurcated approach. Thus, there are three possible explanations: the court in Guest Services (1) was impliedly willing to adopt the Poole rationale that the law of the place of making is only valid when the place of performance coincides; (2) misunderstood Poole or (3) intended only to give “lip service” to Poole.

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76 Id. at 693.
78 Id. at *3.
79 Id.
80 Id.
81 Id.
82 Id.
Whichever is the explanation, *Guest Services* compellingly illustrates that *Poole* is murky waters.

IV. THE FIRST RESTATEMENT: SIMILAR BUT SEPARATE

A little more than a decade after *Poole v. Perkins* was decided, the Restatement (First) of 1934 appeared. Although the Restatement (First) developed after and apart from Virginia’s choice of law jurisprudence, the two have been frequently confused. This is likely due to the fact that both approaches share some similarities in theory and are considered to be “traditional” approaches. Thus, it is critical to note that the choice of law theories embedded in the Restatement (First) and Virginia jurisprudence differ both temporally and substantively.

The Restatement (First) was the brainchild of its reporter, Harvard Professor Joseph Henry Beale, and is said to have “substantially incorporated” his views. Although Beale relied heavily on Huber’s and Joseph Story’s comity theories in the territorial/sovereignty sense and agreed with the notion that contracts should generally be governed by the law of the place of making, he also felt that Story’s comity approach severely lacked in analysis.

The approach championed by Beale and the Restatement (First) was that a court, when faced with a choice of laws situation in which the parties revealed no intent, should first characterize the cause of action needing to be resolved. Under this approach, the governing law depends on whether the dispute involves questions of obligation or questions of performance. Issues concerning the “obligation of the contract” are governed by the law of the place of contracting. Issues concerning performance, in turn, are governed by the place of performance.

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83 Restatement (First) of Conflict of Laws §§ 377-78 (1934) [hereinafter Restatement (First)]
86 1 Joseph H. Beale, *A Treatise on the Conflict of Laws* x-xi (1935) (“Story’s book . . . is classic, but can hardly be relied upon even as an analysis of the subject.”).
87 Restatement (First) § 584.
88 Restatement (First) § 311 (1934).
89 Restatement (First) § 358 (1934).
Interestingly, the commentaries to the First Restatement reveal that the drafters were not immune to the difficult question of how the rule should be applied. “[T]here is no logical line,” the commentaries admit, “which separates questions of the obligation of the contract . . . from questions of performance.” There was, however, a practical line could be drawn. If the application of the law of the place of contracting would affect “minute details . . . of performance so that it would be an unreasonable regulation of acts in the place of performance,” the law of the place of performance must be applied. Conversely, if the application of the law of the place of performance would “determine the effect of an agreement made,” the law of the place of making must be applied.

At first glance, the approaches of the Restatement (First) and Virginia may appear interchangeable, since both assign the governing law depending on whether the issue involves matters of making or performance. However, it is critical to note that Virginia has never adopted the Restatement (First) of Conflict of Laws. The Restatement (First) has only been cited once within Virginia borders, and then only in a federal court that mistakenly assumed that Restatement (First) finds support in Virginia law.

In truth, Virginia had been bifurcating matters of making and performance in choice of law cases long before that of the Restatement (First). In the 1926 case of Arkla Lumber & Mfg. Co. v. W. Virginia Timber Co., nearly a decade before the Restatement (First) was born, the Virginia Supreme Court stated a rule that: “Everything relating to the making of the contract is to be governed by the law of the place where it was made; everything relating to the performance of the contract is to be controlled by the law of the place of performance.” This point is further buttressed by the latter case of United Services Auto Ass’n v. Schrader, which describes the same bifurcated rule, calling it Virginia’s “traditional law” without mention of the Restatement (First): “Issues pertaining to the nature, validity and interpretation of a contract are governed by the place where the contract is made; and substantive issues pertaining to the performance of a contract are governed by the law of the state of performance.”

A number of federal courts also

90 Restatement (First) § 358 cmt. b (1934).
91 Id.
92 Id.
93 See John Deere, 118 F. Supp. 2d at 693.
95 United Services Auto. Ass’n v. Schrader, 115597, 1992 WL 884681 at *4 (Va. Cir. Ct. May 19, 1992) (“Under traditional choice of law rules, questions of substantive law are governed by the law of the place of the transaction or the place where the right is acquired, while questions of procedure and remedy are governed by the law of the place where the
attribute this bifurcated approach to Virginia’s “traditional” precedent, without mention of the Restatement (First).96

Virginia’s bifurcated contract choice of law approach not only predates, but also significantly differs from that of the Restatement (First). Foremost of these differences involves deference to party intent. The Restatement (First) employs a rigid, hard-line rule that entirely ignores the intent of the parties. As Beale himself articulated, the applicable law was designated a matter of state sovereignty and was thus beyond the reach of private individuals.97 This was far different from position of Virginia, which viewed party intent as the deciding factor.98 Where the parties failed to reveal their intent regarding which law should govern their contract, Virginia would presume intent and apply the rule accordingly.99

Another significant difference is that Virginia’s and the Restatement’s (First) lines of bifurcation between matters of making and performance do not align. The Restatement (First) is more “effect-based,” as it designates governing law by predicting whether the law would impact the effect of the contract agreement or the “minute details” of performance. Virginia jurisprudence, in contrast, is “issue-based,” as it designates governing law by determining whether the issue relates to the making or performance of the contract.100

action is brought . . . substantive issues pertaining to the nature, validity and interpretation of a contract are governed by the place where the contract is made; and substantive issues pertaining to the performance of a contract are governed by the law of the state of performance.” See also Black, 48 Va. App. at 142, 628 S.E.2d. at 561.


98 Tate, 181 Va. at 410, 25 S.E.2d at 324.

99 Id.

100 Arkla, 146 Va. at 650, 132 S.E. at 842. (“Everything relating to the making of the contract is to be governed by the law of the place where it was made; everything relating to the performance of the contract is to be controlled by the law of the place of performance.”).
V. UNDERSTANDING THE MISUNDERSTANDING

Several conclusions can be drawn from this analysis of Virginia's Supreme Court choice of law decisions. First, a majority of Virginia courts agree that the choice of law in contract cases should be designated as follows: "Everything relating to the making of the contract is to be governed by the law of the place where it was made: everything relating to the performance of the contract is to be controlled by the law of the place of performance." Thus, Virginia retains its pre-Poole theory that when the contracting parties have revealed no intent regarding what law should govern, the choice of law must be designated according to the matter before the court.

Second, although Virginia courts have developed the above-mentioned articulable rule, they remain confounded by the lack of a workable approach. Much of Virginia's struggle with this issue may be traced back to a longstanding analytical gap between principle and practical application. Virginia has a long history of recognizing and experimenting with important principles when dealing with choice of law. The concept of state sovereignty promoted by Ulrich Huber, the theory of comity suggested by Joseph Story, and the concept of controlling party intent and autonomy have all received due recognition and deference in Virginia jurisprudence. Yet the question remains with how these principles should be applied. Unfortunately, these principles, while individually important, often clash. They cannot be concurrently and uniformly embraced. Accordingly, choice of law cases cannot be tackled with mere recognition of principles. There must be a settled approach that weds principle to practical application.

Third, Virginia must make valuative decisions in order to establish an adequate approach to contract choice of law cases. Values such as territorial sovereignty, state policy interests, intent of the contracting parties, flexibility, and efficiency must be weighed and balanced. Obviously, not all values can be served fully and equally at once. A pure comity approach will sacrifice party autonomy. Full adoption of the vested right theory in the Restatement (First) would sacrifice deference to party intent. Excessive focus on intent would result in judicial presumptions which, in turn, could come at the cost of predictability and efficiency. Quantification of these values into a single formula that may be consistently applied would significantly distill and develop Virginia's choice of law jurisprudence.

Fourth, Poole v. Perkins should be overturned. Just as cultivators have recognized for millennia that pruning is necessary to ensure proper shape and form of fruit-bearing plants, Virginia cannot

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101 Id. at 650, 132 S.E. at 842.
develop of a robust choice of law system without severing irreconcilable decisions from its precedence. *Poole v. Perkins* has an unwelcome yet ubiquitous presence in Virginia’s choice of law jurisprudence. As such, it has become nothing more than a judicial stumbling block. If Virginia courts continue to give *Poole* citational “lip service” while abandoning its analysis, error and confusion will multiply in an already-complex field of law.

Fifth, Virginia courts’ practice of imputing intent on entirely silent parties should be abandoned. Unlike principles that may be measured objectively, such as state sovereignty and policy interests, the intent of contracting parties is a subjective and often concealed factor. Unless expressly revealed, intent is wholly confined to the universe of an individual’s mind and is cannot be known, construed, or presumed by another. Indeed, attempts to do so are effectively equivalent to creating intent *ex nihilo*. Thus, Virginia’s practice of imputing intent on silent parties based on their designation of a particular place of performance is unsound. Indeed, it would be more deferential to the theory of intent if Virginia courts summarily adopted a uniform and predictable approach. This way, courts could at least be certain that contracting parties had *notice* that a particular result would occur if they failed to designate what law should govern the contract. In sum, notice is more deferential to party intent than presumption.

VI. REAFFIRMING AND REFINING THE TRADITIONAL BIFURCATED APPROACH

When uncertainty strikes, it is often best to retrace one’s steps. Given the current confusion that clouds the area of choice of law, Virginia courts should be particularly careful not to lose sight of the developments that have already been made. Now is the time for Virginia courts to rediscover, reinforce, and refine the choice of law rules.

First and foremost, Virginia jurisprudence should reaffirm the precedent that has already been developed. As previously mentioned, there are circumstances in which Virginia’s choice of law is well settled. Foremost of these is the time-honored principle that where the contracting parties have revealed their intent for which law governs the contract, that intent determines choice of law.102 Moreover, it is well-settled in Virginia precedent that the choice of law must not be “contrary to the established public policy of the Commonwealth,”103 must not

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102 Tate, 181 Va. at 410, 25 S.E.2d at 324.
103 Black, 48 Va. App. at 127, 628 S.E.2d at 553.
facilitate “fraud on the law,” and must be “reasonably related to the purposes of the agreement.”

Virginia courts have also made significant advancements beyond these dispositive rules. Based on the theories of Huber and Story, Virginia has developed its own bifurcated approach to contract choice of law cases in which the parties have revealed no intent regarding what law should govern their contract. “Everything relating to the making of the contract is to be governed by the law of the place where it was made; everything relating to the performance of the contract is to be controlled by the law of the place of performance.” Although there have been difficulties in determining exactly where the line of dichotomy lies, Virginia courts have shown a preference for this “traditional” rule. Thus, Virginia could bring much clarity—and confidence—by explicitly reaffirming adherence to this bifurcated approach and overturning the irreconcilable precedent of Poole v. Perkins.

Virginia should also address the analytical gap between rule and application that caused the confusion in the first place. First, Virginia courts should abandon the practice of imputing intent on silent parties, as this notion is logically unsound and only introduces confusion. Second, Virginia courts should build upon the framework provided in the traditional bifurcated rule to address how it should be applied. In this regard, some advancement has already been made. In the case of Freeman’s Bank, the Virginia Supreme Court not only explained that the bifurcating point turned on whether the issue involved right or performance, but also explicated that “validity, nature, interpretation, and effect” were matters of right to be governed by the place of making. Thus, the bulk of the analytical gap appears to be in defining “matters of performance.” On one hand, it is clear that “matters of performance” do not include the “validity, nature, interpretation, or effect” of a contract. On the other hand, the open nature of the term “matters of performance” indicates that Virginia would designate the law of performance as governing more than “minute details” of performance. The Virginia Supreme Court should clarify the meaning of “matters of performance,” preferably somewhere between these two points.

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104 Tate 181 Va. at 410, 25 S.E.2d at 324.
105 Hooper, 234 Va. at 364 S.E.2d at 207.
106 Arkla, 146 Va. at 650, 132 S.E. at 842.
107 Black, 48 Va. App. at 133, 628 S.E.2d at 556 (calling the bifurcated approach “traditional.”).
108 Freeman’s Bank, 57 Va. at 127.
109 Id.
110 RESTATEMENT (FIRST) § 358 cmt. b (1934).
CONCLUSION

The need for clarity in Virginia’s choice of law jurisprudence is evident. Due to a longstanding analytical gap between principle and practical application, Virginia’s jurisprudence with respect to contract choice of law has grown incoherent and inconsistent. This Article has proposed that the Virginia Supreme Court clear away its convoluted and unstable precedent by overturning the irreconcilable decision of Poole v. Perkins, discarding the concept of imputed intent, and reaffirming the traditional bifurcated rule that “matters of making” are governed by the law where the contract was made, while “matters of performance” are governed by the law of the place of performance. This rule should be refined to address the difficulties in application, primarily by defining the precise meaning of “matters of making” and “matters of performance.”

This proposal has several advantages. First, overturning the irreconcilable precedent set forth in Poole would allow for streamlining and clarification of Virginia’s choice of law analysis. Second, abandonment of the practice of imputed intent would improve Virginia’s choice of law jurisprudence since this presumption, while undoubtedly noble in purpose, is fundamentally unsound and incongruous to true intent theory. Moreover, this Article submits that if Virginia reestablishes and builds upon the basic framework set forth in the traditional bifurcated approach, it would not only provide clarity, but would also preserve the values that historically define Virginia jurisprudence. The field of choice of law is sufficiently enough. Now is the time that Virginia chooses how to make that choice.